THE CARTEL OFFENCES:

AN ELEMENTAL PATHOLOGY

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NB This version of the paper is a work-in-progress and has not been updated or revised. Note also that the Trade Practices Amendment Bill (Cartel Conduct and Other Measures) Bill 2008 has since been passed.

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1. INTRODUCTION

Upon enactment the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (**CC&OM Bill**) will make a range of significant amendments to the *Trade Practices Act 1974* (Cth) (**TPA**). The most significant and far-reaching of these amendments will involve the creation of cartel offences, attracting criminal sanctions that include a maximum jail term of 10 years for individual offenders.

The criminalisation of cartel conduct has its origins in the 2003 Report of the Dawson Committee that accepted in principle the submission of the Australian Competition and Consumer Commission (ACCC) that, consistent with international trends, serious forms of cartel conduct should be treated as criminal.[1] The Dawson Committee's recommendation was subject to the important qualification that there be a satisfactory definition of serious cartel behaviour for the purposes of the offences.[2]

The former Howard government accepted the Dawson Committee's recommendation and convened a working group to consider the issues.[3] Then, in February 2005, the then Treasurer Peter Costello announced an outline of the legislative proposals.[4] However, it was not until the after the election of the Rudd government that, in January 2008, the first Exposure Draft Bill was released.[5] That Exposure Draft Bill raised many difficult and several controversial legal and practical issues, prompting calls for extensive amendment.[6] A second Exposure Draft Bill released in October attended to some of the problems but many issues remained.[7] The CC&OM Bill was introduced to Parliament on 3 December 2008 and was referred to a Senate Economics Committee for inquiry.[8] In that process further deficiencies were exposed.[9] The

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1 Submission to the Trade Practices Act Review Committee, Parliament of Australia, June 2002, Submission No 56, (Australian Competition and Consumer Commission), at http://tpareview.treasury.gov.au/submissions.asp, last viewed 23 March 2009.

2 Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) ch. 10, p. 164 Recommendation 10.1, at http://www.tpareview.treasury.gov.au/content/report/downloads/PDF/Chpt10.pdf, last viewed 13 March 2009.

3 Treasurer, 'Working Party to Examine Criminal Sanctions for Cartel Behaviour', Press Release, 3 October 2003, at http://www.treasurer.gov.au/tsr/content/pressreleases/2003/086.asp, last viewed 21 July 2008.

4 Treasurer, 'Criminal Penalties for Serious Cartel Behaviour', Press Release No 4 of 2005, 2 February 2005, at www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp, last viewed 21 July 2008.

5 Exposure Draft, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* at http://www.treasury.gov.au/documents/1330/PDF/Attachment_A_cartels_Exposure_draft_bill.pdf, last viewed 23 March 2009.

6 See the submissions on the Exposure Draft Bill at http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1350, last viewed 7 May 2008.

7 Exposure Draft (17/10/08, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* at http://www.treasury.gov.au/documents/1426/PDF/Cartel_Conduct_Exposure_Draft.pdf, last viewed 11 March 2009.

8 Senate Standing Committee on Economics, *Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* at

Committee's report failed to grapple with the issues, and made no recommendations for amendment.[10] Hence it is anticipated that with bipartisan support the Bill will pass unchanged in the coming months.[11]

The statutory regime that will apply to cartel conduct upon the passage of the CC&OM Bill will be highly complex. Notwithstanding several revisions to the Bill during its gestation, many of the issues have not been addressed and it remains uncertain how many of the key new provisions will be interpreted and applied. The Explanatory Memorandum does not tackle much less resolve many of the issues.[12] There is no white paper or law reform report to assist.

The main purpose of this paper is to review the requirement of a contract, arrangement or understanding, including the amendments proposed by the Australian Competition and Consumer Commission (ACCC) to the meaning of 'understanding' (section 3) and the fault elements of the new cartel offences (section 4). We do not attempt here to provide a detailed analysis of the definition of a 'cartel provision' in s 44ZZRD. The main problems likely to be occasioned by s 44ZZRD have been discussed elsewhere and are summarised in section 2 of the paper. Examples of the problems of over-reach and uncertainty precipitated by s 44ZZRD are set out in Attachment 1 should those problems arise for discussion at the workshop.

There are numerous exclusions from this paper, including bases of liability (primary and ancillary) for corporations and individuals; linked liability (offences relating to the administration of justice; money-laundering offences); investigation powers; enforcement policies; issues of jurisdiction, procedure and evidence; and provisions governing sentencing.[13]

Terminology: in this paper, "D" stands for the accused or defendant.

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http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/index.htm, last viewed 23 March 2009.

9 The submissions to the Committee are available at http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_cartels_09/submissions/sublist.htm, last viewed 23 March 2009.

10 Senate Standing Committee on Economics, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* 2008, at http://www.aph.gov.au/SEnate/committee/economics_ctte/tpa_cartels_09/report/report.pdf, last viewed 11 March 2009.

11 The next sittings of the Senate at which the Bill may be considered are 12–14 May and 15–25 June.

12 Parliament of Australia, Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4027_ems_b454fd30-9e3f-4f16-a964-79f671a6a9fa/upload_pdf/321465.pdf;fileType=application%2Fpdf, last viewed 11 March 2008.

13 For discussion of some of these issues, see C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, 2008, p. 166; C Beaton-Wells and B Fisse, 'Criminal Cartels: Individual Liability and Sentencing', Paper presented at the 6th Annual University of South Australia Trade Practices Workshop, 18 October 2008, pp. 1–133.

2. OVERVIEW OF CRIMINAL AND CIVIL PROHIBITIONS UNDER THE AMENDED TPA

2.1 The new scheme of prohibitions

Following enactment of the CC&OM Bill the structure of prohibitions relevant to cartel conduct under the TPA will be as follows:

- Under Division 1:
    - the cartel offences under ss 44ZZRF and 44ZZRG; and
    - new civil prohibitions under ss 44ZZRJ and 44ZZRK.
- Under Division 2 (containing ss 45-50A), s 45:
    - the existing civil prohibition on exclusionary provisions under s 45(2)(a)/(b)(i); and
    - the existing civil prohibition on provisions that have the purpose, effect or likely effect of substantially lessening competition under s 45(2)(a)/(b)(ii).

The existing provision in s 45A of the TPA which deems conduct within that provision to fall within the general prohibition under s 45(2)(a)/(b)(ii) is to be repealed.

The main cartel offence is as prescribed by s 44ZZRF:

(1) A corporation commits an offence if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

(2) The fault element for paragraph 1(b) is knowledge or belief.

The cartel offence of giving effect to a cartel provision is prescribed by s 44ZZRG:

> (1) A corporation commits an offence if:
>
> (a) a contract, arrangement or understanding contains a cartel provision; and
>
> (b) the corporation gives effect to the cartel provision.
>
> (2) The fault element for paragraph 1(a) is knowledge or belief.

The new civil prohibitions in ss 44ZZRJ and 44ZZRK are in identical terms to the offences, except omitting subsection (2) relating to fault elements.

Common phrases in the offences and civil prohibitions are 'contract, arrangement or understanding' and 'cartel provision'. The first of these has no statutory definition. The second, 'cartel provision', has a detailed definition in s 44ZZRD (summarised in section 2.3 below).[14] In broad terms, the definition of 'cartel provision' reflects the practices known as: price fixing; output restriction; market sharing or division; and bid rigging. Thus, under the new scheme, five types of provision will be prohibited per se: those defined as a cartel provision, and an exclusionary provision as defined in s 4D. Any other provision will be tested for its anti-competitive purpose, effect or likely effect under the competition test in s 45(2).

Under the *Criminal Code Act 1995* (Cth) (*Criminal Code*) an offence consists of physical elements and fault (mental) elements.[15] The physical elements of the cartel offences are respectively: the making of a contract or arrangement or arriving at an understanding that contains a cartel provision (for the offence in s 44ZZRF); or the giving effect to a cartel provision contained in a contract, arrangement or understanding (for the offence in s 44ZZRG). These elements are discussed in Part 3 (contract, arrangement or understanding) and Part 4 (cartel provision) of the paper. The fault elements of the cartel offences are both implied as a result of the operation of the *Criminal Code* (intention) as well as expressly indicated in the offence provisions themselves (knowledge or belief). As explained in Part 5, different fault elements apply to different physical elements.

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[14] The highly prescriptive and convoluted drafting style of the TPA appears to have reached a new nadir: the definition of 'cartel provision' in s 44ZZRD comprises 11 subsections and 36 paragraphs and runs for six pages.

[15] The concepts of fault elements and physical elements are fundamental to the structure of the *Criminal Code Act 1995* (Cth) (*Criminal Code* (Cth)). See further Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, pp. 7–9; I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code', *Criminal Law Journal*, vol. 26, 2002, p. 28. See generally S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007.

2.2 The criminal/civil divide

The Dawson Committee recognised that an important issue in criminalising cartel conduct would be distinguishing adequately between conduct to be treated as an offence and conduct to be treated as a civil contravention. The former government proposed an element of an 'intention to dishonestly obtain a benefit' as the key discriminator between the offences and the civil prohibitions.[16] This proposal was problematic and controversial.[17] It was rightly abandoned by the current government.[18]

Under the scheme to be introduced by the CC&OM Bill the physical elements of the cartel offences and civil prohibitions will be the same. However, the fault elements will be different. The cartel offences will have elements of intention, knowledge or belief that do not apply to the civil prohibitions. Submissions to the government and the Senate Economics Committee have been critical of this framework as failing to ensure that only the most 'serious' forms of cartel conduct are captured by the offences.[19] Concern has been expressed about allowing such significant latitude in the exercise of discretion by the ACCC and the Commonwealth Director

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16 Treasurer, 'Criminal Penalties for Serious Cartel Behaviour', Press Release No 4 of 2005, 2 February 2005, at www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp ,last viewed 21 July 2008.

17 Many of the submissions in relation to the first Exposure Draft Bill were critical of this element. See, e.g., Submission to Treasury, *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 6 March 2008, Submission No 11, pp. 2–3 (Julie Clarke), at http://www.treasury.gov.au/documents/1350/PDF/Mrs_Julie_Clarke.pdf, last viewed 13 March 2009; Submission to Treasury, *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 6 March 2008, Submission No 17, pp. 13–24 [23]–[73] (Law Council of Australia), at http://www.treasury.gov.au/documents/1350/PDF/LCA_Trade_Practices_Committee.pdf, last viewed 13 March 2009; Submission to Treasury, *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 7 March 2008, Submission No 20, Pt. 6, pp. 28–39 (Caron Beaton-Wells and Brent Fisse), at http://www.treasury.gov.au/documents/1350/PDF/Dr_Caron_Beaton-Wells_and_Mr_Brent_Fisse.pdf, last viewed 11 March 2009. See further the analysis in B Fisse, 'The Cartel Offence: Dishonesty?', *Australian Business Law Review*, vol. 35, 2007, p. 235.

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, p. 67 (Chris Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer).

19 Submission to Treasury, *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 6 March 2008, Submission No 17, pp. 13–24 [23]–[73] (Law Council of Australia), at http://www.treasury.gov.au/documents/1350/PDF/LCA_Trade_Practices_Committee.pdf, last viewed 13 March 2009; Submission to Treasury, *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 7 March 2008, Submission No 20, pp. 5–11 (Caron Beaton-Wells and Brent Fisse), at http://www.treasury.gov.au/documents/1350/PDF/Dr_Caron_Beaton-Wells_and_Mr_Brent_Fisse.pdf, last viewed 11 March 2009; Submission to Senate Standing Committee on Economics, Parliament of Australia, 20 January 2009, Submission No 6, pp. 1–3 (Speed and Stracey), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub06.pdf, last viewed 11 March 2009; Submission to Senate Standing Committee on Economics, Parliament of Australia, 30 January 2009, Submission No 10, pp. 2–3 [3.1(a)] (Law Council of Australia), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf , last viewed 13 March 2009.

of Public Prosecutions (DPP) in determining in which instances prosecution, rather than civil proceedings, is warranted.[20]

However, in very few cases have critics attempted to formulate a specific definition that establishes the much sought after bright line.[21] Moreover, there are no overseas models that provide a useful guide.[22] The OECD Recommendation on which the government and the ACCC have relied in devising the four categories of cartel provision was never intended as a blue print for statutory drafting.[23] Some specific formulations have been offered but appear to have been ignored or put in the 'too hard basket.'[24]

It is important to avoid over-reach in the definition of the conduct that is to be criminalised, it is equally important to adopt a comprehensive and systematic approach to the criminal/civil divide. The statutory elements of the offence, while significant, are but one of a wide range of indicia relevant to differentiating criminal from civil conduct. The other main indicia are:[25]

- the name given to the offence and the connection between that name and existing offences recognised by the community as prohibiting criminal conduct;
- the type and the maxima of the penalties that can be imposed;
- the mode of trial and the nature of the court's jurisdiction;

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20 Submission to Senate Standing Committee on Economics, Parliament of Australia, 30 January 2009, Submission No 10, pp. 4–5 [3.1(c)] (Law Council of Australia), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf , last viewed 13 March 2009; Submission to Senate Standing Committee on Economics, Parliament of Australia, 20 January 2009, Submission No 6, pp. 3–5 (Speed and Stracey), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub06.pdf, last viewed 11 March 2009.

21 See B Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery', Paper presented at the Competition Law Conference, 24 May 2008, Sydney, at http://www.brentfisse.com, last viewed 23 March 2009.

22 See the discussion of the limited guidance available from statutory models in other jurisdictions in B Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery', Paper presented at the Competition Law Conference, 24 May 2008, Sydney, section 2.3, at http://www.brentfisse.com, last viewed 23 March 2009.

23 Organisation for Economic Co-operation and Development, 'Recommendation of the Council concerning Effective Action against Hard Core Cartels', C(98)35/FINAL, 14 May 1998, p. 3, at http://www.oecd.org/dataoecd/39/4/2350130.pdf, last viewed 13 March 2009; Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) pp. 5–6; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, p. 12311 (Chris Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer).

24 Evidence to Senate Standing Committee on Economics, Parliament of Australia, Canberra, 16 February 2009, p. E 38 (Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission), at http://www.aph.gov.au/hansard/senate/commttee/S11629.pdf, last viewed 13 March 2009.

25 C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, no. 3, 2008, p. 166, p. 170.

- the type of enforcement action available and the enforcement agency responsible for the conduct of enforcement actions;
- the rules of evidence that apply, especially the need to prove an offence beyond reasonable doubt;
- the rules of procedure that apply, including the powers of investigation that are available;
- the conventional obligations imposed on prosecutors – for example, the obligation to make all the evidence, including exonerating evidence, available to the accused;
- the definition of the fault elements of the offence;
- the definition of the physical elements of the offence;
- the definition and scope of exceptions, exemptions and defences;
- the application of general principles of criminal responsibility; and
- the exercise of prosecutorial discretion in a manner that reflects the above factors plus additional indicators of offence seriousness (e.g. gravity of harm; degree of culpability) and the public interest in the prosecution of criminal offences.

Aside from the definition of the elements of the offences, it is beyond the scope of this paper to assess the proposed approach to any of the other indicia listed above.[26]

2.3 The pivotal but over-reaching and uncertain concept of a 'cartel provision'

The concept of a 'cartel provision' is central to both the cartel offences and the new civil prohibitions. It is defined at length in s 44ZZRD. According to s 44ZZRD(1), in order for a provision in a contract, arrangement or understanding to be a cartel provision, the provision must satisfy:

[26] Cf the discussion in C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, no. 3, 2008, p. 166.

- either the purpose/effect condition (in subs (2) in relation to price-fixing), or the purpose condition (in subs (3) in relation to output restriction, market allocation and bid rigging); and

- the competition condition (in subs (4)), regardless of how the conduct is characterised in relation to the condition.

The definitions of each these conditions suffer from over-reach and introduce new uncertainties of interpretation and application. Key issues likely to arise are identified below. Examples are set out in Attachment 1 to this paper.

The definitions are too far-reaching for per se liability generally and for criminal liability, in particular. They capture conduct that is either not anti-competitive or may be positive in terms of consumer welfare. They do not seek to capture the essence of what is 'serious', in economic terms, about cartel conduct, that is conduct that is intended by a firm to lessen competition between it and an actual or potential competitor or competitors.[27]

Curiously, the definition of a cartel provision does not include the category of conduct known as 'rule fixing'.[28] Cartel conduct takes many different forms and cannot be pigeonholed into four categories of conduct without the risk of leaving gaps.

The difficulties associated with the definition of 'cartel provision' are attributable in large part to the fact that it reflects a rules-based rather than a principles-based approach to regulation.[29] This is a feature of the TPA generally.

2.3.1 Price fixing

The definition of price fixing in s 44ZZRD(2) is based on the definition in s 45A(1), which is to be repealed. The new definition inherits issues associated with s 45A(1) that have remained largely unexplored or have yet to be resolved in the case law. The key issues are:

- whether pro-competitive price-fixing is subject to the per se prohibition;[30]

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[27] RH Bork, *The Antitrust Paradox: A Policy at War with Itself*, Free Press, New York, ch 13.

[28] See RH Lande and HP Marvel, 'Rule Fixing: An Overlooked but General Category of Collusion', in A Cucinotta, R Pardolesi and R Van den Burgh (eds), *Post-Chicago Developments in Antitrust Law*, Edward Elgar, Northampton, Massachusetts, 2002, ch. 9.

[29] See K McMahon, 'Competition Law, Adjudication and the High Court', *Melbourne University Law Review*, vol. 30, 2006, p. 782; J Black, 'Forms and Paradoxes of Principles-Based Regulation', LSE Law, Society and Economy Working Paper 13/2008, at http://ssrn.com/abstract1267722, last viewed 23 March 2009.

- the position of harmless or pro-competitive vertical supply agreements between competitors, which agreements appear to be caught by the definition of price fixing in s 44ZZRD(2) and are not covered by any exception in Subdivision D of Division 1 of Part IV – see Example 5 in Attachment 1;[31]

- the degree of likelihood of the effect on price required to establish that there has been fixing, controlling or maintaining of price, or providing therefor;[32]

- the meaning of the term 'controlling' and whether any degree of control suffices to attract the definition;[33]

- the meaning and relevance, if any, of a so-called 'incidental effect' that does not constitute an 'effect' on price. [34]

2.3.2 Output restriction

The purpose condition in the definition of restricting output in s 44ZZRD(3)(a) creates difficulties parallel to those created by the 'purpose' element of an exclusionary provision under s 4D. These difficulties remain despite the decision of the High Court in the *South*

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[30] See A Nicotra and J O'Regan, 'Dare To Deem - Does Section 45A Trade Practices Act Prohibit 'Pro-Competitive' Price Fixing?' (2001) (unpublished); I Tonking, 'Competition at Risk? New Forms of Business Cooperation', *Competition & Consumer Law Journal*, vol. 10, 2002, p. 169, Pts. 10–11; FH Easterbrook, 'Maximum Price Fixing', *University of Chicago Law Review*, vol. 48, 1981, p. 886.

[31] See further Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, section 4 (B Fisse), at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf, last viewed 23 March 2009.

[32] Note the new definition of 'likely' in s 44ZZRB as including 'a possibility that is not remote'; see further the criticisms in Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 30 January 2009, Submission No 10, pp. 6–7 (Law Council of Australia), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf, last viewed 13 March 2009.

[33] See *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375, [178]; as discussed in B Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery', Paper presented at the Competition Law Conference, 24 May 2008, Sydney, section 4.2, at http://www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf, last viewed 23 March 2009.

[34] See B Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery', Paper presented at the Competition Law Conference, 24 May 2008, Sydney, section 5.5, at http://www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf, last viewed 23 March 2009; compare the obscure notion of 'incidentally affected' mentioned in the Explanatory Memorandum at [1.25].

Sydney case[35] and the extensive comments about s 4D purpose in that case. The key difficulties are:

- it is unclear what exactly is meant by 'the end sought to be accomplished by the conduct'[36] and in particular whether or not an immediate substantial purpose is sufficient to constitute a s 4D purpose if an ultimate purpose is unlikely to lessen competition or is pro-competitive – see Example 6 in Attachment 1;[37]

- it seems that the 'purpose of a provision' need not be the purpose of all of the parties to a contract, arrangement or understanding, but merely the purpose of some parties, such as the party or parties responsible for including the provision in the contract, arrangement or understanding;[38]

- harmless or pro-competitive vertical supply agreements between competitors may easily have a restrictive purpose that is caught by the definition of a cartel provision in s 44ZZRD(3); such agreements are not covered by any exception in Subdivision D of Division 1 of Part IV – see Example 6 in Attachment 1.[39]

The CC&OM Bill seeks to remove the difficulties arising from the 'particularity' requirements of s 4D.[40] However, to the extent that removal of the particularity requirement is likely to

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35 *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563.

36 *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563, [18] (Gleeson CJ).

37 The views expressed by the majority in *South Sydney* do not resolve the following key issues that continue to arise in other cases: (a) the distinction between immediate and ultimate purpose and whether or not s 4F is a dead letter - is an immediate substantial purpose no longer a sufficient purpose under s 4D?; (b) the distinction between purpose and foresight of practical certainty - is foresight of practical certainty no longer sufficient to constitute an exclusionary purpose under s 4D?; (c) does the US doctrine of ancillary restraints somehow over-ride s 4F so that a substantial exclusionary purpose that is ancillary to a legitimate commercial objective does not constitute a s 4D purpose? See further I Wylie, 'What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond', *Australian Business Law Review*, vol. 35, 2007, p. 33, p. 42 ('the question remains whether, with the unusual advantage of recent consideration on two occasions by Australia's highest court, practitioners and businesses are now any the wiser as to what does and does not contravene the Act').

38 See section 4.3.2 below.

39 See further Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, section 4 (B Fisse), at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf, last viewed 23 March 2009.

40 See s 44ZZRD(5), (7). One difficulty under s 4D is the possibility that the particularity of the persons or class of persons must arise otherwise than from the characteristic of being excluded. The view that it does not (see *ASX Operations Pty Ltd v Pont Data Australia* Pty Ltd (No 1) (1990) 27 FCR 460, 488) now appears to be in the ascendancy, but the High Court in *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 56 and *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 did not find it necessary or see fit to remove the lingering uncertainty that remains.

extend the scope of liability, the change aggravates rather than alleviates the over-reach of the definition of a cartel provision.[41]

Further, the definition in s 44ZZRD(3) introduces new terms such as 'production' and 'capacity' the meaning of which is uncertain and a potential subject for expert economic evidence.[42]

2.3.3 Market allocation

The definition of market allocation in s 44ZZRD(3)(b) is infected by the same issues of interpretation of 'purpose' as those arising from the definition of output restriction; see section 2.3.2 above.

Further, while the meaning of 'allocating' will not occasion difficulty in cases of naked market division, the boundary line is not pellucidly clear. Assume that competitors A and B agree not to contest the opportunity to take business away from each other's existing customers. Have they 'indirectly' 'allocated' the customers? Or does this conduct amount to retention or maintenance of customers rather than allocation of them? The notion of 'allocation' suggests some overt act rather than the result of inaction or passivity by the parties involved.[43]

2.3.4 Bid rigging

The definition of bid rigging in s 44ZZRD(3)(c) is problematic.

A wide range of conduct is caught by the concept of bid rigging as defined in s 44ZZRD(3). 'Bid' is broadly defined to include 'the taking, by a potential bidder or tenderer, of a preliminary step in a bidding or tendering process' (s 44ZZRB).[44]

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41 The change is opposed in Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 30 January 2009, Submission No 10, p. 6 (Law Council of Australia), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf, last viewed 13 March 2009.

42 See the definition of 'production' in s 44ZZRB and the comment in the Explanatory Memorandum at para 1.36. Compare TPA s 44B(f) (production process); *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45. 'Capacity' is a loaded and malleable term; consider e.g. LR Klein, 'Some Theoretical Issues in the Measurement of Capacity', *Econometrica*, vol. 28, 1960, p. 272.

43 This is consistent with the dictionary definition of 'allocate': 'To set or lay apart for a special purpose, to apportion, assign, to give one as his special portion or share' (see JA Simpson and ESC Weiner, *The Oxford English Dictionary*, 2nd edn, Clarendon Press, Oxford, 1989, vol. I, p. 339)

44 The scope of the cartel offences is very far-reaching and often has the flow-on effect of radically extending the scope of ancillary liability. For example, liability for attempting to rig a bid would extend to pre-preliminary steps in a bidding process. The implications of the definition of the cartel offences for

Bid rigging is often seen as a species of price fixing. Most forms of bid rigging are caught by the definition of price fixing under ss 44ZZRD(2). However, the definition in s 44ZZRD(3)(c) does not necessarily require conduct that has the purpose, effect or likely effect of fixing or controlling price. Nor does the definition in s 44ZZRD(3)(c) require conduct that otherwise forecloses competitive conduct (see e.g., s 44ZZRD(3)(c)(v)). In consequence, the definition of bid rigging can catch conduct that plainly is pro-competitive and which should not require authorisation: see Example 4 in Attachment 1.

It is not clear why the definition of bid rigging should be confined to conduct that has the purpose of bid-rigging but not extend to conduct that has the effect or likely effect of bid rigging (contrast the purpose/effect condition that applies to price-fixing). In cases where there is evidence that the likely effect of a provision is to rig a bid but insufficient evidence of purpose, in most situations it will be possible to prosecute D for price fixing.

On one view, the definition of bid rigging should exclude 'rigging' that has been notified to the person requesting the bids (cf s 188(6) of the *Enterprise Act 2002* (UK)). On another view, notification to a victim or consent by a victim does not negate liability for price fixing, restriction of output or allocation of customers, and there seems no apparent reason for a special exception in the context of bid rigging.

2.3.5 Competition condition

The competition condition corresponds to the requirement under the per se limbs of s 45 that at least two of the parties to the contract, arrangement or understanding be or would be, but for the contract, arrangement or understanding, in competition with each other and that the competition coincide with the goods and services that are the subject of the offending provision (see s 45A(8); s 4D(1)(a), (2)).

At least for the cartel offences, it may be argued that all the parties to the contract, arrangement or understanding should be required to be in competition (or likely competition) with each other.[45] Serious cartel conduct is engaged in by competitors and their employees or agents. Non-competitors who assist or encourage competitors to engage in cartel conduct are secondary participants for whom the law of complicity lies in wait.

The definition of competition in s 45(3) requires 'competition in any market' but that definition does not apply to the cartel offences (nor does it apply to the civil prohibitions against cartel

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ancillary liability are important but have never been addressed in any discussion paper published by the Government and do not appear to be even on the radar.

