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AUSTRALIAN CARTEL LAW:

RECENT DEVELOPMENTS

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I Australian cartel law – current issues and trends

1. Thanks are due, as ever, to Chris and Chrissy Hodgekiss for creating and sustaining this independent open forum on competition and consumer law. It is a privilege to be invited to participate.

2. This paper surveys various developments in Australian cartel law since the beginning of 2022. The topics are:

   - criminal cartel conduct ─ implications of the bank cartel prosecution (see Part II)
   - maximum fines and civil monetary penalties for cartel conduct ─ recent legislative escalation (see Part III)
   - application of civil monetary penalties and fines against corporations for cartel conduct (see Part IV)
   - cartel liability ─ counterfactual analysis in price fixing; overreach, underreach, complexity (see Part V)
   - individual and corporate liability ─ allocation of individual accountability; definition of corporate fault (see Part VI)
   - ancillary liability ─ attempted inducement of cartel conduct; sidewinder liability (see Part VII)
   - exceptions ─ increased relevance of authorisation (climate change, Covid-19, wide definition of 'cartel provision', limited scope of exceptions), meagre development of class exemptions and exceptions relating to joint ventures and supply contracts between competitors (see Part VIII)

- immunity – recurring questions; comparison of ACCC and CDPP cartel immunity policies with US DOJ cartel leniency policy after the changes to the DOJ policy in April 2022 (see Part IX).

3. Exclusions include:

- anti-competitive harms in a digital economy where cartel conduct remains a danger but is not the main perceived threat; [1]
- concerted practices (as in context of recommended prices,[2] market conduct by corporations with interlocking directors or common ownership,[3] and algorithmic market coordination[4]);
- non-monetary sanctions against corporations;[5]
- damages for cartel conduct;[6]
- Federal Court criminal practice and procedure;[7]

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1 See eg S Lamdan, *Data Cartels: The Companies that Control and Monopolize Our Information* (Stanford University Press, 2022); M Stucke, *Breaking Away: How to Regain Control Over Our Data, Privacy, and Autonomy* (OUP, 2022); P Armoogum, S Davies & F Mariuzzo, 'The Changing Face of Anti-Trust in the World of Big Tech: Collusion versus Monopolisation' (2022 46 Cambridge J of Economics 1455; A Portuese, 'The Rise of Precautionary Antitrust: An Illustration with the EU *Google Android* Decision', Competition Policy International, November 2019.

2 See D Canapa, 'Non-Binding "Recommended Price" as Concerted Practices' (2022) J of European Competition Law & Practice 435.

3 EB Rock & DL Rubinfeld, 'Common Ownership and Coordinated Effects' (2020) 83 Antitrust LJ 201; M Corradi & J Nowag (eds), *Intersections Between Corporate and Antitrust Law* (2023, Cambridge University Press), chs 9-13; CS Hemphill & M Kahan, '(2020) 129 Yale LJ 1392; A Fletcher, M Peitz, F Thépot. 'Introduction to Special Issue on Common Ownership and Interlocking Directors', (2022) 18(1) J of Competition Law & Economics 1.

4 See eg R Nicholls, 'Algorithm-driven collusive conduct' in D Healey, M Jacobs, & RL Smith (eds), *Research Handbook on Methods and Models of Competition Law* (Edward Elgar, 2020) ch 7; JD Chan, 'Algorithmic Collusion and the Australian Competition Law' (2021) 44 UNSW LR 1365 A Ezrachi & ME Stucke, 'Sustainable and Unchallenged Algorithmic Tacit Collusion' (2020) 17 Northwestern Journal of Technology and Intellectual Property 217; M Jablonskis, 'Concerted Practices: Concept and Evolution' (2022) 8 International Comparative Jurisprudence 13; M Gal, 'Limiting Algorithmic Coordination' (2023) 38(1) Berkeley Technology Law Journal (forthcoming).

5 See eg ALRC, *Corporate Criminal Responsibility* (2020) ALRC Report 136 347; B Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 Adelaide Law Review 285.

6 See eg L Edgar, 'Cartel class actions in Australia: Risks vs rewards' (2019) 27 AJCCCL 183.

7 See M Wigney, 'Practice and Procedure in the Criminal Jurisdiction of the Federal Court of Australia' (2022) 30 AJCCL 11.

- evidence and procedure relating to civil penalties;[8]
- compliance and liability control;[9] and
- attempts to evade cartel law.[10]

4. Acronyms:

- 'CCA' = *Competition and Consumer Act 2010* (Cth);
- 'CAU' = contract, arrangement or understanding;
- 'SLC' = substantial lessening of competition in a market.

II Criminal cartel conduct – Implications of the bank cartel prosecution

A CDPP v Australia and New Zealand Banking Group Ltd, Citigroup Global Markets Australia Pty Limited, Deutsche Bank AG, and six senior executives[11]

5. Cartel offences in Australia were enacted in 2009.[12] Cartel prosecutions took many years to emerge but now proliferate.[13] The recent prosecutions include that against Australia and New Zealand Banking Group Ltd ('ANZ"), Citigroup Global Markets Australia Pty Limited ('Citigroup'), Deutsche Bank AG (Deutsch), and six senior executives in relation to part of an IPO to raise $2.5 billion for ANZ. The case arose from an immunity application by JP Morgan, one of the underwriters of the IPO.[14] The

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8 See eg CH Truong & M Peckham, 'Civil Penalty Proceedings: A Practitioner's Guide', 15 September 2022, at: https://foleys.com.au/resources/20220915%20Civil%20Penalty%20Proceedings%20Paper.pdf.

9 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) ('*Australian Cartel Regulation*'), ch 12; B van Rooij and D Sokol (eds), *Cambridge Handbook of Compliance* (Cambridge, Cambridge University Press, 2021).

10 See eg WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) chs 4–5; C Leslie, 'How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence' [2021] Univ of Illinois LR 1199; J Nussim & AD Tabbach, '(Non)Regulable avoidance and the perils of punishment' (2008) 25 European Journal of Law and Economics 191; JW Coleman, 'Law and Power: The *Sherman Antitrust Act* and Enforcement in the Petroleum Industry' (1985) 32 *Social Problems* 264, 268–70.

11 See *Commonwealth Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511; *Commonwealth Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd (No 5 Indictment)* [2021] FCA 1345; *Commonwealth Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd (No 6*) [2021] FCA 1383.

12 *Australian Cartel Regulation*, 3-7.

13 Excuses for the long gestation period are given in 'Criminalisation of cartels and bid-rigging conspiracies – Note by Australia,' OECD, 9 June 2020, [60] at: https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)8/en/pdf

14 See 'Flipping suspects: How cartel prosecutors cracked the investment banking 'omerta'', 8 June 2018, at: https://www.linkedin.com/pulse/flipping-suspects-how-cartel-prosecutors-cracked-investment-lynch/; 'What happens when the masters of the universe turn on each other', *Crikey*, 4 June 2018; 'Shock twist in bank cartel case', *AFR*, 22 March 2019.

charges were laid on 5 June 2018. The accused were committed for trial in the Federal Court on 8 December 2020. In July 2021, the Federal Court held that the indictment was defective [15] The indictment was amended. In November 2021, the Federal Court held that the indictment remained defective.[16] As that judgment was about to be published, the CDPP notified the Court that it did not intend to proceed against the ANZ and the ANZ executive who had been charged.[17] The prosecution against all the accused was withdrawn by the CDPP in February 2022.[18]

6. Controversy surrounds the bank cartel case.[19] Rockets of varying payload and accuracy have been fired. These have been detected:

- the collapse of the prosecution was a devastating knock to the reputation of the ACCC and CDPP in the media;[20]
- the banks had a pyrrhic victory given the adverse publicity, financial and opportunity costs, trauma, and high voltage compliance jolt they experienced;[21]

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15 *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd (No 1 – Indictment)* [2021] FCA 757.

16 *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd (No 5 Indictment)* [2021] FCA 1345.

17 [2021] FCA 1345, Summary. See also 'Australia drops banking cartel case against Deutsche Bank and Citigroup,' *Financial Times*, 11 February 2022.

18 Commonwealth Director of Public Prosecutions, 'Banking Cartel Prosecutions Discontinued', Media Release, 11 February 2022, at: https://www.cdpp.gov.au/news/banking-cartel-prosecutions-discontinued. Compare the collapse of the cartel trial in the prosecution of BA executives in the UK; 'OFT under fire over whistleblowers after BA price-fixing trial fails', *The Guardian*, 12 May 2010, at: https://www.theguardian.com/business/2010/may/11/competition-oft-defends-whistleblower-policy

19 See eg A Zheng, 'Two Steps Forward, Four Steps Back: Threats Facing Australian Criminal Cartel Convictions after Country Care and ANZ' (2023) 31 AJCCL 29. The ACCC reportedly has reviewed the conduct of the case but the outcome and recommendations are not the subject of public account; see 'ACCC launches review of failed ANZ cartel case', *Australian Financial Review*, 17 February 2022.

20 See eg, 'Reputations riding on bank cartel case', *AFR*, 12 January 2022, 40; 'ACCC bank cartel case collapses,' *AFR*, 12-13 February 2022, 40.

21 The industry has a lot of form; see eg A Ferguson, *Banking Bad* (ABC Books, 2019); 'Did JP Morgan rat out fellow bankers in a criminal cartel case in Australia?' *Wall Street on Parade*, 5 July 2018, at : https://wallstreetonparade.com/2018/07/did-jpmorgan-rat-out-fellow-bankers-in-a-criminal-cartel-case-in-australia/; FCA, Press Release, 'FCA issues its first decision under competition law', 21 February 2019, at: https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law; European Commission, 'Amended - Antitrust: Commission fines banks €1.49 billion for participating in cartels in the interest rate derivatives industry,' 4 December 2013, at: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1208; European Commission, 'Antitrust: Commission fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 billion for participating in foreign exchange spot trading cartel,' 16 May 2019, at: https://ec.europa.eu/commission/presscorner/detail/hu/IP_19_2568; 'European Commission fines investment banks for collusive behaviour involving government bonds cartel', 4 August 2021, at: https://cleveland-co.com/european-commission-fines-investment-banks-for-collusive-behaviour-involving-government-bonds-cartel/.

- the enforcement action against underwriters for cartel conduct was unprecedented in Australia and a surprise to the underwriters and the business community;[22]
- the ACCC failed to put the underwriting industry on notice or to consult with the industry and resolve the issue in a much less drastic way;[23]
- civil proceedings at most should have been brought, not criminal proceedings;
- test cases on previously untested material questions of cartel law should be brought against corporations, not individuals;[24]
- the process used by the ACCC for gathering and presenting evidence was flawed;[25]
- the handling of the case by the CDPP, including the way the indictment was drawn up, was inept;[26]
- the immunity policies of the ACCC and CDPP generated weak and unsatisfactory evidence;[27]
- the delay in the case was extreme and unjust, especially to the 6 individual accused;[28]

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22 See 'Australia drops cartel case against banks,' *International Financing Review*, 11 February 2022, at: https://www.ifre.com/story/3248244/australia-drops-cartel-case-against-banks-04l3gj3z7h; 'ANZ's bankers were more Keystone Cops than Criminal Cartel', *Bloomberg News*, 6 June 2018. Cartel issues arise frequently in bail outs in the banking industry; see eg Morgan Lewis, 'Silicon Valley Bank Shutdown: Antitrust Considerations', 13 March 2023, at: https://www.morganlewis.com/pubs/2023/03/silicon-valley-bank-shutdown-antitrust-considerations. Cartel prohibitions potentially relate to a wide range of securities transactions; see H Hovenkamp, 'Antitrust Violations in Securities Markets' (2003) 28 Journal of Corporation Law 607. However, in the US, federal securities law pre-empts antitrust law in some major contexts; see *Credit Suisse Securities (USA) LLC v Billing*, 551 US 264 (2007).

23 'Valuable lessons from the ACCC's cartel case error', *AFR*, 12-13 February 2022, 38.

24 See 'Tireless defence by lawyers felled criminal cartel case against banks', Arnold Bloch Liebler, 14 February 2022, at: https://www.abl.com.au/insights-and-news/tireless-defence-by-lawyers-felled-criminal-cartel-case-against-banks/

25 See 'ACCC's internal evidence gathering processes in the ANZ cartel case 'inadequate for the task': Maddocks partner Shaun Temby,' *The Australian*, 2 March 2022.

26 *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd (No 5 Indictment)* [2021] FCA 1345. See also 'Federal Court slams criminal case against ANZ as a 'complete shemozzle'', ABC, 3 November 2021, at: https://amp.abc.net.au/article/100590248 .

27 See 'Immunity in the dock', *Inside Story*, 10 June 2021, at: https://insidestory.org.au/immunity-in-the-dock/

28 See 'Cartel case executives count the cost', *AFR*, 13 February 2022, at: https://www.afr.com/rear-window/cartel-case-executives-count-the-cost-20220213-p59w1f; 'ACCC criminal cartel case abandoned after 6 years: who counts the human cost?', Russell McVeagh, 25 February 2022, at: https://www.russellmcveagh.com/insights/february-2022/accc-criminal-cartel-case-abandoned-after-6-years-who-counts-the-human-cost

- the definition and application of cartel offences are too complex to work in criminal cases – the offences need to be redrafted and simplified;[29] and
- the prosecution should not have been brought because the case depended on the misconceived definition of the joint venture exception under s 44ZZRO, a section roundly criticised since 2009 and repealed in 2017 before the charges were laid.[30]

7. The discussion below addresses the last and perhaps the most fundamental criticism, which questions the central theory of the case prosecuted. What theory of the case was implicit in the indictment? Was that implicit theory well-conceived? What would happen in the event of a replay of the prosecution today?

B Theory of the case implicit in the indictment

8. What theory of the case was implicit in the indictment? What was going on?

9. The charges in the indictment all related to or arose out of three arrangements or understandings allegedly made or arrived at between Citigroup, Deutsche Bank and J.P. Morgan:[31]

- the 'Friday Understanding' on about 7 August 2015 ─ the substance or effect of the arrangement or understanding was alleged to have been that "for the remainder of Friday 7 August 2015, each of the Investment Banks [Citigroup, Deutsche Bank and J.P. Morgan] would restrict its trading in [ANZ] Shares so each Investment Bank would not, by the end of the trading day, reduce the net number of ANZ Shares it held".[32]
- the '5%-7% Understanding' between about 7 August 2015 and about 8 August 2015 ─ the arrangement or understanding was to the effect that "from Monday 10 August 2015: (1) Each of the Investment Banks would limit [their] trading in [ANZ] shares by selling, on each day, no more than 7% of the average daily

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29 *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 5 – Indictment)* [2021] FCA 1345, [246]. See also 'Unfit for purpose criminal cartel laws need a radical rewrite', *AFR*, 16 February 2022, at: https://www.afr.com/companies/financial-services/unfit-for-purpose-criminal-cartel-laws-need-a-radical-rewrite-20220215-p59wps

30 Alluded to in 'Banks have firewall for ANZ cartel cases, say lawyers', *Australian Financial Review*, 13 February 2022, at: https://www.afr.com/companies/financial-services/banks-have-firewall-for-anz-cartel-cases-lawyers-20220213-p59w1q. For the full background see *Australian Cartel Regulation*, 6, 274-282; *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (s 45AO & s 45AP joint venture exceptions).

31 *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd (No 1 – Indictment)* [2021] FCA 757, [36].

32 [2021] FCA 757, [37].

volume of the trade in ANZ shares (with the aim of not exceeding 5%); and (2) If on a given day an Investment Bank sold above 7% of the average daily volume of the trade in ANZ shares, it would buy ANZ shares so that the net reduction in the number of ANZ shares held by that Investment Bank did not exceed the 7% limit for that day." ;[33]

- the 'Monday understanding' on about 10 August 2015 ─ the arrangement or understanding was to the effect that "on Monday 10 August 2015, each of the Investment Banks [Citigroup, Deutsche Bank and J.P. Morgan] would restrict its trading in [ANZ] Shares so each Investment Bank would not, by the end of the trading day, reduce the net number of ANZ Shares it held".[34]

10. Arrangements or understandings were alleged, not contracts. Yet presumably the alleged arrangements or understandings arose from an underlying underwriting contract.[35] Cartel provisions in that underlying contract would be subject to the application of the joint venture exception under s 44ZZRO. However, on the case implicit in the indictment, cartel provisions in the three alleged arrangements or understandings would fall outside the protection of the joint venture exception under s 44ZZRO.[36] Section 44ZZRO required in part that a cartel provision be 'contained in a contract' (or an arrangement or understanding intended and reasonably believed to be a contract).[37]

11. The requirement that a cartel provision be contained in a contract in order to qualify for the joint venture exception under s 44ZZRO was unnecessary, inept as a means of combatting sham joint ventures, and inconsistent with the position in the US, Canada, and the EU.[38] It was also inconsistent with the definition of the collaborative activity exemption in the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ).[39]

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33 [2021] FCA 757, [38].

