ACCC Supplementary Submissions to Dawson Committee released by the ACCC
after FOI application by Brent Fisse & Lexpert Publications Pty Ltd

The documents attached below were released by the ACCC on 4 October 2007 in response to an FOI application by Brent Fisse and Lexpert Publications Pty Ltd. Initially the ACCC refused access but yielded after the applicants sought review by the Administrative Appeals Tribunal.

The applicants have also made an FOI application to Treasury for a copy of the report of the Working Party established by the Government in 2003 to examine issues of cartel criminalisation referred back to the Government by the Dawson Committee. That application is being resisted by Treasury and it is entirely possible that litigation will be necessary to cure their intransigence.

The first of the supplementary submissions released by the ACCC – the Supplementary Paper to the Trade Practices Act Review Committee – sets out further reasons in support of the ACCC's previous submission to the Dawson Committee. The most notable features of the Supplementary Paper are:

1. The argument that pecuniary sanctions against corporations are inadequate or subject to unacceptable spillover effects is primitive and unpersuasive. It neglects the non-pecuniary sanctions already available against corporations under the Trade Practices Act (probation, community service, adverse publicity orders). It also neglects the large literature on non-pecuniary sanctions against corporations and appears to have been led astray by the other-worldly economic perspective of Wouter Wils.

2. The ACCC recommends that dishonesty be an element of the cartel offence. This departs from the position of the ACCC in its main submission to the Dawson Committee earlier. No cogent reasons are given for this sudden switch in approach:

    - The Supplementary Paper states that making dishonesty an element of the cartel offence is consistent with the view of Bret Walker SC. However, as is apparent from the opinion of Bret Walker SC, he advised against including dishonesty as an element of the offence (see paras 32-33 of the opinion, as attached below).

    - The Supplementary Paper suggests that the element of dishonesty is somehow necessary to exclude criminal liability in cases of price fixing where the only price fixing effect is in a downstream market rather than in upstream market where the parties to the alleged price fixing compete (as was the case in the proceedings brought by the ACCC against the NAB in 2000 in the credit card interchange fee matter). However, that is sheer nonsense. If, as a matter of policy, the cartel offence should not apply to

cases where the cartel conduct has effects only in downstream markets then the appropriate mechanism is an exemption drafted simply in those terms.

3. The ACCC did not support corporate criminal liability for the cartel offence. The reasoning is cryptic and unpersuasive. It is difficult or impossible to understand why corporate criminal liability should be excluded; see further Fisse, "The Australian Cartel Criminalisation Proposals: An Overview and Critique" (2007) 4 Competition Law Review. The Treasurer's press release of 2 February 2005 announced that criminal liability for the cartel offence would be corporate as well as individual.

4. The Supplementary Paper suggests that imprisonment would be inappropriate in cases of eg price fixing by small businesses and offers the sop that "[i]n practice, this may rule out imprisonment for those in small business". This mindset is highly questionable and appears to be a hangover from the Commission's earlier failed attempt to exclude small business from criminal liability altogether.

5. Part 4 of the draft MOU with the Commonwealth DPP seems to contemplate that the ACCC would hand over a case to the DPP after investigation by the ACCC if that investigation disclosed prima facie evidence of serious cartel conduct. This does not address the important question of when or whether individual suspects can or should be forced to answer questions under section 155 if criminal proceedings are later brought against them. The concurrent deployment of criminal and civil proceedings needs to be charted in detail with the assistance of worked examples.

6. Part 7 of the MOU with the Commonwealth DPP states that the ACCC will acknowledge that the decision to grant immunity in criminal proceedings is for the DPP. It is unclear whether or not the leniency policy will be parallel to that of the ACCC in civil penalty cases. It is unclear whether or not those who wish to seek immunity will have a one-stop avenue to do so or will have to run the gauntlet of securing immunity from the ACCC and the DPP separately.

The second document released by the ACCC is an opinion provided to the Commission by Bret Walker SC. The main point made in this opinion is that criminalising cartel conduct would not be inconsistent with the legislative approach taken in the contexts of corporate fraud and taxation. Few would disagree with that opinion. However, issue can be taken with some of the reasoning voiced:

1. The discussion in para 8 misses the point completely. The relevant question, unanswered in para 8 or elsewhere in the opinion, is whether the cartel offence should require proof that the conduct alleged had the purpose or likely effect of substantially lessening competition in a market.

2. The discussion in para 20 does not get to the heart of the issue, which is that a cartel offence is itself a form of conspiracy and that the offence of a conspiracy to commit a conspiracy is infinitely regressive and alien to the common law.

3. Para 30 appears to assume that market definition is relevant under the definition of price fixing in section 45A and an exclusionary provision in section 4D. That assumption is incorrect.

4. Para 31 advocates that the cartel offence should require intentionality only in relation to the making of the agreement or understanding "which has the objective effect of rendering the conduct cartel behaviour." This analysis is wanting because it fails to: (a) identify all the particular conduct and circumstances elements required for liability; and (b) consider the application of the relevant fault principles under the Criminal Code (Cth).

5. Para 32 asserts that the attraction of dishonesty "lies in its aptitude for application by a jury". This contention is unsupported and highly questionable; see Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 ABLR 235 at 254-266.

The third document released by the ACCC is a "supplementary confidential paper" provided by the ACCC to the Dawson Committee on 12 November 2002. This paper sets out an alternative to relying on the concept of dishonesty as a basis for distinguishing criminal cartel conduct from cartel conduct subject to civil monetary penalties and remedies. The approach recommended is to require that the accused knew that the conduct breached or was likely to breach cartel laws. This recommendation is raw and unpersuasive:

1. No justification is given for creating an exception to the general principle that ignorance or mistake of law is no excuse. Understandably, the recommendation was rejected by the Dawson Committee.

2. No attempt is made to consider and apply the general fault principles of the Criminal Code (Cth).

Brent Fisse
9 October 2007

Note: The side bars and other hand-written notations on the documents below are as on the material released by the ACCC.