[45] Compare the much more limited scope of *Enterprise Act 2002* (UK) ss 188–9.

conduct). The effect is to extend the territorial reach of the cartel offences.[46] The extension is not discussed in the Explanatory Memorandum and may be unintentional.

Some have been mystified by the extended definition of 'party' in s 44ZZRC, which states that "if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a *party* to that contract, arrangement or understanding." However, this definition does not over-ride the need to prove the physical elements and the fault elements of a cartel offence: the concept of 'party' is conceptually distinct from the concept of 'making' a contract required as a physical element of the offence under s 44ZZRF, and being a 'party' does not mean that one knows or believes that the contract, arrangement or understanding contains a cartel provision.[47] The effect of the definition seems to be merely that the parties referred to in the purpose/effect condition and the purpose condition under s 44ZZRD include bodies corporate that are related to the bodies corporate that are parties to the contract, arrangement or understanding.[48]

2.3.6 Exceptions, exemptions and defences

The above-described issues of over-reach that arise from the broad definition of a cartel provision in s 44ZZRD are not cured by the exceptions provided in Subdivision D of Division 1 of Part IV.

The anti-overlap provision in s 44ZZRS for exclusive dealing conduct saves the day only to a limited extent. Section 44ZZRS falls well short of excluding many typical kinds of harmless or pro-competitive vertical supply agreements between competitors;[49] see Examples 5 and 6 in Attachment 1.

The joint venture exception in s 44ZZRO is problematic in various ways. The problems were brought to the attention of the Senate Economics Committee which failed to deal with them

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[46] See TPA s 4E; *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Ltd* [2008] FCA 1458. We are indebted to Michael O'Bryan for drawing this point to our attention.

[47] See section 4.4.1 below. Cf. doubts registered in Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 30 January 2009, Submission No 10, pp. 5–6 (Law Council of Australia), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf, last viewed 13 March 2009.

[48] See Explanatory Memorandum: Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), [1.48]–[1.49] at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4027_ems_b454fd30-9e3f-4f16-a964-79f671a6a9fa/upload_pdf/321465.pdf;fileType=application%2Fpdf, last viewed 11 March 2008.

[49] See Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, section 4 (B Fisse), at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf, last viewed 23 March 2009.

adequately.[50] One limitation is that the cartel provision in question must be contained in a contract and not merely in an arrangement or understanding. This limitation is misguided and bound to have undesirable consequences.

Assume that two competitors agree orally to form a joint venture subject to non-compete restrictions that are reasonably necessary to make the venture commercially feasible. They agree further to cement the deal in the contract. The cartel provision/s here that are in the contract will be immunised by the exception in s 44ZZRO. However, s 44ZZRO will not immunise the cartel provision in the prior oral arrangement: there is no provision to the effect that a 'contract' includes a preliminary oral agreement on which a later formal contract is based. The problem illustrated by this example is obvious and partly explains why the joint venture defences in ss 76C and 76D apply to provisions in contracts, arrangements or understandings.

A further unnecessary and inexplicable limitation of the joint venture exception in s 44ZZRO is that it relates only to joint production and supply. There is no reason in principle why the exception should not apply also to joint acquisition or joint marketing arrangements.

It has been contended that parties can and should apply for an authorisation in cases where the cartel offences suffer from over-reach or uncertainty. This contention is an unpersuasive response to those problems. Per se liability, especially criminal liability, warrants careful definition and should not extend to typical examples of harmless or pro-competitive conduct. The authorisation process does not provide any justification for inattentive definition of the elements of the cartel offences or the exceptions that apply to them. Authorisation is an inexpedient solution except in cases where there are anti-competitive effects and where public

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[50] See Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 30 January 2009, Submission No 10, pp. 7–9 (Law Council of Australia), at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf, last viewed 13 March 2009; Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, section 4 (B Fisse), at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf, last viewed 23 March 2009. For the Committee's report, see Senate Standing Committee on Economics, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* 2008, at http://www.aph.gov.au/SEnate/committee/economics_ctte/tpa_cartels_09/report/report.pdf, last viewed 11 March 2009. Contrast Evidence to Senate Standing Committee on Economics, Parliament of Australia, Canberra, 16 February 2009, p. E 41 (Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission), at http://www.aph.gov.au/hansard/senate/commttee/S11629.pdf, last viewed 13 March 2009. Contrary to the incorrect claim made in that evidence, Canadian competition law does not limit a joint venture exception or defence to a cartel provision in a contract. See the broad defence of ancillary restraint under s 45(4) of the *Competition Act 1986* (Can), as recently amended, and note that the requirement of a written agreement in s 112 relates to a notification requirement under Part IX of the Act and has no legal or policy relevance to liability rules governing liability for criminal or civil cartel conduct.

benefits may outweigh those effects. In other cases authorisation typically is impractical given the cost, delay, publicity and uncertainty of the process and the limited scope or period of immunity if authorisation is granted. Review of the authorisation process and possible ways of eliminating the need for authorisation is overdue. No equivalent process for regulating collaborations between competitors has been found necessary in the USA or the EU.

3. CONTRACT, ARRANGEMENT OR UNDERSTANDING

3.1 Introduction

3.1.1 Contract, arrangement or understanding - common to the cartel offences and civil prohibitions

The concepts of 'contract', 'arrangement' and 'understanding' have been present in the civil prohibitions on cartel conduct, under s 45(2) of the TPA, since 1974.[51] There is now a substantial body of case law on their meaning, as well as a growing body of literature.[52] However, in many respects and certainly by comparison with overseas jurisdictions, the law on this threshold element of cartel conduct is undeveloped and unsatisfactory.

The same concepts are used in the new cartel offences in ss 44ZZRF-44ZZRG and new civil prohibitions in ss 44ZZRJ-44ZZRK. Notwithstanding s 44ZZRE, which purports to 'immunise the remainder of the TP Act from the meaning of the terms used in Division 1 of Part IV',[53] it is presumed that courts will adopt the same interpretation of the concepts for both the offences and the civil prohibitions.[54]

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[51] For the history of how the terms came to be introduced into the TPA, see I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, pp. 47–50.

[52] See most recently I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46; I Wylie, 'Understanding "understandings" under the Trade Practices Act – an enforcement abyss?', *Trade Practices Law Journal,* vol. 16, 2008, p. 20; W Pengilley, 'What is required to prove a 'contract, arrangement or understanding'?', *Competition & Consumer Law Journal*, vol. 13, 2006, p. 241.

[53] See Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), p. 12 [1.19], at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4027_ems_b454fd30-9e3f-4f16-a964-79f671a6a9fa/upload_pdf/321465.pdf;fileType=application%2Fpdf, last viewed 11 March 2008. Section 44ZZRE provides that Div 1 is to be disregarded in determining the meaning of an expression in a provision of the *Trade Practices Act 1974* (Cth) (other than a provision in Div 1, sub-s 6(2)(c) or s 76(1A)(aa)).

[54] As much is required by *Waugh v Kippen* (1986) 160 CLR 156, 165, where the High Court held that where the same wording is used for the purposes of criminal and civil proscription, the same interpretation must be adopted in both contexts (the legislature cannot be taken to have spoken 'with a forked tongue').

3.1.2 Recent proposed amendments to the meaning of 'understanding'

In the wake of its failed cases against petrol retailers for alleged price fixing in Ballarat (*Apco*)[55] and Geelong (*Leahy*)[56] and its subsequent petrol pricing inquiry, the ACCC has recommended amendments to the TPA in connection with the interpretation of an 'understanding'.[57] The proposed amendments would insert the following provisions in the Act:

(a) The court may determine that a corporation has arrived at an understanding notwithstanding that:

(i) the understanding is ascertainable only by inference from any factual matters the court considers appropriate

(ii) the corporation, or any other parties to the alleged understanding, are not committed to giving effect to the understanding.

(b) The factual matters the court may consider in determining whether a corporation has arrived at an understanding include but are not limited to:

(i) the conduct of the corporation or of any other person, including other parties to the alleged understanding

(ii) the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way in relation to the subject of the alleged understanding

(iii) the extent to which the corporation was acting in concert with others in relation to the subject matter of the alleged understanding

(iv) any dealings between the corporation and any other parties to the alleged understanding before the time at which the understanding is alleged to have been arrived at

(v) the provision by the corporation to a competitor, or the receipt by the corporation from a competitor, of information concerning the price at which or conditions on which, goods or services are supplied or acquired, or are to be supplied or acquired, by any of the parties to

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55 *Apco Service Stations Pty Ltd v Australian Competition and Consumer* Commission (2005) 159 FCR 452.
56 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321.
57 Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol,* December 2007, pp. 228–9, at http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf, last viewed 11 March 2009.

the alleged understanding or by any bodies corporate that are related to any of them, in competition with each other

(vi) whether the information referred to in (v) above is also provided to the market generally at the same time

(vii) the characteristics of the market

(viii) the likelihood of the information referred to in (v) above being useful to the recipient of the information for any purpose other than fixing or maintaining prices;

(ix) the extent to which, if at all, the communication referred to in (v) above was secret or intended by the parties to the communication to be secret.

Each of the aspects of these proposed amendments are discussed in detail below. Broadly speaking, the proposals should be regarded as misconceived, problematic and, to a significant extent, symptomatic of a failure to grapple with the fundamental issues. The Government announced that it would give the proposals 'careful consideration'[58] and the Treasury subsequently released a 'Discussion Paper' seeking submissions 'regarding the adequacy of the current interpretation of the term 'understanding' in the TPA to capture anti-competitive conduct.'[59] The Discussion Paper is also deficient, not only in its omission of any reference to arguments for and against reform, but equally in failing to raise for consideration approaches alternative to those advocated by the enforcement agency (the views of which unavoidably are self-interested in such matters). The problems complained of by the ACCC have been the subject of extensive examination in other jurisdictions (only a small sample of the relevant material is highlighted in this paper). Yet none of this extensive overseas experience appears to have been drawn upon, either by the Commission or the Treasury.

The ACCC's proposed amendments explicitly relate to s 45 and presumably are intended to . apply to the new civil prohibitions. However, neither the ACCC nor the Treasury has indicated whether the amendments are intended to apply to the cartel offences. The proposals are even more problematic in the context of the offences than in the context of the civil prohibitions. Yet, if dual application is not proposed it would be inconsistent with the general approach under the CC&OM Bill, namely to create parallel criminal and civil prohibitions (with the exception of the fault elements required for the offences), and otherwise leave it to the

[58] The Hon Chris Bowen MP and the Hon Kevin Rudd MP, 'A National Fuelwatch Scheme', Press Release, 15 April 2008, at http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/023.htm&pageID=003&min=ceb&Year=2008&DocType=0, last viewed 13 March 2009.

[59] Treasury, *Discussion Paper: Meaning of 'understanding' in the Trade Practices Act*, at http://www.treasury.gov.au/documents/1459/RTF/Discussion_paper.rtf, last viewed 11 March 2009.

discretion of the enforcement agencies to determine when to bring criminal rather than civil proceedings in respect of cartel conduct (see section 2.2 above).

3.1.3 Questions of interpretation and application in relation to contract, arrangement or understanding

This paper addresses the following questions that surround the concepts of 'contract', 'arrangement' or 'understanding':

(1) What is the significance of recognising a 'spectrum' of dealings when assessing liability for cartel conduct? See section 3.2.

(2) What should be the conceptual boundaries of an 'understanding' for the purposes of the civil prohibitions and cartel offences? Should an 'understanding' be equated with a concerted practice, as appears to be proposed by the ACCC? See section 3.3.

(3) What role should be played by circumstantial evidence in establishing an 'understanding' for the purposes of the civil prohibitions and cartel offences? Should the ACCC's proposed list of factual matters from which an 'understanding' may be inferred be adopted in the TPA? See section 3.4.

Such questions cannot be considered in relation to the cartel offences in isolation. The starting point must be the approach that is or should be taken in relation to the civil prohibitions, and then it can be assessed whether or not the approach should be any different and if so, how, for the purposes of the cartel offences. As such, the questions identified above may be more questions of legislative policy than strictly questions of interpretation and application. Before addressing each of the questions in turn, some preliminary observations are appropriate.

First, there are particular challenges that arise in connection with definitions of collusion in competition law and those challenges are by no means unique to Australia. An initial challenge is one of terminology. The cases and literature in this area are littered with terms and expressions, many of which are used interchangeably yet which have no settled definition. A second and related challenge is one of theory. Economists in this field, as in most other areas of antitrust, are divided in their views on where to draw the line between lawful and unlawful horizontal coordination.[60] Finally, there is a tendency not to separate clearly the existential or

[60] 'There are almost as many economic theories about oligopoly as there are economists': JM Joshua and S Jordan, 'Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law', *Northwestern Journal of International Law & Business*, vol. 24, 2004, p. 647, p. 661. See generally, GJ Stigler, 'A Theory of Oligopoly', *Journal of Political Economy*, vol. 72, 1964, p. 44; DA Yao and SS DeSanti, 'Game Theory and the Legal Analysis of Tacit Collusion', *Antitrust*

conceptual inquiry as to what type of activity should be unlawful (a question of definition) from the evidential inquiry as to how such activity may be proven (a question of information and, to a large extent, inference).[61]

Secondly, the questions considered in this paper are not exhaustive of the questions likely to arise in connection with the requirement of a 'contract, arrangement or understanding'. Those selected for discussion here are key questions that have implications generally for the scope and proof of liability under the offences and that have been brought into focus by the ACCC's proposed amendments to the existing prohibitions. However, other issues may be just as critical in other cases. In particular, there may be issues associated with the scope of the offence of giving effect to a cartel provision under s 44ZZRG – for example:

- what is meant by 'give effect to'; does it include the performance of and receipt of benefits under a contract entered into pursuant to a cartel provision;
- is there any temporal limitation on the scope of the offence of giving effect to a cartel provision; for example, does the offence apply where the alleged giving effect to a cartel provision relates to a provision in an understanding arrived at 20 years ago;
- the extent to which it is possible to negate liability on the basis of abandonment of or withdrawal from the contract, arrangement or understanding.

3.2 A spectrum of dealings

The concepts 'contract', 'arrangement' and 'understanding' are taken to reflect a 'spectrum' of dealings.[62] Thus, the concepts are seen as being related and overlapping, while at the same time falling within a range or sequence.[63] Further, as would be expected, the series is treated as descending, with 'contract' at the one end and 'understanding' at the other, and 'arrangement' at some point in between.[64]

Bulletin, vol. 38, 1993, p. 113; JB Baker, 'Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem and Contemporary Economic Theory', *Antitrust Bulletin*, vol. 38, 1993, p. 143.

61 For an exception, see, e.g., D Snider and I Scher, 'Conscious Parallelism or Conspiracy?', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 49, p. 1144. See further, D Bailey 'Contours of Collusion: Football Shirts and Toys and Games', *Competition Law*, 2006, p. 236.

62 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [24].

63 The *Oxford English Dictionary* defines 'spectrum' as '[t]he entire range or extent of something, arranged by degree, quality, etc.': see JA Simpson and ESC Weiner, *The Oxford English Dictionary*, 2nd edn, Clarendon Press, Oxford, 1989, vol. XVI, p. 170.

64 At least this appears to be the contemporary view. Cf Tonking's description of the view taken in the early years that: 'The term "arrangement" seemed sufficiently descriptive of an informal species of collusion to

This notion of a 'spectrum' implies an approach of interpreting each of the concepts in the range by reference to and distinction from the other concepts. Thus, the term 'contract' imports the traditional common law understanding of that concept as exhibiting a high degree of formality, with features such as an offer by one party, supported by consideration, and accepted by another, with sufficient certainty of terms to make what has been agreed to ascertainable.[65] An 'arrangement' then is said to be a dealing 'lacking some of the essential elements that would otherwise make it a contract'[66] and an 'understanding' is said 'to connote a less precise dealing than either a contract or arrangement.'[67]

This literalist approach to interpretation takes as its starting point the traditional paradigm for lawful business transactions but diverts attention from a more fundamental inquiry as to the proper scope of liability for cooperation between competitors in antitrust law.[68] Further, while 'contract' has a distinctive meaning, the concepts of 'arrangement' and 'understanding' have not been distinguished clearly from each other and nor has either been given much operational content, other than by deduction from the requirements of a 'contract'.[69]

By comparison, in economic theory there is a relatively clear continuum on which horizontal conduct may be demarcated for antitrust purposes.[70] At the one extreme are 'agreements' with the hallmark exchange of assurances about future intentions. At the other extreme is parallel behaviour, sometimes referred to as 'mere' parallelism as a means of emphasising that it is behaviour that cannot be explained by reference to any form of agreement. Mere parallelism, the most commonly observed outcomes of which are uniform or correlated pricing, may be due to external factors affecting cost and demand conditions facing all firms in the market. Thus,

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make it unnecessary to consider whether there were elements which an arrangement required which an understanding might lack.' See I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 55.

65 A distinction between an unlawful cartel 'contract' and a lawful common law contract, however, is that the latter is accompanied by an intention by the parties to be legally bound whereas the former necessarily lacks such an element so as to negate the defence of illegality: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [25].

66 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [26].

67 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 332 [27].

68 Indeed, if analogies from contract are to be drawn on, greater inspiration might be derived from more modern relational contract theory which recognises a 'continuum of commitment which is weak at the beginning and stronger as the process of negotiation develops': RL Smith, A Duke and DK Round, 'Signalling, Collusion and section 45 of the TPA', *Competition & Consumer Law Journal*, 2009 (forthcoming), citing N C Seddon and F Ellinghaus, *Cheshire & Fifoot's Law of Contract,* 9th edn, LexisNexis Butterworths, Chatswood, NSW, 2007, pp. 93–4.

69 As Tonking observes, one of the problems with advocating a wider meaning for the concept of 'understanding' is that 'courts have tended to approach it from the contract end of the CAU spectrum': see I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 59 (and also his observations at p. 67 regarding the problems with the drafting technique of having a series of words with similar shades of meaning).

70 The economic literature on this subject is voluminous. For a useful overview of the main theories, and their application in US and EC case law, see S Stroux, *US and EC Oligopoly Control*, Kluwer Law International, 2004, esp. chps 0 and 1.

while the firms may be acting in parallel, their actions are nevertheless the product of independent or uncoordinated decision-making.[71]

In the grey area between these two ends, there are two other broad categories of behaviour.[72] The first, commonly described as 'conscious parallelism' or 'oligopolistic interdependence', is behaviour generally observed in markets with particular structural features, known as oligopolistic markets.[73] Such behaviour gives the appearance of coordination by agreement, but in fact is reflective of the mutual awareness by firms of each other's activities and their interdependence on each other in making decisions about pricing and output.[74] Most, but not all, economists concede that, although such behaviour has the same anti-competitive effects as agreement, it should not and cannot attract liability given that it is neither culpable (because firms that engage in it are only acting rationally by taking into account each other's actions) nor regulable (because the courts could only restrain such behaviour by direct price regulation).[75] Parallel conduct arising from oligopolistic interdependence is thus seen as a structural issue, as compared with collusive agreement, which is a behavioural issue.[76]

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71 PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 61 ¶1410.

72 This should not be taken to suggest that the lines between these categories are sharp. See the observations of Areeda and Hovenkamp, describing the 'no man's land' between traditional agreement and tacit coordination in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2nd edn, Aspen Law & Business, New York, 2001, ¶1410.

73 Oligopolistic markets are generally defined by market concentration on the supply side, high entry barriers, inelastic product demand, product uniformity, multiple and smaller buyers, small variations in production costs and readily available price information. For a useful brief summary as to how each of these features engender price uniformity or price leadership, see W Pengilley, 'What is required to prove a contract, arrangement or understanding?', *Competition & Consumer Law Journal*, vol. 13, 2006, p. 241, p. 242.

74 See F Scherer and D Ross, *Industrial Market Structure and Economic Performance*, 3rd edn, Houghton Mifflin, Boston, 1990, p. 199.

75 See further D Turner, 'The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal', *Harvard Law Review*, vol. 75, 1962, p. 665, p. 669. With the prominent exception of Posner J (see *High Fructose Corn Syrup Antitrust Litig* 295 F.3d 651, 654 (2002)) or in his academic capacity Professor Posner (see RA Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach', *Stanford Law Review*, vol. 21, 1969, p. 1562; RA Posner, *Antitrust Law: An Economic Perspective*, University of Chicago Press, Chicago, 1976, ch. 4), courts in the US have agreed with this position: see, e.g., *Clamp-All Corp v Cast Iron Soil Pipe Institute* 851 F.2d 484 (1988). See also the discussion in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 231–4 ¶1432d3. Cf the modification of Posner's approach proposed in A Devlin, 'A proposed solution to the problem of parallel pricing in oligopolistic markets', *Stanford Law Review*, vol. 59, 2007, 1111.

76 One possible consequence of which is that the former is better dealt with in the context of merger policy and the concern with acquisitions that create market structures conducive to coordinated effects. See Australian Competition and Consumer Commission, *Merger Guidelines*, November 2008, ch. 6, at http://www.accc.gov.au/content/item.phtml?itemId=809866&nodeId=7cfe08f3df2fe6090df7b6239c47d063&fn=Merger%20guidelines%202008.pdf, last viewed 13 March 2009.

The second category of behaviour in between agreement and independence is commonly referred to as 'tacit' collusion,[77] or 'facilitating' practices.[78] This behaviour goes beyond conscious parallelism or interdependence. In essence, it involves an activity, generally the provision or exchange of information in the market place, which makes coordination between competitors easier and more effective - easier because it facilitates communication, and more effective because it facilitates detection of cheating and administration of punishment for deviations.[79] Such facilitation assists in overcoming the uncertainty associated with competition or the impediments to oligopolistic interdependence.[80] Tacitly collusive or facilitating behaviour increases the likelihood of anti-competitive effects. However, it is recognised that such effects need not ensue - 'the vice of a facilitating practice is its anti-competitive *tendency* rather than a proved anti-competitive *result* in the particular case.'[81] This concern is magnified by the difficulty in preventing or remedying the anti-competitive effects of oligopolistic interdependence as such.

Examples of tacit collusion, facilitating or signalling devices are as infinite as the creativity of commerce. The most commonly cited examples include:

- public speech (e.g. discussion of conditions affecting price in the media);
- private information exchanges (e.g. competitors sending price lists or manuals to each other);

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77 Note there is a tendency in the US case law to use the terms 'express' and 'tacit' to draw evidential rather than conceptual distinctions, as well as a degree of confusion regarding the significance of labelling an agreement 'tacit'. See WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, pp. 19-20; WH Page, 'Twombly and Communication: The Emerging Definition of Concerted Action under the New Pleading Standards', University of Florida Legal Studies Research Paper No. 2008-01, March 2009, pp. 14–15, at http://ssrn.com/abstract=1286872, last viewed 23 March 2009.

78 See, e.g., KJ Arquit, 'The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude', *Antitrust Law Journal*, vol. 61, 1993, p. 531; GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, p. 1189; MD Blechman, 'Conscious Parallelism, Signalling and Facilitating Practices: The Problem of Tacit Collusion under the Antitrust Laws', *New York Law School Law Review*, vol. 24, 1979, p. 881; I Ayres, 'How Cartels Punish: A Structural Theory of Self-Enforcing Collusion,' *Columbia Law Review*, vol. 87, 1987, p. 295.

79 The most commonly invoked example is of two petrol stations located on either side of a highway using price boards to signal price changes and facilitate coordination of conduct: see G Hay, *Facilitating Practices: The Ethyl Case (1984),* in JE Kwoka and LJ White (eds), *The Antitrust Revolution,* 3rd edn, Scott, Foresman, Glenview, Illinois, 1989, p. 183.

80 Uncertainty is seen as 'the most general of the impediments to cartel-like results in oligopoly': PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 36 ¶1407 (and for a description of the factors most likely to generate uncertainty, and so undermine coordination, in an oligopolistic market, see pp. 209–13 ¶1430 (e.g. wide product variety, lumpy or infrequent orders, secret negotiations, or opportunities for concealed price discrimination)).

81 PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 30 ¶1407.

- advance price announcements (e.g. announcing a specific price increase in advance of its stated effective date);

- price protection or 'most favoured customer' clauses (e.g. guaranteeing a buyer that it will be charged no more than the supplier's most favoured customer, or that it will match or better a competitor's price, or even that the buyer will receive a retroactive reduction if the supplier charges anyone a lower price within, say, six months);

- uniform delivery pricing methods (e.g. where suppliers each discount their regular f.o.b price plus transport to match a nearer rival's delivered price);

- basing-point pricing (where each seller charges a delivered price computed as a base price plus a freight charge from a specified location calculated conventionally from published tariffs regardless of the mode of transport actually used or regardless of whether the buyer transports the product themselves);

- product standardisation or benchmarking (e.g. where competitors publish the technical specifications to manufacture a product to a certain standard).[82]

In the United States it has been observed that tacitly collusive behaviour has increased as enforcers have become more aggressive in their pursuit of cartel activity, sanctions have become more severe and courts have shown their willingness to recognise as an 'agreement' conduct that falls outside the traditional realm of written or spoken exchanges.[83] Firms have been induced by these developments to devise 'more subtle and less direct means for

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[82] See generally PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶1435c-¶1435i; GA Hay, 'Oligopoly, Shared Monopoly, and Antitrust Law', *Cornell Law Review*, vol. 67, 1982, p. 439. The economic literature on each of these practices is prolific. For a selection, see RA Winter, 'Price-Matching and Meeting Competition Guarantees', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 53, p. 1269; AS Edlin, 'Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?', *Harvard Law Review*, vol. 111, 1997, p. 528; M Hviid and G Shaffer, 'Hassle Costs: The Achilles Heel of Price-Matching Guarantees', *Journal of Economic and Management Strategy*, vol. 8, 1999, p. 489; I Bos and MP Schinkel, 'Tracing the Base: A Topographic Test for Collusive Basing-Point Pricing', Amsterdam Centre for Law and Economics Working Paper No. 2008-07, December 2008, at http://ssrn.com/abstract=1300947, last viewed 23 March 2009; J Kattan, 'Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment' *Antitrust Law Journal* vol. 63, 1994-1995, p. 133; SC Salop, 'Practices that (Credibly) Facilitate Oligopoly Coordination', in JE Stiglitz and GF Mathewson (eds), *New Developments in the Analysis of Market Structure,* MIT Press, Cambridge, Massachusetts, 1986, p. 271

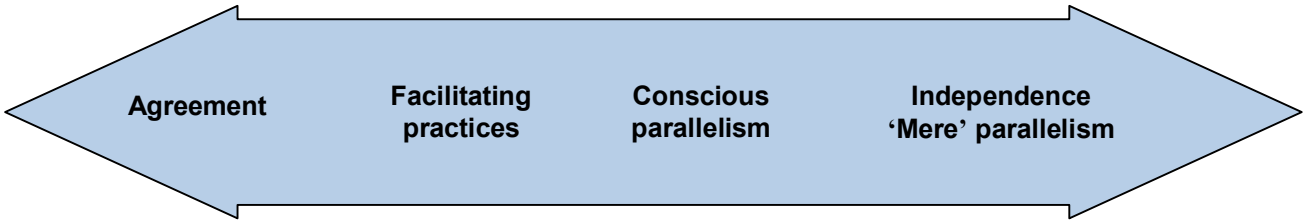
[83] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, pp. 2–13.

communicating intentions and exchanging assurances about future behaviour.'[84] There is no reason to think that Australian business is any different in this regard.