34 [2021] FCA 757, [39].

35 See J Abernethy, 'ACCC missing the mark with cartel charges', *Livewire*, 25 June 2018, at: https://www.livewiremarkets.com/wires/accc-missing-the-mark-with-cartel-charges-2018-06-25

36 We are discussing the *theory* of the case. Whether or not that theory would have been made out if the case had gone to trial is another question that would depend partly on the evidence at the trial, including the evidence relating to the requisite elements of the s 44ZZRO joint venture exception. That issue would have been strongly contested.

37 *Australian Cartel Regulation*, 274-282. There is the possible argument that a cartel provision in an arrangement or understanding is covered by s 44ZZRO if it is made pursuant to a prior cartel provision in a contract; but in my view that argument would be unlikely to succeed: see *Australian Cartel Regulation*, 276-279.

38 *Australian Cartel Regulation*, 274-282. See earlier, B Fisse, 'The contract requirement for the joint venture exceptions under the ss 44ZZRO and 44ZZRP of the Trade Practices Act' (2009) 17 CCLJ 43.

39 Royal Assent on 14 August 2017.

Eventually, in 2017, s 44ZZRO was repealed and replaced by s 45AO.[40] The joint venture exception under s 45AO applies to cartel provisions in a contract, arrangement or understanding.

12. The potential trap for underwriters set by the contract requirement in s 44ZZRO was pointed out in *Australian Cartel Regulation* in 2011:[41]

> Assume a syndicate agreement where the common terms of a loan or underwritten amount are specified, subject to a later decision by the syndicate members to apply or vary those common terms in light of further information to be provided by the borrower. If the later decision to adopt particular common terms involves a cartel provision, which is highly likely, that cartel provision will not be immunised by s 44ZZRO or 44ZZRP unless that provision is contained in a contract or proxy contract. One possible way of achieving protection under ss 44ZZRO and 44ZZRP is to make the later cartel provision conditional on inclusion in the loan or underwriting agreement and for all the syndicate members to be parties to that agreement. As in other contexts, the contract requirement under ss 44ZZRO and 44ZZRP creates a potential trap for the unwary.
>
> The chicanes that now need to be mastered under the TPA would be avoided if, as proposed in Section 8.3.4.5, exceptions for collaborative ventures were introduced. Such exceptions would not require the members of a syndicate or consortium to form a joint venture. Nor would they create the need for the parties to ensure that each and every possible cartel provision is contained in a contract. The focus instead would be on whether or not the collaboration is pro-competitive.

13. Was the warning given in *Australian Cartel Regulation* and elsewhere[42] heeded by the banks before JP Morgan blew the whistle to the ACCC? If the banks did not take careful precautions to avoid being trapped by the contract requirement in s 44ZZRO (and, for civil prohibitions, s 44ZZRP), they would have opened the gate for potential cartel liability (with the possibility of immunity for the first to dob the others in). The account in *The Australian* by Joyce Moullakis in July 2020 suggests that is what happened[43]

> The competition regulator's explosive cartel case against ANZ and its investment bank advisers has triggered a quick fix for capital raising agreements, after panic swept the industry.

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40 *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

41 At 322.

42 Eg B Lloyd, 'Syndicated Lending and Cartel Offences under the Trade Practices Act', 24 September 2009, Clayton Utz, https://www.claytonutz.com/knowledge/2009/september/syndicated-lending-and-cartel-offences-under-the-trade-practices-act.

43 'A fix for capital raising cartels', *The Australian*, 20 July 2020.

> When the case was launched by the Australian Competition & Consumer Commission in 2018, the investment banking sector was on tenterhooks, given what it could mean for underwriting agreements.
>
> But their armies of lawyers and compliance people have since come up with a neat solution, by adding a few extra words or a sentence to the documents that manage how banks oversee and execute a capital raising. The addition basically says investment banks working together can act as a joint venture or syndicate until all shares under the offer are sold or distributed.

The plaudit in the last paragraph is hard to swallow. The problem should have been realised and managed by the banks at the time of the underwriting in 2015 (as by using the 'flame arrester' device described in *Australian Cartel Regulation*).[44]

14. The banking cartel prosecution thus appears to have depended on the misbegotten contract requirement for the joint venture exception under s 44ZZRO. The target of the prosecution was not a 'hard-core cartel' in any orthodox sense. It was a loan syndicate that, on the theory of the case implicit in the indictment,[45] had set off the booby trap of the contract requirement in s 44ZZRO when it acted jointly to sell the IPO shortfall in the market.[46]

15. The repeal of s 44ZZRO (and s 44ZZRP) and the application of s 45AO (and s 45AP) to cartel provisions contained in arrangements or understandings as well as in contracts removes the trap into which the banks seem to have fallen in 2015. What would happen in a replay of the bank cartel prosecution today under s 45AO?

C Replaying the bank cartel prosecution today – is s 45AO fit for purpose in jury trials?

16. Assume a hypothetical replay of the facts alleged in the bank cartel prosecution. Putting aside other possible issues, consider the application of the joint venture exception under s 45AO, as enacted in 2017.

17. Section 45AO:

> **45AO Joint ventures—prosecution**
>
> (1) Sections 45AF and 45AG do not apply in relation to a contract, arrangement or understanding containing a cartel provision if the defendant proves that:

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44 At 279.

45 To repeat, we are discussing the *theory* of the case. Whether or not that theory would have been made out if the case had gone to trial is another question that would depend partly on the evidence at the trial, including the evidence relating to the requisite elements of the s 44ZZRO joint venture exception.

46 See 'A fix for capital raising cartels', *The Australian*, 20 July 2020.

(a) the cartel provision is:
  (i) for the purposes of a joint venture; and
  (ii) reasonably necessary for undertaking the joint venture; and
(b) the joint venture is for any one or more of the following:
  (i) production of goods;
  (ii) supply of goods or services;
  (iii) acquisition of goods or services; and
(c) the joint venture is not carried on for the purpose of substantially lessening competition; and
(d) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and
(e) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
  (i) their joint control; or
  (ii) their ownership of shares in the capital;
  of that body corporate.

Note 1: A defendant bears a legal burden in relation to the matter in this section (see section13.4 of the *Criminal Code*).

Note 2: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

18. The s 45AO joint venture exception, unlike that under the former s 44ZZRO, applies where a cartel provision is contained in an arrangement or understanding or in a contract. The s 45AO exception would therefore be relevant to the cartel provisions alleged to exist in three arrangements or understandings in the bank cartel case.

19. In order to rely successfully on the s 45AO exception, the accused would need to establish, on the balance of probabilities, that the requisite elements of the exception were made out. Three of the requisite elements would be that: (a) there is a 'joint venture'; (b) the cartel provisions were 'reasonably necessary for undertaking the joint venture'; and (c) 'the joint venture was not carried on for the purpose of substantially lessening competition.'

20. It may be that the requisite elements of the s 45AO joint venture exception could be made out by the accused in a replay of the bank cartel prosecution today. If the existence of a joint venture could be established, one key issue would be whether the joint venture had not been carried on for the purpose of substantially lessening competition in a relevant market. That would entail definition of the relevant market,

assessing the competition effects of the alleged cartel provisions in that market,[47] determining the substantial purpose/s for which the joint venture had been carried on, and determining what is meant by a 'substantial' lessening of competition in all the circumstances of the case. The prospect of a fight about the application of s 45AO would be weighed up by those deciding whether to bring a prosecution. Moreover, if a prosecution were launched, the theory of the case today would differ substantially from the theory of the case that seems to have been behind the prosecution in 2018.

21. Applying the SLC-based test of 'not carried on for the purpose of substantially lessening competition' and the other convolutions of s 45AO is a daunting prospect. Having to direct juries on the elements of the s 45AO exception, and expecting them to follow the directions, is one concern. Another is that duels by expert economists over market definition and competition effects are not the stuff from which jury decisions are best made. Another again is the need for juries to come to grips with intended competition effects in the context of underwriting arrangements.[48] A rule of reason[49] might help juries to cut a quick and sensible way through these fences, but a rule of reason does not apply under s 45AO (nor to SLC tests elsewhere under the CCA) [50]

22. The SLC-based test in s 45AO (and s 45AP) does not follow the approach taken in the US and NZ. In those jurisdictions, the exemption of collaborative activities from cartel

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47 It is difficult to accept the possible argument that market definition is not required when applying the words 'for the purpose of substantially lessening competition' in s 45AO or s 45AP. That wording differs materially different from the wording 'competitive with' considered in *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73, [131]-[132]. The Explanatory Memorandum [2.26] equates the SLC test in s 45AO with that in the former s 76C; s 76C(2) made it clear that the term 'competition' referred to competition in a market.

48 See further DA Chaim, 'The Corporate Governance Cartel' (2023) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4324567; C Bergqvist, 'Syndicated Loans and Competition Law' (2021) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3856440; European Commission, Directorate-General for Competition, *EU Loan Syndication and its Impact on Competition in Credit Markets*, Final Report, 2019, at: https://data.europa.eu/doi/10.2763/738938.

49 The SLC test in Australia is unqualified by a rule of reason. The SLC test is a competition test, not one that is geared to assessment of offsetting welfare-enhancing efficiencies. By contrast, a rule of reason applies in the US under s 1 of the Sherman Act and, in practical effect, in the EU under the exemption in Article 101(3) of the Treaty on the Functioning of the European Union.

50 *Universal Music Australia Pty Ltd v. ACCC* [2003] FCAFC 193, [270]-[273]; B Fisse, 'The Australian Competition Policy Review Final Report 2015: Sirens' Call or Lyre of Orpheus?', NZ Competition Law and Policy Institute, 26th Annual Workshop, Auckland, 16 October 2015, 12-13, at: http://www.brentfisse.com/images/Fisse_Harper_Report_Critique_(Oct_2015).pdf.

liability does not apply where the dominant purpose of the party relying on the exemption is to lessen competition between any 2 or more parties.[51]

23. The Explanatory Memorandum on s 45AO (and s 45AP) says that '[t]his amendment confines the exceptions to joint ventures established for genuine commercial purposes' and refers to the former s 76C as a precedent.[52] That explanation is problematic, as elaborated below.

24. Section 76C was inconsistent with and undermined the cartel prohibitions to which it applied:[53]

> The [s 76C SLC] test is based on the assumption that a case-by-case assessment of competition effects is an appropriate way to define a joint venture exception. The opposing view is that joint venture exceptions should be defined on a per se basis that avoids the need to assess competition effects. A 'per se legality' approach to the definition of joint venture exceptions avoids the indeterminacy of a competition test and promotes commercial certainty, expediency and cost saving.

25. Section 76C applied to exclusionary provisions in CAUs subject to civil but not criminal prohibition. When the cartel offences were enacted in 2009, the joint venture exceptions to those offences were not based on s 76C and did not include a SLC test. That was deliberate, on the explicit basis that the SLC test in s 76C would be unworkable in jury trials. The wording of s 45AO is limited to 'purpose of substantially lessening competition' whereas that in s 76C extended to the purpose, effect or likely effect of substantially lessening competition. However, that difference in wording is unlikely to make s 45AO workable in criminal trials. Whether a joint venture was or was not carried on for the purpose of substantially lessening competition in a market requires a determination of the situation that the joint venture was intended to bring about and then an assessment of whether or not, on the facts intended, there would be a substantial lessening of competition in a relevant market.

26. Avoiding the problems that arise from s 45AO would require repealing s 45AO and redrafting the joint venture exception in simpler terms designed to work in criminal

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51 *Commerce Act 1986* (NZ) s 31(2)(b)); *Timken Roller Bearing Co v United States*, 341 US 593, 597–8 (1951). See further *Australian Cartel Regulation*, 8.4.3.2.

52 EM, 2.25, 2.26.

53 *Australian Cartel Regulation*, 291. See further P Areeda & H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2003) ¶2100g.

trials. NZ cartel law excludes pro-competitive collaborative activities from criminal or civil liability without a SLC test.[54] A similar or better approach is overdue in Australia.[55]

III Maximum fines and civil monetary penalties – the recent legislative escalation

A Higher maximum fines and civil monetary penalties

27. Higher maximum fines and civil monetary penalties came into effect on 10 November 2022 under the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth). The new maximum fines or civil monetary penalties for a body corporate are the greatest of:

- $50,000,000
- three times the value of the 'reasonably attributable' benefit obtained from the conduct, if the court can determine this; or if a court cannot determine the benefit,
- 30 per cent of adjusted turnover during the breach period.

28. The former maximum civil monetary penalty for a body corporate was $10 million; three times the benefit, or 10 per cent of relevant turnover.

29. The maximum civil monetary penalty for an individual has increased from $500,000 to $2.5 million. The maximum sentence for an individual in relation to a cartel offence remains 10 years imprisonment and/or a fine of 2,000 penalty units (now $550,000).

30. The escalation in maximum fines and penalties is based on an election promise by the Government and responds to criticisms that the penalties imposed for breaches of competition law have been too low.[56] The Explanatory Memorandum gives this background:

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54 *Commerce Act 1986* (NZ) s 31. Disclosure: the author acted as a consultant to the NZ Government on cartel law reform for many years. The collaborative activities exception was based largely on the proposal in *Australian Cartel Regulation*, 8.3.4.5.

55 See eg I Wylie, 'Cartel Conduct or Permissible Joint Venture' (2019) 47 ABLR 7, 21-22; B Fisse, 'Australian Cartel Law: Biopsies', Competition Law Conference, Sydney, 5 May 2018, Part IV, Joint ventures and other collaborative activities between competitors, at: https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf.

56 See eg OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (2018) at: http://www.oecd.org/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm; C Beaton-Wells & J Clarke, 'Corporate financial penalties for cartel conduct in Australia: A critique' (2018) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149143; Beaton-Wells, 'Cartels caught ripping off Australian consumers should be hit with bigger fines', *The Conversation*, 2 June 2017.

1.3 Schedule 1 to the Bill will implement one part of the Government's Better Competition election commitment to strengthen Australia's competition laws by increasing penalties for anti-competitive behaviour.

1.4 Nearly 30 years ago, the maximum penalty for breach of the competition provisions in Part IV was increased to $10 million for a body corporate and $500,000 for a person that is not a body corporate. While the maximum penalty for a body corporate has since been updated to allow the court to impose penalties based on the benefit obtained or a percentage of corporate turnover, the base penalty has remained the same. As a result, there is a risk under the existing provisions that some large businesses could see a breach of competition law as an acceptable cost of doing business.

1.5 In 2018, the OECD report Pecuniary Penalties for Competition Law Infringements in Australia also found that the average and maximum competition penalties in Australia are, in practice, substantially lower than those in comparable international jurisdictions.

1.6 The amendments will increase the severity of Australia's penalty regime and facilitate the imposition of penalties for anti-competitive behaviour that are more comparable with international jurisdictions. This will ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses.

31. The potential impact of the new maxima for civil monetary penalties is accentuated by the decision of the High Court in *Australian Building and Construction Commissioner v Pattinson*[57] that maximum penalties are not reserved for the 'worst' category of conduct in contravention of the law.

32. The second alternative maximum ─ three times the value of the 'reasonably attributable' benefit obtained from the conduct ─ has been retained. This maximum is largely a phantom given that it is rarely possible in practice to determine the total benefit made from the contravening conduct.[58] However, cases may arise where precise calculation of the 'benefit' is impossible, but where a bare minimum estimate of benefit would require a higher penalty than under the other two metrics.[59]

33. The third alternative maximum ─ 30% of the corporation's adjusted turnover during the breach turnover period ─ is considerably higher than the corresponding former maximum of 10% of 12 months' turnover.[60] First, the maximum percentage of turnover

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57 [2022] HCA 13.

58 *Australian Cartel Regulation*, 447-450. The position would be different if there were concurrent hearings of liability and damages but that is not the current practice and hearings of liability almost invariably occur before hearings on damages.

59 Thanks to John Braithwaite for pointing this out.

60 See further *Australian Cartel Regulation*, 450-453.

has jumped to 30%. Secondly, the 'breach turnover period' is the greater of 12 months or the period during which the breach occurred.