AUSTRALIAN COMPETITION & CONSUMER COMMISSION

SUPPLEMENTARY PAPER TO THE TRADE PRACTICES ACT REVIEW COMMITTEE

INTRODUCTION OF CRIMINAL SANCTIONS

This supplementary paper responds to some comments that have been made regarding the Commission's proposal to introduce criminal sanctions for hard-core cartel conduct. It focuses on three issues:

(i) Why criminal sanctions will be a more effective deterrent;

(ii) The proposed concurrent operation of criminal and civil sanctions for cartel conduct; and

(iii) A number of modifications to the model proposed in the Commission's initial submission.

Why will criminal sanctions more effectively deter cartel conduct than existing civil pecuniary penalties?

The Commission continues to believe that cartels are insidious and difficult to detect and that cartel conduct is akin to other forms of corporate fraud, such as insider trading or market manipulation, that the law regards as criminal. The Commission believes that it is anomalous, given the seriousness with which Parliament obviously regards cartel conduct that criminal sanctions do not already apply.

On 5 August 2002 at the Commission's Enforcement Conference in Sydney, Bret Walker SC argued that the introduction of criminal sanctions for hard-core cartel conduct was soundly based in principle and good policy. His comments were broadly consistent with the Commission's views in this regard. The Commission has asked Mr Walker to prepare a paper developing his views. The Commission expects to provide a copy of this paper to the Review Committee in the week commencing 9 September 2002.

This supplementary paper develops further the Commission's view that criminal sanctions would be a more effective deterrent than existing civil penalties. In essence, the Commission considers that:

(i) it will be difficult, if not impossible, in the context of highly profitable cartels, to impose pecuniary penalties that are sufficiently high to effectively deter cartel conduct; and

(ii) by their nature, criminal penalties, particularly imprisonment, are highly effective as deterrents.

Pecuniary penalties are not an effective deterrent

The number of national and international cartels that continue to be detected demonstrates that the imposition of large penalties in a number of jurisdictions is inadequate to deter such conduct.

In Australia, in the six years to 2001 the Commission received 2426 cartel and price fixing complaints and conducted 400 investigations. The Commission is currently investigating around 20–25 cases that would be classified as potentially relating to *hard-core cartels if they were found to involve illegal conduct (section 2.2.1).*

The Commission would be prepared to give the Review Committee, on a confidential basis, an understanding of the nature and prevalence of cartels in Australia from current investigations.

The major reason cartels continue to flourish is that cartels are potentially so highly profitable. Cartels artificially create market power, which can translate into monopoly rents for cartel participants. By way of example, it has been estimated that the participants in the express freight cartel, Mayne Nickless, TNT and Ansett held 90 per cent of a market worth between $1 billion and $2 billion dollars per year. The agreement operated for approximately 20 years. The 2002 OECD Report on the Nature and Effect of Cartels, suggests the average price rise may be in the order of 15 to 20 percent.[1] If the OECD estimate is correct, the three participants in that cartel ripped-off Australian consumers in the order of $3 billion - $4 billion.

Research supports the conclusion that cartels are so profitable and difficult to detect that it may be impossible to set a pecuniary penalty at a level adequate to deter collusion without threatening the very existence of offending firms.

For a pecuniary penalty to be effective it must exceed the potential gains from participating in a cartel. Cartel activity will not be deterred if the potential penalties are perceived by firms and their executives to be outweighed by the potential rewards.[2] To *calculate the optimum penalty the anticipated gain from conduct is divided by the risk* of detection.

A recent article by W. Wils[3] summarises a body of academic work that has sought to quantify both of these variables: (i) gain and (ii) risk of detection, in an attempt to calculate the optimal level of a pecuniary penalty for a price fixing cartel.

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[1] There is little empirical evidence of the extent of price rises caused by price fixing. Some US literature (refer below) suggests a 10 percent price increase.

[2] "The value of the punishment must not be less in any case than what is sufficient to outweigh that of profit of the offence" - J Bentham, *An introduction to the principles of morals and legislation*, first published in 1781; Modern edition: Promotheus, Amherst, 1988, Ch XIV, Rule 1. Referred to in Wils below.

[3] Wouter Wils, *Does the Effective Enforcement of Articles and 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, in Particular Imprisonment?* 2001 EU Competition Law and Policy workshop/proceedings.

- In relation to risk of detection, the risk of detection is estimated at between 13% and 17% That is, only one in 6 or 7 cartels is detected.[4] Wils points out that if a jurisdiction has investigative powers that are weaker than those in the US, the probability of detection will be even lower.

- In relation to gain, the studies estimate:

  - that the average length of a cartel is six years[5]; and

  - that prices of affected commodities increase by 10%[6] taking into account price elasticities, taxation and other costs of inefficiency. Wils conservatively assumes that the increased profits (or gain to participants) is five percent of the turnover in the products involved in the price fixing conspiracy.

Using these estimates, Wils calculates that a penalty would not deter price fixing unless *it was at least 150 percent of the annual turnover in the products concerned in the* violation.

In an empirical study of almost 400 firms convicted of price fixing in the US between 1955 and 1993, Craycraft, Craycraft and Gallo[7] estimated that optimal penalties would have bankrupted at least 58 percent of those firms.

Even if a company does survive, penalties will often ultimately end up being passed on to the consumer in the form of higher prices. In addition, they punish innocent parties such as employees, shareholders and creditors.

Imprisoning individuals involved in such serious breaches will not affect innocent parties.

It is unrealistic to expect that optimal pecuniary penalties would ever be imposed by courts. Criminal sanctions should be introduced so that penalties are effective to deter conduct the TPA prohibits.

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[4] Wils relies upon the 1991 Bryant and Eckhard paper, " Price Fixing: the Probability of Getting Caught", *Review of Economics and Statistics*, 531 which it a statistical burden death model of 184 US price fixing cases to estimate the probability of detection between 13 and 17%, at most

[5] Bryant and Eckard *ibid* calculated the mean duration of US price fixing cartels was between 5.2 and 7.2 years This accords with a 1981 study of Calbault and Block referred to in Werden and Simon note 6 below.