Many economists, including George Hay, argue that, in appropriate circumstances, facilitating or signalling devices can be unlawful.[85] These devices can produce the same cartel-like effects as explicit agreements, and they can be culpable in the sense that they involve a deliberate attempt to overcome structural impediments to coordination and subvert the competitive functioning of the market, while having no offsetting business rationale.

The spectrum of conduct based on economic theory described in the preceding paragraphs is depicted in Figure 1 below. As explained in the next section, the current law in Australia on 'contract, arrangement or understanding' locates all three concepts at the 'agreement' end of the spectrum.

Figure 1



3.3 Conceptual boundaries

In Australia, while 'contract' is clearly distinguished from 'arrangement' and 'understanding', there has been no clear conceptual distinction between 'arrangement' and 'understanding'.[86]

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[84] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, pp. 17–18. This phenomenon was recognised as early as 1945: 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age': *William Goldman Theatres Inc v Loew's Inc* 150 F. 2d 738, n. 15 (3d Cir. 1945). See further JM Joshua and S Jordan, 'Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law', *Northwestern Journal of International Law & Business*, vol. 24, 2004, p. 647, pp. 654–5; J Hinloopen and A Soetevent, 'From Overt to Tacit Collusion', Tinbergen Institute Discussion Paper TI 2008-059/1, May 2008, at http://ssrn.com/abstract=1146347, last viewed 23 March 2009.

[85] GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, p. 1189.

[86] These terms have often been used synonymously: see *Hughes v Western Australian Cricket Association* (1986) ATPR ¶40-736, 48,040; *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd [No 8]* (1999) ATPR ¶41-732, 43,505. Cf. *Australian Competition and Consumer Commission v Australian Medical Association Western Australian Branch Inc* (2003) 199 ALR 423, [186], Carr J commenting that the evidence required to establish an 'understanding' is probably less than that required to establish an 'arrangement'.

For both concepts, the current law requires that the following criteria be met: (1) communication; (2) consent; (3) consensus; and (4) commitment.

The first three of these requirements have been largely uncontroversial. It is accepted that communication may be express (in the sense of being expressed or spoken) and that it may take a range of forms (written, oral, electronic), or that it may be tacit or implicit (in the sense of being unexpressed or unspoken). Indeed, in *Leahy*, it was suggested that 'arrangement' and 'understanding' might be distinguished on the basis that, while the former requires express communication, the latter may be established by communication that is tacit.[87] It remains to be seen whether this basis for distinction will be adopted more widely.

Further, it is well-established that any dealing for the purposes of a contract, arrangement or understanding must be consensual.[88] This might perhaps be taken to suggest that an allegation of an 'arrangement' or 'understanding' may be denied on the grounds of coercion or duress. However, the scope for such a defence should be limited.[89] In the context of liability for a cartel offence, reliance might be placed on the defence of duress under s 10.2 of the *Criminal Code*, but that defence requires D's conduct to be "a reasonable response to the threat" (s 10.2(2)(c)) and, unless the threat is one to kill or seriously injure D, it is unlikely that entry into a cartel agreement would be a reasonable response.

It is often said that there must be a 'meeting of the minds.'[90] However, prevalent as this precept of pseudo neuroscience is, little attempt has been made to explain what it means.[91] If it means

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87 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 332 [26]–[28].

88 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [24].

89 See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 39–53 ¶1408. In *Rural Press*, it was held that Waikerie entered an arrangement with Bridge through fear of the repercussions of Bridge establishing a competing newspaper in the Waikerie territory. However, there appeared to be no consideration of whether or not such fear undermined the requirement of consent. See *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804, [81], [92].

90 See, e.g., *Top Performance Motors v Ira Berk (Qld) Pty Ltd* (1975) 5 ALR 465, 470; *Trade Practices Commission v Email Ltd* (1980) 3 ATPR ¶40-172, 42,370; *Trade Practices Commission v Nicholas Enterprises [No 2]* [1978] ATPR ¶40-437, 18,342; *Trade Practices Commission v Parkfield Operations Pty Ltd* (1985) ATPR ¶40-526, 46,251; *Trade Practices Commission v. David Jones (Australia) Pty Ltd* (1986) ATPR ¶40-671, 47,409; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321, [28].

91 The same lament has been made about the use of the phrase in the US case law: see WH Page, 'Twombly and Communication: The Emerging Definition of Concerted Action under the New Pleading Standards', University of Florida Legal Studies Research Paper No. 2008-01, March 2009, p. 10, at http://ssrn.com/abstract=1286872, last viewed 13 March 2009; GJ Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory', *Antitrust Law Journal*, vol. 71, 2004, p. 778, observing: 'one might reasonably find a "meeting of minds" or a "conscious commitment to a common scheme" in the equilibrium of every oligopoly model.'

only that the parties have reached a consensus,[92] this begs key questions – on what basis and how has consensus been reached?[93]

3.3.1 The controversy about commitment

Unlike the other requirements for an understanding, the requirement of commitment recently has become the subject of controversy. In *Apco* and *Leahy,* it was held that commitment by a party to a particular course of action or inaction is necessary to establish an 'understanding' within the meaning of section 45(2); whereas an expectation, and even less a hope, that the party will act or not act will fall short of an 'understanding.'[94] In both instances, the ACCC's case failed because the Commission failed to prove the requisite commitment. Concerned about the implications of these cases for its ability to prove anti-competitive collusion,[95] the Commission, in its subsequent report into petrol pricing, recommended amendments said to be intended, amongst other things, to provide statutory clarification that an 'understanding' may exist 'notwithstanding that the party in question cannot be shown to be committed to giving effect to it.'[96] These proposals were based on an opinion by Julian Burnside QC.[97]

The petrol pricing report contends that there has been a 'subtle but significant shift' in the law away from the previous case law under which it was not necessary to show that a party had committed to an action but rather simply that a party had engendered, either consciously or

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92 Based on the Latin translation, *consensus ad idem:* 'An agreement of parties to the same thing; a meeting of minds'. See BA Garner (ed), *Black's Law Dictionary*, 8th edn, Thomson West, St Paul, Minnesota, 2004, p. 323.

93 Ironically, in contract law, from which the concept is borrowed, the notion of a 'meeting of minds' and the will theory of contract on which it is premised have been overtaken largely by more contemporary theories of contract - including the 'objective' theory which focuses on the conduct of the parties rather than their subjective intent: see JW Carter, E Peden and GJ Tolhurst, *Contract Law in Australia*, 5th edn, LexisNexis Butterworths, Sydney, 2007, pp. 8–9; NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th edn, LexisNexis Butterworths, Chatswood, NSW, 2007, pp. 1221–6.

94 *Apco Service Stations Pty Ltd v Australian Competition and Consumer* Commission (2005) 159 FCR 452, 464 [47]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 335 [37].

95 See 'Price fixers face tough new laws', *Australian Financial Review,* 8 January 2009, p. 4. But in truth the ACCC's record in proving collusion in the petrol industry has always been patchy. Petrol cases that the Commission has lost include *Trade Practices Commission v Leslievale* (1986) ATPR ¶40-679; *Trade Practices Commission v J J & Y K Russell Pty Ltd* (1991) ATPR ¶41-132; *TPC v Services Station Association Ltd* (1992) ATPR ¶41-179; *Australian Competition and Consumer Commission v Mobil Oil* (1997) ATPR ¶41-568.

96 Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol,* December 2007, pp. 228–9, at http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf, last viewed 11 March 2009.

97 J Burnside, ACCC *Report, Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol, Appendix R*, December 2007, pp. 368–74, at http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=16fed9965960216fd7066496dacfbddc&fn=Appendix%20R.pdf, last viewed 11 March 2009.

intentionally, an expectation in another party that the first party would so act.[98] The proposed amendments are said to restore the law to the state that Parliament originally intended – presumably through the combination of providing in proposed (a)(ii) that a court may find an understanding to have been arrived at notwithstanding that the parties are not committed to giving effect to it and in proposed (b)(ii) that one of the factual matters that a court can consider in so determining is 'the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way' (see section 3.1.2 above).

The ACCC's assertions that there has been a shift in the law and that the proposed amendments would reflect the Parliament's original intention do not appear to be well-founded.[99] Both contentions are undermined by the High Court's denial of special leave to appeal from the Full Court's decision in *Apco*[100] and the ACCC's decision not to appeal against Gray J's decision in *Leahy*.[101] These developments may be regarded as confirmation that these cases turned on their particular facts rather than on adoption of a more restrictive interpretation of the law than had previously been accepted. Treasury's Discussion Paper acknowledges that 'courts have always required… [that there be] some form of commitment by the parties to the alleged understanding' but claims that '[t]he difficulty arises in determining the nature and content of what is required to satisfy that element of commitment.'[102]

The debate about whether there has been a shift in the law with respect to a requirement or the meaning of commitment is largely academic. The law is as currently stated by the Full Court in *Apco*, and as evidently endorsed by the High Court in refusing special leave in that case. Rather, it seems, there are two key questions. The first is whether the law should be relaxed for the purposes of the civil prohibitions, removing the requirement of commitment (in the *Apco/Leahy* sense) in relation to an 'understanding'. This question should be approached, not by asking whether a commitment of some kind should be present, but by exploring

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98 Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol,* December 2007, p. 228–9 at http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf, last viewed 11 March 2009.

99 See I Wylie, 'Understanding "understandings" under the Trade Practices Act – an enforcement abyss?', *Trade Practices Law Journal,* vol. 16, 2008, p. 35; I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, pp. 63–4.

100 Australian Competition and Consumer Commission v Apco Service Stations Pty Ltd [2006] HCATrans 272 (2 June 2006), at http://www.austlii.edu.au/au/other/HCATrans/2006/272.html, last viewed 23 March 2009.

101 Australian Competition and Consumer Commission, 'No appeal against Geelong petrol decision', Press Release, 19 June 2007, at http://www.accc.gov.au/content/index.phtml/itemId/790103/fromItemId/776481, last viewed 13 March 2009.

102 Treasury, *Discussion Paper: Meaning of 'understanding' in the Trade Practices Act*, January 2009, p. 2 [13], at http://www.treasury.gov.au/documents/1459/RTF/Discussion_paper.rtf, last viewed 11 March 2009.

conceptually what type of behaviour should constitute an 'understanding', that is, by deciding where on the theoretic spectrum depicted in Figure 1 an 'understanding' should lie. The second question is whether the type of behaviour that amounts to an understanding for the purposes of civil liability should also be sufficient as a basis of liability for the cartel offences.

The ACCC's proposal for amendment of the TPA answers neither of these questions. Instead, the proposal approaches the 'problem' perceived by the Commission predominantly from an evidentiary perspective, by suggesting that there be a list of factual matters that a court may consider in determining whether or an 'understanding' may be inferred from the evidence (see proposed (b): section 3.1.2 above). A fundamental difficulty with this approach is that it does not direct or guide a court as to what exactly it is that needs to be inferred. The proposal is that courts be directed not to require proof (by inference or otherwise) of commitment. However, it is not clear what, if anything, is proposed as being required instead. Both the ACCC's petrol pricing report and the annexed Burnside QC opinion argue that an intentional or conscious arousal of an expectation regarding future conduct should be sufficient to establish an 'understanding.'[103] However, the proposed amendments do not make such behaviour a condition or requirement of an 'understanding.' Rather, the concept of expectation is included as one of the factual matters that a court '*may* consider' (emphasis added) in determining whether or not an *understanding* has been arrived at (emphasis supplied).

3.3.2 Looking overseas for workable models

Returning to the question of how an 'understanding' might be conceptualised, the ACCC's unhelpful proposal may be put to one side. Overseas models are more helpful. In the United States, the concepts of 'contract, combination in the form of a trust or otherwise, or conspiracy' in section 1 of the *Sherman Act* are all equated with an agreement.[104] Traditional formulations of an 'agreement' for this purpose are principally: 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement'[105] and a 'conscious commitment to a common scheme.'[106] In practice, however, 'commitment' is a weak and inarticulate concept and has no apparent operational meaning in the absence of express

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[103] Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol,* December 2007, pp. 228–9, at http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf, last viewed 11 March 2009; J Burnside, ACCC *Report, Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol, Appendix R*, December 2007, pp. 368–74, at http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=16fed9965960216fd7066496dacfbddc&fn=Appendix%20R.pdf, last viewed 11 March 2009.

[104] RA Posner, *Antitrust Law*, 2nd edn, University of Chicago Press, Chicago, 2001, p. 262; PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2nd edn, Aspen Law & Business, New York, 2001, ¶1403.

[105] *Interstate Circuit Inc v United States* 306 US 208, 810 (1939).

[106] *Monsanto Co v Spray-Rite Service Corp* 465 US 752, 768 (1984).

assurances.[107] Having recited the traditional definition of an agreement, courts appear largely to focus on whether an agreement can be inferred from evidence suggesting that D was not act independently. In other words, the inquiry is directed at whether there was something other or more than conscious parallelism or oligopolistic interdependence at work.[108] If so, then generally that 'other' is assumed to fall within the traditional concept of 'agreement'.[109] In some cases reliance has been placed on the concept of facilitating practices as developed in the economic literature.[110]

A different approach is taken under Article 81(1) of the European Community Treaty and the contrast is instructive. The prohibition in Article 81(1) distinguishes between 'agreement' on the one hand and 'concerted practices' on the other hand, with the aim of preventing firms from evading the application of the law by colluding in a manner that falls short of an agreement.[111] In general, the standard required to establish a 'concerted practice' is much less demanding than that required to establish an 'agreement.' As a result, the artificiality associated with having to stretch the notion of 'agreement' beyond what might be regarded as its normal bounds is avoided. In particular, a 'concerted practice' does not require any element of commitment.

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[107] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, p. 25. Note further the comments of Areeda and Hovenkamp that 'the commitment may be weak or strong, express or implied' and that it should also be acknowledged that 'weak commitments blend into mere interdependence.' See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 60–1, 64–5 ¶1410.

[108] D Snider and I Scher, 'Conscious Parallelism or Conspiracy?', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 49, p. 1144.

[109] Cf. the recent observation that, following the Supreme Court ruling in *Bell Atlantic v Twombly* 127 S. Ct. 1955 (2007), circuit courts have begun to explore adoption of a more meaningful conceptualisation, one that requires that the parties have communicated to each other their intentions to act in a certain way and their reliance on each other to do the same: WH Page, 'Twombly and Communication: The Emerging Definition of Concerted Action under the New Pleading Standards', University of Florida Legal Studies Research Paper No. 2008-01, March 2009, pp. 2–3, at http://ssrn.com/abstract=1286872, last viewed 13 March 2009. For further discussion of this model, see WH Page, 'Communication and Concerted Action', *Loyola University of Chicago Law Journal*, vol. 38, no. 3, 2007, p. 405; O Black, *Conceptual Foundations of Antitrust*, Cambridge University Press, Cambridge, 2005; WH Page, 'Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act', in K Hylton (ed), *Antitrust Law and Economics,* Edward Elgar Publishing, 2009 (forthcoming).

[110] See, e.g., *Federal Trade Commission v Cement Inst* 333 US 683 (1948) (use of basing point system); *National Macaroni Mfrs Assn v Federal Trade Commission* 345 F.2d 421 (7th Cir. 1965) (standardisation of content of macaroni); *In re Coordinated Pretrial Proceedings in Petroleum Prods Antitrust Litg* 906 F2d. 432 (9th Cir. 1990) (announcements of wholesale price changes). Facilitating practices have also been challenged as unfair methods of competition contrary to s 5 of the *Federal Trade Commission Act:* see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 37 ¶1407.

[111] J Faull and A Nikpay, *The EC law of competition*, Oxford University Press, Oxford, New York, 2007, p. 210 [3.103].

The EC concept of 'concerted practice' has been equated with what is known in the economics literature, and recognised in some US cases, as a 'facilitating practice.'[112] Like a facilitating practice, the economic vice of a 'concerted practice' is said to be that it enables competitors 'to determine a coordinated course of action … and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action.'[113] In order to establish a 'concerted practice' all that needs to be shown is: (1) some form of contact between competitors (which may be indirect or weak as, for example, contact via a publicly announced price increase), (2) a meeting of minds or consensus in relation to cooperation which may be inferred from mere receipt of information, and (3) a relationship of cause and effect between the concertation and the subsequent market conduct.[114] However, in 'hardcore horizontal cases' that relationship is generally presumed once contact and consensus are established and rebuttal of the presumption is allowed only where the firm in question proves that the concertation did not have 'any influence whatsoever on its own conduct on the market.'[115] In practice, the likelihood of rebutting the presumption is seen as slim.[116]

Although EC law is no different to the law in either the US or Australia in that it condemns neither 'mere' parallel nor interdependent conduct of itself, the concept of 'concerted practice' is intended specifically to catch so-called tacit collusion or facilitating practices, recognising that such activity is distinct from 'agreement'.[117] As was pointed out by the Court of Justice in *Suiker Unie:*

> … [while the Treaty] does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is to

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[112] JM Joshua and S Jordan, 'Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law', *Northwestern Journal of International Law & Business*, vol. 24, 2004, p. 647, p. 660.

[113] *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619, [118]. Similarly, it has been said that a 'facilitating practice' 'operates by reducing uncertainty about rivals' actions or diminishing their incentives to deviate from a coordinated strategy': SC Salop, 'Practices that (Credibly) Facilitate Oligopoly Coordination', in JE Stiglitz and GF Mathewson (eds), *New Developments in the Analysis of Market Structure,* MIT Press, Cambridge, Massachusetts, 1986, p. 271. Uncertainty is seen as 'the most general of the impediments to cartel-like results in oligopoly': PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 36 ¶1407 (and for a description of the factors most likely to generate uncertainty, and so undermine coordination, in an oligopolistic market, see pp. 209–13 ¶1430).

[114] J Faull and A Nikpay, *The EC law of competition*, Oxford University Press, Oxford, New York, 2007, p. 212 [3.108]–[3.111].

[115] *Huls AG v Commission* [1999] ECR I-4287, [167].

[116] J Faull and A Nikpay, *The EC law of competition*, Oxford University Press, Oxford, New York, 2007, pp. 212–13 [3.111].

[117] In *Commission v Anic Partecipazioni* [1999] ECR I-4125, [108] the European Court of Justice said that Art 81 is intended: 'to apply to all collusion between undertakings, whatever the form it takes. … The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion.'

> either influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor that the course of conduct which they themselves have decided to adapt or contemplate adopting on the market.[118]

Subsequent cases have refined this test, indicating that disclosure of future intention in itself will not constitute a concerted practice. Rather, the communication must have the purpose or effect of removing or reducing the uncertainty that usually exists in competitive markets.[119]

It is likely that the EC concept of a 'concerted practice' would catch the behaviour alleged to constitute an 'understanding' in *Apco* and *Leahy.* Applying this concept to the type of situation that arose in *Apco* and *Leahy*, there would be no need to establish commitment on the part of the respondents to increase prices in accordance with the signals provided. Nor would it be necessary to show that there was a reciprocal or two-way exchange of information – the concept of 'concerted practice' covers the situation where one party is active in disclosing information and another is passive in receiving or accepting it.[120] Thus, for the purposes of finding those respondents who conveyed the information about changes in petrol prices liable, it would be sufficient to show that they did so with the purpose of influencing their competitors to follow the signalled price rise (even if in some cases, they failed to achieve the desired effect). For the purposes of finding the recipients of the information liable, it would be sufficient to show that their conduct was influenced even if merely by aiding their decisions as to whether or not to follow the signalled price.[121]

As regards information recipients, the view taken in the EC is that firms will 'necessarily and normally unavoidably act on the market in light of the knowledge and on the basis of the discussions which have taken place in connection' with collusive practices.[122] Even proof of actual deviations from the prices discussed will not be sufficient to rebut this presumption of influence.[123] Nor necessarily will evidence of a rational alternative reason for subsequent parallel price increases, such as changes in demand or raw material prices. The receipt of information for the purpose of restricting competition will be enough, without the Commission having to prove a specific causal link between the information receipt and subsequent behaviour.[124] The justification for this strict approach, as identified by the European Court of

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[118] *Suiker Unie v Commission* [1975] ECR 1663,173–5.
[119] See I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 54.
[120] *Cimenteries v Commission* [2000] ECR II-491.
[121] See, e.g., reference in *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, [47] to the finding that: 'the information conveyed by Bentley and Carmichael may have been useful to Anderson because it helped him to know when to tell his franchisees to check competitor's prices and when to raise Apco's prices if he chose to do so …'.
[122] *Rhone-Poulec SA v Commission* [1991] ECR II-867.
[123] *Commission v Anic* [1999] ECR I-4125, [127]–[128].
[124] *Polypropylene* OJ [1986] L 230/1, [73], [89].

Justice (ECJ), is that a 'party which tacitly approves an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery.'[125]

As suggested in the ECJ's statement above, the only defence open to an information recipient (or, as in several of the EC cases, a passive attendant at a cartel meeting) is to show that it had distanced itself from the cartel or, in the other words, that it had clearly refused to 'go with the flow.'[126] Consistent with a strict liability approach, the bar is set very high for this defence:

- the act of distancing must take place without undue delay;
- the objectives of the cartel and the matters agreed between its participants must be denounced; that denouncement must be clearly and equivocally expressed to the other cartel members;
- the firm in question must avoid disclosing its own strategy and pricing intentions; it must be able to establish that its subsequent commercial policy and behaviour is determined independently; and
- it must not participate in any further anti-competitive discussions.[127]

Satisfying these requirements strengthens the policy objective of the prohibition on collusion, namely to preserve the decision-making independence of competitors and maximise the risks of uncertainty associated with competition.[128]

Blowing the whistle by reporting the cartel to the authorities, while the most public and effective method of distancing oneself from a cartel, is not seen as mandatory for this defence. The defence would probably become a dead letter if any such requirement were to be imposed.[129]

Based on the preceding discussion, the point at the spectrum in Figure 1 at which the line is drawn between legal and illegal coordination between competitors under Australian law, as compared with the law in the EC and possibly also the US, is depicted in Figure 2 below.

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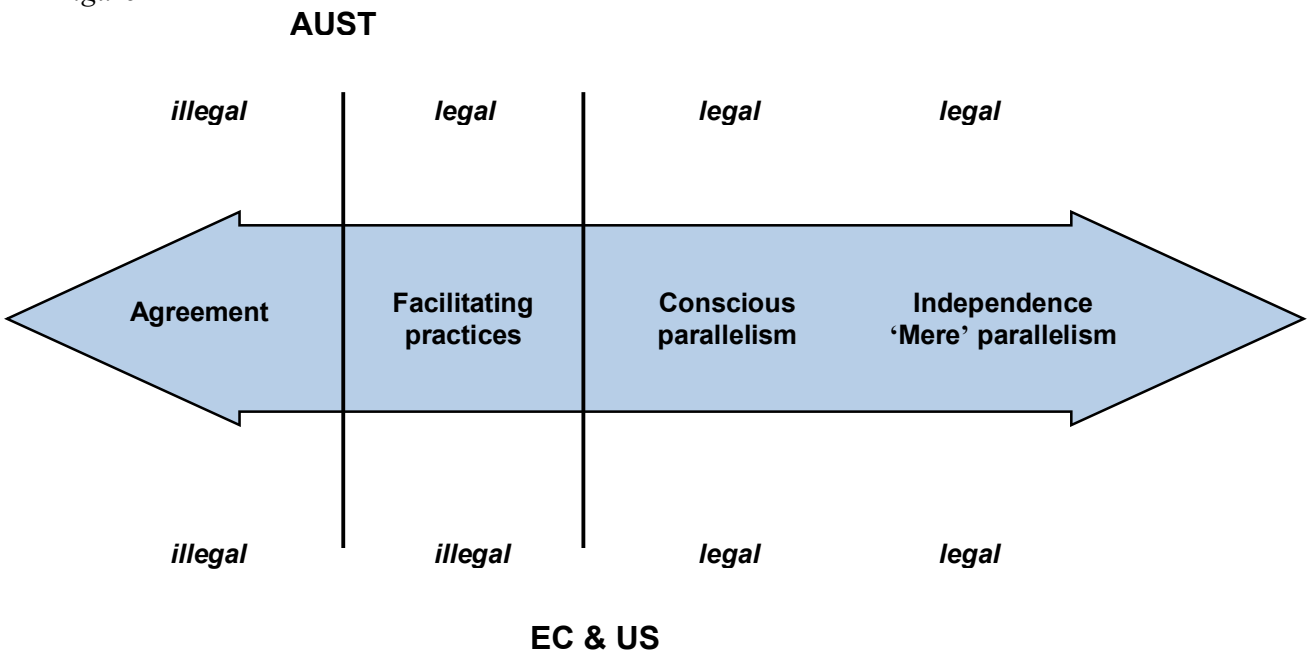
[125] *Dansk Rorindustri v Commission* [2005] ECR I-5425, [143].
[126] See generally the cases discussed in D Bailey, 'Publicly Distancing Oneself from a Cartel', *World Competition: Law and Economics Review*, vol. 31, no 2, 2008, p. 177, p. 178.
[127] D Bailey, 'Publicly Distancing Oneself from a Cartel', *World Competition: Law and Economics Review*, vol. 31, no 2, 2008, p. 177, p. 179.
[128] O Odudu, The Boundaries of EC Competition Law, Oxford University Press, Oxford, 2006, pp. 81–6.
[129] D Bailey, 'Publicly Distancing Oneself from a Cartel', *World Competition: Law and Economics Review*, vol. 31, no 2, 2008, p. 177, p. 188.

Figure 2



3.3.3 Equating 'understanding' with concerted practice'?

There is a respectable case for adopting the concept of 'concerted practice' in the interpretation of an 'understanding' in the civil prohibitions on cartel conduct in Australia.[130] The concept is recognised in both EC law (formally) and US law (at least to some extent, albeit informally).[131] It is consistent with economic theory as to where the line should be drawn between legal and illegal horizontal coordination, based on recognition that such practices may have the same anti-competitive effects as collusive agreements.[132] Extension of liability beyond agreements would acknowledge that there is a growing trend towards deliberate adoption of tacit collusive

[130] See I Wylie, 'Understanding "understandings" under the Trade Practices Act – an enforcement abyss?', *Trade Practices Law Journal,* vol. 16, 2008, p. 33.