34. It is odd that the maximum fine for a body corporate that has committed a cartel offence is no higher than the maximum civil penalty for a corporation that has contravened a cartel prohibition.[61]

35. It is strange that the maximum fine for an individual who has committed a cartel offence is now only 22% of the maximum civil penalty for an individual who has contravened a cartel prohibition.[62] This is an affront to legal philosophers who believe that proportionality is a principle that should guide criminal sentencing and the legal distinction between wrongdoing and crime. Proportionality does not guide civil penalties assessed after the decision in *Pattinson*, but should guide the relationship between maximum civil and criminal penalties.[63]

B What can the new maxima be expected to achieve? [64]

36. The Explanatory Memorandum makes this claim:[65]

> The amendments will increase the severity of Australia's penalty regime and facilitate the imposition of penalties for anti-competitive behaviour that are more comparable with international jurisdictions. This will ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses.

37. However, too much should not be expected of the new maxima. The assertion that the new maxima will 'ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses'[66] is fanciful. This is piecemeal legislation. There is no apparent strategy for making the best use of all the options available for preventing unlawful corporate

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61 See *Australian Cartel Regulation*.33; See also Justice M Wigney, at: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-wigney/wigney-j-20220609. Contrast the unlimited maximum fine applicable in Canada from 23 June 2023: *Competition Act 1985* (Can) s 45(2).

62 On the lesser previous disparity, see *Australian Cartel Regulation*, 480-481.

63 Thanks to John Braithwaite for this criticism.

64 It is difficult or impossible to assess the deterrent effectiveness of monetary sanctions against corporations. See eg C Veljanovski, 'The Effectiveness of European Antitrust Fines' in T Toth (ed), *The Cambridge Handbook of Competition Law Sanctions* (Cambridge University Press, 2022) ch 4. Assessment is even more difficult in the US, Australia and other jurisdictions where liability is not exclusively corporate but individual and corporate.

65 [1.6].

66 Ibid.

conduct.[67] Moreover, many variables govern the impacts that the new maxima may have. Eight variables are set out below.

38. First, the impact of the new maxima will much depend on how civil monetary penalties and fines against corporations are applied by the courts to contraventions that occur on or after 10 November 2022. An initial factor is what the courts make of the decision of the High Court in *Pattinson* when applying the new maxima.

39. Secondly, the 'instinctive synthesis' mode of sentencing and assessment of penalty still applies.[68] By contrast, leading proponents of increasing the maximum penalties argued for a structured approach to the exercise of judicial discretion to help ensure that higher penalties would in fact be imposed.[69]

40. Thirdly, the higher the penalty in prospect, the more likely the insistence by courts on compelling evidence of the facts that support the imposition of the penalty.[70]

41. Fourthly, much will depend on the enforcement strategies used by the ACCC and CDPP to meet the challenge of enforcing the law against large and medium size corporations the control systems of which are far different from the brains and nerves of humans. That question is discussed in Part IVC below.

42. Fifthly, the new maxima reflect an unstated theory of economic deterrence. Such a theory assumes that corporations are best deterred by putting a price on unlawful conduct and making that price more costly than lawful conduct.[71] However, deterring unlawful corporate conduct depends on much more than economic incentives. The mechanism of corporate deterrence depends on the impacts that monetary sanctions have on corporate internal controls. Hence the Deterrent Impacts Theory of monetary penalties against corporations,[72] as restated below.

> The Deterrent Impacts Theory first specifies the main intended deterrent impacts of monetary penalties:

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67 Contrast eg ALRC, *Corporate Criminal Responsibility*. See further J Braithwaite, *Macrocriminology* (ANU Press, 2022) ch 9.

68 *Markarian v The Queen* [2005[HCA 25, [84] (McHugh J), See further G Brown, 'Four Models of Judicial Reasoning in Sentencing' [2019 (3) Irish Juridical Studies Journal 55.

69 Beaton-Wells & Clarke, 'Corporate financial penalties for cartel conduct in Australia: A critique', 59-62.

70 *Australian Competition and Consumer Commission v Uber BV* [2022] FCA 1466 is portentous.

71 'Penal Designs and Corporate Conduct', 294-295. Theories of 'optimal deterrence' are criticised in *Australian Cartel Regulation*, 425-428. They were held not to apply under the TPA in *ACCC v ABB Transmission & Distribution Ltd* (No 2) [2002] FCA 559, [21]-[25].

72 'Penal Designs and Corporate Conduct', 295-297.

(a) a monetary penalty on a corporation is to be felt by management with limited pass-through to shareholders or consumers;

(b) to the extent possible, those implicated in a contravention are to be held accountable; and

(c) internal operating procedures (including compliance programs)[73] are to be reviewed and revised to guard against similar contravention in future.

Secondly, the Deterrent Impacts Theory requires that:

(d) monetary penalties be used in ways calculated to reinforce and achieve the intended impacts specified above; and

(e) intervention in the internal affairs of corporations be avoided except to the extent of enforced self-regulation.[74]

The Deterrent Impacts Theory is not based on neo-classical economic theory[75] nor on principal-agent theory.[76] It does not assume a rational human actor or rational unitary actor model of corporate behaviour.[77] Consistently with theories of organisational behaviour, the Deterrent Impacts Theory recognises that threats or incentives directed to corporations do not operate in the same way as threats or incentives directed to individuals.[78] They work like this:

- Deterrent signals or incentives are received and processed by a corporate system for receiving and managing external information.
- Managers and employees participate in that system but the output is not merely self-restraint or self-activation on their part — the input of deterrent signals or incentives is fed into the internal controls of the organisation. Those internal controls include policies, procedures and processes.

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73 *Australian Cartel Regulation*, ch 12.

74 J Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 Michigan Law Review 1466. Enforced self-regulation is the strategy of allowing corporations to regulate their own conduct but insisting that self-regulation does in fact occur. Compliance is more likely to ensue if nurtured in a spirit of cooperation (enforcement policies should avert organised business cultures of resistance). Efficiency considerations are also important and require that intervention in the internal affairs of corporations be kept to a minimum. Another precept of enforced self-regulation is the utilitarian principle of least drastic means; more drastic means are available but are used primarily as a contingent threat.

75 See further the references in *Australian Cartel Regulation*, 425, n 14.

76 See eg J-J Laffont & D Martimort, *The Theory of Incentives: The Principal-Agent Model* (2002).

77 See B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 73–74; TF Malloy, "Regulating by Incentives: Myths, Models, and Micromarkets" (2002) 80 Texas Law Review 531.

78 See B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 Southern California Law Review 1141, 1159–66.

- If the external threat or incentive is to be heeded, those policies, procedures or processes need to be applied and, if necessary, revised.

43. Sixthly, monetary sanctions against corporations have limitations that need to be recognised. The main limitations have been summarised in this way:[79]

(1) Monetary sanctions are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour. However, they may have little impact on those in a position of control.[80] Instead, they may inflict substantial loss on shareholders.[81] Alternatively or additionally, they may have adverse spillover effects on employees, consumers, and other innocent bystanders.[82] The worst case scenario for spillover effects on consumers is where all members of an oligopoly are fined for their participation in a cartel, have sufficient market power to be able to pass the fines on to their customers and are able to rely on some form of tacit collusion to coordinate future prices.[83] In theory, a fine is a sunk cost and will not be passed on to consumers: rational economic actors look to what they should do in future and do not try to recover sunk costs. However, whether or when corporations treat fines as sunk costs is an empirical question.[84] Moreover, if fines are treated as sunk costs, they emerge as a relatively weak form of deterrent punishment.

(2) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending

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79 'Penal Designs and Corporate Conduct', 293-294.

80 See B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1983) 56 Southern California Law Review 1141, 1216–7.

81 See JW Adams, 'Trustbusting and the "Innocent" Shareholder: "Compensation" If Stock Prices Fall?' (1978) Antitrust Law & Economics Review 51. But see *Corporations, Crime and Accountability*, 49–50. For the view that shareholders should bear the cost of fines, see C Kennedy, "Criminal Sentences for Corporations: Alternative Fining Mechanisms" (1985) 73 Calif LR 443.

82 See 'Reconstructing Corporate Criminal Law', 1219–20. Whether or not such spillover effects will occur in any given case is an empirical question. See A Dershowitz, 'Increasing Community Control over Corporate Crime. A Problem in the Law of Sanctions' (1961) 71 Yale LJ 280, 286, n 17. For the dubious view that fines are unlikely to be passed on to consumers as higher prices see M Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) 29 *European Competition Law Review* 209, 217–9. The passing on of a fine is a factor to be considered in sentencing under US federal criminal law: 18 USC §3572(a)(7). The factor is not specified in the French Factors or the NW Frozen Foods factors. Nor is it listed in *Crimes Act 1901* (Cth) s 16A(2). For a discussion of this factor in *CDPP v NYK* [2017] FCA 876 see B Fisse, 'The First Cartel Offence Prosecution in Australia: Implications and Non-Implications' (2017) 45(6) ABLR 482, 486.

83 However, there are many reasons why corporations may not pass on fines, including the risk of losing market share and the 'stickiness' of prices; on the latter see generally AS Blinder, ERD Canetti, DE Lebow & JB Rudd, *Asking about Prices: A New Approach to Understanding Price Stickiness* (Princeton University Press, 1998).

84 How sunk costs are treated in the real world as distinct from neoclassical economic theory is one of many items on the agenda of behavioural economics; see, eg C Jolls, CR Sunstein & R Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford Law Review 1471, 1482–3.

conduct.[85] The cheapest and least embarrassing response may be simply to write a cheque in payment of the fine and continue with business as usual. Corporations have incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in civil litigation against the company or its officers.

(3) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures in such a way as adequately to guard against re-offending.[86] The response may be to treat the offence as an isolated incident and simply to write a cheque in payment of the fine, hoping or expecting that the incident will not be repeated.

44. Seventhly, monetary sanctions against corporations are prone to the limitation described by John Coffee, Jr as the 'deterrence trap'.[87] This trap emerges where the size of the fine or pecuniary penalty that is necessary to deter a corporation effectively is larger than that which the corporation is able to pay. As Coffee has explained:[88]

> .. the maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth. Logically, a small corporation is no more threatened by a $5 million fine than by a $500,000 fine if both are beyond its ability to pay. In the case of an individual offender, this wealth ceiling on the deterrent threat of fines causes no serious problem because we can still deter by threat of incarceration. But for the corporation, which has no body to incarcerate, this wealth boundary seems an absolute limit on the reach of deterrent threats directed at it. If the "expected punishment cost" necessary to deter a crime crosses this threshold, adequate deterrence cannot be achieved. .. In short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources.

45. The hard-line position taken in Australia and by some commentators is that general deterrence needs to be achieved even where to do so will result in insolvency[89] and that companies unable to pay a penalty of the amount required for general deterrence

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85 *Corporations, Crime and Accountability*, 8–12; JC Coffee, Jr, 'Corporate Crime and Punishment: A Non-Chicago View of the Economies of Criminal Sanctions' (1980) 17 American Crim LR 419, 458–9.

86 See CD Stone, *Where the Law Ends* (1975) ch 6.

87 JC Coffee, Jr, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 387, 389-93. The 'retribution trap' extends the concept to retributive theories of corporate punishment:

88 'No Soul to Damn: No Body to Kick', 390.

89 *ACCC v Australia High Adventure Pty Ltd* [2005] FCAFC 247, [11]; *Australian Competition and Consumer Commission v Leahy Petroleum [No. 2]* (2005) 215 ALR 281, 284; *ACCC v Dataline.Net.AU Pty Ltd (in liq)* [2007] FCAFC 146. See also *Australian Securities and Investments Commission v GetSwift Limited (Penalty Hearing)* [2023] FCA 100.

are inefficient and unfit to stay in business.[90] Query whether a hard-line position will survive scrutiny if tested. It is likely to be tested given the size of the increase in penalties authorised by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*. It is unclear from *Australian Building and Construction Commissioner v Pattinson*[91] where the balance between specific and general deterrence is to be struck in this kind of situation.

46. Finally, the new maxima are likely to spur many corporations to upgrade their compliance precautions. However, unintended consequences will also result. They include the ramping up of liability control.[92] Thus, facilitating practices (eg price-matching, MFN clauses) may be used more extensively to coordinate conduct in markets without creating CAUs and hence to avoid cartel liability.[93]

IV Application of civil monetary penalties and fines against corporations

A Assessing civil penalties against corporations

47. This Part IVA reviews the implications of the decision of the High Court in *Australian Building and Construction Commissioner v Pattinson*.[94]

48. The High Court decided, by a 6─1 majority, that the principle of proportionality[95] did not apply to civil penalties under s 546 of the *Fair Work Act 2009* (Cth), and that the maximum civil monetary penalty under s 546 was not reserved for the worst cases but was justified where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. The majority decision overturned the unanimous decision of a five-member Full Court of the Federal Court of Australia.[96] The decision is relevant generally to the interpretation and application of civil penalty regimes in Australian legislation including that applicable to cartel conduct under the CCA.

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90 *Australian Competition and Consumer Commission v Leahy Petroleum [No. 2]* (2005) 215 ALR 281, 284; M Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) 29 European Competition Law Review 209, 217.

91 [2022] HCA 13. The narrowness and limits of this decision should be seen in the much broader perspective of social control and the nature and limits of punishment as one means of social control: J Braithwaite, *Macrocriminology* (ANU Press, 2022) ch 9.

92 On the difference between 'compliance' and 'liability control' see *Australian Cartel Regulation*, 543-548.

93 See B Fisse, 'Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge' (2016) 44 ABLR 325.

94 [2022] HCA 13.

95 *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348, 354. See further RG Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 Melbourne Univ LR 489.

96 *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177.

49. The first limb of the majority decision in *Pattinson* was that the principle of proportionality did not apply to civil penalties under 546 of the *Fair Work Act 2009* (Cth:[97] This is a condensation:

- Civil penalties are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions. To introduce considerations drawn from theories of retributive justice into the application of s 546 of the Act undermines the primary significance of deterrence.
- Nothing in the text, context or purpose of s 546 of the Act suggests that the Full Court's "notion of proportionality" inheres in the court's task, pursuant to s 546, to fix a penalty which it considers to be an "appropriate" penalty. The discretion conferred by s 546 is, like any discretionary power conferred by statute on a court, to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the legislation
- Section 546 requires the court to ensure that the penalty it imposes is "proportionate", where that term is understood to refer to a penalty that strikes a reasonable balance between deterrence and oppressive severity.
- Some concepts familiar from criminal sentencing may usefully be deployed in the enforcement of the civil penalty regime. In this regard, concepts such as totality, parity and course of conduct may assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the Act.

50. The second limb of the majority decision in *Pattinson* was that the maximum civil monetary penalty under s 546 was not reserved for the worst cases but was justified where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind.[98] Condensation:

- Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor's affairs as unattractive as it is open to the court reasonably to do.

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97 [2022] HCA 13, [38]-[48].
98 [2022] HCA 13, [49]-[60].

- The maximum penalty is "but one yardstick that ordinarily must be applied" and must be treated "as one of a number of relevant factors". Other factors relevant for the purposes of the civil penalty regime include those identified by French J in CSR.
- The maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed". This relationship of "reasonableness" may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.
- Once it is accepted … that the maximum penalty is intended by the Act to be imposed in respect of a contravention warranting the strongest deterrence within the prescribed cap, there is no warrant for the court to ascertain the extent of the necessity for deterrence by reference exclusively to the circumstances of the contravention. The categories of circumstances may overlap, in that matters may bear upon both the seriousness of the contravention and the intransigence of the contravenor. Further, circumstances which can be said to relate exclusively to the contravenor may bear strongly on what level of deterrence will be "appropriate".
- It is not necessary that the task of setting a penalty that is "appropriate" to deter further contraventions should proceed by considering characteristics of the contravenor only to the extent that they can be said to bear upon the seriousness of the contravening conduct.
- Indeed, in some cases, the circumstances of the contravenor may be more significant in terms of the extent of the necessity for deterrence than the circumstances of the contravention. In this regard, it is simply undeniable that, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable. It is equally obvious that, the more determined a contravenor is to have its way in the workplace and the more deliberate its contravention is, the greater will be the financial incentive necessary to make the contravenor accept that the price of having its way is not sustainable.

51. Edelman J dissented, fundamentally.[99]

52. What are the implications of the majority judgement in *Pattinson*? The main implications seem to be seven-fold.

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99 [2022] HCA 13, [75]-[125].

53. First, the multiplicity of factors recited in civil penalty cases under the CCA since the factors laid out by French J in the *CSR* case[100] and the 'Heerey factors' [101] remain relevant to the extent that they relate to or 'moderate' the pursuit of deterrence.[102] They are marbling integral to the prime cut of deterrence.