[6] Wils refers to several studies of US bid rigging cases in the mid-1980s that indicated a price increase resulting from a conspiracy of at least 10 percent [including Werden and Simon, *Why Price Fixers Should Go to Prison*, The Anti-trust bulletin (1987) at 917] This estimate is used in the US Sentencing Guidelines and Wils cites a number of articles that have accepted this figure

[7] Craycraft, Craycraft and Gallo (1997) 'Anti-trust Sanctions and a Firm's Ability to Pay' 12 *Review of Industrial Organization* 171

There are few figures available in Australia that estimate the harm caused by a cartel, or the gain to the participants. Indeed, this is difficult to assess, because it involves calculation of a theoretical competitive price. However, in the Queensland fire protection cartel, it has been estimated that fines of $15 million represented only 31 per cent of the total harm caused

The fear of possible gaol sentences is a far more effective deterrent.

Companies act through individual executives, managers and employees. Individuals benefit directly or indirectly from their firm's participation in a cartel. There are bonuses, promotions and the increased value of share options. Sanctions must be real for individuals if they are to be effective as deterrents

It is very difficult to ensure that such penalties are not paid by the employer There is nothing that can be done to prevent companies paying bonuses in subsequent years that, in effect, indemnify individuals.

Indeed, there is considerable anecdotal evidence that the business careers of those involved in cartels flourish even after they are found to have contravened the law The Commission is aware of a number of cases where the most culpable executives appear to have won promotions after they have admitted wrong-doing.

A criminal penalty has personal implications against which the company cannot indemnify an employee. A person will have a criminal record and may lose their liberty.

Pecuniary penalties may be seen as just the cost of doing business. Companies and individuals weigh the cost of paying a penalty and may calculate that the benefits to be gained from the conduct are worth the risk of the penalty. It may be tempting to see pecuniary penalties for engaging in cartel conduct as just another tax on a minor misdemeanour. However, cartels should not be in the category of taxable conduct. They are abhorrent and criminal sanctions should underscore this point.

Whereas a pecuniary penalty may be seen as a cost of doing business, criminal conviction and imprisonment are qualitatively different.

Criminalisation of cartel conduct would convey the State's disapprobation, but it would also add significantly to the stigma associated with contravention of the law. Reputation is particularly valued by the corporate executives and managers whose participation in cartels is sought to be deterred. Such executives and managers are usually regarded as successful and upstanding members of society. Significantly more stigma will be associated with a criminal conviction than the contravention of a law (that may be regarded by some as technical economic regulation) that is merely "taxed", in the sense that a pecuniary penalty is imposed.

Opponents of criminal sanctions have argued that there is no empirical data to support the claim that they are an effective deterrent.[8] However, it is impossible to prove that a

[8] Criminal Sentencing in Anti-trust Cases MP Kerns, (1982) Loyola University Law Journal, 985 at 994

cartel that did not exist, would have done so if it had not been for the possibility of criminal conviction. Limited information can be gleaned comparing the incidence of cartels across different time periods or different jurisdictions. Records will reveal how many cartels were detected, but not how many cartels in fact existed and any change in the number of cartels detected may have less to do with a change in the overall number of cartels than with changing enforcement priorities or other environmental factors.

However anecdotal evidence and commonsense suggest that criminal sanctions will have a greater deterrent effect than pecuniary penalties

This was eloquently expressed by Arthur Liman of the New York Bar:

> *"For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations."*[9]

James Griffin, the Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, on a recent trip to Australia stated that it was generally accepted in the US that gaol terms do deter. He illustrated his point with two anecdotes.

- First, he said that in 25 years experience prosecuting individuals engaged in cartels he had listened to many accused say they would gladly pay a higher fine to avoid imprisonment but he had never once heard anyone offer to spend a few extra days in gaol in exchange for a lower fine recommendation.

- Secondly, he told of a senior executive, who was committed to compliance with anti-trust laws, who explained that, "so long as you are only talking about money, the company can, at the end of the day, take care of me – when you talk about taking away my liberty, there is nothing that the company can do for me."

Some commentators have suggested that the higher evidentiary burdens in criminal law will make it harder to obtain a conviction and that this will in fact undermine the deterrent effect of criminal sanctions. The Commission acknowledges that it is harder to obtain a criminal conviction. However, in the Commission's experience participants in many of the most serious cartels confess their involvement and/or inform on other participants. It is also noted that where there is inadequate evidence to overcome a criminal burden of proof, civil sanctions, with their less rigorous balance of probability standard of proof, will remain available.

Concurrent civil and criminal penalty regimes and draft Memorandum of Understanding with the DPP

The Commission continues to believe that it is important to have concurrent civil and criminal offences applying to cartel conduct. However, the Commission accepts that a

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9 Liman A, *The Paper Label Sentences Critiques*, 86 Yale Law Journal (1977) p 630 at 630-631

definition of criminal cartel conduct that includes an additional element to distinguish it from civil conduct is appropriate.

Mr Walker's paper (referred to above) will discuss this issue in more detail. In the interim, it is noted that, consistent with the views of Mr Walker, and the test proposed in the UK Enterprise Bill, the Commission supports the inclusion of "dishonesty" as an element of the criminal offence

Even with this additional element, conduct may have a 'dishonest' character and yet not warrant criminal prosecution The resources required to investigate and prosecute a criminal offence may outweigh the impact of the conduct It is also possible that the Commission is unable to obtain sufficient evidence to satisfy the DPP that there are reasonable prospects of proving a matter to the criminal standard In either case, it should remain an option to commence civil proceedings

In the circumstances, the Commission believes that it is important that concurrent civil and criminal penalty regimes exist Concurrent penalty regimes already exist in taxation, customs and corporate law in Australia.