[131] The mainstream position in the US continues to be that an agreement, as traditionally formulated, is required for liability under s 1 of the *Sherman Act*. However, there have been cases in which the concept of a facilitating practice has been recognised as a basis for liability: see, e.g., *Federal Trade Commission v Cement Inst* 333 US 683 (1948) (use of basing point system); *National Macaroni Mfrs Assn v Federal Trade Commission* 345 F.2d 421 (7th Cir. 1965) (standardisation of content of macaroni); *In re Coordinated Pretrial Proceedings in Petroleum Prods Antitrust Litg* 906 F2d. 432 (9th Cir. 1990) (announcements of wholesale price changes). See also the discussion in GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, pp. 1208–16; J Kattan, 'Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment' *Antitrust Law Journal* vol. 63, 1994-1995, p. 133.

[132] See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 220–1 ¶1432b. Note also the authors' comparison between the stability or sustainability of express agreements versus tacit collusion, concluding that 'express cartels may involve nearly as much vagueness, incompleteness and uncertainty as afflicts oligopolists that coordinate prices' (at p. 224).

behaviour in response to the toughening of anti-cartel laws and enforcement,[133] aided by the emergence of the 'electronic marketplace' which facilitates instant universal exchange of volumes of market information.[134] Moreover, equating an 'understanding' with a 'concerted practice' would enable 'understanding' to be differentiated clearly from 'contract' or 'arrangement', leaving those concepts to occupy the 'agreement' end of the spectrum (as depicted in Figure 1) – an 'arrangement' being understood for this purpose as a less formal and less certain version of an agreement than a 'contract'.

Against extending liability in this way is the understandable concern about the potential for over-reach and over-deterrence.[135] This is particularly so given that the concept of 'concerted practice', as applied in EC law, may be established having regard to the purpose of conduct, irrespective of its effects. However, communication between competitors can have at least ambiguous, if not pro-competitive and welfare-enhancing, effects.[136] Consider the scenario in which competitors post their prices, including future prices, on an electronic bulletin board. This is a practice that has been used in the airline industry (but ceased in the United States as a result of an antitrust suit)[137] and in the fuel industry (in Australia, through the fuelwatch scheme administered by the Western Australian government).[138] Such devices provide consumers with access to information more quickly and cheaply than would otherwise be

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[133] See the comments of Bill Reid regarding the contributions being made towards the education of business people in tacit methods of collusion by business schools and trade practices compliance training: B Reid, 'Cartels – Criminal Sanctions and Immunity Policy', Paper presented at the Competition Law Conference, 12 November 2005, Sydney, pp. 7–12.

[134] J Baker, 'Identifying Horizontal Price Fixing in the Electronic Marketplace', *Antitrust Law Journal*, vol. 65, 1996, p. 41; DW Carlton, RH Gertner and AM Rosenfield, 'Communication Among Competitors: Game Theory and Antitrust', *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423, p. 432; S Borenstein, 'Rapid Price Communication and Coordination: The Airline Tariff Publishing Case', in JE Kwoka and LJ White (eds), *The Antitrust Revolution: Economics, Competition and Policy*, 4th edn, Oxford University Press, New York, 2004, p. 310.

[135] Although this concern would not be as pronounced if the civil per se prohibitions, both existing and proposed, were not so plagued by over-reach and uncertainty: see generally section 2.3 above.

[136] RL Smith, A Duke and DK Round, 'Signalling, Collusion and section 45 of the TPA', *Competition & Consumer Law Journal*, 2009 (forthcoming); PB Overgaard and HP Mollard, 'Information Exchange, Market Transparency and Dynamic Oligopoly', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 52.

[137] See *United States v Airline Tariff Publ'g Co,* 836 F. Supp. 9 (DDC 1993), at http://www.usdoj.gov/atr/cases/f4700/4796.htm, last viewed 23 March 2009, discussed in DW Carlton, RH Gertner and AM Rosenfield, 'Communication Among Competitors: Game Theory and Antitrust', *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423, pp. 436–8; GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, pp. 1211–12.

[138] See http://www.fuelwatch.com.au. In relation to the failed attempt by the federal government to establish a Commonwealth equivalent, see J Soon, 'Fuelwatch: A Tale of Two Interventions', at http://www.abc.net.au/news/stories/2009/03/04/2506817.htm, last viewed 23 March 2009, observing '[a] government-mandated website for posting the petrol prices of retailers across Australia rather than just Geelong, would, presumably given the ACCC's concerns, have multiplied significantly any opportunities for petrol retailers throughout the country to collude, relative to the situation in ACCC v Leahy. Any such collusion opportunities would then have been rendered even more potentially successful by the requirement that petrol retailers not change their prices for 24 hours…'. See also D Harding, 'Fuelwatch: Evidence Based Policy or Policy Based Evidence?', *Economic Papers*, vol. 27, 2008, p. 315.

possible and correct information asymmetries between suppliers and consumers. At the same time, they may be used to coordinate pricing amongst rivals just as effectively, and arguably more efficiently, than if the firms in question sat together in the proverbial smoke-filled room.

Accordingly, there is a good argument that such practices should be subject to a competition or rule of reason test, so as to enable their effects to be assessed having regard to the nature of the practices and the market context in which they occurred.[139] A per se rule may not be appropriate given that, in the absence of such an assessment, it is not possible to say with any degree of certainty that the majority of such practices would be likely to have anti-competitive effects.[140] On the other hand, the TPA now has several per se prohibitions the economic justification for which is ambiguous or flimsy, but which have been adopted to facilitate enforcement by the ACCC and which depend heavily on the possibility of error correction through the bureaucratic mechanism of authorisation.[141]

It might also be argued that behaviour of the kind illustrated by *Apco* and *Leahy* could be addressed by seeking to impose liability for an attempt to contravene the Act[142] or an attempted inducement of a contravention.[143] However, that approach would necessarily focus liability on the parties that initiated contact with or transmitted information to competitors, to the potential exclusion of the passive recipients or beneficiaries of the contact or information. It thus would not catch a person such as Mr Anderson in *Apco*. In receiving the phone calls from his competitors and then considering the information given when making a decision about whether to follow the price increase, clearly Mr Anderson did nothing that amounted to an attempt to arrive at an understanding or to induce other dealers to arrive at an understanding. The other option open in such situations may be to pursue a passive recipient of information on the basis

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[139] DW Carlton, RH Gertner and AM Rosenfield, 'Communication Among Competitors: Game Theory and Antitrust', *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423; ME Stucke, 'Evaluating the Risks of Increased Price Transparency' 19 Spring ANTITRUST 81 (2005), at http://ssrn.com/abstract=927417, last viewed 23 March 2009. Such an assessment would have to be made in any event in the context of a private damages suit given the requirements to prove loss and, as importantly, causation (that is, a causal nexus between the impugned conduct and the claimed loss).

[140] See the view that 'an act can facilitate undesirable consequences without being an unalloyed evil … [such an act] cannot be found unreasonable without considering the offsetting economic or social benefits of the practice. Thus, the label "facilitating practice" is only an invitation to further analysis, not a license for automatic condemnation.' See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 30–1 ¶1407.

[141] See the prohibitions on third line forcing in s 47(6) and resale price maintenance under s 48. See also the general discussion of the legitimate and beneficial purposes served by facilitating practices in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 251–5 ¶1435. Cf the exemption under Article 81(3) of the EC Treaty.

[142] See, e.g., *Trade Practices Commission v Parkfield* (1985) 7 FCR 534, 538–9, in which the Court held that conversations between two petrol retailers, in the course of which one sought to ascertain the other's attitude to raising petrol prices, were sufficient to constitute attempts to contravene s 45(2), notwithstanding that the price fixing proposal had not reached an advanced stage.

[143] For an attempted inducement, it would be necessary to show an intention to bring about a prohibited result: see *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168, 183 (Toohey J).

of ancillary liability, the most obvious possibility being liability for being knowingly concerned in the attempt by a competitor to contravene the Act.

A further possible approach to definition of the concept of an understanding may involve drawing on the 'invitation-to-collude' theory (or the related theory of 'solicitation to conspire'). Such theory holds that an invitation to engage in unlawful anticompetitive conduct, if lacking any countervailing pro-competitive benefit, demonstrates a dangerous anti-competitive tendency that should be condemned for that reason.[144] The theory has been applied by the Federal Trade Commission in several cases under s 5 of the *Federal Trade Commission Act* that have been settled. While theoretically available, these possible alternative bases of liability appear complicated and unlikely to achieve outcomes that cannot be achieved by adoption of the tried and tested EC concept of 'concerted practice.'

The ACCC's proposed amendments could be read as intending to equate an 'understanding' with a 'concerted practice', or some close version thereof. This is suggested by: (1) the proposal that commitment be excluded as an element in establishing an 'understanding'; (2) the particular relevance, as explained below, of several of factors under the ACCC's proposals to the establishment of a 'concerted practice'; and (3) the restriction of the list of factual matters in proposed amendment (b) to proof of an 'understanding'.[145] However, if this is what the ACCC is seeking to achieve by its amendments, the proposal should be re-stated clearly so that the desirability or otherwise of such a change in the law can be fully debated. Moreover, careful consideration should be given to the statutory drafting of any Australian equivalent or variant of the EU concept of concerted practice.[146]

If it is decided that 'understanding' should be equated with 'concerted practice', then the TPA should be amended to make this clear, rather than by inserting a list of factual matters directed at that end in the hope that courts will take the cue (see proposed amendment (b)(ii)). A suggested amendment has not been drafted for the purposes of this paper. However, in general terms, there appear to be three principal options. The first is to remove the expression 'contract,

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[144] For a discussion of the 'invitation to collude' theory and its comparison with the theory of facilitating practices, SS DeSanti, 'Game Theory and the Legal Analysis of Tacit Collusion', *Antitrust Bulletin*, vol. 38, 1993, p. 113. See also KJ Arquit, 'The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude', *Antitrust Law Journal*, vol. 61, 1993, p. 531. For a discussion of the related concept of solicitations, see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 122–38 ¶1419.

[145] The justification for this restriction, however, is not clear. There seems no reason in principle why at least some of the factual matters listed in (b) may not be relevant in determining whether or not an 'arrangement' has been made.

[146] In the absence of clear interpretation provisions and extrinsic materials, courts may not appreciate the significance of the amendment: see I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 67. The impact of the change on all of the other provisions in the TPA that incorporate the expression 'contract, arrangement or understanding' also needs to be considered (e.g. ss 4F, 45C, 45E, 45EA, 49, 51, 65A, 73, 90).

arrangement or understanding' altogether and replace it with 'agreement or concerted practice', indicating in extrinsic materials that the amendment is intended to reflect broadly the approach taken in EC law, but otherwise leaving it to the courts to determine the precise distinction and boundaries between the two. The downside of this option is that the principles that have been developed in the case law in relation to 'contract, arrangement or understanding' will be lost. The second option is to retain 'contract, arrangement or understanding' but to add 'concerted practice' (thus the wording would read 'contract, arrangement, understanding or concerted practice'). This option lacks appeal because it involves extending the 'spectrum' without clearly delineating the various types of behaviour along it; in particular, the intended scope of 'understanding' would be even less clear than it is now. The third option is to insert a definitional provision explaining that 'understanding' includes a concerted practice and to indicate in the Explanatory Memorandum that 'concerted practice' is intended to have the same meaning as 'concerted practice' under Article 81(1) of the EC Treaty. In our view, the third option is the most promising.

A modified version of a 'concerted practice' has been suggested by Ian Tonking SC who has formulated for consideration an amendment that would add a paragraph (c) to s 45(2) so that s 45(2) would read as follows:

> A corporation shall not:
>
> ...
>
> (c) communicate with any competitor for the purpose, or with the effect, of inducing or encouraging the competitor (or any other competitor) to alter or adjust the price (the 'new price') (including any discount, allowance, rebate or credit in relation to the price) at which such competitor supplies, or offers to supply, goods or services, in a manner, or to an extent, so that the new price differs (materially) from the price (including any discount, allowance, rebate or credit in relation to the price) at which such competitor:
>
> (i) before receiving the communication, intended to supply, or offer to supply, the same goods or service;
>
> (ii) in the absence of becoming aware of the terms of the communication, would have supplied, or offered to supply, the same goods or services.[147]

[147] I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 69.

As Tonking explains:

> This formulation has the advantage of eliminating the need to demonstrate any consensual element or any commitment on the part of the initiating party, which has become controversial in practice, but which it remains necessary either to prove or infer so long as the language of agreement continues to be used. Because of the requirement for deliberate contact, it would not catch normal parallel conduct. Because of the need to prove purpose or effect, and because of the final qualification, it would not catch normal exchanges of information which might take place in a market and which were not designed to raise expectations in an abnormal way, or to bring about a departure from normal competitive reactions, such as the mere publication of a price in the normal course. …
>
> The circumstances described in subparas (i) and (ii) are designed to remove from the scope of the prohibition communications which result in changes in the recipient's pricing conduct which are explicable solely in terms of parallel conduct, price leadership or false signalling. The first, parallel pricing, resulting for example from changes in input prices experienced by both, will not be the *effect* of the communication; similarly price leadership, which will be excluded under (ii) in any event. If a corporation communicates a change which it in fact does not intend to make, and the recipient reacts by putting its price up, the initiator might be at risk of contravening, but the recipient would not. [148]

This proposal has much to commend it.[149] However, it also has some limitations. One of these, acknowledged by Tonking, is that it would expose only the initiator of the communication to primary liability, leaving the recipient to be the subject of ancillary liability.[150] However, as Tonking points out, 'if the initiator's conduct is nipped in the bud, no arrangement or understanding, or culture of acting on information, develops.'[151] Another limitation is that the proposed amendment is confined to conduct relating to price and does not deal with practices having the purpose of facilitating coordination relating to output. This objection might be answered on the basis that concerted practices in relation to price are likely to be the most harmful in terms of competitive effects and that any other such practices may still be dealt with

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[148] I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 69. A further attribute of the proposal is that it overcomes the question as to whether it is necessary to prove reciprocity or mutuality in commitments. This question is yet to be settled: see, e.g., *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1986) 13 FCR 446; *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344; *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd [No 8]* (1999) 165 ALR 468; *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* [2006] FCA 1777, [110].

[149] Consideration should also be given to the related proposal in RL Smith, A Duke and DK Round, 'Signalling, Collusion and section 45 of the TPA', *Competition & Consumer Law Journal*, 2009 (forthcoming) as a means of specifically tackling signalling behaviour.

[150] I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 69.

[151] I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 70.

under the remaining prohibitions. Finally, it should be noted that the specific prohibition proposed by Tonking would extend liability beyond what is caught by a concerted practice under EC law because it does not appear to allow denial of liability on the basis of a legitimate business rationale. Such a rationale would be irrelevant if the 'effect' of the communication was to induce or encourage a change in price, regardless of its purpose. Extending liability to that extent is questionable given the risk of catching some conduct that is unlikely to harm competition.

If the law is to be amended to allow recognition of the equivalent of a 'concerted practice' for civil liability under s 45(2) and the new civil prohibitions in Division 1, it does not follow necessarily that the amendment should also apply to the cartel offences. There is no criminal liability for cartel conduct in the EC. In the US, the courts continue, at least formally, to require 'commitment' to establish a *Sherman Act* agreement in the context of both criminal and civil liability. By extending liability to 'concerted practices' for the purposes of the civil prohibitions in Australia, a broader range of conduct would be caught by those prohibitions than by the cartel offences. This would be consistent with the widespread view that cartel offences should be limited to 'serious cartel conduct'.[152]

3.4 Circumstantial evidence

In Australia, as elsewhere, a conspiracy, howsoever conceived, may be proven by direct evidence, circumstantial evidence or, as is often the case, a combination of both.[153] Self-evidently, the 'hard' cases and thus those most likely to be contested are the ones in which the direct evidence is weak or lacking altogether.[154] Indeed, the ACCC's failures in *Apco* and *Leahy* have been ascribed as much to weaknesses in the direct evidence offered by the Commission – in particular, problems in the evidence of non-contesting respondents and admissions made pursuant to the ACCC's Cooperation Policy – as to the difficulties associated with the circumstantial evidence.[155]

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[152] See section 2.2 above.

[153] Organisation for Economic Co-operation and Development, 'Prosecuting Cartels without direct evidence of agreement', DAF/COMP/GF(2006)7, 11 September 2006, at http://www.oecd.org/dataoecd/19/49/37391162.pdf, last viewed 13 March 2009.

[154] For a discussion of the problems with interpretation of direct testimony by participants to an alleged conspiracy, see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 116–22 ¶1418.

[155] See the description of the evidentiary issues in the case in W Pengilley, 'ACCC Fails in Geelong petrol price-fixing litigation: what are the lessons?', *Australian and New Zealand Trade Practices Bulletin*, vol. 3, no. 4, 2007, p. 54. See also the general discussion of problems associated with the use of admissions in this context in C Hodgekiss, 'Not Worth the Paper it was Written On…When Admissions Mean Nothing', *Trade Practices Law Journal*, vol. 16, 2008, p. 155.

The ACCC perceives a reluctance by the courts to accept circumstantial evidence.[156] It is not clear whether the ACCC's concern is with the approach taken in *Apco* and *Leahy* specifically, or with petrol cases generally or cartel cases across the board. Nor is it clear whether the concern is that courts are hostile to this category of evidence in principle or that there are particular types of circumstantial evidence that the ACCC considers should be given greater weight than currently. Further, whether in fact the claimed reluctance exists is debatable.[157]

However, to provide that a court may determine an 'understanding' has been arrived at 'notwithstanding that the understanding is ascertainable only by inference from any factual matters the court considers appropriate' (as per proposed amendment (a)(i)) is unlikely to make much, if any, difference in practice. The question is not whether it is or should be possible to infer the existence of an 'understanding' from circumstantial evidence alone. That possibility has always been and remains open. Rather, the question is what types of circumstantial evidence are or should be considered to be probative. That question can only be answered once one knows what it is that needs to be proved. Thus, as previously argued, a serious flaw in the ACCC's proposal is that it fails to grapple first and fundamentally with the conceptual question of how an 'understanding' should be defined.[158] Only after that question has been resolved can questions of evidence and proof be addressed sensibly.

3.4.1 Problems with the ACCC's list of proposed factual matters

The need for conceptual definition aside, the ACCC's proposed list of factors to be taken into consideration is unsatisfactory in many respects. It would appear to have been inspired partly by the approach taken in the United States under s 1 of the *Sherman Act* where the courts have developed a list of so-called 'plus factors' that may be relied on to support a finding of conspiracy.[159] As most antitrust cases are tried before juries in the United States, the question of sufficiency of proof of an agreement in practice reduces to whether the evidence is enough to allow the jury to consider and potentially draw inferences that an agreement was reached. In general, in deciding this question, the view is taken that the court 'should analyze [the

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[156] Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol* December 2007, p. 229, at http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf, last viewed 11 March 2009.

[157] Indeed, as the Full Court acknowledged, the ACCC succeeded against the other respondents in *Apco* based on a 'powerful case' of circumstantial evidence: *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, 465 [52].

[158] As Areeda and Hovenkamp frame this 'difficult question': it is 'how far we may move away from direct, detailed, and reciprocal exchanges of assurances on a common course of action and yet remain within the statutory and conceptual boundaries of an agreement': PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2nd edn, Aspen Law & Business, New York, 2001, ¶1404.

[159] The term 'plus factors' appears to have originated in the trial judgment in *C-O Two Fire Equipment Co v US* 197 F 2d 489 (9th Cir 1952).

evidence] as a whole to determine if it supports an inference of concerted action'.[160] Such an inference will be available if the evidence 'tends to exclude the possibility of independent action.'[161] In turn, the exclusionary tendency is analysed by reference to the 'plus factors'. Thus, the basic principle is that, while consciously parallel conduct is of itself insufficient to enable an agreement to be inferred, evidence of such conduct coupled with evidence of inculpatory plus factors will be sufficient to support such an inference.[162] There is no codified list of such factors. However, key examples or factors recurringly cited in the case law have been identified by commentators as including:

- existence of a rational motive for defendants to behave collectively;
- actions contrary to the defendant's self-interest unless pursued as part of a collective plan;
- market phenomena that cannot be explained rationally except as the product of concerted action;
- defendant's record of past collusion-related antitrust violations;
- evidence of interfirm meetings and other forms of direct communications among alleged conspirators;
- the defendant's use of facilitating practices;
- industry structure characteristics that complicate or facilitate the avoidance of competition;
- industry performance factors that suggest or rebut an inference of horizontal collaboration.[163]

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[160] D Snider and I Scher, 'Conscious Parallelism or Conspiracy?', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 49, p. 1152. For a useful discussion of the consistent approach taken in EC law, employing a concept of the 'cartel as a whole', see C Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford University Press, Oxford, 2003, pp. 151–64.

[161] *Matsushita Elec Indus Co v Zenith Radio Corp* 475 US 574, 588 (1986).

[162] This rule was recently extended to the pleadings context when, in *Bell Atlantic Corp v Twombly* 127 S. Ct. 1955 (2007) the Supreme Court held that a conspiracy claim under s 1 of the Sherman Act should be dismissed when it alleges only parallel conduct, absent 'factual context suggesting agreement' (at 1961). Thus the Court endorsed the applicability of the principles used at the summary judgment stage to judgments on the sufficiency of pleadings - in this instance the principle of the presumptive lack of illegality of consciously parallel conduct standing alone (at least when rational nonconspiratorial explanations for the conduct exist) and the notion that something more, whether or not captured by the plus factors, must be identified to render such conduct probative of conspiracy.

[163] This list is taken from WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, p. 5, pp. 37–54. See also the categorisation in C

The 'plus factor' approach to determining whether or not an 'agreement' has been established has been criticised heavily. A major complaint is that courts 'rarely rank plus factors according to their probative value or specify the minimum critical mass of plus factors that must be established to sustain an inference of collusion.'[164] Nor have courts devoted much effort to explaining how each factor supports or detracts from the relevant inference.[165] These failings have been said to make the 'disposition of future cases unpredictable' and to impart 'an impressionistic quality to judicial decision-making.'[166] Further, it has been suggested that reliance on the plus factors may be manipulated to reflect the individual judge's personal intuition about the likely cause of the observed parallel behaviour.[167]

It should not be assumed that the loose or arbitrary tendencies alleged against the plus factors in the United States would be repeated here if the ACCC's proposed amendment were accepted. However, a list of factors does encourage a factor-by-factor approach rather than assessment of the circumstantial evidence as a whole with due regard to its cumulative effect.[168] Further, it is difficult, if not impossible, to capture fully and accurately in a list of factors the complex factual and economic analysis involved in determining whether or not there is an 'understanding' for the purposes of the cartel prohibitions.[169] This is apparent from the limited scope and the ambiguity of the ACCC's proposed factors, as criticised below.

(i) the conduct of the corporation or of any other person, including other parties to the alleged understanding

This factor is so broadly stated as to be of little or no assistance. Presumably it is intended to highlight the potential significance of identical or parallel conduct by the parties to the alleged understanding. However, as economic theory makes clear, parallel conduct may be just as explicable by market conditions and structures as by any form of collusion. For example, the

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Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford University Press, Oxford, 2003, p. 151.

[164] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, p. 35.

[165] GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, p. 1189.

[166] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, p. 36.

[167] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, p. 36.

[168] As recommended by the OECD in 'Prosecuting Cartels without direct evidence of agreement' DAF/COMP/GF(2006)7, 11 September 2006, p. 9, at http://www.oecd.org/dataoecd/19/49/37391162.pdf, last viewed 13 March 2009. That said, it has been observed that courts applying a 'holistic plausibility' analysis approach in the United States, 'seem to arrive at similar outcomes' to those applying the plus factor approach, and not always with the same degree of transparency in reasoning: D Snider and I Scher, 'Conscious Parallelism or Conspiracy', in American Bar Association, *Issues in Competition Law and Policy Vol II,* ABA Book Publishing, Chicago, 2008, p. 1143, p. 1172.

[169] To get a sense of the complexity, see the suggested steps in the analysis required to appraise facilitating practices generally, in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 279–80 ¶1436e.

fact that 1,000 sellers of beef charge precisely the same price at a given time does not provide evidence of a conspiracy if each is indifferent to what the others are doing. The more obvious explanation is that they are each selling by reference to the going market price.[170]

It may be possible in theory to infer collusion based on simultaneous identical actions alone (a form of 'unnatural parallelism' – for example identical secret bids on a made-to-order item unlike anything previously sold).[171] However, the experience in the US has been that 'few cases have found parallelism so extraordinary that an agreement could be inferred without more.'[172]

(ii) the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way in relation to the subject of the alleged understanding

This factor is the ACCC's intended replacement for the current requirement of commitment. It is consistent with the notion of a 'concerted practice' in EC law to the extent that an intentional arousal of an expectation is similar to the idea of a D taking action with the purpose of influencing the conduct of competitors and thereby reducing the uncertainty of competition. However, it does not capture the concept of concerted practice given that it fails to specify the need to show a causal relationship between the purpose and subsequent conduct in the market. Under Article 81(1) the causal relationship required plays an important role in distinguishing between unilateral and concerted action.[173]

(iii) the extent to which the corporation was acting in concert with others in relation to the subject matter of the alleged understanding

It is unclear what this factor is intended to achieve. The concept of "acting in concert" may possibly refer to the law relating to the distinction between principal liability and liability as a secondary party. In that context, "acting in concert" requires a joint agreement to act.[174] However, that concept is narrower than that of an understanding. Another possibility is that the concept of 'in concert with' is borrowed from the definition of the prohibition against secondary boycotts under s 45D(1) of the TPA. Again, however, that concept is narrower than

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[170] PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 169–70 ¶1425e.

[171] For discussion and examples, see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 167–85 ¶1425.

[172] GJ Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory', *Antitrust Law Journal*, vol. 71, 2004, p. 748.

[173] SS DeSanti, 'Game Theory and the Legal Analysis of Tacit Collusion', *Antitrust Law Bulletin*, vol. 38, 1993, p. 113.

[174] See S Bronitt and B McSherry, *Principles of Criminal Law*, 2nd edn, Thomson Lawbook, Pyrmont, NSW, 2005, pp. 372–7.

that of an understanding.[175] This is puzzling in the extreme: the narrowness of factor (iii) seems to cancel out the relative breadth of factor (ii).