54. Secondly, the factors that govern the assessment of civil penalties for cartel conduct now differs fundamentally from those which govern the determination of fines in criminal cartel cases. Yet the definition of cartel offences differs very little from that of civil cartel contraventions.[103] Hence, a civil monetary penalty imposed in a civil cartel case may be higher, or far higher, than a fine imposed in a criminal case based on the same facts. Conversely, a civil monetary penalty imposed in a civil cartel case may be lower, or far lower, than a fine imposed in a criminal case based on the same facts.

55. Thirdly, the approach of the majority is a less precise way of assessing civil penalties than relying on proportionality or desert as a supporting guide. This concern was amplified by Edelman J in dissent: [104]

> The practical operation of a penalty regime based principally upon the object of deterrence, therefore, is that a court's assessment of both general and specific deterrence cannot be precise. The assessment can only identify potentially overlapping ranges of penalties, based on general and specific deterrence, that may achieve a reasonable deterrent effect in any decision calculus. Within those ranges, it must be assumed that the increasing penalties will increase the deterrent effect upon the contravener, and others like them, in the future. By definition, and on the assumptions of utilitarianism, the penalty with the greatest deterrent effect will be the maximum penalty available.
>
> Within the ranges of reasonable deterrent effect provided by each of general and specific deterrence, there are other factors that assist a court in imposing a particular penalty. In this way, proportionality or desert plays a role as a secondary criterion of justice. In the imposition of an appropriate penalty within the overlapping ranges provided by specific and general deterrence, a court can have regard to considerations including totality, consistency, and course of conduct. For instance, within the range of penalties that must be assumed to exist, from more than a minimal deterrent effect up to the maximum available deterrence, secondary considerations of desert can apply so that the penalty is

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100 *TPC v CSR Ltd* [1991] ATPR 41-076 at 52,152.

101 *ACCC v NW Frozen Foods Pty Ltd* [1996] ATPR 41-515.

102 [2022] HCA 13, [48].

103 *Australian Cartel Regulation*, 27-28. See also 'Recent Developments in Competition Law: Cartel Cases'.

104 [2022] HCA 13, [109]-[110]. On the use by human beings of rules of action instead of trying to make impossible calculations, see B Russell, *Human Knowledge* (Routledge, 1992) 416-7; *Corporations, Crime and Accountability*, 92-93.

> not crushing or oppressive. In this secondary sense, the "proportionality of penalty is measured in the wider context of the demands of effective deterrence". [footnotes omitted]

56. Fourthly, the majority judgment means that a high penalty can be imposed where necessary to achieve general deterrence where a much lower penalty is enough to achieve specific deterrence of the defendant. It is unclear where the balance between specific and general deterrence is to be struck.

57. Fifthly, it is unclear what balance is to be struck between: (a) corporate specific deterrence and individual specific deterrence; and (b) corporate general deterrence and individual general deterrence; and between (a) and (b). Consider, for instance, the balance to be struck between: corporate specific deterrence and individual specific deterrence:[105]

> Where individual persons implicated in a cartel offence or civil cartel contravention cannot be prosecuted or joined in a penalty enforcement action, arguably that should be taken into account as a factor when determining the sentence or penalty to be imposed on a corporation. A deterrence deficit that arises from inability to prosecute individual persons should be offset by an increase in the punishment or penalty imposed on the corporation. By hypothesis, the deterrent impact of prosecution or enforcement action will be too low unless the write-off of individual liability is offset on the corporate side of the deterrence ledger. Although corporate and individual liability are conceptually and legally distinct, deterrence is likely to be undermined unless the total deterrent impact of corporate and individual liability is taken into account. The flip side is that corporate penalties should be reduced where all or most of the individuals implicated in an offence or contravention have been subject to prosecution or enforcement action and punished or penalised. Where a corporation has materially assisted an investigation into offences or contraventions by employees but prosecution or enforcement action has not ensued, that cooperation can be taken into account in mitigation of penalty.

58. Sixthly, the majority judgment suggests that courts may look more closely than they have in the past at the extent to which a monetary penalty against a corporation is likely to be passed on to consumers.[106] The greater the extent to which a penalty is likely to be passed on to consumers the less the likely deterrent effect.

59. Finally, in order to assess a penalty calculated to work as a specific deterrent against a corporation, a court will need to know what the corporation has done to have an effective compliance program and what measures have been taken to hold

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105 'Australian Cartel Law: Biopsies', [94].

106 As noted earlier, the passing on of a fine is a factor to be considered in sentencing under US federal criminal law: 18 USC §3572(a)(7).

accountable the individuals mainly responsible for the contravention.[107] The less adequate the corporate account of those matters in a submission on penalty, the greater the demonstrated need for a higher deterrent penalty. A corporate defendant that fails to give the court a detailed and cogent account of these fundamental indicators of the need or otherwise for deterrence would invite and justify the imposition of an elevated penalty.

B Determining fines against corporations for cartel offences

60. Fines have been imposed on corporations for cartel offences in several cases. The more recent are: *Commonwealth Director of Public Prosecutions v Wallenius Wilhelmsen Ocean AS*;[108] *Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd*;[109] and *Commonwealth Director of Public Prosecutions v Alkaloids of Australia Pty Ltd*).[110] These are significant judicial waypoints. The discussion below focusses on the legislative framework, which is less developed.

61. Federal sentencing legislation remains unsatisfactory. Part IB of the *Crimes Act 1914* (Cth) has been criticised for complexity, poor drafting, inflexibility, limited scope and impracticality.[111] That led to an extensive review by the ALRC and a substantial report (*Same Crime, Same Time: Sentencing of Federal Offenders*) in 2006.[112] The Commission reiterated its call for a separate new federal sentencing Act, distinct from the *Crimes Act* provisions dealing with substantive criminal law and criminal procedure. The ALRC recommended that the sentencing factors corresponding with sentencing purposes (see paras (j), (k) and (n)) be relocated to a codified list of such purposes in a separate provision of a federal sentencing Act. It recommended also that the sentencing factors be substantially restructured and revised.

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107 There are the main types of internal corporate controls relevant to the prevention of unlawful corporate conduct. See further *Corporations, Crime and Accountability*; CD Stone, *Where the Law Ends* (1975).

108 [2021] FCA 52. See further 'Shipping Line Executives Charged with Cartel Conspiracy Offences', *Handy Shipping Guide*, 28 June 2017 (3 WWL executives indicted in US), at: https://handyshippingguide.com/shipping-news/shipping-line-executives-charged-with-cartel-conspiracy-offences_8149; 'Cartel case has cost Wallenius Wilhelmsen USD 485 in total', *ShippingWatch*, 5 February 2021, at: https://shippingwatch.com/carriers/article12738776.ece#:~:text=Thursday%2C%20Australia%20sentenced%20car%20carrier,losses%20to%20USD%20485%20million .

109 [2022] FCA 665.

110 [2022] FCA 1424.

111 See eg, *R v Paull* (1990) 20 NSWLR 427, 437; Attorney-General's Department, *Review of Commonwealth Criminal Law: Fifth Interim Report* (Australian Government Publishing Service, Canberra, 1991) chs. 10–18.

112 Report 103, 2006.

62. The ALRC has further examined this area in its Report, *Corporate Criminal Responsibility* in 2020.[113] Recommendations 9, 10, 12 and 16 in the Report are as follows:

> **Recommendation 9** The Australian Government should implement Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).
>
> **Recommendation 10** The *Crimes Act 1914* (Cth) should be amended to require the court to consider the following factors when sentencing a corporation, to the extent they are relevant and known to the court:
>
> a) the type, size, and financial circumstances of the corporation;
> b) whether the corporation had a corporate culture conducive to compliance at the time of the offence;
> c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;
> d) the involvement in, or tolerance of, the criminal activity by management;
> e) whether the unlawful conduct was voluntarily self-reported by the corporation;
> f) any advantage realised by the corporation as a result of the offence;
> g) the extent of any efforts by the corporation to compensate victims and repair harm;
> h) the effect of the sentence on third parties; and
> i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:
> i. internal investigations into the causes of the offence;
> ii. internal disciplinary action; and
> iii. measures to implement or improve a compliance program.
>
> This list should be non-exhaustive and should supplement, rather than replace, the general sentencing factors, principles, and purposes when implemented in accordance with Recommendation 9.
>
> **Recommendation 12** The *Crimes Act 1914* (Cth) should be amended to provide that when sentencing a corporation that has committed a Commonwealth offence the court has the power to make one or more of the following:
>
> a) orders requiring the corporation to publicise or disclose certain information;
> b) orders requiring the corporation to undertake activities for the benefit of the community;
> c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
> d) orders requiring the corporation to facilitate redress of any loss suffered, or any expense incurred, by reason of the offence; and

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113 ALRC Report 136, at: https://www.alrc.gov.au/publication/corporate-criminal-responsibility/.

e) orders disqualifying the corporation from undertaking specified commercial activities.

A corresponding provision should be enacted in appropriate legislation to empower the court to make equivalent orders in respect of a corporation that has contravened a Commonwealth civil penalty provision.

Recommendation 16 The *Crimes Act 1914* (Cth) should be amended to empower the court to order a pre-sentence report for a corporation convicted under Commonwealth law.

63. These Recommendations are commendable. Legislation adopting them does not seem to be on the near horizon. However, at least Recommendation 10 lends itself to judicial adaptation in the meantime.

C Enforcement strategies for enforcing the law against large and medium size corporations

64. How the new maximum penalties are applied by the courts will be affected by the enforcement strategies of the ACCC and CDPP to enforce the law against large and medium size corporations. Corporations of that kind have organisational control systems that need to work if enforcement actions and prosecutions are to succeed in preventing corporate unlawful conduct.[114] High monetary penalties against corporations may not result in the taking of effective precautions against unlawful conduct. Enforcement strategies are needed to help ensure that such precautions are taken.

65. Detailed consideration of this topic is beyond this scope of this paper. However, it is worth noting the policies adopted by the US DOJ in recent years to spur corporations to develop better control systems to help prevent unlawful conduct. These polices deal with corporate crime enforcement but are also relatable to corporate civil penalty enforcement. They are more instructive than the Australian case law on compliance programs,[115] the ACCC website,[116] or AS ISO 19600:2015 Compliance management systems – Guidelines.

66. The main US DOJ initiatives on corporate precautions are:

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114 'Penal Designs and Corporate Conduct', 296.

115 As referenced in RV Miller, *Australian Competition and Consumer Law Annotated* (2023, 45th ed) [CCA.76.1040].

116 See eg https://www.accc.gov.au/business/compliance-and-enforcement/implementing-a-business-compliance-program.

- The Criminal Division of the Department developed 'Evaluation of Corporate Compliance Programs', a detailed guide to assist prosecutors assess the effectiveness of a corporate compliance programs. (Updated March 2023).[117]
- That guide is complemented by the Antitrust Division's accompanying guide, 'Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations' (July 2019).[118]
- In October 2021, the DOJ announced three steps to strengthen our corporate criminal enforcement policies and practices with respect to individual accountability, the treatment of a corporation' s prior misconduct, and the use of corporate monitors.[119]
- The Corporate Crime Advisory Group (CCAG) was established within the Department at the same time to evaluate and recommend further guidance and consider revisions and reforms to enhance our approach to corporate crime, provide additional clarity on what constitutes cooperation by a corporation, and strengthen the tools attorneys have to prosecute responsible individuals and companies.[120]
- On 15 September 2022, the DOJ published 'Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group', a memorandum by Deputy Attorney General Lisa Monaco.[121] This memorandum provides guidance on how prosecutors should ensure individual and corporate accountability, including through evaluation of: a corporation's history of misconduct; self-disclosure and cooperation provided by a corporation; the strength of a corporation' s existing compliance program; and the use of monitors, including their selection and the appropriate scope of a monitor's work.
- On 3 March 2023 the DOJ announced 'The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks' that became effective on 15 March 2023.[122]

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117 https://www.justice.gov/criminal-fraud/page/file/937501/download

118 https://www.justice.gov/atr/page/file/1182001/download

119 Memorandum from Deputy Attorney General Lisa Monaco, 'Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies,' 28 October 2021, at: https://www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf

120 Memorandum from Deputy Attorney General Lisa Monaco, 'Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group', 15 September 2022, 1-2 at: https://www.justice.gov/opa/speech/file/1535301/download

121 https://www.justice.gov/opa/speech/file/1535301/download. See further J Attridge, ' The Department's Corporate Criminal Enforcement Policy Changes: Implication for Antitrust Practice', Competition Policy International, 14 November 2022.

122 https://www.justice.gov/criminal-fraud/file/1571941/download Clawbacks are also used in corporations and securities regulation; see eg, SEC, 'SEC Adopts Compensation Recovery Listing Standards and Disclosure Rules,' 2022-192, 26 October 2022, at: https://www.sec.gov/news/press-release/2022-192;

67. The US DOJ material flagged above is useful, especially the Evaluation of Corporate Compliance Programs guide, as most recently updated. This is a guide for prosecutors but is used widely by corporations in the US as a benchmark.

68. The Evaluation of Corporate Compliance Programs guide deals with three fundamental questions:

    1. Is the corporation's compliance program well designed?
    2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
    3. Does the corporation's compliance program work in practice?

69. 'Is the corporation's compliance program well designed?' Part I sets out the elements of a well-designed compliance program:

    - risk assessment;
    - company policies and procedures;
    - training and communications;
    - confidential reporting structure and investigation process;
    - third-party management; and
    - mergers and acquisitions.

70. 'Is the program being applied earnestly and in good faith?' Part II gives guidance on these elements:

    - commitment by senior and middle management;
    - autonomy and resources; and
    - compensation structures and consequence management.

71. 'Does the corporation's compliance program work in practice?' Part III deals with this key question:

    - continuous improvement, periodic testing, and review;
    - investigation of misconduct; and
    - analysis and remediation of any underlying misconduct.

72. The guidance on analysis and remediation of any underlying misconduct illustrates the 'hands on' nature of the Evaluation of Corporate Compliance Programs guide: [123]

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123 Id, at 18-19;

.. a hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

Prosecutors evaluating the effectiveness of a compliance program are instructed to reflect back on "the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47.120(3)(c) ("to receive full credit for timely and appropriate remediation" under the FCPA Corporate Enforcement Policy, a company should demonstrate "a root cause analysis" and, where appropriate, "remediation to address the root causes").

Prosecutors should consider "any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program." JM 98-28.800; *see also* JM 9-47-120(2)(c) (looking to "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred" and "any additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risk").

Root Cause Analysis – What is the company's root cause analysis of the misconduct at issue? Were any systemic issues identified? Who in the company was involved in making the analysis?

Prior Weaknesses – What controls failed? If policies or procedures should have prohibited the misconduct, were they effectively implemented, and have functions that had ownership of these policies and procedures been held accountable?

Payment Systems – How was the misconduct in question funded (e.g., purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?

Vendor Management – If vendors were involved in the misconduct, what was the process for vendor selection and did the vendor undergo that process?

Prior Indications – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations? What is the company's analysis of why such opportunities were missed?

Remediation – What specific changes has the company made to reduce the risk that the same or similar issues will occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

Accountability – What disciplinary actions did the company take in response to the misconduct and were they timely? Were managers held accountable for misconduct that occurred under their supervision? Did the company consider disciplinary actions for failures in supervision? What is the company's record (e.g., number and types of disciplinary actions) on employee discipline relating to the types of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue? Did the company take any actions to recoup or reduce compensation for responsible employees to the extent practicable and available under applicable law?

V Cartel liability – Counterfactual analysis in price fixing; Overreach, underreach, complexity

A Counterfactual analysis in price fixing

73. Is counterfactual analysis required or appropriate when applying the definition of a cartel provision in the context of price fixing? Under counterfactual analysis, a price is not 'controlled' by an alleged price-fixing provision if the price in question is the same or much the same as the market price that would exist in a counterfactual world without the alleged price-fixing provision.

74. Counterfactual analysis is likely to be raised in some cases by defendants exposed to the threat of liability for price fixing especially given that the threat of high penalties has escalated. However, counterfactual analysis should be rejected in this context. Allowing counterfactual analysis would be to convert per se liability into liability based on an impractical test of market price with and without the alleged price fixing conduct.