Critics have suggested that if concurrent regimes exist at the Commission may seek to use the possibility of criminal prosecution as leverage At the same time as acknowledging that this would be possible, the Commission agrees that it would be highly improper The Commission would develop internal guidelines aimed at preventing this. It also notes that other agencies currently managed similar potential conflict

The Commission acknowledges that it will be important for it to develop arrangements with the DPP to ensure that cases are selected and managed appropriately and consistently. The DPP currently has Memoranda of Understanding with a number of organisations including, Centrelink, The Australian Federal Police, the Australian Securities and Investment Commission, the Australian Customs Service and the Australian Taxation Office. Some of these agencies, including ASIC, Customs and Tax administer laws that have a range of remedies from administrative penalties to civil pecuniary penalties and criminal penalties, including imprisonment and fines.

Each MOU specifies that the regulatory agency has responsibility for investigation and that there will be many matters that can be resolved or dropped without reference to the DPP. However, they also specify that the DPP is the prosecuting authority for criminal matters (major ones in case of ATO) and that civil proceedings will not be used as a substitute for criminal prosecution for serious fraud or corporate crime

It is proposed that an agreement between the DPP and the Commission recognise the following:

- the Commission must have the initial investigatory role (this utilises the existing complaints procedures of the Commission and recognises that the Commission will continue to prosecute civil matters);
- only a small number of complaints are investigated, and remedies are sought in an even smaller number of cases;

- the Commission is best placed to allocate its own resources and to determine how to most effectively satisfy the objects of the TPA. However, the DPP should be consulted at an early stage in an investigation that may involve criminal conduct. The DPP and the Commission should review cases at the investigation stage to determine whether they are appropriately handled as civil or criminal. If it is agreed that a matter is criminal, the Commission should consult the DPP in relation to gathering evidence before referring the matter for prosecution;
- prosecutions will be conducted by the DPP (an independent prosecutor is seen to be an important protection).

The Commission has consulted the DPP in relation to the practical arrangements that may be put in place to manage the investigation and prosecution of cartel matters in the event that criminal sanctions are introduced. These consultations have resulted in an agreed outline for a Memorandum of Understanding. The outline is at Attachment A.

An alternative model

In response to a number of comments on, and criticisms of, the Commission's proposal, the Commission proposes a number of modifications of the earlier model. The proposed changes are based on wide consultation including with Mr Walker. Mr Walker's paper, (referred to above) will also include discussion on an appropriate and workable model for the introduction of criminal sanctions for hard-core cartel conduct.

To what conduct should criminal sanctions apply?

The Commission continues to believe that criminal sanctions should only apply to hard-core cartel conduct. As stated in the Commission's original submission, this includes price-fixing, bid rigging, market sharing and output restriction. Each term would need to be separately defined in the TPA. As noted above, the Commission would support a requirement to prove "dishonesty" for a matter to be criminal. This would ensure that arrangements such as those entered into by the banks that set credit card interchange fees, which the Commission argued amount to price-fixing, are not treated as criminal offences.

Application of criminal sanctions to individuals

The Commission proposes that individuals engaging in cartel conduct be liable for criminal sanctions but that corporations who participate in cartels be liable only for the existing civil sanctions.

The Commission's original submission acknowledged that criminal sanctions are less effective as deterrents for corporations because corporations cannot be imprisoned. After discussions with the DPP and Mr Walker, the Commission also now believes that administrative advantages of investigating and prosecuting conduct where the same remedy is sought from individuals and corporations is not as significant as first thought. The burden of proof is also more onerous in criminal proceedings. In all the circumstances, the Commission now believes that it would be more appropriate if criminal sanctions only applied to individuals.

Application of criminal sanctions to large and small corporations.

The Commission now supports universal criminalisation of cartel conduct.

The Commission's original proposal, to criminalise only conduct engaged in by a large corporation, sought to recognise the likelihood that the most damaging cartels would be likely to be those involving large corporations. The Commission now believes that the preferable approach is not to have criminality depend upon company size but rather to allow judicial discretion to take account of the impact of the conduct in question. If a cartel involving small companies had only a limited impact on the economy, it would be expected that a judge would exercise his/her discretion to impose penalties at the lower end of the possible range. In practice, this may rule out imprisonment for those involved in small businesses

Outline of Proposed Memorandum of Understanding between the Director of Public Prosecutions and the Australian Competition and Consumer Commission

Part 1: Introduction

The introduction will state:

- that cartel conduct has traditionally been dealt with by the imposition of civil pecuniary penalties;
- the legislative intention that criminal penalties are part of the full spectrum of remedies available for contravention of the anti-competitive provisions of the TPA;
- the background and rationale for the introduction of criminal sanctions The Parliamentary intention being that criminal sanctions, including the possibility of imprisonment, is appropriate in serious cases of price fixing, bid rigging or market sharing, which is recognised as being akin to fraud.

Part 2: Responsibilities

The DPP is responsible for:

- prosecuting offences against Commonwealth law in accordance with the prosecution Policy of the Commonwealth

The ACCC is responsible for:

- *administering and enforcing the TPA;*
- investigating complaints regarding possible contraventions of the TPA; and
- referring appropriate matters to the DPP for criminal prosecution.

Part 3: Decision to investigate

The MoU will acknowledge that the ACCC receives a significant number of complaints and that it is not practical to investigate all such complaints

The ACCC will decide what matters should be investigated in accordance with its internal guidelines.

The ACCC will refer matters to the DPP that have been investigated where criminal prosecution may be appropriate. In deciding whether a matter should be referred to the DPP the ACCC will act in accordance with selection criteria that have been agreed with the DPP. The selection criteria will set out those matters to be considered in deciding whether a matter should be referred to the DPP for consideration for prosecution as a criminal matter.

The ACCC and DPP will have regular operational meetings involving national and regional staff that will, amongst other things:

- examine matters under investigation to ensure that cases worthy of criminal prosecution are being dealt with appropriately;
- review current matters that have been referred to the DPP;
- ensure that the ACCC and DPP have nominated case officers for every matter that is referred;
- review the effectiveness of operational issues such as DPP provision of advice during an investigation and the adequacy of ACCC briefs of evidence.