(iv) any dealings between the corporation and any other parties to the alleged understanding before the time at which the understanding is alleged to have been arrived at

Presumably this factor is directed at establishing that the alleged parties to an understanding had the opportunity to arrive at an understanding. However, the 'mere opportunity to conspire', without more, is insufficient to support an inference of collective action,[176] and generally any suggested inference may be readily rebutted by explanations of innocent activities by which such opportunities are presented (the most obvious example being attendance at trade association meetings).[177] The factor might also be intended to embrace other furtive collaborations, 'cover-ups' and suspicious behaviour that, by their nature, could be taken to reflect consciousness of wrongdoing.[178] On the other hand, 'innocent stealth' by competitors might be explained by plans for lawful lobbying, research, advertising or joint ventures.[179]

(v) the provision by the corporation to a competitor, or the receipt by the corporation from a competitor, of information concerning the price at which or conditions on which, goods or services are supplied or acquired, or are to be supplied or acquired, by any of the parties to the alleged understanding or by any bodies corporate that are related to any of them, in competition with each other

This factor also captures in part the notion of a facilitating or concerted practice. However, as with factor (ii), on its own, the provision or receipt of information is or should not be sufficient to cross the line from 'innocent' to illegal coordination. The purpose or effect of that behaviour is what is critical. The exchange of information between competitors might be benign, if not pro-competitive or welfare-enhancing.[180] It is for this reason that economic theory counsels the need for a detailed analysis of the effects of information exchange before concluding that it is anticompetitive. Such an analysis would encompass consideration of at least the following

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[175] See eg, *Australasian Meat Industry Employees' Union v Meat & Allied Trades Federation of Australia* (1991) 104 ALR 199; *J-Corp Pty Ltd v Australasian Builders Labourers Federated Union of Workers (WA Branch)* (1992) 44 IR 264.

[176] PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 105 ¶1417. See, e.g., *Seagood Trading Corp v Jerrico Inc* 924 F.2d 1555, 1574–5 (11th Cir, 1991); *Valley Liquors Inc v Renfield Importers* 822 F2d 656, 662 (7th Cir, 1987).

[177] See, e.g., *International Distribution Centers Inc v Walsh Trucking Co* 812 F.2d 786, 794–5 (2nd Cir, 1987).

[178] See the discussion of what may be drawn from such behaviour in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 111–12 ¶1417.

[179] PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 111 ¶1417d.

[180] RL Smith, A Duke and DK Round, 'Signalling, Collusion and section 45 of the TPA' *Competition & Consumer Law Journal*, 2009 (forthcoming); PB Overgaard and HP Mollard, 'Information Exchange, Market Transparency and Dynamic Oligopoly', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 52.

features of the exchange: 'Is the information exchanged kept proprietary by existing firms or does it flow to the public (potential buyers and entrants)? When do the different parties gain access to the information exchanged? Absent formal information exchange, who has access to which pieces of information? Does the information exchanged relate to the past, the present or to future intentions? Can the information exchanged be subsequently retracted or revised? If the information exchanged relates to future intentions, does it commit firms vis-à-vis potential buyers?'[181]

(vi) whether the information referred to in (v) above is also provided to the market generally at the same time

It is true that there is a tendency to view the private exchange or transfer of information as more likely to be collusive than a public exchange or transfer.[182] However, as pointed out above, the complexity inherent in information exchange between competitors means that focussing on any single facet of the exchange carries the risk of oversimplification and error. Even a private exchange of information amongst competitors (for example, in relation to costs) can reduce the dispersion or even level of price. A private exchange is not certain to be anti-competitive and furthermore consumers may be uninterested in this type of information.[183] Further, for firms that have operated in the same market for a substantial period of time, have similar structures, frequent interactions with each other and are well-informed about cartel laws, communication through public statements may be just as effective as private communication. Consequently, in some circumstances, an emphasis on the 'public' vs 'private' nature of the communication may be misleading.[184]

(vii) the characteristics of the market

To what does this factor refer? Structural characteristics? Performance characteristics? Both? Unless this factor is spelt out in considerable detail it is vacuous.

In antitrust analysis generally, market structure is recognised as significant in assessing the prospects of coordinated behaviour between rivals.[185] Broadly speaking, collusion is seen as

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[181] PB Overgaard and HP Mollard, 'Information Exchange, Market Transparency and Dynamic Oligopoly', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 52

[182] DW Carlton, RH Gertner and AM Rosenfield, 'Communication Among Competitors: Game Theory and Antitrust', *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423.

[183] DW Carlton, RH Gertner and AM Rosenfield, 'Communication Among Competitors: Game Theory and Antitrust', *George Mason Law Review*, vol. 5, no. 3, 1997, p. 432; ME Stucke, 'Evaluating the Risks of Increased Price Transparency' 19 Spring ANTITRUST 81 (2005), at http://ssrn.com/abstract=927417, last viewed 23 March 2009.

[184] RL Smith, A Duke and DK Round, 'Signalling, Collusion and section 45 of the TPA', *Competition & Consumer Law Journal*, 2009 (forthcoming).

[185] There is extensive economic literature on this. See the surveys of theoretical and empirical work by M Ivaldi, B Jullien, P Rey, P Seabright and J Tirole, *The Economics of Tacit Collusion*, DG Competition,

unlikely in settings in which there is a large number of sellers, entry barriers are low, the product is relatively homogeneous and not subject to rapid technological change, the buyer community consists of a relatively small number of sophisticated purchasers and transactions are infrequent.[186]

Market performance may also be a source of evidence from which inferences about collusion are available. In particular, performance data that shows stable market shares over time, the profitability of the firms allegedly party to the conspiracy, the existence of sustained market-wide supra-competitive pricing or systematic price discrimination may be relied on as evidence that firms have succeeded in coordinating pricing and output decisions.[187] In addition, a failure of the market to reflect the adjustments ordinarily expected from effective competition would be evidence of its absence. Thus, stable prices in the face of a substantial decline in demand or substantial excess capacity may imply that the market is not functioning competitively.[188]

In addition, inferences about whether or not there is an understanding between competitors in a given market may be drawn by comparing the level of competition in that market with competition in a similar market. Non-competitive performance may reflect collusion where competitive results are observed in an otherwise identical market.[189] To be provable, such propositions necessitate statistical evidence from an economist about the similarity of markets and their relative performance.[190] Albeit of a different nature, the evidentiary considerations associated with possible inferences of conspiracy drawn from evidence of past conspiracy by the same competitors are equally challenging.[191]

(viii) the likelihood of the information referred to in (v) above being useful to the recipient of the information for any purpose other than fixing or maintaining prices

Like factor (v), this factor appears directed at capturing the notion of a 'concerted practice'. However, what is intended by the notion of 'usefulness' is uncertain. If it means that the recipient will take the information into account in making its own decisions about price, then as

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Brussels, 2003; S Feuerstein, 'Collusion in Industrial Economics - A Survey', *Journal of Industry, Competition and Trade*, vol. 5, 2005, p. 163; MC Levenstein and VY Suslow, 'What Determines Cartel Success?', *Journal of Economic Literature*, vol. 44, 2006, p. 43.

186 W Pengilley, 'What is required to prove a "contract, arrangement or understanding?", *Competition & Consumer Law Journal*, vol. 13, 2006, p. 241.

187 WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, pp. 54–5.

188 See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 221 ¶1432b.

189 PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 145–6 ¶1421.

190 See, e.g., *City of Tuscaloosa v Harcros Chemicals* 158 F.3d 548, 566 (11th Cir. 1998); *Ohio v Louis Trauth Dairy* 925 F. Supp 1247 (SD Ohio 1996).

191 PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 146–54 ¶1421.

much may be presumed (as it is in the EC). Further, is not clear why the use is limited to a price-related purpose. An 'understanding' may relate to a range of other purposes, including the restriction of output or allocation of markets.

Further, the motives of both the party receiving and the party providing the information are likely to be as relevant if not more relevant. In the US and the EC, it is common for courts to examine D's 'motive-to-conspire' or the related question of whether D's actions could be said to be contrary to its self-interest unless pursued as part of a collective plan.[192] Thus, for example, an agreement may be inferred where the evidence is that D failed to respond rationally to changing demand or supply conditions by raising prices in the face of sluggish or declining demand.[193] In most cases, however, the 'conspiratorial motivation' or 'acts against self-interest' factors do no more than reflect interdependence. For that reason their absence is commonly used to preclude a conspiratorial inference (rather than it being necessary to prove such factors positively in order to raise the inference).[194]

(ix) the extent to which, if at all, the communication referred to in (v) above was secret or intended by the parties to the communication to be secret

This seems to be an extension of the point that factor (vi) attempts to make. Generally, it has been recognised that an inference of conspiracy based on interfirm communications is strengthened where the communications took place in secret.[195] Not suprisingly, it is taken to be strengthened further where the parties to the communications adjust their behaviour in parallel shortly thereafter[196] and even further if no non-conspiratorial explanation is offered, or an innocent explanation is offered that later turns out to be false.[197] The compounding effect of these various factors illustrates the importance of viewing the evidence as a whole, and in a cumulative rather than sequential fashion.

3.4.2 Additional considerations

As should be evident from the observations made in relation to each of the factors in the ACCC's proposed list, the danger with such a list is that, without proper explanation of the

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[192] GJ Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory', *Antitrust Law Journal*, vol. 71, 2004, p. 748–50.

[193] See, e.g., *C-O Two Fire Equipment Co v United States* 197 F.2d 489, 497 (9th Cir, 1952); *Bond Crown & Cork Co v FTC* 176, F. 2d 974, 978–9 (4th Cir, 1949).

[194] PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 92–101 ¶1415, 224–47 ¶1434c.

[195] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, p. 47.

[196] WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, p. 47.

[197] PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 105–15 ¶1417.

conceptual theoretical relevance of each factor and/or various potential combinations of factors, there is potential for confusion, distorted reasoning and erroneous outcomes. However, in addition to these criticisms, there are four further considerations that are relevant to assessment of the ACCC's list proposal.

First, there is a glaring omission from the list, namely the existence of a plausible business justification for the conduct in question. Plausible business justifications may be used to negate the inferences of a motive to conspire or action taken against self-interest, referred to above.[198] The most obvious examples of such cases include parallel refusals to supply when the product in question is in short supply, parallel denials of credit to a customer adjudged a poor credit risk or parallel terminations of a 'troublemaker' dealer.[199] Although the bar is set high to establish this defence, it is accepted nevertheless in both the US and the EC that D may be able to prove that its behaviour was explicable on the grounds of independent decision-making having regard to its own commercial interests.[200] Such evidence considerably weakens and may even eliminate any inferences that might otherwise be drawn from evidence of communications, parallel conduct, market structure and/or performance.

Secondly, the ACCC's proposed list of factors will not ease in any way the evidentiary burden associated with proving cases based on circumstantial evidence. In civil cases, the burden is to prove that the circumstances raise a more probable inference in favour of what is alleged. This burden is heightened by the *Briginshaw* principle, requiring evidence to be assessed with regard to the gravity of the allegations and the consequences for the defendant of finding them proven.[201] In criminal cases the burden is to prove beyond a reasonable doubt that the circumstances exclude any reasonable hypothesis consistent with innocence.[202] In practice, this means that a plausible business justification will raise a reasonable doubt that D did not arrive at an 'understanding'.

Thirdly, the ACCC's proposes that its list of factual matters be used for the purposes of determining whether an understanding has been arrived at. In the context of the cartel offences, arriving at the understanding is a physical element of the offence. The relevant fault element for this physical element is intention. Depending on the circumstances of the offence and the

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198 See generally PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 68–101 ¶1412–¶1415.

199 See the cases discussed in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 74–5, 81–91 ¶1412–¶1413.

200 WE Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws', *The Antitrust Bulletin,* Spring, 1993, pp. 55–7; See I Tonking, 'From Coal Vend to Basic Slag: Winning the Hearts and Minds?' *University of New South Wales Law Journal* (submitted) for the suggestion that, if the ACCC's proposed amendments are adopted, a similar defence should be introduced in Australia.

201 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

202 *Chamberlain v R [No 2]* (1984) 153 CLR 521, 535.

evidence available, the factual matters in the ACCC's list may be as relevant to establishing intention as they are to establishing that an understanding has been arrived at. Indeed, several of the factors may also be relevant to establishing that D knew or believed that the understanding contained a cartel provision. In light of this, it would be anomalous to have the list included in the legislation as relevant to the physical element but not the fault elements. If the list is to be adopted and if it is to apply to the cartel offences, one solution may be to make the fault element of intention explicit in the offence provisions, and to provide that the list of factual matters is relevant to determining whether or not an understanding has been arrived at, as well as whether or not D intended to arrive at the understanding.[203]

Finally, the proposed list may encourage greater reliance on expert economic evidence. Most of the factors in the list relate to D's inter-actions with other competitors in the market and the inferences to be drawn from those inter-actions may depend on expert economic evidence..[204] This is certainly the experience in the United States,[205] despite the fact that many commentators and even economists agree that, apart from questions of market structure and performance, economics does not provide any particular expertise for determining the difference between tacit and overt collusion.[206] Given that the use of expert economic evidence raises particular

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[203] I Tonking, 'From Coal Vend to Basic Slag: Winning the Hearts and Minds?' *University of New South Wales Law Journal* (forthcoming).

[204] The two basic categories of circumstantial evidence used in conspiracy cases have been described by Posner as follows: 'economic evidence suggesting that the defendants were not in fact competing, and non economic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types … : evidence that the structure of the market was such as to make secret price fixing feasible … and evidence that the market behaved in a non-competitive manner.' (*Re High Fructose Corn Syrup Antitrust Litig,* 295 F.3d 651, 655 (7th Cir. 2002)) For a description of the economic models underpinning economic evidence in this area, see GJ Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory', *Antitrust Law Journal*, vol. 71, 2004, p. 719.

[205] 'The variable geometry of the oligopoly theory will fit almost every type of conduct. It can be invoked to explain why prices stick and [why] they go up. In almost every parallel pricing case, therefore, teams of expert economists are produced to testify that the parallel pricing is the result of free market forces - and on the other side equally distinguished economists will give exactly the opposite opinion': JM Joshua and S Jordan, 'Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law', *Northwestern Journal of International Law & Business*, vol. 24, 2004, p. 647, p. 662. Economic evidence appears to have played a significant role in the trial of Gary Swanson in the DRAM price fixing case: see R Bunzel and H Miller, 'Defending "The Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial *United Sates v Swanson*', *Antitrust Source,* June 2008, at http://www.antitrustsource.com, last viewed 18 September 2008. For a summary of the use of expert economic testimony in US criminal antitrust cases, see ABA, *Criminal Antitrust Litigation Handbook* (2nd ed, 2006) 308-9.

[206] See GJ Stigler, 'What Does an Economist Know?', *Journal of Legal Education*, vol. 33, 1983, p. 311; H Hovenkamp, 'Economic Experts in Antitrust Cases', in DL Faigman et al (eds), *Modern Scientific Evidence*, West Group, St Paul, Minnesota, 1999, 179 §38-2.0; RD Blair and JB Herndon, 'Inferring Collusion from Economic Evidence', *Antitrust*, Summer, 2001, p. 17, p. 18.

challenges in jury trials,[207] this is a further reason why the ACCC's proposed amendments on the element of 'understanding' should not be adopted for the cartel offences.

[207] For suggestions as to how such challenges may be met, see Justice Finkelstein, 'Running a Criminal Jury Trial in Cartel Cases: The Special Problem of Economic Evidence and Some Proposals for its Judicial Management', Paper presented at the Law Council Trade Practices Workshop, September 2008.

4. CARTEL OFFENCES – FAULT ELEMENTS

4.1 Introduction

4.1.1 Outline of the fault elements of the cartel offences[208]

The cartel offence under s 44ZZRF has the following main fault elements:

(1) Intention is required in relation to the element of making a contract or arrangement or arriving at an understanding. This is a 'physical element' of the offence. This physical element is a 'conduct' element.[209] No fault element is specified in relation to this element. However, intention is required by operation of the default fault provisions of the *Criminal Code*.[210]

(2) Knowledge or belief is the fault element in relation to the physical element requiring that the contract, arrangement or understanding contain a cartel provision (s 44ZZRF(2)).

The requirement of intention relates only to the making of a contract or arrangement or the arriving at an understanding. There is no requirement of an intention not to compete against a competitor. Under s 44ZZRF(2), D must know or believe that the contract, arrangement or understanding contains a cartel provision. The definition of 'cartel provision' in s 44ZZRD is far-reaching and does not necessarily require that the provision be anti-competitive (see section 2.3 above).

The cartel offence under s 44ZZRG has the following main fault elements:

(1) Intention is required in relation to the physical element of giving effect to the relevant cartel provision. No fault element is specified in relation to that conduct element. However, intention is required by operation of the default fault provisions of the *Criminal Code*.

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[208] The Australian provisions are largely sui generis. For example, they differ considerably from s 1 of the *Sherman Act*; for an outline of the fault elements for criminal liability under s 1, see ABA, *Criminal Antitrust Litigation Handbook* (2nd ed, 2006) 301-8.

[209] See *Criminal Code* (Cth) s 4.1. The element is characterised as a conduct element in the Explanatory Memorandum at [2.30].

[210] *Criminal Code* (Cth) s 5.6(1).

(2) Knowledge or belief is required in relation to the physical element requiring that the contract, arrangement or understanding contain a cartel provision (s 44ZZRG(2).

'Intention' has the meaning given by s 5.2(1) of the *Criminal Code*:[211]

> 'A person has intention with respect to conduct if he or she means to engage in that conduct.'

The fault element under s 44ZZRF(2) and 44ZZRG(2) is 'knowledge or belief'. The hybrid fault element of knowledge or belief is required for several other Commonwealth offences,[212] including the offence of receiving stolen goods under s 132.1 of the *Criminal Code* and conspiracy to defraud under s 135(5) of the *Code*. Knowledge or belief is also sufficient to amount to 'knowledge' of the essential matters constituting a principal offence where D is charged with liability as an accomplice or for being knowingly concerned in an offence.[213]

'Knowledge' has the meaning given by s 5.3 of the *Criminal Code*:[214]

> 'A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.'

'Belief' is undefined by the *Criminal Code* although it appears in various provisions of the *Code* including the provisions specifying the fault elements of money-laundering offences.[215] 'Belief' bears its ordinary meaning.[216] There is no settled ordinary meaning of 'belief'.[217]

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[211] See further S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, pp. 36–42; Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, pp. 53–64.

[212] See Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, pp. 67–9.

[213] *Giorgianni v R* (1985) 156 CLR 473, 506 (Wilson, Deane and Dawson JJ). By contrast, Gibbs CJ and Mason J formulated the requirement in terms of 'actual knowledge' or 'wilful blindness' (at 482, 495). The minority view of Gibbs CJ and Mason J that wilful blindness is to be equated with knowledge was later rejected in *Pereira v DPP* (1988) 35 A Crim R 382, 385.

[214] See further S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, pp. 42–4; Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, pp. 65–7.

[215] See e.g. *Criminal Code* (Cth) s 400.3(1).

[216] See Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 69.

[217] Dictionary definitions vary considerably. There are also many different views in the philosophical and legal literature about what the concept means: see, e.g., 'Belief', in *Stanford Encyclopedia of Philosophy*, at http://plato.stanford.edu/entries/belief/, last viewed 23 March 2009; E Griew, 'Consistency, Communication and Codification: Reflections on Two Mens Rea Words', in P Glazebrook (ed),

Recklessness is insufficient in relation to any of the main physical elements of the cartel offences. By contrast, under the exposure draft Bill released in January 2008, recklessness was a sufficient fault element in relation to the requirement that the contract, arrangement or understanding contain a cartel provision. This recklessness element has been dropped in response to criticism of the breadth and uncertainty of the concept of recklessness as defined under s 5.4 of the *Criminal Code* in the particular context of the cartel offences.[218]

A conditional intention will be treated as an intention except where the condition negates the existence of a requisite element of liability.[219] For example, there is no intention to make a contract or arrangement or to arrive at an understanding under s 44ZZRF(1) where D genuinely intends to enter into a proposed contract that contains a cartel provision only if the provision is cleared by the company's lawyers and the review process does not mask any underlying cartellous arrangement or understanding.[220]

There is no requirement of an intention dishonestly to obtain a benefit. This is a major change from the exposure draft Bill released in January 2008. The former requirement of an intention dishonestly to obtain a benefit has been dropped in response to widespread criticism.[221]

The cartel offences are subject to various definitional provisions and jurisdictional requirements. These are physical elements to which the default fault provisions under the *Criminal Code* apply. If, as is typically the case, the definitional or jurisdictional element is a circumstance or a result,[222] the relevant fault element is recklessness.[223]

Reshaping the Criminal Law: Essays in Honour of Glanville Williams, Stevens, London, 1978, p. 57, pp. 69–76; WV Quine, *Quiddities: An Intermittently Philosophical Dictionary*, The Belknap Press of the Harvard University Press, Cambridge, Mass., 1987, pp. 18-21. See further section 4.4.2 below.

218 See C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, 2008, p. 166, p. 192; B Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery', Paper presented at the Competition Law Conference, 24 May 2008, Sydney, pp. 37–8, 47–8, 50–1, at http://www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf, last viewed 23 March 2009.

219 See G Williams, *Criminal Law: The General Part*, 2nd edn, Stevens & Sons, London, 1961, pp. 52–3.

220 Nor would such conduct be an attempt because, on the facts as D believes them to be, the complete offence would not be committed.

221 See B Fisse, 'The Cartel Offence: Dishonesty?', *Australian Business Law Review*, vol. 35, 2007, p. 235; C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, 2008, p. 166, pp. 171, 182–9. Since this is now a dead issue in Australia, no point is served by discussing it further.

222 *Criminal Code* (Cth) s 4.1.

223 The default fault provisions under the *Criminal Code* apply to all physical elements and are not confined to some category of main elements; there is no basis in the *Code* for distinctions between the main physical elements and those which are 'referential' or 'definitional': *R v JS* [2007] NSWCCA 272.

The requisite fault elements must be present at the time when the physical elements are performed or are present.[224] There is no provision under the *Criminal Code* for exceptions to the requirement of concurrence between fault elements and physical elements.[225]

The fault elements of intention, knowledge or belief are provable by inference from circumstances as well as by direct evidence. D may make a damaging admission but often will not. The *Criminal Code* allows proof by means of circumstantial evidence, including evidence that D was aware of the likely existence of the physical elements of the offence.[226] However, the particular fault element required must be established beyond a reasonable doubt. Where there is a plausible innocent alternative explanation for D's conduct, there will be reasonable doubt. Many forms of co-operation between competitors are not anti-competitive but are normal and valued means of commerce.[227] Where there is some semblance of legitimate co-operative activity between competitors, the process of inferring intention, knowledge or belief is unlikely to be clear-cut.[228] Expert economic evidence may be relevant in some cases on the issue of whether or not an inference of intention, knowledge or belief should be drawn.[229] By contrast, most of the leading cases on the inference of fault elements from circumstances

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[224] See S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, p. 11.

[225] Query whether it is consistent with the *Criminal Code* to stretch the relevant time frame by using such slippery constructs as a 'continuing act' or a 'series of acts': see generally S Bronitt and B McSherry, *Principles of Criminal Law*, 2nd edn, Thomson Lawbook, Pyrmont, NSW, 2005, pp. 202–4. Note that such constructs do not appear to be necessary in the situation suggested by the C7 case where the original purpose or likely effect of a cartel provision has changed by the time of the conduct alleged to give effect to a cartel provision (compare *Seven Network Limited v News Limited* [2007] FCA 1062, [2222]): if the purpose or likely effect of a provision is no longer of a kind sufficient to be caught by ss 44ZZRD then the contract, arrangement or understanding no longer 'contains a cartel provision' within the meaning of s 44ZZRG(1)(a).

[226] *R v Saengsai-Or* (2004) 61 NSWLR 135, [74]; *Cao v The Queen* [2006] NSWCCA 89. See further, S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, pp. 39–40. A deeper question is the extent to which formally stated subjective fault elements are transformed by triers of fact into objective fault elements based on their own conceptions of blameworthiness: see, e.g. K Shapira-Ettinger, 'The Conundrum of Mental States: Substantive Rules and Evidence Combined', *Cardozo Law Review*, vol. 28, 2007, p. 2577. What happens when lay jurors are faced with situations involving alleged cartel conduct that they are unlikely to have experienced before?

[227] See generally A Harpham, D Robertson and P Williams, 'The Competition Law Analysis of Collaborative Structures', *Australian Business Law Review*, vol. 34, 2006, p. 399. Many collaborations between competitors are not joint ventures and for that reason alone will not come within the joint venture exception under s 44ZZRO.

[228] See generally PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2008, vol. IV. Some of the implications are canvassed in B Fisse, 'Denials of Liability in Criminal Cartel Trials: A Non-Digger's Guide to the Escape Routes', Paper to be presented at the Competition Law Conference, 23 May 2009, Sydney.

[229] Compare the use of expert economic testimony in US criminal antitrust cases: for a summary see ABA, *Criminal Antitrust Litigation Handbook* (2nd ed, 2006) 308-9.

involve offences of importing prohibited drugs,[230] a context where the process of inferential reasoning rarely extends beyond the self-evident or the range of familiar assessment.

4.1.2 The fault elements of the cartel offences as compared with those of the civil prohibitions

The fault elements of the cartel offences differ from those relevant to the civil prohibitions (including the civil prohibitions against cartel provisions and the existing prohibitions in s 45(2) of the TPA) differ in two respects:

(a) The default fault element of intention under the *Criminal Code* does not apply to the conduct element of making a contract or arrangement or arriving at an understanding (s 44ZZRJ(1)) or giving effect to a cartel provision (s 44ZZRK(1)). However, the elements of consensus and commitment required for a contract, arrangement or understanding are each tantamount to an intention to agree.[231]

(b) It is irrelevant to liability under the civil prohibitions whether or not D knew or believed that the contract, arrangement or understanding contained a cartel provision or an exclusionary provision,[232] or a provision that had the purpose, effect of likely effect of substantially lessening competition.

A 'cartel provision' is defined in s 44ZZRD partly in terms that require the provision to have a prescribed purpose (see the purpose/effect condition under s 44ZZRD(2) and the purpose condition under s 44ZZRD(3)). No difference is drawn between the purpose of a provision in the context of the cartel offences and the purpose of a provision in the context of the civil penalty prohibitions against cartel provisions.