75. The better view is that counterfactual analysis is irrelevant in relation to the effect condition or the purpose condition in s 45AD(2), but some doubt may linger:[124]

- The law, as stated and applied in *ACCC v CC (NSW)* by Lindgren J,[125] is that: "An arrangement or understanding has the effect of 'controlling price' if it restrains a freedom that would otherwise exist as to a price to be charged." This

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124 Contrast *ACCC v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 413 [168] (Lindgren J) with: *ACCC v Pauls Ltd* [2003] ATPR ¶41-911 46 624–46 626 [117]–[128] (O'Loughlin J); *ACCC v Australian Abalone Pty Ltd* (2007) ATPR 42-199 (where it was argued that the relevant prices were controlled by international market forces); N Hutley, 'Challenging the Australian Competition and Consumer Commission's Pleadings in Cartel Cases' in M Legg (ed), *Regulation, Litigation and Enforcement* (2011) ch 7.

125 (1999) 92 FCR 375, 413 [168].

is consistent with the approach taken by the US Supreme Court in *United States v Socony Vacuum Oil Co*:[126] where price fixing was defined in terms of interference with the free play of market forces.

- In *ACCC v Pauls Ltd*[127] O'Loughlin J seems to have taken the view that an agreement does not control a price if the price charged or offered pursuant to the agreement is a market price. That is not the position taken by Lindgren J. O'Loughlin J's interpretation introduces a counterfactual analysis that, with respect, is inconsistent with the wording and purpose of the provisions defining price fixing.
- O'Loughlin J's interpretation comes close to allowing competitors to deny liability for price fixing if the price is a "reasonable price". That interpretation was rejected emphatically by the US Supreme Court in *United States v Socony Vacuum Oil Co*:[128]

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale, and protects that vital part of our economy against any degree of interference.

76. The question has been settled in New Zealand by the decision of the Supreme Court in *Lodge Real Estate Ltd. v. Commerce Commission*.[129] The Court followed *ACCC v CC (NSW)*[130] and earlier decisions to the same effect in the *Commerce Commission v. Caltex New Zealand Ltd* cases.[131] The Supreme Court held that the Commerce Commission 'was required to prove only that the arrangement had the purpose or effect of restraining a freedom that would otherwise have existed as to the price to be charged.' [132]

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126 310 US 150, 220 (1940).
127 [2003] ATPR ¶41-911 46 624–46 626 [117]–[128].
128 310 US 150, 220 (1940). See also *United States v Addyston Pipe & Steel Co*, 85 F 271, 284 (6th Cir 1898) (any court that presumed to accept the responsibility for deciding whether a given price was reasonable would 'set sail on a sea of doubt') (Taft J).
129 [2020] NZSC 25. Some commentators disagree with the rejection of counterfactual analysis in relation to the controlling of a price: see especially J Land, 'Clarifying New Zealand Competition Law' (2019) 25 NZBLQ 255.
130 (1999) 92 FCR 375, 412-20.
131 [1998] 2 NZLR 78, 84; (1999) 9 TCLR 305.
132 [2020] NZSC 25, [146].

77. The decision in *Lodge* includes a consideration of the degree of interference with freedom of action that is required to 'control' a price.[133] On the facts it was held that the arrangements between competitors restrained price freedom to a sufficient extent and that a complete restraint on that freedom was not required for the restraint to 'control' a price.

B Overreach, underreach, complexity

78. The overreach, underreach and complexity of cartel-related sections in Part IV are discussed in detail in *Australian Cartel Regulation*[134] and elsewhere.[135] The extent of the fall-out from poor statutory design appears to have increased.

Overreach

79. Overreach arises where a prohibition is defined in terms that catch conduct that is not harmful enough to justify subjection to liability.

80. Overreach often arises when s 45AD of the CCA is dropped on commerce. These are some examples:

(a) A and B agree that B will supply iron ore to A for use in A's steel making plant. A and B compete downstream in Australian steel market/s. As in *ACCC v CC(NSW)*,[136] the price of the input under the supply agreement 'controls' the price of the steel supplied by A downstream in competition with B. The cost of the iron ore is a material component of the cost of the steel.[137] The input provision is a cartel provision. There is no exclusivity so the exclusive dealing exception under s 45AR does not apply. There is no joint venture so the joint venture exceptions under ss 45AO and 45AP do not apply. A and B are exposed to cartel liability unless the input price provision is authorised by the ACCC. The test for authorisation is overriding benefit, not merely lack of substantial lessening of competition.

(b) C and D are competing suppliers of gas on the East Coast of Australia. They agree to supply gas over the next year for less than $10 per gigajoule.[138] The maximum price

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133 [2020] NZSC 25, [148]-[171]. See further M Berry, 'Lodge: Old and New Questions About the Analysis of Cartels in New Zealand', *Competition Policy International*, June 2022.

134 Ch 4.

135 See eg Gilbert + Tobin, 'ACCC win against Flight Centre in High Court raises competition compliance risk for dual distribution models', 14 December 2016, at: https://www.gtlaw.com.au/insights/accc-win-against-flight-centre-high-court-raises-competition-compliance-risk-dual; M Parry & R Hobson, 'A snuggle for survival ─ the paradox of section 44ZZRD(3)(c): Restricting co-operation may mean restricting competition' (2014) 22 AJCCL 201.

136 (1999) 92 FCR 375, 412-20.

137 *ACCC v Olex Australia Pty Ltd* [2017] FCA 222, [655]-[658].

138 Suggested by 'PM playing with cartel fire as he pushes domestic gas plan', *The Australian*, 4 October 2017.

provision in the agreement is a cartel provision.[139] C and D will be exposed to cartel liability unless the maximum price provision is authorised by the ACCC.

(c) E is an airline that sells international air tickets direct to online customers. F is a travel agent that sells E's international air tickets. The agreement between E and F includes a price parity clause that E will not sell tickets directly to customers at a lower price than the prices made available by E to F. F is an agent in a similar position to Flight Centre in the *Flight Centre* case.[140] The price parity clause is a price fixing provision. The parties are competitors. There is a cartel provision. E and F will be liable for cartel conduct unless the cartel provision is authorised by the ACCC.

(d) G is a gym franchisor. H and I are franchisees who compete against each is the same city.[141] The franchise agreement between G, H and I requires that the gym subscription payable by persons with a disability will be discounted by 50%. The 50% discount provision is a price fixing provision. The franchise agreement is not a joint venture. G, H and I are subject to cartel liability unless the 50% discount provision and other possible cartel provisions in the franchise agreement are authorised.

(e) J, K and L are competing banks and members of Swap 451, a climate lobby group. They agree to stop funding fossil fuel ventures from 1 July 2023.[142] The agreed restriction on supply is a cartel provision and will be subject to cartel liability unless authorised by the ACCC.

(f) M, N and O are competing pharmaceutical companies. They agree that each of them will restrict the supply of Type X drugs in Australia by 30% for 6 months in order to increase their supply of those drugs to Ukraine, PNG, Nigeria, Yemen and other

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139 *Australian Cartel Regulation*, 96.

140 *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203; see the critique in A McClenahan, 'Agents as Competitors? The Implications of ACCC v Flight Centre for Dual Distribution' (2019) 27 AJCCL 235.

141 Cartel issues in franchise agreements are prevalent yet rarely discussed. An exception is Lane Neave, 'The Commerce Act and cartel conduct: what does it mean for your franchise?', 25 July 2018, at: https://www.laneneave.co.nz/news-events/the-commerce-act-and-cartel-conduct-what-does-it-mean-for-your-franchise/#:~:text=Franchise%20provisions%20such%20as%20restraint,allocate%20markets%20between%20the%20franchisees

142 Compare: 'Banks and Climate', *BankTrack*, 15 March 2023, at: https://www.banktrack.org/campaign/banks_and_climate; '87 major companies lead the way towards a 1.1.5°C future at UN Climate Action Summit', 22 September 2019, at: https://sciencebasedtargets.org/news/87-major-companies-lead-the-way-towards-a-1-5-c-future-at-un-climate-action-summit. See further "When does Collaboration become Collusion?', *NY Times*, 13 November 2022, at: https://www.nytimes.com/2022/11/07/fashion/fashion-industry-antitrust-sustainability.html; Norton Rose Fulbright, ''Climate cartel" or sustainability?', January 2023, at: https://www.nortonrosefulbright.com/en/knowledge/publications/e58258d5/climate-cartel-or-sustainability; Mayer Brown, ''Climate cartels': ESG and Antitrust in the News', 21 November 2022, at: https://www.mayerbrown.com/en/perspectives-events/publications/2022/11/climate-cartels-esg-and-antitrust-in-the-news.

countries where the drugs are needed urgently and are in very short supply.[143] The restrictive provision in their agreement is a cartel provision and will be subject to cartel liability unless authorised.

(g) P and Q settle a patent dispute by cross-licensing their patents.[144] The patents relate to the same type of product and P and Q compete against each in the wholesale market for that product. The cross-licensing enables P and Q to improve the quality of their products without increasing the cost of production. The terms of the cross-licensing are likely to involve price fixing provisions and restriction of supply provisions that are cartel provisions under s 45AD. The cartel provisions will be subject to cartel liability unless authorised by the ACCC. As the application for authorisation in the Juno Pharmaceuticals Pty Ltd case[145] shows, getting authorisation may be difficult.

(h) There are numerous other situations where cartel provisions are likely to arise in IP licensing agreements and where the repeal of s 51(3) is may give rise to cartel liability unless the cartel provisions are authorised by the ACCC.[146]

(i) 'Assume an attack on a number of electricity sub-stations that supply Sydney with much of its electricity.[147] There are back-up supplies of diesel fuel to operate generators so that apartment dwellers can continue to live in their apartments until power is restored. An arrangement is entered into between fuel suppliers to ensure that back-up supplies of diesel fuel are rationed to ensure that the maximum number of apartment dwellers benefit. The purpose of the rationing provision is to restrict the supply of fuel to other users of diesel fuel such as motorists. The arrangement would be likely to fall within

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143 Consider eg OECD, 'Using trade to fight COVID-19: Manufacturing and distributing vaccines', 11 February 2021, at: https://www.oecd.org/coronavirus/policy-responses/using-trade-to-fight-covid-19-manufacturing-and-distributing-vaccines-dc0d37fc/.

144 Cross-licensing deals between competitors may be anti-competitive but not always. See further, Clayton Utz, 'Pharma patent settlements: Will yours withstand Australian competition law scrutiny?', 23 July 2020, at: https://www.claytonutz.com/knowledge/2020/july/pharma-patent-settlements-will-yours-withstand-australian-competition-law-scrutiny.

145 Application for authorisation was withdrawn after a draft determination by the ACCC; the draft determination summary is at: https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/juno-pharmaceuticals-pty-ltd-ors. See further Bird & Bird, 'Not what the doctor ordered: Authorisation application withdrawn for pharma patent settlement in Australia,' 22 August 2022, at: https://www.twobirds.com/en/insights/2022/australia/not-what-the-doctor-ordered-authorisation-application-withdrawn-for-pharma-patent-settlement#:~:text=The%20withdrawal%20of%20the%20application,settlements%20in%20the%20pharmaceutical%20sector.

146 B Fisse, 'Harper Report Implementation Breakdown: Repeal of Section 51(3) of Competition and Consumer Act 2010 (Cth) and Lack of Proposed Supply/Acquisition Agreement Cartel Exception' (2019) 47(1) Australian Business Law Review 127; B Fisse, 'Competition Law and Intellectual Property in Australia – Traps for Unwanted Catches', *Competition Policy International*, 14 October 2019.

147 S Corones & B Lane, 'Shielding Critical Infrastructure Information-sharing Schemes from Competition Law' (2010) 15 Deakin LR 1, 20.

the definition of a cartel provision in [s 45AD(3)(a)(iii)] despite the obvious public benefit of such a provision.'

(j) Several competing online platforms enter into an agreement imposing controls and procedures that each will use to remove child pornography, gambling and other specified types of unlawful or undesirable content.[148] The restrictions are cartel provisions. Authorisation is the only safe escape route.

(k) In *Quantum Service and Logistics Pty Ltd v Schenker Australia Pty Ltd*,[149] Quantum and Schenker entered into a Services Agreement which included a six-month restraint of trade clause, that specified that the parties agree not to employ the employees or ex-employees of the other party as follows:

> 13.13. Solicitation for Employment. The parties agree that neither party and their associated entities, sub-contractors or their employees will employ or approach for employment, the employees or ex-employees of the other party, during the term and until a minimum period of six (6) months following the termination of this agreement.

The restraint of trade was held to be reasonable. However, if the plaintiff and defendant were competitors, was the restraint of trade a cartel provision?[150]

81. In some cases where the purpose condition is relevant under s 45AD(3) it may be possible to avoid overreach by resorting to the ultimate purpose escape route created in *News Ltd v South Sydney*.[151] In *News Ltd v South Sydney* a majority of the High Court held that the immediate purpose of a term of an agreement to merge two rugby league competitions was not an exclusionary purpose because the 'end in view' was to save the game of rugby league from financial ruin:[152] In other cases, where the effect condition of s 45AD(2) applies or where the purpose condition of s 45AD(3) applies by reason of s 4F of the CCA, it will be necessary first to hunt for one or more exceptions apart from authorisation. If none is available or likely to work, the option left is to apply for authorisation by the ACCC. Authorisation of cartel conduct is subject to a public benefit test: it is insufficient to show that the conduct is unlikely to substantially lessen

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148 See further E Douek, 'The Rise of Content Cartels: Urging Transparency and Accountability in Industry-Wide Content Removal Decisions', Knight First Amendment Institute, 11 February 2020, at: https://knightcolumbia.org/content/the-rise-of-content-cartels; 'EPL to end gambling sponsorships', *RNZ*, 14 April 2023, at: https://www.rnz.co.nz/news/sport/487913/epl-to-end-gambling-sponsorships (thanks to John Land for the latter example).

149 [2019] NSWSC 2.

150 No poach agreements between competitors have been challenged as cartel conduct in the US, the EU and Canada. In Australia, it is doubtful that such agreements are protected by s 51(2) of the CCA. In NZ, it is doubtful that such agreements are protected by *Commerce Act 1986* (NZ) s 44(1)(f).

151 (2003) 215 CLR 563.

152 *Australian Cartel Regulation*, 104 (footnotes omitted). See also I Wylie, 'What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond' (2007) 35 ABLR 33.

competition in a market. The need for further development of exceptions to cartel prohibitions in Australian cartel law is discussed in Part VIII below.

Underreach

82. Underreach arises where a prohibition is defined in terms that do not catch conduct that is harmful enough to justify subjection to liability.

83. An orthodox view has been that an arrangement or understanding requires 'assumption of an obligation' or 'commitment' by at least one party to a CAU.[153] The difficulty of proving commitment or assumption of an obligation has generated concern about the underreach of the cartel prohibitions and much debate.[154] The response in the 2017 amendments to the CCA after the Harper Review was to introduce a concerted practices prohibition that does not require a CAU but, unlike the cartel prohibitions, is subject to a SLC test.[155]

84. A different interpretation of the concept of an 'understanding' in a CAU has been adopted by O'Bryan J in *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)*.[156] That interpretation dispenses with the concepts of 'commitment' and 'assumption of an obligation' where an 'understanding' is the type of CAU alleged.

85. O'Bryan J's interpretation in *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)* has three central planks.

86. The first is the distinction between an arrangement and an understanding.[157] In *Top Performance Motors*, [158] Smithers J concluded:

> "…the existence of an arrangement of the kind contemplated in s. 45 is conditional upon a meeting of the minds of the parties to the arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement".

By contrast, Smithers J described an understanding in these terms:[159]

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153 See eg *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 161, [45]; *Australian Cartel Regulation*, 43-47.
154 As discussed in 'Australian Cartel Law: Biopsies', Part II.
155 CCA s 45(1)(c).
156 [2022] FCA 1475.
157 [2022] FCA 1475, [105]-[106].
158 (1975) 24 FLR 286, 291.
159 (1975) 24 FLR 286, 291.

> It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.

87. Secondly, the different language used by Smithers J to explain an 'arrangement' and an 'understanding' within the meaning of s 45 of the Act is subtle but important: [160]

> By the use of three different words, contract, arrangement and understanding, Parliament has prohibited three forms of conduct that are considered to be harmful to competition and, thereby, the welfare of Australians (as per s 2 of the Act). Each of the three words should be given meaning and effect: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] per McHugh, Gummow, Kirby and Hayne JJ. While an arrangement is well described in terms of undertaking obligations or duties, albeit not legally enforceable, an understanding is more aptly described as arriving at a common mind (or consensus) as to a particular course to be followed. Cartel conduct is the antithesis of competitive conduct and, for that reason, is a criminal offence under the Act. Businesses tempted to engage in such conduct will rarely do so openly and will usually seek to do so through hidden or subtle communications with competitors which may take the form of words or conduct. If through such communications competitors arrive at a common mind as to the adoption of a particular course of business conduct that answers the description of a cartel provision, competition and the welfare of Australians will be harmed. It is consistent with the statutory text and purpose to describe such conduct as an understanding within the meaning of the Act.