Part 4: Referral to the DPP

If an ACCC investigation discloses prima facie evidence of serious price fixing, bid-rigging or market sharing that is worthy of criminal prosecution (in accordance with the selection criteria), the ACCC will refer the matter to the DPP as soon as possible for a decision on whether charges should be laid.

If an ACCC investigation discloses such serious conduct, and the ACCC is uncertain whether it would be appropriate to deal with the matter as a criminal prosecution, the ACCC will seek advice from the DPP.

The ACCC will as far as possible refer to the DPP a completed brief of evidence in a form agreed between the ACCC and the DPP.

Where the DPP requests the ACCC to undertake further investigations the ACCC will as far as practicable undertake those further investigations. In the event of disagreement as to the further investigations the ACCC will consult with the DPP.

Part 5: Criteria for referral / selection criteria

All serious cases of cartel conduct are appropriate for referral to the DPP. In considering whether to refer a matter to the DPP the ACCC will have regard to the following factors:

Are there circumstances surrounding the conduct that warrant or militate against criminal prosecution?

- Is the alleged contravention a blatant disregard of the law?
- What was the scale of the conduct? Has it continued for a long time? Do the participants represent a significant part of the market?
- What was the impact of the conduct? Has it had a significant economic impact assessed by reference to the volume of commerce affected or the extent of the price rise?
- Did the participants attempt to keep the conduct secret or to enforce participation?
- The prevalence of the conduct and the need for deterrence either personal or general

Are there characteristics of the participants that warrant or militate against criminal prosecution?

- Is there evidence ~~of~~ that those involved thought the conduct was dishonest?
- Do the participants have a history of involvement in cartels?
- Is there clear evidence that the defendants were not aware of, or did not appreciate, the consequences of their conduct?
- Is there evidence that the participants knew that their conduct was illegal but decided to proceed to engage in that conduct?
- Is there any evidence of coercion?

Part 6: The decision to prosecute

Once a case has been referred to the DPP the decision whether to prosecute will be made by the DPP independently of the ACCC

The DPP will make the decision on all evidence available, on the basis of the guidelines set out in the *Prosecution Policy of the Commonwealth*.

If criminal sanctions only apply to individuals, the ACCC and the DPP will consult in relation to any civil proceedings the ACCC wishes to bring against corporations involved in the cartel to ensure that such proceedings do not impinge upon the investigation or prosecution of criminal proceedings against individuals.

If there is a dispute at a national operational level as to whether a particular matter should be pursued as a prosecution the matter will be resolved by the Chairperson of the ACCC and the Director.

Part 7: Leniency Policy

The ACCC will acknowledge that the decision to grant immunity in criminal proceedings (including under the TPA) is a matter for the DPP. The DPP will exercise its discretion in accordance with the *Prosecution Policy of the Commonwealth*

The DPP will acknowledge the existence of the ACCC leniency policy (applying only to civil Part IV matters)

The ACCC and DPP will where required have regard to the application of leniency/indemnity in hard-core cartel cases. This may include practical operational issues such as the importance of early discussions in cases where issues of leniency may arise.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
CRIMINAL PENALTY RÉGIME

OPINION

Following a speech I made on 5th July 2002 at a conference organized by the ACCC concerning issues of enforcement, I am asked to advise on some aspects of the current debate concerning the provision of criminal penalties in relation to certain breaches of Part IV of the *Trade Practices Act 1974*. For present purposes, the unlawful conduct in question may be described as the organization and conduct of serious cartels.

2 It follows that the topics I address in this Opinion are largely matters of policy, on which I am no more expert than other lawyers practising in this area who have given consideration to how the law might be changed. In particular, my comments address the issues of some possible analogues in the existing law concerning other regulatory régimes, and some of the objections to a criminal penalty régime for serious cartel behaviour to which my attention has been drawn.

3. I take as a given that serious cartel behaviour has two characteristics, as a matter of definition. The first is that it is anti-competitive conduct, by which prices or other terms in favour of sellers or suppliers (usually - I give no further attention to buyers' cartels) are enabled to be more favourable to the seller or supplier because of

attenuated or eliminated competition The second is that it is not, of its nature, behaviour which could occur accidentally or unwittingly, and in that sense is deliberate

4 The anti-competitive characteristic, I also assume, has the potential to increase the expense borne by other enterprise or by consumers, or both, in areas of commerce where cartels operate Serious cartels are therefore calculated to cause relative inefficiencies, at least from the point of view of those buying goods or services in markets affected by them. I therefore further assume that the economic aspect of the public interest is damaged by all serious cartel behaviour.

5 Indeed, as a matter of history rather than assumption it is clear that the *Trade Practices Act* regulates such behaviour by generally prohibiting it because of a Parliamentary perception that such behaviour is against the public interest and that its eradication will conduce to the public good So much is also clear from precursors of the *Trade Practices Act*, including most prominently the original antitrust legislation in the United States of America.

6 It has been objected that cartel behaviour need not be anti-competitive That statement, and testing of it, undoubtedly turn on the definitions one uses of cartel behaviour and anti-competitive If, as a matter of commonsense, the offence provisions in a criminal penalty régime for serious cartel behaviour truly encompassed behaviour which could not, of its very nature, reduce or eliminate competition in the relevant market, then that would no doubt be a good reason to reconsider the drafting

of those provisions. It would not, however, provide a principled ground to object to any criminal penalties for any offenders

7 Furthermore, there is the same air of unreality in using supposedly innocuous cartel behaviour to repel a proposed criminal penalty régime, as there would be in sparing empty-handed burglars from prosecution In my opinion, people who engage in cartel behaviour have no shred of justification in any protest they may utter against inferences drawn by Parliament, regulators, prosecutors and juries that they did it in order to remove the financial discomfort of commercial competition That their efforts were ineffective or misguided is no answer to the claim of public policy that their deliberate conduct should be exposed, prosecuted when appropriate, and punished appropriately upon conviction Pleas to the effect that "no-one was hurt" are best heard during sentencing.