The fault elements required for the cartel offence under s 44ZZRG do make the scope of criminal liability less extreme than the potential scope of civil penalty liability for giving effect

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[230] See e.g.: *Kural v The Queen* (1987) 162 CLR 502; *R v Saengsai-Or* (2004) 61 NSWLR 135, [74]; *Cao v The Queen* [2006] NSWCCA 89.

[231] There is a distinction between an objective intention to enter into legal relations and the subjective intention of the parties; the formation of a contract requires an objective intention only. It might be argued that an arrangement or understanding requires only an objective intention to enter into the obligation required for an arrangement or understanding. On that analysis, the implied fault element of subjective intention is not redundant in a legal sense because it is concerned with a different type of intention to make a contract or arrangement or arrive at an understanding. However, the distinction is technical and seems of little significance in the context of the cartel prohibitions under the TPA. For example, the distinction is not mentioned or applied in *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794.

[232] This difference between civil penalty liability and criminal liability is striking given the very severe civil penalties that can be imposed. The role or otherwise of fault elements in civil penalty prohibitions generally is discussed briefly in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report 95, 2002, ch. 4.

to a cartel provision or an exclusionary provision. Assume that two competitors, ACO and BCO, entered into a market sharing arrangement in 1989 for supply contracts in NSW and Victoria, and allocated the NSW contracts to ACO and the Victorian contracts to BCO. The arrangement remains in effect as a result of organisational routine but all the employees who were aware of the arrangement in 1989 have moved on to other corporations or have retired or expired. A, an executive at ACO, enters into a supply contract in NSW in 2009. A is unaware of the 1989 arrangement or the market sharing provision in that arrangement. Viewed objectively, the 2009 supply contract is in accordance with the market sharing provision in the 1988 arrangement between ACO and BCO. In this scenario, ACO would be liable to a civil penalty for giving effect to a cartel provision or an exclusionary provision: the lack of awareness of the market sharing provision by A or any other employee of ACO is irrelevant to that liability. A would be liable to a civil penalty under the Schedule Version of s 44ZZRK and s 45(2) - his lack of awareness of the market-sharing provision would be irrelevant. In contrast, A would not be liable for the cartel offence under s 44ZZRG(1): on the facts given, he does not know or believe that a cartel provision is contained in any relevant contract, arrangement or understanding. Nor can he be said to have intended to give effect to the cartel provision.

However, the fault elements of the cartel offences do not differentiate criminal from civil liability to any major extent. In particular, the cartel offences do not limit the concept of a cartel provision to cartel conduct in the sense of deliberate deals between competitors for the sole or dominant intention of not competing against one or other (notwithstanding that this is at the heart of 'serious cartel conduct').[233] The inclusion of such a fault element has been proposed on several occasions.[234] The proposal has yet to be adopted by the Government or discussed in any discussion or other paper published by the Government.

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[233] Contrast *US v Addyston Pipe & Steel Co*, 85 Fed 271, 282–3 (1898); *US v Socony-Vacuum Oil Co*, 310 US 150 (1940). See further RH Bork, *The Antitrust Paradox: A Policy at War with Itself*, Free Press, New York, pp. 26–30, 135–6, ch. 13; Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, pp. 12–17, 39 (B Fisse), at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf, last viewed 23 March 2009.

[234] See, e.g., Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, pp. 12–17 (B Fisse), at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf, last viewed 23 March 2009; B Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery', Paper presented at the Competition Law Conference, 24 May 2008, Sydney, pp. 18–22, at http://www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf, last viewed 23 March 2009.

4.1.3 Questions of interpretation and application of the fault elements under ss 44ZZRF and 44ZZRG

Numerous questions of interpretation and application lurk beneath the statutory surface of the cartel offences. The more important questions appear to be:

(1) What is meant by the requirement of intention to make a contract or arrangement or to arrive at an understanding? Does the requirement mean that an intention to e.g. fix prices is required where the only relevant contract, arrangement or understanding is one to fix prices but not where the cartel provision is contained in a separate contract, arrangement or understanding? See section 4.2 below.

(2) For the requirement of knowledge or belief that a cartel provision is contained in the alleged contract, arrangement or understanding, what exactly is the subject matter that must be known or believed? 'Cartel provision' is a complex statutory concept. The relevant content for the purposes of the requirement of knowledge or belief needs to be unravelled. See section 4.3 below.

(3) What is meant by 'knowledge'? What is meant by 'belief'? Is 'wilful blindness' sufficient to amount to 'knowledge' or 'belief' and, if so, on what basis? How detailed must D's awareness of the relevant facts be to amount to knowledge or belief that a contract, arrangement or understanding contains a cartel provision? What is the relevance of mistake of fact? What if, on the facts as D believes them to be, but not in reality, the conduct is covered by an exception (e.g. the exclusive dealing exception; the joint venture exception)? To what extent, if any, must knowledge or belief include awareness of the law that needs to be known in order to determine whether or not a provision is a cartel provision? See section 4.4 below.

4.2 Intention to make a contract or arrangement or arrive at an understanding - an inconstant fault element

What is meant by the requirement of intention to make a contract or arrangement or to arrive at an understanding?

In relation to the physical element under s 44ZZRF(1)(a), D must intend that the relationship with the other relevant party have the ingredients required for a contract, arrangement or understanding, including the ingredients of consensus and commitment (see the discussion in

section 3 above). Thus, if D merely pretends to agree because, for example, he or she is an agent provocateur), D does not intend to make a contract, arrangement or understanding.[235] However, an intention to cheat on the agreement does not negate an intention to agree.[236] Moreover, if there is an intent to agree, it will not be excused by the fact that D succumbed to economic coercion.[237]

In some situations, D will not intend to enter into a commitment unless he or she also has an intention to fix prices or to achieve some other object that satisfies the purpose/effect or the purpose condition of a cartel provision as defined in s 44ZZRD.[238]

Assume that A and B are competitors and that A informs B of A's forthcoming prices on numerous occasions. B always gives an equivocal response about whether or not he will follow A's prices and does not always follow those prices. On a cartel offence charge under s 44ZZRF(1) the main issue of liability is whether or not B has arrived at an understanding with A. B will not have arrived at an understanding with A unless he has indicated a commitment to fix a price to be charged by B or by A.[239] If B enters into a commitment to fix prices then he will intend to fix those prices.

Assume, by contrast, that X and Y are competitors and make an arrangement under which they agree to share pricing information but without committing to fix prices on the basis of that information. On a charge of a cartel offence under s 44ZZRF it is possible that X or Y may be liable on the basis that:

(a) they made an arrangement (the information-sharing arrangement);

(b) the provision for sharing price information in that arrangement was a cartel provision – it had the likely effect of controlling a price to be charged by X or Y or both of them; and

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[235] As in the conspiracy decision of the Supreme Court of Canada in *R v O'Brien* [1954] SCR 666. See further MR Goode, *Criminal Conspiracy in Canada*, Carswell Co, Toronto, 1975, pp. 19–28.

[236] See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]* [2007] FCA 1617, [317]-[318] (Heerey J).

[237] See *Commonwealth Edison Co v Allis Chalmers Mfg Co*, 245 F. Supp 889, 892 (1965).

[238] Compare the two dimensions of the element of intention in conspiracy at common law, namely: (a) an intent to agree; and (b) an intent to achieve an unlawful objective; see further MR Goode, *Criminal Conspiracy in Canada*, Carswell Co, Toronto, 1975, pp. 28–9.

[239] *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794 especially at [35]-[36] and [41].

(c) X and Y each knew that the arrangement contained a cartel provision – they knew that there was a substantial risk that the provision for sharing information would influence and control the price to be charged by either or both of them.

In this example, the requirement under s 44ZZRF(1) of an intention to arrive at an understanding does not also have the effect of requiring an intention by X or Y to fix prices; it is sufficient that they knew or believed that the information-sharing arrangement contained a provision that had the likely effect of fixing, controlling or maintaining a price to be charged by either or both of them.

This approach is open in cases such as the Geelong petrol case,[240] where it may be argued that the element of commitment could be made out on the basis of a commitment by D to exchange information, or a commitment to receive and consider the information supplied by a competitor. If so, then an understanding could be established and D would be liable if it could be shown that the purpose, effect or likely effect of the provision subject to the commitment was to control a price and that D knew or believed that the provision had the purpose, effect or likely effect of controlling a price.

It seems arbitrary that an intention to fix prices must be present for liability in the first example but not in the second.[241] It may possibly be argued that the fault element for a cartel offence should be less exacting in the second example than in the first given that X and Y have engaged in a dangerous facilitating practice by entering into an arrangement to exchange price information. However, the discussions between A and B also amount to a facilitating practice and, depending on the facts, could be as dangerous or more dangerous than X and Y's arrangement to exchange price information.

A more commendable approach would be to require an intention to fix prices (or reduce output, allocate markets, or suppliers or territories, or rig bids) in all cases, including the examples given above.[242] This approach would result in a uniform fault element instead of one that, in the context of price fixing, requires an intention to fix prices in some cases but not others. It would also help to simplify directions to juries. However, now that the s 44ZZRF feral cat has been let out of the bag, such an approach does not appear to be open:

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[240] *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794.

[241] The underlying cause of this problem is that s 44ZZRF departs from the common law definition of criminal conspiracy, which requires not only an intention to agree but also a common design to perpetrate an unlawful object: *Mulcahy* (1868) LR 3 HL 306 at 317; *Gerakiteys v The Queen* (1983) 153 CLR 317.

[242] Compare the UK cartel offence: s 188(1)–(3) of the *Enterprise Act 2002* (UK) require an intention to, for example, fix prices on the part of all parties to the relevant cartel agreement. However, the UK model is imperfect: the provisions of ss 188–9 of the *Enterprise Act* are extremely complex and defy meaningful communication to juries.

- the wording of s 44ZZRF(1)(a) refers only to making a contract or arrangement or arriving at of an understanding and does not proscribe any result (e.g. the result of price fixing); and

- s 44ZZRF(1)(b) refers to a cartel provision and the need for knowledge or belief that a cartel provision is contained in the alleged contract, arrangement or understanding – knowledge or belief, not intention, is required in relation to the elements that make up a cartel provision.[243]

The vagary of the element of intention for s 44ZZRF(1)(a) is therefore unlikely to be curable by the courts: 'once the conclusion is reached that legislation bears a particular construction, even if a court thinks that legislation may be "uncommonly silly", "unwise, or even asinine", that consideration cannot prevail over the legislative language.'[244]

4.3 Knowledge or belief that a contract, arrangement or understanding contains a cartel provision

4.3.1 Outline

Under s 44ZZRF(2) and s 44ZZRG(2) there is a requirement of *knowledge or belief* that a cartel provision is contained in the relevant contract, arrangement or understanding. What is the subject matter that must be known or believed?

Knowledge or belief is required in relation to the following elements:

(a) the existence of a *cartel provision*, i.e.:

(i) the existence of facts sufficient to satisfy the meaning of a "provision";[245]

(ii) the existence of facts sufficient to satisfy the purpose/effect condition required in the case of price fixing (s 44ZZRD(2)), or the purpose

[243] Another consideration is that intention under s 5.2(1) of the *Criminal Code* is narrower than intention under s 5.2(3) of the *Code* - the latter extends intention to include the situation where D is aware that a result will follow in the ordinary course of events. Arguably, the extended definition of intention should apply if there is to be a requirement of an intention to, for example, fix prices: see *US v United States Gypsum Co*, 438 US 422, 445–6 (1978). However, s 44ZZRF(1)(a) specifies a conduct element and the concept of intention that applies under the default fault provisions of the *Criminal Code* is intention as defined by s 5.2(1), not s 5.2(3).

[244] *CTM v The Queen* [2008] HCA 25, [237] (Heydon J).

[245] See TPA s 4(1); *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794, [31]–[32].

condition required in the case of reduction of output, allocation of customers or bid-rigging (s 44ZZRD(3)); and

(iii) the existence of facts sufficient to satisfy the competition condition under s 44ZZRD(4) (to simplify, at least 2 or more of the parties to the contract, arrangement or understanding must be competitors or likely competitors); and

(b) the cartel provision under (a) must be *contained in the contract, arrangement or understanding* that is in issue.

On appropriate facts, any of the above elements could be the subject of a denial of knowledge or belief. Element (a)(ii) above is likely to come into play often. Indeed, given the complexity of the purpose/effect and purpose conditions under s 44ZZRD(3), this element is likely to be a popular attraction for defence counsel.[246] In the case of blatant cartels, as illustrated by the vitamins cartel[247] and many others,[248] proving the element of knowledge or belief will be relatively straightforward and the convolutions of s 44ZZRD are unlikely to get in the way. However, there will be less blatant cases where difficulty may arise, especially in relation to the need to prove knowledge or belief as to the purpose of the cartel provision alleged. On the other hand, where there is an understanding with a single provision that is the alleged cartel provision, if it can be proved that there was commitment by D to a price fixing understanding then usually the evidence of commitment would also show that D knew or believed that the purpose of the provision was to fix prices.

4.3.2 Knowledge or belief as to the purpose of the cartel provision alleged

Assume that E and F are competing airlines and enter into an agreement under which E will share F's maintenance facilities. The deal is proposed by E and settled by management teams from both companies. The maintenance agreement includes a provision that gives F priority in the event of a capacity restraint that prevents F from servicing E's aircraft in addition to servicing F's own aircraft (the prioritisation provision). E and the members of its management

[246] A rating of 8+ on the Richter scale?

[247] For a detailed account of this case and the widespread and regular use of meetings between competitors as an avenue for colluding on price, see JM Connor, *Global Price Fixing*, 2nd edn, Springer-Verlag, Berlin, 2007, ch. 11.

[248] The lysine conspiracy is another prime example: JM Connor, *Global Price Fixing*, 2nd edn, Springer-Verlag, Berlin, 2007, ch. 8; K Eichenwald, *The Informant: A True Story: The FBI was ready to take down America's most politically powerful corporation: but there was one thing they didn't count on*, Broadway Books, New York, 2000. See also, e.g., C Mason, *The Art of the Steal: Inside the Sotheby's-Christie's Auction House Scandal*, GP Putnam's Sons, New York, 2004; J Herling, *The Great Price Conspiracy: The story of the antitrust violations in the electrical industry*, R B Luce, Washington, 1962 (heavy electrical equipment conspiracies).

propose do the deal for the purpose of reducing costs. F and its management team do the deal partly to achieve an economy of scale and partly because they intend to use the prioritisation provision from time to time as a means of hampering E's ability to fly on schedule. The prioritisation provision in the maintenance agreement will be a cartel provision if the purpose of the provision was to limit the supply of airline services (flights) by E (see s 44ZZRD(3)(a)). What is the purpose of the provision? E and the members of E's management team responsible for the deal were the parties who included the provision in the draft contract but they did not have the purpose proscribed under s 44ZZRD(3)(a). If, as stated by Sackville J in *Seven Network Limited v News Limited*,[249] the relevant purpose of a provision is the purpose of all the parties responsible for including the provision, then the prioritisation provision does not have a proscribed purpose and is not a cartel provision.

Assume next that the proposal to share F's maintenance facilities is advanced, not by E and its management team, but by F and its management team and that F and its management team have included the prioritisation provision in the contract. In this scenario, the purpose of the parties responsible for including the provision is a proscribed purpose and, on the interpretation of 'purpose of a provision', adopted by Sackville J in *Seven Network Limited v News Limited*, the provision is a cartel provision. F and the members of its management team are guilty of the cartel offence under s 44ZZRF(1) because they knew that one substantial purpose of the provision was to limit the supply of flights by E. E and the members of its management team will not be liable unless they knew or believed that the purpose of the provision (i.e. F's purpose and perhaps also that of each member of F's management team) [250] was to limit the supply of flights by E.

But should the purpose of a cartel provision be taken to mean the purpose of the parties responsible for including the provision into the contract, arrangement or understanding? An alternative possible interpretation is that the relevant purpose of a provision is the purpose of all the parties to the contract, arrangement or understanding (as required under the interpretation adopted in *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing NSW Ltd*).[251] This approach would impose an additional burden on the prosecution in some cases, but would do much to simplify the fault elements of the cartel offences (an important consideration in the setting of jury trials).[252] It would also reflect the orthodox view that cartel conduct requires

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[249] [2007] FCA 1062, [2402] ff. Contrast *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460, 476 'purpose of the individuals by whom the provision was included in the contract, arrangement or understanding'.

[250] It is unclear whether the proposition that the purpose of a provision is the purpose of all the parties responsible for introducing the provision refers not only to the corporate parties responsible for introducing the provision but also to the individual parties who performed the conduct of introducing the provision.

[251] (1987) ATPR ¶40-820, 48,880.

[252] See section 5.4 below.

competitors to agree not to compete against one or other (i.e. to eliminate or reduce competitive rivalry).[253] Thus, in the example given above, there would not be a cartel provision because the only parties to the maintenance agreement are E and F and E does not have the purpose proscribed by s 44ZZRD(3)(a).

The purpose element of a cartel provision under s 44ZZRD is ambiguous: it is far from clear that purpose refers to the purpose of only some and not all of the parties to the relevant contract, arrangement or understanding. Given the penal nature of the provisions defining a cartel provision, is there any reason why this ambiguity should not be resolved in favour of defendants?[254]

4.4 Knowledge or belief

4.4.1 Knowledge

'Knowledge' has the meaning given by s 5.3 of the *Criminal Code*:[255]

> 'A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.'

Knowledge of the likelihood of a circumstance or result is insufficient. Recklessness is not knowledge.

The Commonwealth Criminal Code: A Guide for Practitioners (***Guide for Practitioners***) published by the Attorney-General's Department states that the *Code* definition of knowledge 'appears to have been intended to restrict its application to instances where the individual was *conscious*, at the time, of the circumstances or anticipated results of conduct.'[256] By contrast, conscious awareness is not a necessary element of knowledge as matter of ordinary usage: people 'know' more than what they are consciously aware of at any particular time.[257]

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[253] See RH Bork, *The Antitrust Paradox: A Policy at War with Itself*, Free Press, New York, ch. 13.

[254] Consider *Murphy v Farmer* (1988) 165 CLR 19; *Chew v The Queen* (1992) 7 ACSR 481; *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J); *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, 145 (Mason, Deane and Dawson JJ); *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826, [45]–[48].

[255] See further S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, pp. 42–4; Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, pp. 65–7.

[256] At p. 65.

[257] Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 65.

The view expressed in the *Guide for Practitioners* has been questioned by Stephen Odgers:[258]

> 'the contrary view would be that it is sufficient if the person possesses the information (in the sense that it could be recalled) without any requirement that it be actually recalled at the critical moment. Taking s 149 [of the *Criminal Code*] as an example, it is difficult to see why the person alleged to have committed the offence of obstructing a Commonwealth public official should have to be consciously aware at the time of the obstruction that the person obstructed is such an official. What should be sufficient is that the alleged offender possessed the information, not that it was actually brought to mind at the time of the obstruction.'

Although the position is not clear-cut, and although there are additional possible approaches,[259] the view expressed in the *Guide for Practitioners* is supportable. First, the mere possession of information, in the sense that the information could be recalled if D is interrogated or cross-examined, does not indicate subjective culpability. Subjective culpability depends on informed choice and D does not exercise an informed choice unless the information in question informs D's conduct at the critical moment.[260] Secondly, the suggested test of ability to recall fails to distinguish between knowledge and negligence; an unreasonable failure to recall information that would or might have led D to have acted otherwise may amount to negligence but does not amount to knowledge.[261] Thirdly, there is some support in the case law for the proposition that knowledge requires conscious awareness.[262]

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[258] S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, p. 43. See Bello. Contrast the tighter test suggested in G Williams, *Criminal Law: The General Part*, 2nd edn, Stevens & Sons, London, 1961, p. 170: 'Probably the test is: was the defendant capable of recalling the fact at the moment in question if he had addressed his mind to it?' See further N Lacey, 'Denial of Responsibility', in D Downes et al (eds), *Crime, Social Control and Human Rights: From Moral Panics to States of Denial: Essays in Honour of Stanley Cohen*, Willan Publishing, Cullompton, 2007, p. 255; KW Simons, 'Should the Model Penal Code's *Mens Rea* Provisions be Amended?', *Ohio State Journal of Criminal Law*, vol. 1, 2003, p. 179, pp. 192–5; S Shute, 'Knowledge and Belief in the Criminal Law', in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, Oxford, 2002, p. 171, pp. 198–200; GR Sullivan, 'Knowledge, Belief and Culpability', in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, Oxford, 2002, p. 207, pp. 210–12.

[259] See especially S Shute, 'Knowledge and Belief in the Criminal Law', in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, Oxford, 2002, p. 171, pp. 198–200.

[260] See A Ashworth, 'Belief, Intent and Criminal Liability', in J Ekelaar & J Bell (eds), *Oxford Essays in Jurisprudence*, Oxford University Press, Oxford, 1987, p. 1, p. 7.

[261] See, in the context of the requirement of knowledge for complicity, *Giorgianni v The Queen* (1985) 156 CLR 473, 505–7; *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679, [231]; *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1; *Caple v All Fasterners (WA)* [2005] FCA 1558.

[262] *R v Selim* [2007] NSWSC 362, [26]. See also *Hann v The Commonwealth* [2004] SASC 86, [26] (conscious awareness for recklessness under the *Criminal Code*).

Proving that D was consciously aware of the facts necessary to constitute a cartel provision might be difficult in some situations including those where D was thinking consciously only about a limited range of other items (e.g. keeping a business afloat). However, the cartel offences require knowledge *or belief* that a cartel provision is contained in the relevant contract, arrangement or understanding. As discussed in section 4.4.2 below, 'belief' does not necessarily require conscious awareness - it appears that subconscious belief is sufficient.

Another issue is whether knowledge on the part of a corporate defendant can be established on the basis that, although no one employee or agent has the requisite knowledge, that knowledge can be complied by aggregating the information held by a number of employees. A detailed discussion of this or other issues of corporate criminal responsibility is beyond the scope of the present paper.[263] However, it appears unlikely that the provisions for vicarious corporate responsibility under s 84 extend responsibility to an aggregation of information that is 'knowledge' only in a synthetic sense.[264]

4.4.2 Belief

'Belief' is not defined in the *Criminal Code*. The case law is limited and at an early stage of development.[265]

The element of belief in ss 44ZZRF(2) and 44ZZRG(2) has these basic features:

- Belief, unlike knowledge, does not require being sure or certain about the facts; one *believes* rather than knows that something is so when the evidence is less than conclusive.[266] One can believe a proposition while having some doubt as to whether the proposition is in fact true.[267]

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[263] For a brief overview see C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, 2008, p. 166, pp. 195–7.

[264] See *R v Australasian Films Ltd* (1921) 29 CLR 195; *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292. See further J Clough J and C Mulhern, *The Prosecution of Corporations*, Oxford University Press, South Melbourne, Vic, 2002, pp. 106–8.

[265] See, e.g., *Kural v The Queen* (1987) 162 CLR 502, 504–5, 659 (Mason CJ, Deane and Dawson JJ) where a distinction is drawn between knowledge and belief without elaboration.

[266] Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 69. Compare *Mathebula* [2004] VSCA 74, [42] (where it is suggested that 'arguably' knowledge includes belief, but without stating the argument or citing authority; and *Giorgianni v R* (1985) 156 CLR 473, 506 (Wilson, Deane & Dawson JJ) (complicity requires knowledge or belief as to the essential matters constituting the principal offence)).

[267] S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, p. 43; Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 69; B Fisse, 'Probability and the *Proudman v Dayman* Defence of Reasonable Mistaken Belief', *Melbourne University Law Review*, vol. 9, 1974, p. 477, pp. 481–4.

- There is an element of faith in belief;[268] to believe X is to hold an opinion that X. D must assent to the proposition that is the subject of belief.[269] However, D need not necessarily have a high degree of confidence in the proposition that is believed.[270] Nor need D necessarily think that it is highly likely that the proposition believed is true.[271] On one view, D must have 'a conviction' that the proposition believed is true[272] but that view is highly questionable.[273] The view expressed in the *Guide for Practitioners* is that: 'belief might be taken to require something less than the degree of conviction required for knowledge, but something more than the pallid substitute of mere suspicion.' [274] But what is that something more? For example, a test that D must 'feel' 'actual persuasion' (based on the formulation of the civil standard of proof by Dixon J in *Briginshaw v Briginshaw*[275]) would seem to set the bar too high.

- 'Belief' does not appear to require a conscious belief, on the basis explained in the *Guide for Practitioners*:[276]

> Often we are not consciously aware of our beliefs, even when engaged in activities which manifest reliance on those beliefs - a point recognised in the *Code* in its definition of the defence of reasonable mistake. We might infer that a person *believed* that goods were stolen from their behaviour in much the same way as we infer that a person believes their car will start from their behaviour in turning the ignition and pressing the accelerator. That inference does not entail any

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[268] Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 69.

[269] S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, p. 43.

[270] See B Fisse, 'Probability and the *Proudman v Dayman* Defence of Reasonable Mistaken Belief', *Melbourne University Law Review*, vol. 9, 1974, p. 477, pp. 493–5.

[271] See HH Price, *Belief*, Allen & Unwin, London, 1969, pp. 189–240, 296–301.

[272] S Shute, 'Knowledge and Belief in the Criminal Law', in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, Oxford, 2002, p. 171, pp. 198–200; *The Macquarie Dictionary*, Macquarie Library Pty Ltd, McMahons Point, NSW, 1981, p. 194 ('belief' means 'conviction of the truth or reality of a thing based upon grounds insufficient to afford positive knowledge').

[273] See, e.g.: Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles*, Clareondon Press, Oxford, 1993, vol. I p. 209, ('belief' means ''[m]ental acceptance of a statement, fact, doctrine, thing, etc., as true or existing.'); HH Price, *Belief*, Allen & Unwin, London, 1969; B Fisse, 'Probability and the *Proudman v Dayman* Defence of Reasonable Mistaken Belief', *Melbourne University Law Review*, vol. 9, 1974, p. 477; E Griew, 'Consistency, Communication and Codification: Reflections on Two Mens Rea Words', in P Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, Stevens, London, 1978, p. 57, pp. 70–1.

[274] Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 69.

[275] (1938) 60 CLR 336, 361.

[276] At 71; implicitly endorsed in *R v Selim* [2007] NSWSC 362, [26].

> speculation concerning the person's state of conscious awareness of particular facts at any particular point of time. In short, it is not necessary to address the question whether the defendant was consciously aware of the fact that the goods were stolen.

- It is most unlikely that belief requires D to hold the view that 'there be no other reasonable conclusion in the light of the circumstances, in the light of all I have heard and seen.'[277] A belief may be held by someone who thinks that there are several possible reasonable conclusions but prefers one conclusion over the other possibilities because it seems more likely to be true than any of the others.