88. Thirdly, in the context of an understanding containing an unlawful cartel provision, the assumption of an obligation means no more than the communication of assent to a particular course of conduct proposed by a competitor, where the communication may be by words or conduct.[161] 'Language of obligation, commonly used in the law of contract, should not obscure the nature of an understanding and the means and circumstances in which it may be arrived at.' [162]

89. Dispensing with the concepts of obligation and commitment is most welcome. However, query whether the concept can so readily be read out of the case law on the element of 'understanding.[163]

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160 [2022] FCA 1475, [106].

161 [2022] FCA 1475, [108].

162 Ibid.

163 Consider eg *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 161, [45]. On an orthodox interpretation, the key difference between 'arrangement' and 'understanding' does not depend on the concepts of obligation or

90. More fundamentally, the concepts of commitment and assumption of an obligation are irrelevant to contract, arrangement or understanding if the underlying model is an offer and acceptance model of agreement. See Oliver Black, *Agreements: A Philosophical and Legal Study* (2012)[164] and the discussion of that model and its implications in 'Australian Cartel Law: Biopsies' at this Conference in 2018.[165] By contrast, the approach taken in *BlueScope Steel* is consistent with an offer and acceptance model of agreement in relation to the concept of an 'understanding' but not the concept of an 'arrangement'. In my view, an offer and acceptance model of agreement should apply to all species of a CAU, ie contract, arrangement or understanding. A statutory amendment to that effect has been proposed, in 'Australia Cartel Law: Biopsies'.[166]

Complexity ─ cartel tunnel syndrome

91. The complexity of the definitions of the cartel prohibitions remains other-worldly. Widespread criticism of that complexity since the inception of the cartel legislation in 2009 and earlier[167] has yet to result in simplification.

92. The complexity came to an ugly head in the *Country Care* prosecution[168] and the bank cartel prosecution.[169]

93. The acquittals in the *Country Care* case ensued after necessarily complex directions were given by Bromwich J.[170] That led Wigney J to make these extra-curial observations:[171]

> Of course, nobody but the jury knows exactly why they were ultimately not satisfied beyond reasonable doubt in relation to the charges, and I doubt that it could just be put down to the complexity of the charges.
>
> But what perhaps can be said is this: the underlying factual allegations in the case were not overly complex or difficult.

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commitment but on the need or otherwise for communication between the parties: communication is implicit in an arrangement whereas an understanding may be tacit.

164 (Cambridge University Press, 2012).

165 Part II.

166 Part II.

167 See eg B Fisse, 'Defining the Cartel Offences: Disaster Recovery', Competition Law Conference, Sydney, 24 May 2009.

168 *Commonwealth Director of Public Prosecutions v The Country Care Group Pty Ltd* [2019] FCA 2200 is the first of a long list of reported judgments in this case. The case is discussed in 'Two Steps Forward, Four Steps Back.'

169 See references at n 11 above.

170 I am indebted to His Honour and the Federal Court for making a copy of these directions available to me.

171 'Recent Developments in Competition Law: Cartel Cases'.

> And yet, when I recently had cause to read the trial judge's meticulous and articulate directions of law in relation to the elements of the offences, the complexity of the legal case that confronted the jury was plain to see. The written directions concerning the elements of the offences which the trial judge provided to the jury, and which his Honour no doubt explained and developed orally in the course of his summing up, were exceptionally long and complex. The written directions concerning the elements of the first charge alone extended to seven pages!

94. In the bank cartel case, Wigney J was forthright about the tortuous statutory maze into which cartel trials must enter:[172]

> Those responsible for drafting the cartel offence provisions in the C&C Act – none of whom could possibly have ever set foot in a criminal trial court before – appear to have approached the drafting task as if it were akin to producing a cryptic crossword. The offence provisions, when read with the extensive definitions of the terms used in them, are prolix, convoluted and labyrinthine. When coupled with the general principles of criminal responsibility, including the extensions of criminal responsibility in Ch 2 of the Criminal Code, the complexity of the offences is multiplied. By the time the maze of provisions is worked through, it is very easy to lose sight of exactly what conduct the offence provisions are intended to bring to account and punish.

95. The statutory definition of criminal and civil cartel liability in the *Commerce Act 1986* (NZ) is far simpler.[173] The civil liability provisions in the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ) were discussed at this Conference in 2014.[174]

96. The NZ model, although a refreshing simplification, is open to improvement. For example:

- the concept of a 'provision' in a CAU is unduly technical;[175] and
- the concept of 'purpose of a provision' is to be avoided ─ it has no cogent policy rationale and causes difficulties of interpretation.[176]

97. So many cartel tunnels have been dug in the CCA that eradication of complexity requires substantial legislative revision.[177] Digging more tunnels is not the solution. Open cast mining is needed by a new team with modern drafting equipment. One gold

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172 *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 5 – Indictment*) [2021] FCA 1345 [246].
173 Sections 30-33.
174 Hon S Rares J, 'Competition, Fairness and the Courts' (2014) 39 Australian Bar Rev 79; B Fisse, 'Competition, fairness and the courts' (2014) 30 Australian Bar Review 101. The Commerce (Cartels and Other Matters) Amendment Bill received Royal Assent on 14 August 2017. Criminal cartel liability was enacted in 2019 and came into effect in 2021.
175 *Australian Cartel Regulation*, 276-277.
176 'Australian Cartel Law: Biopsies', [29]-[33].
177 *Australian Cartel Regulation*, 131-132.

ingot to be produced is a total reduction and recasting of Division 1 of Part IV of the CCA. There is no quick fix.

VI Individual and corporate liability — Allocation of individual accountability; Definition of corporate fault

A Allocation of individual accountability

98. The allocation of individual and corporate liability for cartel conduct, as in the context of corporate unlawful conduct generally, is a fundamental issue.[178] Individual and corporate liability complement each other. They are not substitutes.

99. A major problem in many jurisdictions including Australia is that individual liability may not be pursued, or pursued to a minimal extent, as part of a deal under which the corporation takes the rap in order to protect managers against enforcement action.[179] Individual responsibility is a foundation of social control. However, individual responsibility may be abandoned where corporations induce prosecutors or enforcement agencies to cut a deal under which the bad deeds of managers are in effect bought off by a corporate fine or civil monetary penalty, or are considered too difficult to pursue.[180] Conversely, prosecutors or enforcement agencies may target individuals in order to get evidence from them against their corporation.[181]

100. Individuals together with their corporations have been prosecuted successfully for cartel offences in several recent cases in Australia:[182]

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178 *Corporations, Crime and Accountability*. See also ALRC, *Corporate Criminal Responsibility*, ch 9.

179 The most prominent Australian example is *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538 ($1.3 billion penalty for money-laundering). See further JC Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Oakland, CA, Berrett-Koehler Publishers, 2020); J Eisenger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (New York, Simon & Schuster, 2017).

180 In Australia, civil penalty actions were brought successfully against many airlines for air freight surcharge price fixing but no individual was the subject of proceedings. In the case of Qantas, the meagre yield of enforcement action against individuals appears limited to one US Qantas executive (Mr B. McCaffrey); see 'Ex-Qantas freight chief pays heavy price for cartel', *Sydney Morning Herald*, 4 May 2009, 24. Senior Qantas executives in Australia were not subject to extradition to the US: at that time there was not cartel offence in Australia (cartel offences came into effect on 24 July 2009). The civil enforcement proceedings taken in Australia by the ACCC did not extend to the Qantas employees who were implicated in the price fixing.

181 As in the case in 2022 against the Trump Organization for fraud and tax evasion: 'The Trump Org.'s convictions highlight the sharpest arrow in the prosecution's quiver', *Flipboard*, 8 December 2022, at: https://flipboard.com/topic/georgiapolitics/-/a-Yg1xXoqARLWm_xThXG9dlg%3Aa%3A47769541-%2F0.

182 See further: Clayton Utz, 'The "cryptic crossword" of Australian cartel laws still unsolved: An update on criminal cartel prosecutions,' 24 March 2023, at: https://www.claytonutz.com/knowledge/2023/march/the-cryptic-crossword-of-australian-cartel-laws-still-unsolved-an-update-on-criminal-cartel-prosecutions;'Maddocks, ACCC 2022 in review: Cartel conduct', 9 February 2023, at: https://www.maddocks.com.au/insights/accc-

- *Commonwealth Director of Public Prosecutions v Alkaloids of Australia Pty Ltd*[183] and *Commonwealth Director of Public Prosecutions v Joyce*;[184]
- *Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd*';[185]
- *Commonwealth Director of Public Prosecutions v Bingo Industries*;[186] and
- *Commonwealth Director of Public Prosecutions v Aussie Skips Recycling and Aussie Skips Bin Services*.[187]

101. Individuals together with their corporations have been proceeded against successfully for cartel conduct in recent civil proceedings:[188]

- *ACCC v NQCranes Pty Ltd*;[189]
- *ACCC v Bluescope Steel Limited*;[190]
- *ACCC v Ashton Raggatt McDougall Pty Ltd*;[191]
- *ACCC v Qteq Pty Ltd*;[192]
- *ACCC v First Class Slate Roofing Pty Ltd*;[193] and
- *ACCC v Delta Building Automation Pty Ltd*.[194]

Contrast *ACCC v Swift Networks Pty Ltd*[195] where civil penalty proceedings have been taken in relation to the corporation only.

102. These results are to be contrasted with the acquittals in the *Country Care* case and the resounding collapse of the bank cartel prosecution. A conviction has yet to be attained in a contested cartel prosecution.

2022-in-review-cartel-conduct; Clifford Chance, Cartels update', 4 July 2022, at: https://www.cliffordchance.com/briefings/2022/07/cartels-update-a-review-of-australias-criminal-cartel-regime.html.

183 [2022] FCA 1424.
184 [2022] FCA 1423.
185 [2022] FCA 665.
186 ACCC, 'Bingo Industries pleads guilty to alleged demolition waste cartel', 16 August 2022.
187 ACCC, 'Aussie Skips and its chief executive charged with alleged waste services cartel offences,'19 December 2022.
188 See further, Maddocks, 'ACCC 2022 in review: Cartel conduct'.
189 [2022] FCA 1383.
190 [2022] FCA 1475.
191 [2023] FCA 351.
192 ACCC, 'Oil and gas services company Qteq in court for alleged cartel conduct,' 8 December 2022.
193 [2022] FCA 1093.
194 ACD32/2021.
195 ACCC, 'Court action for alleged tendering cartel at WA mining camps', 17 February 2023.

103. In three major cartel prosecutions the accused were corporations alone:

- *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha*;[196]
- *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd*;[197] and
- *Commonwealth Director of Public Prosecutions v Wallenius Wilhelmsen Ocean AS*. [198]

The expectation that catalysed the introduction of cartel offences in Australia was that the threat of individual criminal liability and imprisonment was necessary in order to deter cartel conduct effectively.[199]

104. The ACCC *2023 Compliance and Enforcement Policy and Priorities*[200] does not refer to the importance of individual liability or the balance to be struck between individual and corporate liability. Nor does the *Prosecution Policy of the Commonwealth*.[201] Clearer direction would be desirable somewhere. Consider the Yates Memorandum 'Individual Accountability for Corporate Wrongdoing' (2015) that applies to US federal enforcement discretion.[202] That policy was updated in September 2022 by Deputy Attorney-General, Lisa Monaco.[203]

105. The revised US DOJ Memorandum includes these directions:[204]

> The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime. Such accountability deters future illegal activity, incentivizes changes in individual and corporate behavior, ensures that the

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196 [2017] FCA 876.
197 [2019] FCA 1170.
198 [2021] FCA 52.
199 See Commonwealth, Parliamentary Debates, House of Representatives, 3 December 2008, 12309 (Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Second Reading Speech). As regards some of the recent the US experience see eg LM Phelan, JC Folio, S Pollock-Bernard, 'Executives Indicted, But Will the Companies Follow? The Increasingly Aggressive Focus on Individual Executives in US Cartel Investigations and the Implications for Criminal and Follow-on Civil Litigation', *Competition Policy International*, 7 December 2022.
200 February 2018, at: https://www.accc.gov.au/system/files/D18-20423%20Enf%20-%20Admin%20Other%20-%20CLEAN%20VERSION%20final%20draft%20Combined%20Complia...%20%5Bfinal.%5D.pdf .
201 Updated 19 July 2021, at: https://www.cdpp.gov.au/prosecution-policy.
202 At: https://www.justice.gov/archives/dag/file/769036/download
203 Memorandum from Deputy Attorney General Lisa Monaco, 'Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group', 15 September 2022, at: https://www.justice.gov/opa/speech/file/1535301/download.
204 Id, 2-3.

> proper parties are held responsible for their actions, and promotes the public's confidence in our justice system. See Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015 …
>
> To be eligible for any cooperation credit, corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct. …
>
> In particular, it is imperative that Department prosecutors gain access to all relevant, nonprivileged facts about individual misconduct swiftly and without delay. Therefore, to receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals. Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Companies seeking cooperation credit ultimately bear the burden of ensuring that documents are produced in a timely manner to prosecutors.

106. The ALRC, in its report, *Corporate Criminal Responsibility*, examined how different mechanisms for holding individuals liable had been used in criminal and civil penalty proceedings reported on in the period 1 January 2015 to 20 March 2020 by ASIC and the ACCC as having been conducted against corporations and individuals associated with them.[205] For the purpose of analysing the proceedings, the ALRC categorised the corporations or corporate groups involved into four groups: 'small', 'large', 'very large', and 'largest', according to financial and organisational indicators.[206] This research supported the suggestion that there is an accountability gap in relation to boards and/or senior management of the largest corporations. It indicated that, in the sectors regulated by ASIC and the ACCC, boards and senior management of the largest corporations were subject to significantly fewer court enforcement actions than equivalent individuals in any other size corporation, as a percentage of total cases.[207] This is one Table set out in the Report.[208]

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205 *Corporate Criminal Responsibility*, 418-428.

206 Id, at 420.

207 This is symptomatic of the 'shut-eyed sentry' problem discussed in *Australian Cartel Regulation*, 6.5.

208 Id, at 422.

Table 9-3: ACCC reported proceedings

Size Group	Total proceedings reported	Against corporation only	Involving directors and/or senior managers (corporate misconduct)	Involving directors and/or senior managers (private misconduct)	Involving lower level employees or agents
Small	53	23 (43%)	28 (53%)	1 (2%)	1 (2%)
Large	12	11 (92%)	1 (8%)	-	-
Very Large	9	8 (89%)	1 (11%)	-	-
Largest	57	52 (91%)	5 (9%)	-	-

Note: *One proceeding may involve individuals from more than one category of individual, so the percentages in each row do not necessarily total 100%.*

107. An updated study is needed to reflect more recent enforcement activity, with a breakdown of the type of alleged breaches of the CCA to compare the picture in different areas of enforcement including cartel enforcement. Ideally, the ACCC would provide this information in its Annual Report. Table 3.4: Performance measures for key activity 1.1 in the 2021-2022 Annual Report does not do so.

B Definition of corporate fault

108. The physical elements and fault elements required for corporate liability under the cartel prohibitions in Part IV Div 1 are attributable to a corporation on the basis of 'vicarious responsibility'[209] under s 84(1) (fault elements) and s 84(2) (physical elements). The general principles of corporate criminal responsibility under Part 2.5 of the Criminal Code are excluded by s 6AA(2) of the CCA. Apart from s 84, the physical elements and fault elements are attributable to a corporation under the common law. The current trend in Australia is to take the common law position to be as expressed by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*.[210]

109. According to *Meridian*, there is no general principle at common law for the attribution of conduct or fault to a corporation. Instead, there is an adjuration that the conduct or fault of a representative acting on behalf of a corporation is to be attributed to the

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209 Technically, s 84(1)-(2) make the state of mind and conduct of a director, employee or agent the state of mind and conduct of the corporation: see *Trade Practices Commission v Tubemakers Ltd* (1983) 47 ALR 719, 738–40. However, the effect is to impose vicarious responsibility in the sense of strict responsibility for the state of mind or conduct of another. The term 'vicarious responsibility' is used here in the latter commonplace sense.

210 [1995] 2 AC 500. For NZ, see *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549, [66]; *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608, [38]-[50].

corporation where, as a matter of construction, the conduct or fault 'should be attributed' to the corporation:[211]

> 'the determination of the applicable rule of attribution to apply in a given legal setting is a matter of construction of the relevant substantive law being applied; the question of construction is whether the substantive law requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.'