8 A similar answer may be given to the related objection, which has been framed as a not so helpful suggestion concerning the drafting of offence provisions, pushing the view that the prosecution should be required to prove an effect on competition The idea begs the question of how much effect, as well as ancillary questions of proof However, in my opinion a general principled rejection of that view lies in the placement in Parliament of the policy judgement that cartel behaviour is bad and should be prohibited because of its calculated effect upon competition To require individual proof of that in particular cases would be like requiring demonstration that some programme conducted by the Commonwealth has been restricted by a delinquent's failure to pay his, her or its income tax, as an element in prosecuting tax evasion

9 The deliberate characteristic has the consequence that it may be said of persons responsible for serious cartel behaviour that they have chosen to engage in it, against the solid background expectation that commercial people make commercial choices guided by their perceived self-interest, which is directly or indirectly financial in nature. It follows that any enforcement régime which does not eliminate the perceived benefit sought to be gained from serious cartel behaviour would simply represent an extra cost of doing business unlawfully, and not represent an adequate disincentive.

10 An important if unquantifiable aspect of the deliberate characteristic of serious cartel behaviour is that, unpunished, it brings the regulatory scheme in question into disrepute among those who are aware of or suspect the existence of lucrative breaches of it.

11. Apart from antitrust regulation in the *Trade Practices Act*, there are two other fundamental schemes for regulating commercial behaviour in Australia. Neither exists or operates only in the commercial realm, but both affect it enormously. The first is the regulation of corporations, which have the inestimable advantage for commercial people of providing limited liability vehicles for their business activities. The second is the requirement to declare (or "return") net income and to pay the resultant tax to the relevant authorities - income tax being a useful example in relation to the Commonwealth.

12 It is difficult to overstate the elementary and integral qualities of the corporations and taxation laws in relation to commercial conduct in Australia. In both

areas, elaborate requirements have been devised to ensure that the fiction of separate legal personality, limited liability and the social allocative justice which might be thought to inform a general taxation system do not permit delinquent natural persons to cheat creditors, shareholders or the revenue

13 There is no gainsaying the history of ebb and flow in legislative responses to delinquent behaviour by officers of corporations or people who should be taxpayers I do not suggest for one moment that more regulation or harsher penalties are axiomatically better policy - and in any event that opinion would be well outside my expertise Rather, I suggest more modestly that consideration of criminal penalties for serious cartel behaviour should involve comparison with the availability of such enforcement methods in the case of corporations and taxation laws.

14 One paradigm case in relation to corporations is the director who permits an insolvent corporation to continue trading so as to elevate the risk of a creditor being unpaid over that which has long been regarded as acceptable Another is the case of a director who favours his or her personal interests or connexions in dealing with the corporation's assets, to the detriment of its shareholders. In both cases, the current law provides a range of remedies and enforcement provisions, the various natures of which evince concern for private loss and public vindication of the law

15 Thus, creditors and shareholders are given private civil remedies in damages, compensation or personal liability of the delinquent director. The regulatory authority is empowered to seek so-called civil penalties, and disqualification orders Civil penalties enable nefarious gains to be eliminated Disqualification orders protect the

public in the future against the inferred propensity of the delinquent director to abuse his or her statutory privileges

16 Vitally, the regulatory authorities and the general prosecution authorities are also provided, in the case of specified offences, with the capacity to prosecute in the criminal system - and the courts have been given the power both to fine and imprison

17 The same range of remedial and enforcement responses is displayed in the area of taxation eg of income At the venial level, where accident or oversight may be typical as explanations, the regulatory authorities are empowered to impose penalty tax as a matter of non-criminal regulatory enforcement. That system includes graded rates of penalty to reflect in accordance with published guidelines the authorities' assessment of culpability - importantly, including degrees of deliberateness or calculation by the delinquent taxpayer

18 Serious cases of taxation delinquency can be prosecuted, criminally, including for offences in the nature of imposing on the Commonwealth. Conviction can result in fines or imprisonment

19 It is not a peculiarity of recent statutory regulation that a range of remedial and enforcement methods is available in the case of the one kind of delinquency The most obvious long-standing illustration of this is the general area of fraud Obviously, a civil remedy in damages is available to the victims But so too are criminal prosecutions available, resulting in fines or imprisonment, in cases which come to the

police or prosecution authorities' attention and result in an exercise of prosecutorial discretion to prefer criminal charges

20 An important overlay in relation to criminalization of all these kinds of *unlawful conduct is the availability of criminal conspiracy, an independent offence* which particularly aims at a group of natural persons involved in planning such unlawful conduct It is trite to observe that the selection of a so-called substantive *offence or of a conspiracy charge in such cases is a matter requiring careful* judgement by prosecutorial authorities, and upon which reasonable minds will no doubt continue to differ occasionally.

21. These aspects of other areas of law which regulate commercial behaviour reveal two presently relevant significant propositions. First, it has not been regarded as an objectionable feature of those schemes (or, less grandiosely, those collections of laws) that they provide a graded range of both civil and criminal remedial and enforcement responses

22. Second, especially since modern governments have instituted independent general prosecution authorities (for the Commonwealth, the Director of Public Prosecutions), it has not been regarded as an objectionable feature that an assessment and decision-making which is more or less discretionary are called for in any putative criminal prosecution, so as to select which cases should be prosecuted at all, which charges should be preferred, and which pleas should be accepted (where conduct in the nature of charge-bargaining is permitted)

23 Alternatively, if these two features have been regarded as objectionable, public policy embodied by statutory and common law has forthrightly declined to regard such objections as sufficient to require them to be eliminated If anything, the pattern of legislative regulation in these areas has been to increase the range of available enforcement responses - the availability of disqualification orders and the large increase in civil penalty maximums being the most salient examples

24 In my opinion, the element of discretion ultimately reposed in a prosecutor with respect to charges, indictments and conduct of a prosecution cannot be sensibly used as an objection to criminal penalties becoming available with respect to serious cartel behaviour Whatever supposed uncertainty it may involve, it would be similar to that obtaining in the other areas I have discussed above, in common with which it may be said that the discretions are essential to our present understanding of an impartial, adversarial system of criminal justice.