- Recklessness, in the sense of awareness of a substantial risk, does not amount to belief; 'realisation of a substantial risk that something is so does not amount to belief in that state of things in ordinary language or in the *Code*'.[278]

- A suspicion does not amount to a belief.[279] This proposition is supported by decisions on the meaning of belief as a fault element of the offence of receiving stolen goods.[280]

- 'Wilful blindness' is not to be equated with belief.[281]

These features of the element of belief under ss 44ZZRF(2) and 44ZZRG(2) are rudimentary and fuzzy at the edges. Perhaps these rudiments and their fuzziness are enough to make ss 44ZZRF(2) and 44ZZRG(2) work well enough in practice. However, belief is an elusive concept, at least to the questioning mind, and the limits may be pushed by prosecution and defence counsel. To take an obvious example, belief under ss 44ZZRF(2) and 44ZZRG(2) might be taken to require a conviction or commitment to the proposition that the contract, arrangement or understanding contained a cartel provision.[282] If so, diffidence and scepticism

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[277] Contrast *Hall* (1985) 81 Crim App R 260, 264 (in the context of handling stolen goods and the requirement that D know or believe that the goods were stolen).

[278] Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 71.

[279] Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 69. But see E Griew, 'Consistency, Communication and Codification: Reflections on Two Mens Rea Words', in P Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, Stevens, London, 1978, p. 57, pp. 70–1.

[280] See e.g., *R v Schipanski* (1989) 17 NSWLR 618, 620; CR Williams and MS Weinberg, *Property Offences*, 2nd edn, Law Book Co, Sydney, 1986, pp. 359–60.

[281] *Pereira v DPP* (1988) 35 A Crim R 382, 385; *R v Schipanski* (1989) 17 NSWLR 618; *R v McConnell*; *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661.

[282] Relying on e.g.: S Shute, 'Knowledge and Belief in the Criminal Law', in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, Oxford, 2002, p. 171, pp. 198–200; *The Macquarie Dictionary*, Macquarie Library Pty Ltd, McMahons Point, NSW, 1981, p. 194

will become a basis for denials of liability. Should criminal liability turn on a factor as variable and fickle as degrees of confidence?[283]

The view has been taken in some UK decisions on the offence of handling stolen goods that the element of 'belief' is readily understandable by juries and should not to be defined in jury directions.[284] That position has been criticised[285] and, if followed in the context of the cartel offences, could result in misdirection.[286] This is one area where, short of a statutory definition of belief, a model jury direction could do much to reduce uncertainty and to minimise the need for clarification through appeals.

The requirement of belief, although less exacting than the alternative fault element of knowledge, nonetheless presents a hurdle for the prosecution that defendants doubtless will try to exploit. As indicated above, recklessness is insufficient: D must have a *belief* that the contract, arrangement or understanding contains a cartel provision. And, as discussed above, belief may possibly be interpreted as requiring a conviction or commitment. Managers with an IQ over 80 are likely to adapt accordingly. In larger organisations they will seek to position themselves at a sufficient distance from the front line of cartel conduct as to avoid or minimise the risk of either: (a) making a contract or arrangement or arriving at an understanding; or (b) being aware of or believing in the existence of circumstances that amount in law to a cartel provision.[287] Organisations are notorious for fostering and harbouring superiors who leave the 'dirty work' to be undertaken by inferiors under their span of command or influence.[288]

('belief' means 'conviction of the truth or reality of a thing based upon grounds insufficient to afford positive knowledge'). This conception of belief is highly questionable; see e.g., *Shorter Oxford Dictionary* ('belief' means '[m]ental assent to or acceptance of a proposition, statement or fact, as true, on the ground of authority or evidence; the mental condition involved in this assent').

283 'No' is the answer given to this question in the context of the common law defence of reasonable mistaken belief in B Fisse, 'Probability and the *Proudman v Dayman* Defence of Reasonable Mistaken Belief', *Melbourne University Law Review*, vol. 9, 1974, p. 477, pp. 493–5.

284 *Smith (Albert)* (1976) 64 Cr App R 217; *Reader* (1978) 66 Cr App R 33. These attempts to sweep under the carpet the question of what amounts to a belief seem forlorn. It is not explained why 'belief' is understandable by juries when 'knowledge' requires definition. Nor is there any apparent empirical basis for the assertion that 'belief' is readily understood by juries.

285 Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney General's Department, Canberra, 2002, p. 71; E Griew, 'Consistency, Communication and Codification: Reflections on Two Mens Rea Words', in P Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, Stevens, London, 1978, p. 57, pp. 71–2.

286 Compare *Mathebula* [2004] VSCA 74 where it was argued unsuccessfully that a direction failed to deal adequately with degrees of belief but where belief was not the relevant fault element in issue.

287 As illustrated by the position of Ralph Cordiner, CEO of General Electric, in the infamous US heavy electrical equipment cases in the late 1950s and early 1960s: RA Smith, *Corporations In Crisis*, Anchor Books, Garden City, New York, 1966, chs. 5–6; G Geis, 'The Heavy Electrical Equipment Cases of 1961', in G Geis and R Meier (eds), *White Collar Crime: Offenses in Business, Politics, and the Professions*, Free Press, New York, 1977, pp. 117–132; B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press, Albany, 1983, ch. 16. Note that the cartel offence under s 44ZZRF(1) is not defined in terms of making or *authorising* the making of a contract or

4.4.3 'Wilful blindness'

Cases will arise where managers are involved in the making of contracts or arrangements or the arriving at understandings but where they deliberately refrain from inquiring into the possibility that a provision in the relevant contract, arrangement or understanding is a cartel provision. Is 'wilful blindness' sufficient to amount to knowledge or belief under ss 44ZZRF((2) and 44ZZRG(2)? If so, on what basis?

The legal status of the concept of wilful blindness under ss 44ZZRF(2) and 44ZZRG(2) may be summarised as follows:

- Wilful blindness is not a fault concept under the *Criminal Code*. The possibility of including the concept was expressly rejected by the framers of the Model Criminal Code that led to the *Criminal Code*.[289]

- Wilful blindness is not to be equated with knowledge or belief: actual knowledge or belief must be established.[290]

- Wilful blindness is an ill-defined concept and has widely divergent meanings.[291] In *Pereira v The Queen*[292] the High Court charitably described it as 'lawyer's

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arrangement or the arriving at of an understanding; see the criticism in C Beaton-Wells and B Fisse, 'Criminal Cartels: Individual Liability and Sentencing', Paper presented at the 6th Annual University of South Australia Trade Practices Workshop, 18 October 2008, Pt 2.2.1. Potential avenues open to escapologists are surveyed in B Fisse, 'Denials of Liability in Criminal Cartel Trials: A Non-Digger's Guide to the Escape Routes', Paper to be presented at the Competition Law Conference, 23 May 2009, Sydney.

288 See e.g. B Fisse and J Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press, Melbourne, 1993, pp. 39–40.

289 Criminal Law Officers Committee, *Model Criminal Code*, *Chapters 1 and 2 - General Principles of Criminal Responsibility*, 1992, p. 25, at http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~modelcode_ch1_general_principles%5B1%5D.pdf/$file/modelcode_ch1_general_principles%5B1%5D.pdf, last viewed 23 March 2009. The discussion in this report is very brief. For a much more helpful explanation see D Lanham, 'Wilful Blindness and the Criminal Law', *Criminal Law Journal*, vol. 9, 1985, p. 261, pp. 267–9 (making the point, inter alia, that wilful blindness is a less blameworthy mental state than numerous other mental states that do not amount to recklessness yet which are stronger candidates for the imposition of criminal responsibility).

290 *Pereira v DPP* (1988) 35 A Crim R 382, 385; *R v Schipanski* (1989) 17 NSWLR 618; *R v McConnell* (1993) 69 A Crim 39; *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661.

291 Compare e.g.: G Williams, *Criminal Law: The General Part*, 2nd edn, Stevens & Sons, London, 1961, pp. 157–9; AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine*, 3rd edn, Hart Publishing, Oxford, 2007, pp 143–4; B Fisse, *Howard's Criminal Law*, 5th edn, Lawbook Co, Sydney, 1990, pp. 278–9; D Lanham, 'Wilful Blindness and the Criminal Law', *Criminal Law Journal*, vol. 9, 1985, p. 261; M Wasik and MP Thompson, '"Turning a Blind Eye" as Constituting Mens Rea', *Northern Ireland Law Quarterly*, 1981, p. 328; IP Robbins, 'The Ostrich Instruction: Deliberate Ignorance as Criminal Mens Rea', *Journal of Criminal Law & Criminology*, vol. 81, 1990 p. 191; R Charlow, 'Wilful Ignorance and

shorthand'.[293] It is unclear from this shorthand what degree of risk D must appreciate before the concept comes into play. It is also unclear when a failure to inquire further amounts to a 'wilful shutting of the eyes' as opposed to simply a failure to inquire or an unreasonable failure to inquire.

- Depending on the evidence, and in particular whether or not there is any basis for giving a direction on wilful blindness,[294] a jury may be instructed that knowledge or belief may be inferred from wilful blindness.[295] Particular care is needed to focus on the requirement of knowledge or belief. Knowledge or belief is not easily inferred from wilful blindness.[296] Indeed, that is an understatement. As discussed below, the better view is that wilful blindness is not a valid basis for inferring knowledge or belief.

In *Pereira v The Queen* the High Court endorsed the possible inference of knowledge from wilful blindness without clarifying the relevant process of inference: [297]

> 'a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiry may sometimes, as a matter of lawyer's shorthand, be referred to as wilful blindness. Where that expression is used, care should be taken to ensure that a jury is not distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt.'

This statement does not define what is meant by the opaque concept of wilful blindness. Nor does it provide guidance as to when or why an inference of knowledge can permissibly be drawn from wilful blindness. It may also be noted that, in the context of the cartel offences, the relevant fault element is not knowledge of the likely existence of relevant facts but knowledge or belief (recklessness is insufficient).

The discussion of wilful blindness by Gleason CJ in *R v Schipanski*[298] gives greater guidance. The NSW Court of Criminal Appeal quashed D's conviction for the offence of receiving stolen

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Criminal Culpability', *Texas Law Review*, vol. 70, 1992, p. 1351; AC Michaels, 'Acceptance: The Missing Mental State', *Southern California Law Review*, vol. 71, 1998, p. 953.

292 *Pereira v DPP* (1988) 35 A Crim R 382.

293 (1988) 35 A Crim R 382, 385.

294 See *R v Garlick (No 2)* (2007) 170 A Crim R 265, 275–8.

295 *Pereira v DPP* (1988) 35 A Crim R 382, 385; *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679, [224]–[231].

296 See *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363, [189].

297 (1988) 35 A Crim R 382, 385.

goods because the jury had been misdirected that wilful blindness was to be equated with knowledge or belief. Gleason CJ observed that:[299]

> 'a state of mind involving suspicion that the goods have been stolen is relevant to the question whether the accused knew or believed that the goods had been stolen, in that suspicion, coupled with a deliberate or wilful failure to make further inquiries as to the provenance of the goods may, depending upon the circumstances, provide evidence from which a jury may conclude that there was actual knowledge or actual belief that the goods were stolen.
>
> References, however, to "wilful blindness", are capable of giving rise to confusion and error. The ultimate question of fact to be determined is a question as to the subjective state of mind of the accused person. It is a question as to his personal state of knowledge or belief. The existence of suspicion or suspicious circumstances and the deliberate failure to make inquiries may, depending on the circumstances, be of evidentiary significance in relation to that ultimate question. However, a wilful shutting of the eyes to avoid suspicions hardening into actual belief is insufficient if that is all there is to it: *R v Fallon* (1981) 28 SASR 394, 4 A Crim R 411; and *R v Wilton* (Court of Criminal Appeal, 30 July 1985, unreported).'

The *Schipanski* progression addresses what is insufficient to amount to wilful blindness but is otherwise obscure.[300] In particular, it does not identify the particular circumstances that need to be present before knowledge or belief may be inferred from wilful blindness. Nor does it explain how it is possible to 'infer' knowledge from wilful blindness without re-defining knowledge to include wilful blindness.[301] But, under s 5.3 of the *Criminal Code*, knowledge is defined in terms that do not include wilful blindness.

Consider and contrast the interpretation and application of the requirement of knowledge under s 79 of the *Corporations Act 2001* (Cth) by Santow J in *Adler v ASIC*:[302]

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298 (1989) 17 NSWLR 618.

299 (1989) 17 NSWLR 618 at 620.

300 See E Griew, 'Consistency, Communication and Codification: Reflections on Two Mens Rea Words', in P Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, Stevens, London, 1978, p. 57, p. 72: 'The present judicial approach [in the UK] … is obscurantist. It permits information to the jury as to how they may (if they choose) detect what they seek, but leaves them to determine for themselves the full specification of the thing sought.'

301 The difficulties discussed here are not resolved by the discussion of *R v Schipanski* in *R v Dykyj* (1993) 29 NSWLR 652.

302 *ASIC v Adler* (2002) 41 ACSR 72, [209]. See also *Crooks* [1981] NZLR 53, 59.

'Knowledge may be inferred from the fact of exposure to the obvious, though that does not obviate the need for actual knowledge of the essential facts constituting the contravention; *Georgianni v The Queen* (1985) 156 CLR 453, 505–8 (Wilson, Deane and Dawson JJ). That is further explained, in words which I would adopt, from Burchett J in *Richardson & Wrench (Holdings) Pty Ltd and Anor v Ligon No. 154 Pty Limited* (1994) 123 ALR 681, 693–4:

> "the passage which was cited in *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364 at 351; 110 ALR 484 at 492 from the advice of Lord Sumner in *The Zamora No 2* [1921] AC 801 at 812-13, distinguishing between the senses in which 'a man is said not to know something because he does not want to know it', is instructive. The sense which condemns, according to Lord Sumner, is that which indicates that the man really does know, but wishes to avoid:
>
> > 'full details or precise proofs ... because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his *further* ignorance, even though actual and complete, is a mere affectation and disguise ... Mr Banck understood it very well, so well that he knew where to draw the judicious line between scanty *but sufficient* information and undeniable complicity. *Knowledge* being proved, no opinion need be expressed as to the effect of presumptions in the present case [emphasis added].'
>
> This is not constructive, nor is it imputed, knowledge; it is actual knowledge reduced to a minimum by the defendant's wilful act, and the point of the case was that the minimum of actual knowledge was enough: see also *R v Crabbe* [1985] HCA 22*;* (1985) 156 CLR 464, 450–1; 58 ALR 415.""'

The approach taken by Santow J in *Adler v Asic* and Burchett J in *Richardson & Wrench (Holdings) Pty Ltd v Ligon No 154 Pty Ltd* spells out when it is legitimate to infer knowledge or belief in a situation where D has deliberately refrained from making further inquiry. That approach is consistent with the definition of knowledge in s 5.3 of the *Criminal Code*. It is also consistent with the now well-established proposition that wilful blindness is not to be equated with belief.

For the reasons given above, our conclusion is:

- the requirement of knowledge or belief under ss 44ZZRF(2) and 44ZZRG(2) requires actual knowledge or belief;

- the *Schipanksi* approach of instructing a jury that it may "infer" knowledge from wilful blindness is loose, misleading and prejudicial and should not be followed;

- the approach taken by Santow J in *Adler v ASIC* should be followed in cases where it is necessary to explain to a jury the significance of a failure by D to make further inquiry where a further inquiry could or perhaps should have been made - it is unnecessary and prejudicial to refer to the discredited and tendentious notion of wilful blindness.

4.4.4 Degree of detail of which D must be aware in order to know or believe that the contract, arrangement or understanding contains a cartel provision

How detailed must D's awareness of the relevant facts be to amount to knowledge or belief that a contract, arrangement or understanding contains a cartel provision?

These appear to be the main contours:

- D need not necessarily know or believe that the relevant provision is a provision for price fixing, reduction of output, allocation of markets or bid-rigging. On the wording of ss 44ZZRF(2) and 44ZZRG(2), it is sufficient that, on the facts as D knows or believes them to be, the provision is 'a cartel provision'.[303]

- D need not necessarily be aware of the particular provisions constituting the alleged contract, arrangement or understanding or the particular provision that is a cartel provision.[304] It is sufficient that, on the facts as D knows or believes them to be, there is a provision in the contract, arrangement or understanding and that provision amounts in law to a cartel provision.

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[303] Compare the position at common law for complicity where D is reckless that an offence within a range of possible offences will be committed but does not know what the particular offence is: see *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140.

[304] For liability as an accomplice, D can know the 'essential matters' constituting the principal offence without necessarily having knowledge of the particular means used to execute a criminal enterprise; see *R v Bainbridge* [1960] 1 QB 129; *Ancuta* (1990) 49 A Crim R 307; *Australian Competition and Consumer Commission v Mayo International Pty Ltd* [1998] FCA 937. It is difficult to see why the requirement of knowledge should be more exacting in the case of principal offenders.

- D need not necessarily be aware of the identity of other parties to the contract, arrangement or understanding or the identity of other employees who are implicated in the making of the contract or arrangement or the arriving at of an understanding.[305] Similarly D need not necessarily be aware of other circumstantial details of the offence, including the particular time or location at which prices are to be fixes, output is to be reduced, customers, suppliers or territories are to be allocated, or bids are to be rigged.[306]

- It is insufficient that D believes merely that there is an agreement with a competitor not to compete. The facts as D knows or believes them to be must indicate that a provision in the agreement provides for price fixing, reduction of output, allocation of customers, suppliers or territories, or bid-rigging. Merely to know or believe that there is a non-compete provision in the contract, arrangement or understanding is not to know or believe that the provision relates to a form of cartel conduct prescribed by the definition of a cartel provision in s 44ZZRD.

- It is insufficient that D believes that the contract, arrangement or understanding contains a provision that has the purpose or likely effect of substantially lessening competition in a market. The test is whether, on the facts as D knows or believes them to be, there is a provision in the contract, arrangement or understanding that amounts in law to a cartel provision. The proposition established in *R v Bainbridge*[307] and other cases that liability as an accomplice requires D to know only the *type* of offence to be committed has no application to ss 44ZZRF(2) or 44ZZRG(2).[308]

The question of whether or not D needs to appreciate the legal significance of the facts within his or her knowledge or belief is discussed in s 4.4.6 below.

4.4.5 Mistake of fact

Situations will arise where D makes a contract or arrangement or arrives at an understanding and is mistaken about or ignorant of the fact that a provision in the contract, arrangement or

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[305] *Kennedy v Sykes* (1992) 24 ATR 546, 551 (D need not be aware of all the mechanical details of the venture or the identity of all participants - it is sufficient that he or she is aware of 'the general nature of the transaction').

[306] *Kennedy v Sykes* (1992) 24 ATR 546, 551.

[307] [1960] 1 QB 129.

[308] In any event, the breach of the civil penalty prohibition in s 45(2) against agreements that have the likely effect of substantially lessening competition in a market is not an offence.

understanding is a cartel provision. This situation falls within s 9.1 of the *Criminal Code* which provides that D is not criminally responsible for an offence where he or she has a mistaken belief or is ignorant of facts and the existence of that mistaken belief or ignorance negates a fault element. In the type of situation put, D's mistaken belief or ignorance will negate the fault element of knowledge or belief under ss 44ZZRF(2) and 44ZZRG(2).

It is irrelevant under s 9.1 that, on the facts as D believed them to be, he or she is committing some offence other than the cartel offence alleged or is engaging in conduct that is 'morally wrong'.[309] There is no requirement under s 9.1 that D's state of mind must be 'innocent'. [310]

What if, on the facts as D believes them to be, but not in reality, the conduct is covered by an exception (e.g. the authorisation exception under s 44ZZRM; the exclusive dealing exception under s 44ZZRS; or the joint venture exception under ss 44ZZRO)?

Assume that Warbucks, a procurement manager of GUNSCO-OP, proceeds with a round of collective bargaining for the supply by BIGBORE of automatic weapons on the basis of advice by Annie, GUNSCO-OP's in-house counsel, that GUNSCO-OP has filed a collective bargaining notification with the ACCC a month ago and that the ACCC has not objected. Annie was confused at the time and no collective bargaining notification had been filed with the ACCC. Alternatively, assume that Warbucks acted on incorrect information from Annie, or from another usually reliable source, that the conduct had been authorised by the ACCC. Is Warbucks nonetheless liable? [311]

The *Criminal Code* does not deal with this kind of situation; there is a lacuna.[312] Does this leave open the possibility of applying the common law presumption that mens rea is required[313] to the exceptions in Division 1 of Part IV of the TPA and, if that presumption is rebutted, the further common law presumption that the common law defence of reasonable mistaken belief is

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[309] Compare *Prince* (1975) LR 2 CCR 154.

[310] Standard formulations of the *Proudman v Dayman* defence of reasonable mistaken belief require the relevant conduct or state of affairs to be 'innocent' on the facts as D believes them be. See further B Fisse, *Howard's Criminal Law*, 5th edn, Lawbook Co, Sydney, 1990, pp. 518–22.

[311] It is unlikely that Annie would be liable for complicity. Assuming that she made a mistake of fact not law, she lacks intention (see s 11.3(a) of the *Criminal Code*) and does not know of the essential matters constituting the principal offence (as required at common law or for being knowingly concerned under s 79 of the TPA or Exposure Draft Bill).

[312] The *Criminal Code* defines the physical elements and fault elements of offences but not those of defences. On the limited extent to which courts can apply common law principles when interpreting the Code, see S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, pp. 3–4. See further I Leader-Elliott, 'Cracking the *Criminal Code*: Time for Some Changes', Paper presented at the Federal Criminal Justice Forum, September 2008, Canberra, at http://ssrn.com/abstract=1339727, last viewed 23 March 2009.

[313] See *He Kaw Teh v The Queen* (1985) 157 CLR 523.

available?[314] The common law presumptions have no apparent application given that the *Code* principles of fault are intended to apply to offences under the TPA.[315] Unless the common law presumptions apply and one or other is not rebutted by the statutory wording or context, then absolute liability will apply in relation to a mistaken belief that an exception applies. In our view, the TPA should be amended so that the fault element of knowledge or belief applies not only to the physical elements specified in s 44ZZRF(1)(b) and s 44ZZRG(1)(a) but also to the elements of the exceptions under Subdivision D of Division 1 of Part IV. [316]

There is no requirement that D be aware of the factual or legal basis on which an exception applies. Neither the *Criminal Code* nor the TPA requires that D know or believe that the relevant conduct and circumstances are covered by, for example, the exclusive dealing exception or the joint venture exception.[317] This generosity may be unintended, but is nonetheless welcome given that almost all employees in corporations are not trade practices lawyers and know nothing about Subdivision D of Division 1 of Part IV of the TPA.

4.4.6 Knowledge or belief relates to facts not law

The requirement of knowledge or belief under ss 44ZZRF(2) and 44ZZRG(2) relates to relevant facts, not the legal significance of facts. The basic rules are well-known:

- Ignorance or mistake of law is no excuse.[318] For example, it is irrelevant that D may think that price fixing is not an offence because he believes that the resulting prices will be 'reasonable.' [319]

- It is irrelevant to liability that a mistake of law stems from reasonable reliance on legal or official advice.[320]

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[314] See *Proudman v Dayman* (1941) 67 CLR 536; *CTM v The Queen* [2008] HCA 25.

[315] TPA s 6AA; *Criminal Code* (Cth) s 2.1. See further *R v Lee* [2007] NSWCCA 71.

[316] The latter are not 'physical elements': under the *Criminal Code* (Cth) s 4.1 the term 'physical element' relates to offences but not to defences, exemptions or exceptions.

[317] Contrast *Dadson* (1850) 4 Cox CC 358; R Christopher, 'Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence', *Oxford Journal of Legal Studies*, vol. 15, 1995, p. 229. .

[318] *Criminal Code* (Cth) s 9.3; *Ostrowski v Palmer* (2004) 218 CLR 493, [1]-[4] (Gleason CJ and Kirby J). For a detailed constructive critique of s 9.3 of the *Criminal Code* see I Leader-Elliott, 'Cracking the *Criminal Code*: Time for Some Changes', Paper presented at the Federal Criminal Justice Forum, Canberra, September 2008, Canberra, at http://ssrn.com/abstract=1339727, last viewed 23 March 2009.

[319] Compare *A-G (Cth) v Associated Northern Collieries* (1911) 14 CLR 387; (1913) 18 CLR 30; *US v Trans-Missouri Freight Association*, 166 US 290 (1897); *US v Trenton Potteries Co*, 273 US 392 (1927); *US v Socony Vacuum Oil Co*, 310 US 150 (1940).

[320] *Ostrowski v Palmer* (2004) 218 CLR 493, especially [53]-[59] (McHugh J).

- D need not necessarily be aware or believe that the conduct in issue is unlawful.[321] The requisite knowledge or belief is present if, on the facts as known or believed by D, the elements of liability are satisfied.[322]

- It is unnecessary to know or believe that the facts in issue are capable of characterisation in the language of the statute: [323] For example, in the context of price fixing, D need not know that the alleged cartel provision was likely to control a price; it is sufficient that, on the facts known to D, the provision was likely (as a matter of objective evaluation) to control a price.

- D need not be aware of the physical or fault elements constituting an offence.[324] However, a mistaken belief that 'it is safe to proceed' is insufficient to inculpate D.[325] The test is whether or not, on the facts as D knows or believes them to be, there is a provision in the contract, arrangement or understanding that amounts in law to a cartel provision

- A 'cartel provision' is a compound of law and fact. When will a belief that there is no cartel provision be treated as one of law and not fact? Consider this example:

> P, the CEO of GOCO genuinely believes that a new supply agreement with a competitor does not contain a 'cartel provision.' She has been told by Q, the company's in-house lawyer, that QC, a barrister, has advised that 'there is no cartel provision in the agreement.' The advice is wrong. P has not read the provisions of the supply agreement. Nor has she read the QC's advice. If asked 'why did you believe there was no cartel provision in the contract?' P's answer is: 'My company delegates the legal review of contracts to lawyers, who are paid to do the job well. I had no idea what particular provisions were in the

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321 *Ostrowski v Palmer* (2004) 218 CLR 493, [1] (Gleason CJ and Kirby J).

322 *Ostrowski v Palmer* (2004) 218 CLR 493, [10] (Gleeson CJ and Kirby J), [41] (McHugh J).