This *Meridian* adjuration is neither principle nor rule; it is elusion.

110. In *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)*[212] O'Bryan J held that s 84(1) did not apply to attempt to induce cartel conduct[213] and other forms of ancillary liability and that the common law on attribution of fault to a corporation applied in relation to the fault elements of ancillary liability.

111. Section 84(1) relevantly provides:

> (1) If, in:
>
> (a) a prosecution for an offence against section 44ZZRF or 44ZZRG in respect of conduct engaged in by a body corporate; or
>
> (b) a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 44ZZRJ, 44ZZRK … applies; or
>
> (ba) ..
>
> it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:
>
> (c) a director, employee or agent of the body corporate engaged in that conduct; and
>
> (d) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
>
> (e) the director, employee or agent had that state of mind.

112. Section 84(2) provides:

> (2) Any conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

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211 [1995] 2 AC 500, 507.
212 [2022] FCA 1475.
213 [2022] FCA 1475, [171].

> shall be deemed, for the purposes of this Act, a gas market instrument and the consumer data rules, to have been engaged in also by the body corporate.

113. O'Bryan J examined the wording of s 84(1) and the legislative history of the provision. Three main conclusions of law were reached. First, s 84(1) is limited to the offences and contraventions specified in the subsection. Secondly, the common law as stated by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*[214] applied to the fault element of intention required for an attempt to induce cartel conduct. Thirdly, s 84(2) applies generally to '[a]ny conduct engaged in or on behalf of a body corporate': s 84(2) is not limited to the offences and contraventions specified in s 84(1):

114. O'Bryan J held that, under *Meridian*, the intention of employees who have the actual or ostensible authority to enter into the alleged understanding is attributable to the corporate defendant:[215]

> .. in a case such as the present, I consider that the applicable rule extends to employees who have the actual or ostensible authority to enter into the understanding on the corporation's behalf. That is for two principal reasons. First, it is consistent with the statutory rule of attribution of conduct that applies in this case under s 84(2), by which conduct of an employee within the scope of the employee's actual or apparent authority is attributed to the corporation. If the legislature considered that such conduct should be attributed to the corporation in a proceeding under s 76(1), it is reasonable to assume that the state of mind of the employee engaging in that conduct is also to be attributed to the corporation for the same purpose. It is that employee's state of mind that will be the most relevant in assessing the liability of the corporation under the Act. Second, it is consistent with the general principles established in company law concerning attribution, as recently summarised by Lords Toulson and Hodge JJSC in *Bilta (UK) Ltd (in liq) v Nazir* [2016] AC 1 at [183]-[189], particularly at [188], under which a company can incur direct liability through the transactions of agents within the scope of their actual or apparent authority.

115. O'Bryan J held further that corporate attribution under *Meridian* in this case was not limited to the intention of two senior managers, Messrs Ellis and Hennessy:[216]

> It follows, in my view, that it is relevant to consider the state of mind of each of the BlueScope employees allegedly engaged in the unlawful conduct, and not just the state of mind of Messrs Ellis and Hennessy. I note, though, that even if BlueScope were correct and only the intention of Messrs Ellis and Hennessy were to be attributed to BlueScope, the analysis of the evidence would not alter in any material way. As BlueScope

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214 [1995] 2 AC 500, 507; [2022] FCA 1475, [172].
215 [2022] FCA 1475, [174].
216 [2022] FCA 1475, [175].

> acknowledged, the understanding of Messrs Sparks, Gent, Whitfield and Kelso about BlueScope's strategy remains relevant and probative of the content and intent of the strategy because the strategy was communicated within BlueScope and those employees had a role in implementing it.

116. The practical effect of the weight given to s 84(2) when applying *Meridian* to the relevant CCA provisions is much the same as the result of attributing the intention of an employee or agent to a corporation under s 84(1). The anti-climax is stark and startling. It induces doubt as to the law-worthiness of *Meridian*.

117. The attempt of the Privy Council in *Meridian* to rectify the rightly-criticised decision of the House of Lords in *Tesco Supermarkets v Nattrass*[217] sensibly broadens the scope of direct corporate responsibility but is otherwise unsatisfactory.[218] *Meridian* has two basic flaws. First, whether the acts and state of mind of a person not representing the directing mind and will of the company are to be attributed to the corporation depends on 'construction', not guiding principle. Secondly, the rule in *Meridian* bears no relationship to the fundamental fault concept of corporate blameworthiness. That concept has been widely recognised by commentators and law reform agencies.[219] The contention in *Meridian* that there is no one concept of corporate fault tries to block out that body of thought. The contention is also specious. No general principle of fault in the criminal or civil law operates to the exclusion of exceptions and defences to liability. The concern about holding a corporation liable for the conduct of a director or employee that has defrauded the corporation[220] can readily be accommodated by an exception to corporate liability in such a situation.

118. The *Meridian* flaws and the recent escalation of fines against corporations under the CCA raise the question whether the cartel offences and ancillary liability under the CCA call for more robust forms of corporate fault than we now have. Should Part 2.5

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217 [1972] AC 153. 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions', 1186–8; J Gobert & M Punch, *Rethinking Corporate Crime* (Butterworths, London, 2003) 62–9.

218 See CMV Clarkson, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 Modern Law Review 557, 565–9; J Clough & C Mulhern, *The Prosecution of Corporations* (Melbourne, Oxford University Press, 2002) 99–10.

219 See eg E Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023); *Corporate Criminal Responsibility*, 231; *Corporations, Crime and Accountability*, ch 2; C List & P Pettit, *Group Agency* (2011); P Pettit, 'Responsibility Incorporated (2007) 117 Ethics 171; PA French, *Collective and Corporate Responsibility* (1984); J Hill, 'Legal Personhood and Liability for Flawed Corporate Cultures', Research Paper No 19/03, Faculty of Law, The University of Sydney, February 2019, at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309697

220 See eg *Macleod v The Queen* (2003) 214 CLR 230; *Bilta (UK) Ltd (in liq) v Nazir* [2016] AC 1, [204]-[207] (UKSC).

of the Criminal Code apply given the ALRC recommendations for revising the principles of corporate responsibility under that Part?

119. The ALRC Final Report, *Corporate Criminal Responsibility* (2020) advances two possible options for attributing fault to a corporation under the Criminal Code:[221]

> **Recommendation 7**
>
> **Option 1**
>
> Section 12.3 of the schedule to the Criminal Code Act 1995 (Cth) should be amended to:
>
> a) replace 'commission of the offence' with 'relevant physical element';
> b) replace 'high managerial agent' with 'officer, employee, or agent of the body corporate, acting within actual or apparent authority' (with consequential amendments to s 12.3(4));
> c) replace 'due diligence' with 'reasonable precautions' (with consequential amendments to s 12.5);
> d) pluralise the terms 'attitude', 'policy', and 'rule' in the definition of corporate culture and replace 'takes' with 'take'; and
> e) repeal subsection 12(2)(d).
>
> **Option 2**
>
> Section 12.3 of the schedule to the Criminal Code Act 1995 (Cth) should be replaced with a provision to the effect that, if it is necessary to establish a state of mind, other than negligence, of a body corporate in relation to a physical element of an offence, it is sufficient to show that:
>
> a) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, engaged in the relevant conduct, and had the relevant state of mind; or
> b) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, directed, agreed to, or consented to the relevant conduct, and had the relevant state of mind.
>
> It is a defence if the body corporate proves that it took reasonable precautions to prevent the commission of the offence.

120. My preference is for Option 2, partly because it avoids the concept of 'corporate culture' which is unworkable as a basis of liability.[222] However, exploration of these Options and other possible approaches is beyond the scope of this paper.

121. It is unclear what the Government intends to do about the ALRC Report and its Recommendations. An interim solution in the context of the CCA would be to add a

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221 ALRC Report 136.

222 *Australian Cartel Regulation*, 232. This is not to deny that cultures of compliance matter in other contexts including the ethos of corporate management. See further DC Langevoort, 'Cultures of Compliance' (2017) 54 Am Crim L Rev 933.

defence of corporate reasonable precautions to s 84(1) for the purposes of cartel offences and criminal or civil ancillary liability for cartel offences or contraventions. The elements and application of a defence of reasonable corporate precautions to the cartel offences are discussed in detail elsewhere.[223]

VII Ancillary liability – Attempted inducement of cartel conduct; Sidewinder liability (Al Capone or Abe Saffron charges)

A Attempted inducement of cartel conduct

122. There have been many enforcement actions and some prosecutions for attempting to induce another person to engage in cartel conduct.[224]

123. Attempting to induce another person to engage in cartel conduct is the main potential basis of liability where unilateral conduct is intended to lead to a cartel. It is an important basis of liability partly because it does not require proof of a CAU between the defendant and a competitor. It is also important given the repeal of the price signalling prohibitions[225] and the absence of any close equivalent to invitation to collude under s 5 of the *Federal Trade Commission Act* (US) or attempted monopolisation under s 2 of the Sherman Act.[226]

124. The law on attempting to induce a breach of a cartel prohibition in Australia has been reconsidered and restated by O'Bryan J in *ACCC v Bluescope Steel Limited*.[227].

125. First, as regards the conduct element of an attempt to induce, O'Bryan J held that a person may be found to have attempted to induce a counterparty to reach a price fixing understanding notwithstanding that the person never expressly asked the counterparty

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223 *Australian Cartel Regulation*, 234-240. The contention in ACCC, ALRC Corporate Criminal Responsibility Review, Submission on Discussion Paper, 3,2 that a due diligence defence would undermine corporate and individual incentives to report cartel conduct under the immunity policy is to try to make the tail of immunity wag the dog of general criminal principle on fault elements. The contention also neglects the point that a due diligence defence would be limited to cartel offences; strict corporate liability for civil penalties would remain and would provide a strong incentive to report. See further C Beaton-Wells, 'Criminal Sanctions for cartel Conduct: The Leniency Conundrum;' (2017) 13 Journal of Competition Law & Economics 125 (the case for criminalization on the grounds of enhancing leniency effectiveness is weak).

224 See eg *Commonwealth Director of Public Prosecutions v The Country Care Group Pty Ltd* [2019] FCA 2200; *ACCC v Australian Egg Corporation Limited* [2017] FCAFC 152; *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203.

225 Repealed in 2017 pursuant to a recommendation of the Harper Review that the price signalling provisions were unfit for purpose. See further B Fisse & C Beaton-Wells, 'The Competition and Consumer Amendment (No 1) 2011 (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 ABLR 28.

226 See eg A O'Brien, 'The Newest Wave of Antitrust "Crimes": Revival of Criminal Monopolization', (2023) 2 Antitrust Chronicle 14, 17-18.

227 [2022] FCA 1475.

for a commitment with respect to the counterparty's prices. The respondents' submission to the contrary was rejected:[228]

> The statutory words have a broader meaning. They require that the parties have, by words or conduct, aroused an expectation in each that they will conduct themselves in accordance with the subject matter of the arrangement or understanding. The expectation must be more than a mere hope, belief or prediction that, as a matter of fact, a person will conduct themselves in the future in a particular way. The expectation must arise out of the dealings between the parties which has resulted in what can alternatively be called the assumption of an obligation, the giving of an assurance or undertaking, or a meeting of minds, that they will act in the future in a particular way. While an arrangement is well described in terms of undertaking obligations or duties, albeit not legally enforceable, an understanding is more aptly described as arriving at a common mind (or consensus) as to a particular course to be followed. Conduct which founds an understanding can be arrived at by words or conduct and may be tacit. Further, as an arrangement or understanding is not binding on the parties in law, the parties are inevitably free to withdraw from it and act inconsistently with it, notwithstanding their consent to it.
>
> It follows from the judicial explication of the concept of an "understanding" that there is no requirement in law for one of the parties to have expressly sought a commitment from the other party to assume some obligation. An understanding may be reached through a course of dealings between the parties that makes clear the desired outcome and through which a meeting of minds on pursuing the outcome is achieved. A course of dealings between parties is capable of arousing an expectation in each party that they will conduct themselves in accordance with the communicated outcome.
>
> It necessarily follows that an attempt to reach a price fixing understanding within s 76(1)(b) does not require, as a matter of law, that the relevant person has expressly sought a commitment from a competitor to price in a particular way. There are other ways in which a price fixing understanding may be brought about. That conclusion is even stronger in the case of inducing or attempting to induce a person to reach a price fixing understanding within s 76(1)(d). An inducement ordinarily refers to some proffered advantage or disadvantage, promised or threatened, which will follow if the object of the inducement adopts or fails to adopt a stipulated course of action. Mere persuasion, with no promise or threat, may also constitute an attempt to induce. It is not possible to define in any rigid or narrow manner the categories or types of conduct that may constitute inducing or attempting to induce a person to reach a price fixing understanding within s 76(1)(d). The conduct may involve a course of meetings, communications and other dealings in which inducements are proposed or offered and which are directed at reaching a consensus, or a meeting of minds, about the level of prices to be charged by one or more of the parties.

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228 [2022] FCA 1475, [145]-[147].

> It can be accepted that, for a consensus or meeting of minds to be finally arrived at, there must be some communication or indication of assent from one party to the other whether by words or by conduct. However, an attempt to induce a person to reach a price fixing understanding does not require assent to be achieved; it requires a step towards the inducement of the understanding which is more than merely preparatory and which is immediately and not merely remotely connected with the inducement to reach the understanding. It should also be reiterated that, in the context of an attempt and an attempt to induce, it is not necessary for the conduct to have reached an advanced stage or for the precise terms of the proposed understanding to have been formulated.

126. Secondly, as regards the element of intention required for attempt, O'Bryan J held that a person may only be found to have attempted to induce a counterparty to reach a price fixing understanding if the person intended, by their conduct, to take steps which were directed at inducing the counterparty to reach the understanding. It is insufficient that the intention was merely to make the arrangement or arrive at the understanding containing a cartel provision.[229] His Honour amplified what is entailed:[230]

> In other words, it is necessary that the understanding be in contemplation and be the intended outcome of the attempt to induce. It is not sufficient for the person to merely intend that the counterparty reflect on the prices they are charging. The intention must be directed to the ultimate end of reaching an understanding. Again, though, the use of the word "commitment" in that context is unduly limiting. The intention must be to induce the counterparty to reach an understanding, which requires a consensus or meeting of minds about acting in accordance with the subject of the understanding. It is sufficient that, by the acts that constitute the attempt to induce, the person offers promises or threats or otherwise engages in persuasive conduct that is intended to induce a consensus, however the ultimate assent may be communicated.

127. The interpretation of the term 'understanding' by O'Bryan J in *ACCC v Bluescope Steel* is discussed further in Part VB (Underreach) above. The interpretation of O'Bryan J differs from that of the Full Federal Court in *Australian Competition and Consumer Commission v Australian Egg Corporation Limited*:[231]

> In order for there to be an arrangement or understanding within s 44ZZRJ, there must be a meeting of minds and this involves a commitment to act in a particular way. A mere expectation as distinct from an assumption of obligation, assurance or undertaking to act in a particular way is not sufficient.

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229 Contrast *ACCC v Australian Egg Corporation Ltd* (2017) 254 FCR 311, [93]).
230 [2022] FCA 1475, [148].
231 [2017] FCAFC 152 at [95].

128. The attribution of the element of intention to the corporate respondent in *ACCC v BlueScope Steel* is discussed in Part VIB above.

129. The ACCC has been lobbying for the introduction of a prohibition against unfair conduct.[232] The aim is largely to overcome the limits of the prohibitions against unconscionable conduct and also to address the use of harmful 'dark patterns' in the digital economy.[233] It should also be noted that an unfair conduct prohibition, if broadly defined, would allow the introduction of invitation to collude as a basis of liability as under s 5 of the FTC Act in the USA.[234] That basis of liability would be broader than that for attempt to induce cartel conduct under s 76)(1)(d) or s 79(1)(b) of the CCA. This possibility is akin to the use of unconscionability as a basis for enforcement action in cases where misuse of market power is difficult or impossible to prove.[235]

B Sidewinder liability (Al Capone or Abe Saffron charges)[236]

130. Exposure to liability is not limited to the cartel prohibitions and complicity, attempt to induce cartel conduct and other forms of ancillary liability. There is also the possibility of 'sidewinder liability':[237]

> Sidewinder liability is liability that arises incidentally from surrounding events and is enforced in addition to or in lieu of the main offences or contraventions that a defendant is alleged or thought to have committed. A classic example is the conviction and imprisonment of Al Capone for tax offences in the wake of unsuccessful efforts by Eliot Ness and other 'untouchables' to pin him down for murder. In the context of cartel conduct, the main forms

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232 See eg ACCC, '2019 Compliance and Enforcement Policy,' at: https://www.accc.gov.au/about-us/media/speeches/2019-compliance-and-enforcement-policy-address. See further J Paterson & E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 J of Consumer Policy 1.