25 Furthermore, the availability of discretions, or judgements, to accommodate general law to a particular case is a hallmark, one may think, of a civilized penal system The most obvious current manifestation of that value is sec 16A of the *Crimes Act 1914* (C'th), which positively requires courts exercising Chapter III judicial power to fit the severity of their sentences to the circumstances of the offence. In my opinion, the availability of that flexibility is a good thing, not a bad thing, and is a matter which should provide a complete answer to any objection to criminal penalties with respect to serious cartel behaviour, to the effect that the penalties would be "too severe"

26 It is, of course, a social rather than legal question whether serious cartel behaviour should be criminalized at all I have not read or heard any arguments worth the name which distinguish between the mischief or vice aimed at by criminalizing corporations and taxation misconduct on the one hand, and that sought to be regulated by antitrust provisions on the other hand In all three areas, the delinquents are evidently motivated by greed, in serious cases they act deliberately and with financial calculation to some extent or other, and undetected or unpunished misconduct causes (at least) economic harm to other people or to the commonweal

27 It follows that, in my opinion, once the premise is conceded that serious cartel behaviour should remain prohibited by law, it should be capable of remedy and enforcement by a similar range of responses as are already available in the area of corporations and taxation misconduct

28 The next issue is whether a criminal penalty régime for serious cartel behaviour should preselect, as it were, the kind of breaches of Part IV which are eligible to be considered for criminal prosecution In favour of some such criterion of seriousness in legislation creating an offence or offences is the commonsense view that the law should not brandish terrible retribution for such a wide range of unlawful conduct as to include truly venial delinquencies I agree that an excess of such legislation may bring the law generally into disrepute: the Bloody Code of the late eighteenth and early nineteenth centuries suffices to illustrate the point

29 However, there does not seem to be any widespread or deep feeling of discontent in the public about the fairly wide range of degrees of culpability, and of

gravity of financial consequence, which characterizes the availability of the criminal penalty régimes in the areas of corporations and taxation misconduct

30 For these reasons, I doubt the efficacy or sound policy in attempting to categorize a subset of serious cartel behaviour which may be prosecuted criminally, by reference eg to the amount of money at stake (whatever that may mean) or the size (whatever that may mean) of the market in question (however that may be defined). It is difficult enough in civil enforcement under Part IV to get the definition of relevant *markets right, and difficult enough when seeking civil penalties to assess the amount* of gained or calculated benefit, without imposing these unnecessarily on eligibility to be prosecuted criminally

31 I have given consideration to the possibility of requiring as an element of the offence that it be deliberate or dishonest For the reasons discussed above I do not regard the explicit stipulation of deliberateness as necessary, given the nature of the conduct in question, and therefore there may well be a danger that its addition explicitly will cause unintended problems of application. It would be both unnecessary and unsound to insist upon a conscious awareness of the relevant provisions of Part IV and the fact that (as a matter of law) the cartel conduct was prohibited by those provisions, in order for an offence to have been committed. Rather, it should suffice that the element of intentionality attaches simply to the making of the agreement or understanding etc which has the objective effect of rendering the conduct cartel behaviour.

32 Similarly with a notion I initially found attractive, viz an explicit requirement of dishonesty. Its attraction lies in its aptitude for adjudication by a jury, as sec 80 of the *Constitution* would require were such offences to be triable on indictment (as they should be, at least as a matter of possibility)

33 However, it seems to me that the mens rea most appropriate for serious cartel behaviour should be attuned to the human reality: that of ostensible trade rivals planning to rig their market by agreements which soften their lawful competition at the expense of their customers That reality is preternaturally one of deliberate conduct against a legal order well-known to any serious businessman, and one which should be known by anyone in a position to influence conduct which may contravene antitrust regulations

34 For these reasons, it seems to me that the most robust and ultimately fairest approach to the selection of serious cartel behaviour for criminal prosecution should be aligned with the analogous issue in both corporations and taxation misconduct In practice, no doubt there should be protocols or understandings - explicit and published, by preference - between the regulatory authorities (here, the ACCC) and the prosecution authorities (here, the Commonwealth DPP) as to the circumstances in which a file, so to speak, should be transferred from the one to the other Further, I see no good reason why the ultimate decision to prosecute, and ancillary decisions, should not be left with the Commonwealth DPP, to be carried out in accordance with the published guidelines of that Office

35 In this way, it can be said that antitrust miscreants will be dealt with consistently with the approach to corporations and taxation miscreants That seems fair What does not appear as fair is special treatment for them, by leaving them unexposed to criminal penalties

36 It should go without saying, but bears repeating in light of some of the objections I have read, that one would expect that trivial or fleeting or purely technical breaches will not be prosecuted This is not merely a Pollyanna view, given exactly the same expectation in cases of common or garden fraud (and all its various statutory cousins such as false pretences and the like), corporations and taxation offences

37 For all the same reasons, which depend on the value I see in consistent treatment of relevantly comparable offenders, imprisonment of natural persons involved in serious cartel behaviour, ie involved by intentional conduct of the kind discussed above, is essential Pleas for special treatment by omitting imprisonment are inherently unfair, and furthermore pose the definite prospect of maximum fines being inadequate.