323 *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53, [48] (Gummow, Hayne & Heydon JJ); *The Queen v Tang* [2008] HCA 39. The discussion in *Rural Press* is very limited and does not address the real complexity that arises in the context of the prohibition against agreements likely to substantially lessen competition in a market. What exactly are the facts that D must be aware of given that the application of the substantial lessening of competition test may turn on many factors, including particular competitive effects, that few managers are likely to be aware of? See *Commerce Commission v New Zealand Bus Ltd* [2007] NZCA 502, especially [263]-[264] (Arnold J). In some situations D may be reckless, but recklessness is a lesser fault element and does not amount in law to knowledge or belief.

324 *Ostrowski v Palmer* (2004) 218 CLR 493, [1] (Gleason CJ and Kirby J).

325 Compare *R v Lavender* (2005) 222 CLR 67, [59] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

> contract. I was aware only of the main commercial heads of agreement.' The heads of agreement of which P is aware do not include the cartel provision that is in the contract. In this example, P has not made an underlying error of law. Accordingly, her mistaken belief that there is no cartel provision is to be treated as one of fact[326] and will exculpate her.

> By contrast, if P is a fuss-pot and watches over Q and QC closely, she may easily fall into a trap. If she reads QC's advice, then almost certainly she will become aware of: (a) the fact that the contract contains the relevant provision; and (b) enough information about that provision to indicate that it amounts in law to a cartel provision. If so, she is done for. Her honest mistaken belief that the contract does not contain a cartel provision will be a mistake about the legal relevance of facts and, given that even a reasonable mistake of law is no excuse, will be irrelevant to liability for committing an offence against s 44ZZRF.

Reasonable as well as unreasonable mistakes of law are to be expected as companies and their advisers grapple with the provisions defining the cartel offences. As noted in section 2 above, considerable uncertainty surrounds the meaning of a cartel provision as defined by s 44ZZRD. The Explanatory Memorandum does not resolve that uncertainty and is misleading in several significant respects.[327]

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[326] Contrast the facts and decision in *Ostrowski v Palmer* (2004) 218 CLR 493 where the elements of the offence charged were present on the facts known to D. On mistaken belief as to a matter of mixed law and fact see: *Ostrowski v Palmer* (2004) 218 CLR 493, [35] (McHugh J), [87] (Callinan and Heydon JJ); S Odgers, *Principles of Federal Criminal Law,* Lawbook Co, Pyrmont, NSW, 2007, pp. 79–81; B Fisse, *Howard's Criminal Law*, 5th edn, Lawbook Co, Sydney, 1990, pp. 506–10. See further G Williams, *Criminal Law: The General Part*, 2nd edn, Stevens & Sons, London, 1961, pp. 160–2.

[327] For example, it is stated in [4.8] of the Explanatory Memorandum that 'Exceptions are included in the Bill to ensure that the prohibitions do not prohibit legitimate business activities that are beneficial to the economy or in the public interest.' This statement is misleading because it suggests that the exceptions are effective to achieve that objective when they are not; see section 2.3 above. Another example is the engendering of false hope in the discussion of supply agreements between competitors (at p. 13): this discussion is obscure and misleading; see section 2.3 above and Example 5 in Attachment 1.

5. CONCLUSION – ELEMENTAL PATHOLOGY RESULTS[328]

5.1 Cartel provision

The definition of a 'cartel provision' is far-reaching and does not limit the scope of the cartel offences to conduct that is anti-competitive. Indeed, as is evident from the examples set out in Attachment 1, s 44ZZRD(2) and (3) are over-eaters and given to consume harmless or pro-competitive conduct. Authorisation usually is an impractical solution in cases of over-reach or uncertainty; this is partly because authorisation applications are elective surgery and not covered by Medicare. The underlying problem is the defective gene pool from which s 44ZZRD and related provisions have been drawn. The provisions in ss 45A(1) and 4D have recessive genes that require correction before cloning definitions of serious cartel conduct. The new-born s 44ZZRD is likely to require years of palliative care. See section 2 above and the examples set out in Attachment 1.

5.2 Contract, arrangement or understanding

The DNA structure of an 'understanding' has eluded discovery in Australia largely because it has been thought to exist within the framework of a 'spectrum of dealings'. See section 3.2 above. A more helpful approach is to map out the conceptual boundaries of an 'understanding' by comparing the approaches taken under US and EC law. From that perspective, in the context of civil liability there is much to be said for extending the concept of an 'understanding' to include a 'concerted practice' based on Article 81(1) of the EC Treaty. It is questionable whether the same approach should be adopted in the context of the cartel offences. See section 3.3 above.

Traces of the concept of a 'concerted practice' are discernible in the ACCC's recent proposals for amending s 45 of the TPA so as to omit the requirement of a commitment and encourage the court to find an 'understanding' by inference from factual matters, including those matters listed by the ACCC. The ACCC's proposals do not define or redefine the concept of an 'understanding' but instead advocate a therapy of thinking consciously about a list of factors. The therapy recommended is aimless and the factual matters in the list are ill-defined, highly selective and, in some instances, vacuous. The test we have conducted shows that the ACCC proposals are misconceived. It is unclear from any public source whether or not the proposals are intended to apply to the cartel offences and the civil prohibitions under s 44ZZRJ and 44ZZRK. In our view they should not be adopted in any context. See sections 3.3 and 3.4 above.

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[328] Compare *US v Socony-Vacuum Oil Co*, 310 US 165, 225, n. 59 (1940) ('[cartel arrangements] are all banned because of their actual or potential threat to the central nervous system of the economy').

5.3 Fault elements

The fault elements of the cartel offences are complex, which explains the length and detail of our dissections in section 4 above. The offences have multiple physical elements in relation to each of which there is a requisite fault element. Some fault elements are implied by operation of the default fault provisions in the *Criminal Code*. The one explicit fault element is that D must know or believe that the relevant contract, arrangement or understanding contains a cartel provision. This fault element is explicit only in a high-level sense: given the multi-veined nature of a cartel provision, the element of knowledge or belief about a cartel provision is a cluster of implicit fault elements: see section 4.3.1 above.

Superficially, the main particular fault elements that apply - intention, knowledge and belief – may seem free from difficulty. However, there are deeper issues. One is the elusive meaning of the concept of 'belief', as in cases where D 'thinks' that the relevant contract, arrangement or understanding contains a cartel provision but is not confident and has some considerable doubt: what degree of certitude is required before D can be found to hold a 'belief'? Another issue is the status of 'wilful blindness'; the diagnosis in section 4.4.3 above is that this concept is loose, misleading and prejudicial but easily avoidable.

It should not be assumed that the process of inferring intention, knowledge or belief from circumstances will be as easy as is often the case for other types of crime, including offences relating to the importation of prohibited drugs. Only in the most blatant cases of price fixing or market sharing will there be no conceivable legitimate explanation for the conduct. As discussed in section 3.4.2 above, in other situations there may easily be some plausible explanation and the explanation may be supportable and supported by expert economic evidence.

5.4 Jury directions

Our examination of the entrails of the cartel criminalisation legislation and the public documents from which that legislation has emanated has not revealed any sign of how the cartel offences are to be reflected in jury directions. For example, what would be an appropriate direction on the requirement under ss 44ZZRF(2) and 44ZZRG(2) that D knew or believed that the contract, arrangement or understanding contained a cartel provision? How exactly should the multiple prongs of this element be communicated to a jury? Unless the elements required

for liability can be conveyed to juries in a readily comprehensible way, verdicts are likely to be based on non-legal conceptions of what amounts to cartel conduct.[329]

The need to work backwards from the question of how juries will be directed was emphasised by Greenwood J in his commentary, 'Considerations to be taken into Account in Framing a Cartel Offence', at a competition law conference in May 2008:[330]

> '2. Where an indictable offence is framed in legislation, it *must* be defined in a way that is capable of explanation to a jury because an indictable offence is, by definition, a trial upon indictment before a jury.
>
> 3. Jurors often lack any real experience in critical or analytical thinking within a legal or commercial framework and are not accustomed to extended periods of concentration on relatively abstract matters.
>
> 4. The formulation of the offence should try to avoid undue intersection with or reliance upon a cascading sequence of other sections or definitions, in isolating the content of the offence.'

Serious cartel conduct has been described as 'a cancer on the economy.'[331] However, much work remains to be done before the provisions in the CC&OM Bill are likely to act as a cure.

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[329] See further PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2nd edn, 2001, Aspen Law & Business, New York, p. 22 ¶1405; R Charrow and V Charrow, 'Making legal language understandable: A psycholinguistic study of jury instructions', *Columbia Law Review*, vol. 79, 1979, p. 1306. The jury instructions in US criminal antirust trials (e.g. Gary Swanson, Michael Andreas; see generally ABA, *Model Jury Instructions in Criminal Antitrust Cases* (2009)) give some guidance but the elements of the cartel offences are much more complex than the elements required for liability under s 1 of the *Sherman Act*. Nor are the cartel offences closely similar to the offence of conspiracy – consider the relatively simple model direction on conspiracy in Victorian Criminal Charge book, 6.1, available at http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm , last viewed 7 April 2009.

[330] 'Considerations to be taken into Account in Framing a Cartel Offence', Paper presented at the Competition Law Conference, 24 May 2008, Sydney, at www.fedcourt.gov.au/aboutct/judges_papers/speeches_greenwoodj4.rtf, last viewed 23 March 2009.

[331] G Samuel, 'Cracking Cartels', Paper presented at the Cracking Cartels: Australian and International Developments Conference, 24 November 2004, Sydney, at http://www.accc.gov.au/content/index.phtml/itemId/607077, last viewed 23 March 2009.

ATTACHMENT 1

EXAMPLES OF OVER-REACH

Example 1

Assume that a hurricane strikes Cairns and is causing extreme flooding and devastating damage to public and private buildings and other facilities. Building contractors, concerned about by the delay or insufficiency of governmental action, stop competing with each other and create an recovery program under which they agree immediately to deploy all their resources on agreed priority recovery projects. Valuable or essential as this private sector initiative is, one substantial purpose is to restrict supply and is caught by s 44ZZRD(3)(a)(iii) and s 4D. The contractors invite ACCC staff in Brisbane to join the reconstruction team and to help process applications for assistance.

Example 2

Assume that a local television blackout of a sporting event is imposed in order to attract the crowds necessary to make the event commercially feasible. Such conduct appears to involve an exclusionary provision:[332]

> Suppose a group of horse racing clubs agree to allow closed-circuit telecasting of races to social clubs, hotels, motels, racetracks and other institutions but a term of the agreement is that local races are not to be telecast in the local area. The reason for this restriction is that the local horse racing clubs wish to retain racetrack crowds. Without such crowds, local race meetings would be less successful and it is not inconceivable that the subject matter of the telecast itself (that is, races) could cease to exist.
>
> All of the above reasons in favour of home town 'blackouts' have led to the conclusion in the US that such jointly agreed TV 'blackouts' are not anticompetitive. Indeed, the home town blackout restriction 'promotes competition more than it restrains it'. In Australia, a *per se* ban on such jointly agreed arrangements may, however, be the result. There is no doubt that the immediate purpose is to deny services to certain identifiable persons or institutions. There appears to be little doubt that the various horse racing clubs are competitive with each other (they compete for sponsorships, entries and prize money offered and, highly relevant in the present context, for TV coverage and payments for such coverage). While the blackout certainly does not substantially lessen

[332] W Pengilley, *Price Fixing and Exclusionary Provisions,* Prospect Media, St Leonards, NSW, 2001, pp. 104–5.

> competition between the horse racing clubs in those matters in respect of which they compete, this is not the relevant test for infringement of the Australian exclusionary provision legislation.

The conduct described in this example also appears to be caught by s 44ZZRD(3)(a)(iii) of the Bill – a substantial purpose is to restrict the supply of a service (the right to broadcast the sporting event locally) to local television stations.

In this example, as in others, it is possible to perform a vanishing trick on the immediate substantial purpose by shining the spotlight only on 'the end sought to be accomplished by the conduct'.[333] However, it is far from clear when such a vanishing trick might work.[334]

Example 3

Assume that competing aviation companies provide helicopter services for medical emergencies in rural areas at cost or on a subsidised basis. They arrange a system under which each agrees to provide a minimum guaranteed level of emergency transport services for patients in different geographical areas. All of the parties are free to provide additional services whenever they wish to do so, whether on a subsidised or full price basis. This allocation scheme is caught by s 44ZZRD(3)(b)(iii): one substantial purpose is to allocate the geographical areas in which services are supplied, or likely to be supplied.[335] The allocation scheme is also caught by s 4D: one substantial purpose is to restrict the supply of services to a particular class of persons (patients requiring air transport to hospital) in particular circumstances (where the competitor is not rostered to supply the service required in a particular area).

Example 4

Assume that A and B, two of 5 competing suppliers and installers of desalination plants in Australia, are requested by the NSW government to bid for several new plants. A manufactures distillation units. B manufactures pumps. A wants to use B's technology for the bid and B wants to use A's technology. They discuss supply arrangements for the bid and agree to supply

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[333] *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563, [18] (Gleeson CJ).

[334] See further I Wylie, 'What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond', *Australian Business Law Review*, vol. 35, 2007, p. 33, p. 42 ('the question remains whether, with the unusual advantage of recent consideration on two occasions by Australia's highest court, practitioners and businesses are now any the wiser as to what does and does not contravene the Act').

[335] The wording of s 44ZZRD(3)(a) and (b) is unqualified in any way that exempts roster schemes. Note 1 to s 44ZZRD states that 'subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.' However, an immediate and substantial purpose of roster schemes is to restrict the supply of services.

each other at a mutual discounted rate in order to improve each other's chance of winning the tender. The input cost of A's technology is a material component of B's bid. The input cost of B's technology is a material component of A's bid. Since the discounted rate applicable to A's technology and B's technology has been worked out in accordance with an arrangement between A and B, and the purpose is to implement that deal, the mutual discount provision is caught by s 44ZZRD(3)(c)(v). There is no joint venture between A and B and hence the joint venture exceptions under ss 44ZZRO and 44ZZRP do not apply.

Example 5

ACO, an Australian manufacturer of Product A, supplies Product A on reasonable commercial terms and conditions to BCO, CCO and numerous other companies with which ACO competes downstream in the Australian wholesale market for Product A and competing products. These supply arrangements are pro-competitive given that: (a) BCO, CCO and other companies are able to compete as wholesalers against ACO in relation to ACO's Australian-made Product A; (b) BCO, CCO and other companies are able to compete against each other in relation to ACO's Australian-made Product A and to compete more effectively against companies supplying imported similar products; and (c) the agreements do not include an exclusive dealing condition, a resale price maintenance restriction or any other condition on the freedom of BCO, CCO and the other companies to sell ACO's Product A however and wherever they wish.

The price charged by ACO for Product A obviously is a major input cost of the wholesale price to be charged for Product A by BCO, CCO and the other companies in competition with ACO. The supply price provision therefore "controls" that wholesale price; see *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 at [164]-[202]. Accordingly, the supply price provision is a price fixing provision, as defined in s 45A(1) of the TPA. It is possible that the provision may not control the price to be charged for Product A by ACO. However, that is irrelevant: the provision does control the price to be charged for Product A by BCO, CCO and other customers and it is sufficient that the competitors agree that the price to be charged by one of them will be controlled. [336]

[336] This is consistent with the wording of ss 45A(1) or 44ZZRD(2)(a) and the apparent legislative intention to avoid creating a loophole in situations where e.g. a price fixing agreement between two competitors relates only to the price to be charged by one competitor or where it may be difficult to prove that the price fixing provision controls the price to be charged by both parties. Assume that GCO competes with HCO in relation to Type G products. GCO threatens to expand its production of Type G products if HCO discounts the price it charges for Type G products. HCO agrees not to discount its price for Type G products and GCO agrees not to expand production of Type G products. In such a case it may be difficult or impossible to prove that the agreement is likely to control the price to be charged for Type G products by GCO. Such proof in unnecessary under the s 45A(1) definition of price fixing. The contrary has been suggested in I Tonking, 'Competition at Risk? New Forms of Business Cooperation', *Competition &*

The supply price provision is also a cartel provision, as defined by s 44ZZRD(2)(a) and (e) and (4) of the Bill. The reasoning parallels that set out above for price fixing under s 45(2) and s 45A(1) of the TPA.

The Explanatory Memorandum states (at p 13) that s 44ZZRD(2) is not intended to apply where a price is only "incidentally affected" and "where the price is otherwise established independently" and gives this example:

> "Company A, having a shortage of inputs for its manufacture of a good, seeks to source the inputs from Company B, a competitor in the market for the good. B agrees to produce the additional inputs and to provide them to A, at an agreed price.
>
> Provided there is no agreement between A and B regarding the price at which A sells the good concerned, the purpose/effect condition would not be met merely because of the reflection of the input price in the price of the good."

Example 5 does not involve the supply of an input for use in the manufacture of a product but the supply of a product that is to be re-supplied by a competitor. The price charged by ACO has an indirect effect on the price to be charged by BCO, CCO and other customers but it is difficult or impossible to say that the effect is merely "incidental". The definition of a cartel provision in s 44ZZRD(2) explicitly covers situations where a provision has the purpose or likely effect of controlling the price for "goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding" (s 44ZZRD(2)(e)).

Apart from the limited scope of the exception stated and the example given in the Explanatory Memorandum, the extent to which supply agreements between competitors are subject to per se liability should not depend on the vague notion of an "incidental effect", the obscure distinction between indirect and incidental effects, or the opaque qualification "where the price is otherwise established independently". The position should be governed by a clearly drafted statutory provision, not a makeshift rescue attempt in an explanatory memorandum.

Consumer Law Journal, vol. 10, 2002, p. 169, [54]–[55] on the basis that the words 'in competition with each other' that succeed the wording 'by any of them' in s 45A(1) indicate that the earlier words should be read as if they said 'or by any *two or more* of them', since there must be at least two competitors for there to be competition. However, it is difficult to reconcile that interpretation with the wording of s 45A(1) and the requirement that there be two or more competitors requires only that there be two or more competitors, not that the price fixing agreement must control the price to be charged by two or more competitors.

The anti-overlap provisions do not exclude Example 5 from per se liability. The supply price provision in ACO's supply agreements is not excepted by s 44ZZRS from per se liability for a cartel offence under s 44ZZRF or s 44ZZRG or for breach of the civil penalty prohibitions under s 44ZZRJ or s 44ZZRK: there is no exclusive dealing condition in the supply agreements.

Nor is there any other escape route short of the unrealistic possibility of applying for an authorisation. For example, the resale price maintenance exception under s 44ZZRR does not apply: the supply price provision is not a resale price maintenance provision. Nor is there a way out under the joint venture provisions in ss 44ZZRO(1) and 44ZZRP(1): there is no joint venture between ACO and BCO or any of the other companies to which ACO supplies Product A.

Example 6

XCO, an Australian manufacturer, agrees to supply Product D to YCO on condition that YCO agrees to supply Product E to XCO. YCO agrees to supply Product E to XCO on condition that XCO agrees to supply Product D to YCO. XCO and YCO compete against each other in the market for Product D, Product E and competing products. The reciprocal supply provisions are pro-competitive because they increase the ability of XCO and YCO to compete against major competitors in the market. Neither XCO nor YCO are prevented from deciding to acquire Product D or Product E from alternative sources at any time.

The reciprocal supply provisions are exclusionary provisions as defined by s 4D of the TPA. XCO and YCO compete with each other in relation to the relevant competing products. A substantial purpose of each reciprocal supply provision is to restrict the supply of a relevant competing product unless the condition of reciprocity is satisfied. It is irrelevant that the exclusionary purpose is conditional: an exclusionary purpose under s 4D may be conditional or unconditional. Nor can it be maintained that the "real" or "ultimate" purpose of each reciprocal supply provision is not an exclusionary purpose but a purpose to "act in the best interests of the market' or to "improve competition": if the purpose of a provision is to restrict the supply or acquisition of goods or services in the way prescribed by s 4D it is irrelevant whether or not the defendant believes that the restriction is in the best interests of the market or a way of improving competition.

Each reciprocal supply provision is also a cartel provision, as defined by s 44ZZRD(3)(a)(iii) and (4). A substantial purpose of the provision is to restrict or limit the supply or likely supply of goods or services to a person (YCO or XCO) by a party to the contract (XCO or YCO) – s 44ZZRD(3)(a)(iii).

The reciprocal supply provisions are not excepted by s 45(6) from per se liability for making a contract containing an exclusionary provision under s 45(2)(a)(i): they are not exclusive dealing conditions. Nor are the reciprocal supply provisions excepted by s 44ZZRS from per se liability for a cartel offence under s 44ZZRF or s 44ZZRG or for breach of the civil penalty prohibitions under s 44ZZRJ or s 44ZZRK: they are not exclusive dealing conditions.

Nor is there any other escape route short of the unrealistic possibility of applying for an authorisation. For example, the resale price maintenance exception under s 45(5)(c) and s 44ZZRR does not apply: the reciprocal supply provisions are not resale price maintenance provisions. Nor is there a way out under the joint venture provisions in ss 44ZZRO(1) and 44ZZRP(1): there is no joint venture between XCO and YCO but merely a reciprocal supply agreement.

ADDENDUM

COLLABORATIONS BETWEEN COMPETITORS UNDER THE CARTEL OFFENCE IN SECTION 45 OF THE *COMPETITION ACT 1986* (CAN)

In relation to n 50, the evidence of Mr Cassidy to the Senate Standing Committee on Economics, Parliament of Australia, Canberra, on 16 February 2009 was that:

> "From our point of view, we see the focus on contracts as we move into a criminal regime as being desirable. The reason for that is that we are aware, from overseas experience, that there have been instances where cartels have been dressed up as joint ventures in an effort to evade the law.
>
> We are particularly aware that this has happened in the Canadian case. Their law in this area is fairly similar to ours. It seemed to us that any genuine joint venture is likely to rest on some sort of contractual arrangement, be it written or oral. Once you start getting into somewhat looser things—a joint venture based on an arrangement or an understanding—you are starting to get into territory where creative people can use a joint venture to try and dress up and protect what is otherwise a cartel."

Upon seeking clarification from Mr Cassidy, he has indicated that:

> "This was a comment on the Canadian historical experience in seeking to prosecute cartel behaviour and is based on comments we have received from our colleagues in the Canadian Bureau of Competition.
>
> It was not a comment that the contract limitation in ss44ZRO and 44ZZRP of our Criminal Bill reflects the Canadian law."

We do not agree that, at the time of the Senate Economics Committee hearing, Canadian and Australian competition law was similar in relation to the treatment of joint ventures in the context of cartel conduct:

- the criminal prohibition under s 45(1) of the *Competition Act 1986* (Can) was then subject to a competition test, whereas the civil prohibitions against price fixing and exclusionary provisions under the TPA were (and remain) per se prohibitions; and

- the prohibition under s 45(1) of the *Competition Act* was not subject to a joint venture defence or exemption comparable to the defence under ss 76C and 76D of the TPA.

We do not seek to contradict Mr Cassidy's evidence that sham joint ventures have been used in Canada in an attempt to evade the law. But, according to the public documents explaining and leading up to the recent amendments to s 45 of the *Competition Act*, the prime concern recorded has been the unjustified exposure of commercially desirable joint ventures, strategic alliances and other collaborations to criminal liability under s 45(1), not the risk of sham joint ventures (see eg, Canada, Competition Policy Review Panel, *Compete to Win*, Final Report – June 2008, pp 58-59; Commissioner of Competition, Competition Bureau, Submission to the Competition Policy Review Panel, 11 January 2008 at pp 5-6).

Today, under s 45(4) of the *Competition Act*, the new per se cartel offence under s 45(1) is subject to a defence of ancillary restraint. The new per se offence and the defence of ancillary restraint have been discussed in Canada for many years and were recommended in 2002 in a parliamentary report (House of Commons Standing Committee on Industry, Science and Technology, Parliament of Canada, A Plan to Modernize Canada's Competition Regime (2002)

at pp 56-62). The recommendations were accepted by the Canadian Government in 2002 but were not enacted until March 2009.

Unlike the position under s 44ZZRO, the defence of ancillary restraint under s 45(4) of the *Competition Act* does not require the relevant restraint to be in a contract – the restraint may be in an agreement or an arrangement. Nor is the s 45(4) defence limited to joint ventures – it is available in relation to any conspiracy, agreement or arrangement between competitors. Unlike the joint venture defence under ss 76C and 76D of the TPA, the defence of ancillary restraint does not impose a competition test – the focus is on whether or not the restraint in question is ancillary to and reasonably necessary to give effect to a broader or separate legitimate agreement or arrangement between the parties. Unlike the joint venture exception under s 44ZZRO (but like ss 76C and 76D), the defence of ancillary restraint imposes a persuasive as well as evidentiary burden of proof on the accused.

The differences between Canadian and Australian law on the treatment of joint ventures in the context of prohibitions against cartel conduct, whether in the past, the present, or in the future if s 44ZZRO is enacted, are considerable. The differences are instructive, but the relative advantages and disadvantages of the amendments to s 45 of the *Competition Act* have not been considered in any public discussion paper relating to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008.

The requirement under the joint venture exception in s 44ZZRO that a cartel provision must be in a *contract* seeks to address a particular kind of sham joint venture where the parties try to dress up a naked cartel as an informal joint venture. However, there are other more sophisticated and potentially more effective kinds of sham or 'Mickey Mouse' joint ventures. Consider in particular the risk posed by what have been called 'jv ultra-lights',[337] ie joint ventures created on a contractual basis for the dominant purpose of evading a per se prohibition against cartel conduct and which are also calculated to achieve some efficiencies in order to create a substantial smokescreen. It is unclear under s 44ZZRO (and corresponding provisions) whether or not a cartel provision in a jv ultra-light contract is 'for the purposes of a joint venture'. The relevant wording is not (and could not sensibly be): "for the purposes of a joint venture and for no other purpose." Nor is the wording: "for the dominant purpose of pursuing efficiencies by means of a joint venture." The cartel offences under s 44ZZRF and 44ZZRG may thus be vulnerable to evasion by the use of jv ultra-lights.[338] By contrast, s 45(4) of the *Competition Act* (Can) addresses the jv ultra-light problem squarely by adopting a test of ancillary restraint derived from the well-developed concept of an ancillary restraint in US antitrust law and EU competition law.[339] Moreover, the defence of ancillary restraint under s 45(4) of the Canadian Act avoids the sterile and peculiar Australian mystery of what is meant by the wording 'for the purposes of a joint venture.'

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[337] Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, section 5.3.1 (B Fisse), available at: http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf.

[338] There are of course possible backstops - the civil prohibitions against exclusionary provisions and anti-competitive agreements will apply in some situations. However, the potential availabilty of those backstops does not explain why jv ultra-lights should escape criminal liability.

[339] There are some variations in approach, but the core concept is substantially the same.