38 It has been objected that imprisonment for serious cartel behaviour is as unreasonable as capital to deter conduct calculated to yield nefarious returns exceeding maximum fines punishment The argument is silly It is difficult to grasp the comparison suggested between crossing the Rubicon by killing a convict, and treating business executives the same way as petty frauds are treated - viz by exposing them to the risk of imprisonment in appropriate cases The issue, like all questions of crime and punishment, goes well beyond deterrence, and includes vindication of the

law, the declarative aspect of punishment, and the critical need to have some overall consistency of approach A white collar cannot justly be the modern version of the benefit of clergy

39 In my opinion, furthermore, in the case of serious cartel behaviour it is difficult to understand why responsible executives should not be subject to a disqualification order, viz an order that they not be involved in the management or direction of a corporation which itself trades to any degree at all This salutary possibility, the application of which would no doubt require consideration of all the circumstances of a particular case including genuine contrition, would bring this area of economic regulation to prevent a form of cheating into line with corporations misconduct

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15 November 2002

Sir Daryl Dawson AC KBE CB
Trade Practices Act Review
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PARKES ACT 2600

Dear Sir Daryl,

Supplementary confidential paper prepared for the Committee of Inquiry for the Review of the Competition Provisions of the *Trade Practices Act 1974* – defining criminal cartel conduct

The Commission has prepared a further paper relating to the proposal to criminalise hard-core cartel conduct. The paper proposes an alternative ground upon which to distinguish criminal cartel conduct from civil cartel conduct.

The Commission asks that the Committee consider this paper in the event that the Committee does not consider that "dishonesty" is an appropriate basis for this distinction

Yours sincerely

Brian Cassidy
Chief Executive Officer

AUSTRALIAN COMPETITION & CONSUMER COMMISSION

SUPPLEMENTARY PAPER TO THE TRADE PRACTICES REVIEW COMMITTEE

Defining Criminal Cartel Conduct

In its previous submissions to the Committee, the Commission has supported the introduction of criminal sanctions for hard core cartel activity. The current civil regime in Part IV of the TPA proscribes, amongst other things, cartel conduct, namely price fixing, bid rigging, market sharing and output restrictions. The Commission has argued that some cartel conduct is so serious that it warrants criminal penalties

The Commission accepts that a definition of criminal cartel conduct should include an additional element to ensure an appropriate distinction is drawn between conduct that warrants civil sanctions under Part IV and conduct that warrants criminal prosecution under new stand-alone cartel provisions

The challenge in framing new cartel provisions is to clearly specify this additional element to ensure the criminalisation of the most objectionable instances of collusive conduct. At the same time, the provisions must be capable of being applied in practice to a complex economic environment and to the rigorous criminal standard of proof

Dishonesty

The Commission has previously proposed its favoured option of "dishonesty" in a supplementary paper provided to the Committee and refers the Committee to those submissions. However, if dishonesty is not acceptable to the Committee, the Commission has another option to propose

Other possible alternatives

Broadly speaking, there are two possibilities. On the one hand, it would be possible to focus on the consequence of the conduct. On the other hand, it would be possible to concentrate on the intent/knowledge of the accused

The consequences or effect of the conduct

Factors that may be the relevant to such a question include the dollar value of commerce affected by the conduct, the combined market share of the alleged participants and whether or not the conduct effects a market of national significance. In all these cases, complex market definition issues arise. These are not appropriate to be submitted to a jury. The Commission would not support this alternative.

The intent of an accused

It may be relevant to consider whether the accused engaged in the conduct intending to harm or defraud a third party/customer or to benefit his/her employer or himself/herself The Commission does not support this option.

In some cases evidence may indicate the participants in the cartel had the purpose of raising prices, minimising discounting or exploiting an individual/firm or consumers generally However, it is more likely the purpose will be less specific. For instance, a manager of a firm may seek to lessen the impact competition has on the financial performance of the firm. Proving such an intention beyond reasonable doubt may well make it impossible to obtain a criminal conviction. This may also require competition and market definition issues to be submitted to the jury. In Canada this requirement has made it virtually impossible to obtain a criminal conviction in a price fixing matter[1].

Proving that a participant expected to benefit personally from conduct has the additional problem that an employee may benefit only indirectly from super-normal corporate profits that may be expected when a cartel exists.

The accused's state of knowledge

Another alternative that may be worth pursuing further is to criminalise conduct where the accused *knew that the conduct breached, or was likely to breach cartel laws*. This formulation would ensure that criminal sanctions apply to the most reprehensible and calculated hard-core cartel conduct

There are numerous criminal offences that require the prosecution to prove that an accused had some knowledge that an offence had been committed. For instance, receiving stolen property is an offence if the accused "dishonestly receives stolen property, knowing or believing the property to be stolen "[2] Harbouring persons who have committed an act of treason is only an offence if the person accused of harbouring "knows or believes" that a treasonable offence has been committed [3]

If the Committee was to favour such an approach, the Commission notes that:

(i) The precise formulation of such a requirement must make it clear that it is a criminal offence to enter into, or attempt to enter into, an agreement, which if given effect, would amount to cartel conduct.

(ii) Only a court can determine whether conduct amounts to a breach of the law The formulation must ensure that something less than judicial certainty is required. This would be achieved if the formulation included knowledge that the conduct was <u>likely to</u> breach the law

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[1] Refer to the Commission's June 2002 submission, at page 39

[2] Commonwealth Criminal Code, Division 132 1

[3] Commonwealth Criminal Code, Division 80 1(2)

(iii) To obtain a conviction, it would be necessary to prove that the accused had personal knowledge It is not sufficient to show that the person should have known that the conduct was illegal. This would be a matter of proof.

(iv) There will not always be direct evidence of the accused's state of knowledge However, in analogous offences the case law establishes that knowledge can be inferred from the circumstances.[4] The ability to prove knowledge on the basis of an inference would be particularly important in cartel cases and should be provided explicitly in legislation. For example, the circumstances surrounding highly secretive meetings may lead to such an inference

(v) It would also be important to define precisely the specificity of knowledge required It would only be appropriate to criminalise conduct if the accused knew that the conduct was a breach of a provision of the TPA prohibiting cartel conduct It is envisaged that a person would commit a criminal offence if he or she engaged in cartel conduct (which would be defined to include bid rigging, market sharing, price fixing and output restriction) and he or she knew that the conduct was, or was likely to be, cartel conduct.

An accused should not be able to escape liability if a court determined that the impugned conduct was price fixing when he/she believed the conduct amounted to some other form of cartel conduct, such as bid rigging, but did not amount to price fixing

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[4] See for instance *R v Zreika* [2001] NSWCCA 373, para 47 ff