233 See FTC, 'Bringing Dark Patterns to Light', Staff Report, September 2022, at: https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers .

234 See *In the Matter of Valassis Communications Inc*, FTC 051-0008; *U-Haul International*, FTC 081-0157 (July 14 2010); WE Kovacic & M Winerman, 'Competition Policy and Section 5 of the Federal Trade Commission Act' (2010) 76 Antitrust Law Journal 929. As regards the breadth of s 5, consider eg A Mazumdar, 'Algorithmic Collusion: Reviving Section 5 of the FTC Act' (2022) 122 Columbia LR 449.

235 Eg *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405; A Fels & M Lees, 'Unconscionable conduct in the context of competition law with special reference to retailer/supplier relationships within Australia', In F Di Porto & R Podszun (eds), *Abusive Practices in Competition Law* (ASCOLA Competition Law series, Edward Elgar, 2018), ch 14.

236 I am indebted to Justice Bromwich for the example of Abe Saffron, the 'Mr Sin' who was convicted for tax evasion. See further: 'King of the Cross: Sydney crime boss Abe Saffron's secret friends and properties', *SMH*, 31 May 2007; DC Richman & WJ Stuntz, 'Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution' (2005) 105 Columbia Law Review 583.

237 *Australian Cartel Regulation*, 6.7. See also, MD Paley, 'Prosecuting Failed Attempts to Fix Prices As Violations of the Mail and Wire Fraud Statutes: Elliot Ness Is Back!' (1995) 73 Wash ULQ 333.

> of sidewinder liability are offences relating to the administration of justice .. , money laundering and forfeiture of proceeds of crime .. and offences relating to organised crime ... The main likely targets of sidewinder liability are individuals but corporations are also subject to liability.[238]

131. Offences relating to the administration of justice[239] and for failure to comply with a s 155 notice are the main kinds of sidewinder liability that arise in the context of cartel-related conduct. There are other possibilities including breach of continuous disclosure obligations under the *Corporations Act 2001* (Cth) [240] and money-laundering offences under the *Criminal Code* (Cth).[241]

132. A recent example of sidewinder liability is the prosecution and conviction of Mr Jason Ellis for inciting the obstruction of justice in the *BlueScope Steel* case.[242] Mr Ellis, a former general manager of sales and marketing at BlueScope Steel, was sentenced to eight months imprisonment, for inciting the obstruction of an ACCC investigation into alleged price fixing by BlueScope. Magistrate Atkinson ordered that Mr Ellis be released, without entering custody, upon entering into a recognizance in the sum of $1,000, on the condition that he be of good behaviour for two years. Mr Ellis was ordered to pay a fine of $10,000. Mr Ellis was also a co-respondent in the civil penalty proceedings brought against BlueScope Steel for attempting to induce a competitor to enter into a cartel understanding.[243]

133. Prosecution for obstruction of justice or other offences relating to the administration of justice is justifiable in various situations, including cases like that of Mr Ellis where an attempt is made to get others to give false evidence. However, the discretion to pursue sidewinder liability has not always been exercised wisely. An example is the laying of charges against Mr Richard Pratt in 2008 for providing false or misleading evidence to

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238 *Australian Cartel Regulation*, 199-200.

239 Id, at 6.7.1. See also, 'BMW fined by UK watchdog over information request', *Reuters*, 8 December 2022, at: https://www.reuters.com/business/autos-transportation/uk-watchdog-fines-bmw-after-failure-meet-information-request-2022-12-08/l; American Bar Association, *Criminal Antitrust Litigation Handbook* (American Bar Association, Chicago, 2nd ed 2006) 361–6; ICN, Cartels Working Group, 'Report on Obstruction of Justice in Cartel Investigations' (2006), at: https://www.internationalcompetitionnetwork.org/portfolio/obstruction-of-justice/; US, DOJ; 'Former CEO of the Morgan Crucible Co Sentenced to Serve 18 Months in Prison for Role in Conspiracy to Obstruct Justice', Press Release Number 10-1426, 10 December 2010, at: https://www.justice.gov/opa/pr/former-ceo-morgan-crucible-co-sentenced-serve-18-months-prison-role-conspiracy-obstruct.n

240 See eg 'ANZ withheld true account of raising: ASIC', AFR, 10 May 2023, 11.

241 *Australian Cartel Regulation*, at 6.7.2.

242 ACCC, 'Ex BlueScope GM Jason Ellis pleads guilty to obstructing cartel investigation', 1 September 2020, at: www.accc.gov.au/media-release/ex-bluescope-gm-jason-ellispleads-guilty-to-obstructing-cartel-investigation

243 [2022] FCA 1475.

the ACCC despite a purported prior settlement of civil penalty proceedings against Visy.[244] After much criticism, the charges were dropped shortly before Mr Pratt died.

134. Fortunately, the danger of misuse of sidewinder liability is tempered to some extent by the prospect of sidewinder missiles being knocked out by the Iron Dome of abuse of process, or by restrictive statutory construction of the scope of sidewinder liability intended by legislation.

VIII Exceptions ─ Increased relevance of authorisation (climate change, Covid-19, wide definition of 'cartel provision', limited scope of exceptions), Meagre development of class exemptions and exceptions relating to joint ventures and supply contracts between competitors

A Increased relevance of authorisation of competitor collaborations

135. Applications for and grants of authorisation increased significantly in Australia partly in response to the need for Covid-19 and climate change to be managed by competitors acting collaboratively [245] Covid-19─related authorisations of competitor collaborations are decreasing given the reputed recovery from the pandemic, but authorisations of cooperation by competitors to help manage climate change seem likely to increase.[246]

136. Applications for authorisation are also likely to increase as a result of growing realisation in the business and legal world the definition of 'cartel provision' is broad and overreaching and that the scope of exceptions to the cartel prohibitions under the CCA is unduly limited in surprising ways. The overreach of the definition of 'cartel provision' is discussed in Part VB (Overreach) above. The limits of exceptions to the cartel prohibitions are discussed in Part VIIIB below.

137. The ACCC & AER *Annual Report 2020-2021* (October 2022) gives these updates on Covid-19 authorisations during the period covered by the Report:[247]

> During 2020 the ACCC had granted an unprecedented number of urgent applications for authorisations by competing businesses seeking exemptions to cooperate to meet the challenges arising from the pandemic. Some of these exemptions began to expire in 2021. However, the ongoing economic and supply chain disruptions caused by the pandemic

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244 'Pratt gives up public roles to fight charges', *AFR*, 21 June 2008; *Australian Competition and Consumer Commission v Pratt [No. 4]* [2009] FCA 416.

245 See further D Howarth & H Alexander, 'COVID Collaboration and Competition Policy: Authorisation vs Forbearance as Crisis Responses' (2020) 48 ABLR 189.

246 See *Climate Change Act 2022* (Cth); Gilbert + Tobin, 'Competitor collaborations for environmental goals', 28 March 2023, at: https://www.gtlaw.com.au/knowledge/competitor-collaborations-environmental-goals

247 Id, at 6, 50.

> meant we continued to receive urgent exemption applications during 2021–22, including in the education, medical and financial services sectors. …
>
> 17 authorisations relating to the COVID-19 pandemic, including applications to manage hospital capacity; and adjustments to supply chains and market operations.
>
> Due to disruptions and risks that resulted from the COVID-19 pandemic, there has been a significant surge in the number of applications for authorisation of competitor collaborations. Many businesses and government agencies acted with a united purpose in responding to the challenges of the COVID-19 pandemic. Some of this involved collaboration between competitors.
>
> Our role in authorising what would normally be anti-competitive conduct was important in helping particular industries meet the needs of the Australian public during the pandemic. While the ACCC was willing to be flexible, we ensured that authorisations and exemptions were strictly limited in duration. The exemptions began to expire in 2021. Some parties decided not to seek reauthorisation as the economy started to transition out of various lockdowns. Although the pandemic continues to impact our economy and society, we expect reduced need for cooperation among competitors in response to COVID-related issues. However, the ACCC will continue to be ready to consider urgent exemption applications.

138. A recent example is the authorisation on 21 September 2022 to enable Coles Group Limited, other participating supermarkets and other approved supermarkets to 'continue cooperating in response to the COVID-19 pandemic to ensure supply and distribution of retail products and a safe operating environment.[248] This followed authorisation of substantially the same conduct in March 2020 and interim authorisation on 25 March 2022. Given the uncertainty of the situation regarding eh pandemic, collaboration between the parties may need to occur in future, and likely at short notice. To reflect the evolving COVID-19 situation since the earlier authorisations, and to limit the potential for public detriment to arise, the ACCC required that any coordination undertaken be for the purpose of 'responding to issues arising from or significantly impacted by the COVID-19 pandemic'.

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248 Determination, Application for revocation of AA1000546 and the substitution of authorisation AA1000606 lodged by Coles Group Limited on behalf of itself and participating supermarkets in respect of engaging in coordinated activities in response to the COVID-19 pandemic to ensure the supply of Retail Products to consumers, Authorisation number: AA1000606, 21 September 2022, at: https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/coles-group-on-behalf-of-itself-and-participating-supermarkets-1. Note also the LGA procurement authorisation: ACCC, Determination, Application for authorisation AA1000611 lodged by LGCS Pty Ltd as Trustee for the LGCS Trust No 1 (trading as LGA Procurement) in respect of a joint energy purchasing group comprised of 64 local government councils and 7 participating local government entities in South Australia, 30 September 2022.

139. The ACCC & AER *Annual Report 2020-2021* (October 2022) reports on authorisations relating to the management of climate change and its consequences:[249]

> In February we granted urgent interim authorisation permitting the cooperation and sharing of information by companies in the supply chain to ensure critical retail goods, including food supplies, were able to reach consumers and businesses in WA and the NT, following storms and flooding that interrupted rail and road networks. …
>
> After receiving an application from the Australian Energy Market Operator, the ACCC also granted an interim and then final authorisation for a range of measures allowing participants in the gas and electricity markets to work together to support Australia's security of energy supply and systems.

140. A recent example is the draft determination of the ACCC on 30 March 2023 that authorisation be granted to Coles Group Limited, Woolworths Group Limited and ALDI Stores and current and future Program Partners to collaborate with an industry-led taskforce (the Soft Plastics Taskforce) to address the immediate effects of the suspension of the REDcycle program.[250] The REDcycle program was a return-to-store soft plastics recovery program that facilitated the collection and processing of soft plastics into durable recycled plastic products. Interim authorisation was granted on 25 November 2022. Submissions on the draft determination are invited by 17 April 2023.

141. The large number of authorisations relating to Covid-19 competitor collaborations in Australia contrasts strikingly with the absence of authorisations or clearances in New Zealand in relation to similar conduct.[251] A significant part of the explanation is that pro-competitive competitor collaborations are excepted from the NZ cartel prohibitions by the collaborative activity exception under s 31 of the *Commerce Act 1986* (NZ) and other exceptions apart from authorisation.[252] Another part of the explanation is that the Commerce Commission acquired power to grant provisional authorisation in May 2020

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249 At 6.

250 At{ https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/coles-group-on-behalf-of-itself-and-participating-supermarkets-2 .

251 See: https://comcom.govt.nz/.

252 See Commerce Commission, 'Business collaboration in response to an emergency', March 2023, [21]-[26], at: https://comcom.govt.nz/__data/assets/pdf_file/0019/215812/Business-collaboration-in-response-to-an-emergency-Guidance-March-2023.pdf; Buddle Findlay, 'Collaborating with competitors during COVID-19: is Commerce Commission authorisation required?', 11 May 2020, at: https://www.buddlefindlay.com/insights/collaborating-with-competitors-during-covid-19-is-commerce-commission-authorisation-required/; Buddle Findlay, 'Green cartels: climate change and competition law', 16 November 2022, at: https://www.buddlefindlay.com/insights/green-cartels-climate-change-and-competition-law/..

and this power does not seem to be as expeditious in design or execution as the ACCC's power to grant interim authorisation.[253]

142. It should also be noted that competitor collaborations for the purpose of managing Covid-19 or climate change have not been the subject of authorisation in the US or the EU. There is no authorisation process in those jurisdictions.[254] Instead, reliance has been placed on guidance by the enforcement agencies, the rule of reason under s 1 of the Sherman Act and, in the EU, Article 101(3) of the European Treaty (TFEU) plus class exemptions.[255]

B Meagre development of class exemptions and exceptions relating to joint ventures and supply contracts between competitors

143. The development of class exemptions and exceptions relating to joint ventures and supply contracts between competitors under the CCA remains meagre and less than satisfactory.

Class exemptions

144. Class exemptions were recommended by the Harper Review[256] and introduced in 2017 under s 95AA of the CCA. Class exemptions could apply to a wide range of conduct that would otherwise be unlawful under the ACCC including competitor collaborations that are subject to the cartel prohibitions.

145. Class exemptions potentially are important:

- class exemptions can provide an expedient safe harbour in addition to joint venture and other exceptions;

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253 There are two examples of provisional authorisation in cases where the circumstances were not covid-related but where the power to grant provisional authorisation arose during the covid period as defined: https://comcom.govt.nz/case-register/case-register-entries/news-publishers-association-of-new-zealand-incorporated2/media-releases/provisional-authorisation-granted-for-news-publishers-association-to-engage-in-collective-bargaining-with-meta-and-google#:~:text=The%20Commerce%20Commission%20has%20provisionally,operated%20by%20Meta%20and%20Google; https://comcom.govt.nz/news-and-media/media-releases/2021/provisional-authorisation-granted-for-new-zealand-tegel-growers-association-to-engage-in-collective-bargaining-with-tegel-foods. I thank Troy Pilkington and John Land for the information they kindly provided on the question discussed in the text to this footnote.

254 *Australian Cartel Regulation*, 327-328.

255 See further A Jones, 'Cartels in the time of COVID-19' (2020 8 Journal of Antitrust Enforcement 287; MC Comba, 'EU Competition Law and Sustainability' (2022) 15(3) Erasmus Law Review.

256 *Competition Policy Review: Final Report*, 22.3, Recommendation 39.

- can carve out conduct that is likely to be pro-competitive or benign yet is caught by the broad definition of a "cartel provision" (or, under s 45(1), the nebulous SLC test);
- they can help to relieve pressure on the authorisation process;
- a class exemption provides binding liability rules whereas guidelines offer only non-binding guidance; and
- ACCC guidelines may constrain ACCC enforcement discretion but have little or no impact on private litigants.

146. There is currently one active class exemption under the CCA. This relates to collective bargaining by smaller businesses.[257] It became available for use on 3 June 2021. As John Land has commented to me, the value of this collective bargaining class exception is demonstrated by the trans-Tasman experience in relation to chicken growing collective bargaining. In the past the ACCC have frequently authorised such arrangements. The class exception now avoids the cost of an authorisation application. In NZ, by contrast, Tegel opposed the growers' recent authorisation application. Any contested authorisation application will naturally involve greater cost and prolong the time frame involved for obtaining authorisation. Tegel's opposition to its growers' authorisation application raised the cost and time frame for the growers. Eventually, in 2022, provisional and final authorisations were granted by the Commerce Commission. However, the process was protracted in a situation where it could reasonably be expected that Tegel had greater bargaining power and greater ability to fund the costs of a contested authorisation process.[258] Being able to rely on a class exception would have saved the growers substantial cost and time, and arguably would have been appropriate given the authorisation of similar collective bargaining arrangements for chicken growers in the past by the ACCC and the Commerce Commission.

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257 ACCC, at: https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption-0.

258 The Commerce Commission authorised New Zealand Tegel Growers Association to engage in collective negotiations with Tegel Foods Limited for a 10 year period. Tegel appealed the Commission's decision ([2022] NZCC 30) to the High Court. Tegel abandoned proceedings prior to any hearing and paid costs. See at: https://comcom.govt.nz/case-register/case-register-entries/the-new-zealand-tegel-growers-association-incorporated.

147. An ocean liner shipping class exemption has been under consideration by the ACCC. The ACCC website provides this information: [259]

> In December 2019, the ACCC issued a discussion paper seeking comments on a possible class exemption for ocean carriers providing international liner cargo shipping services to and from Australia (Liners).
>
> Liners currently have access to a wide suite of exemptions from Australia's competition law. These exemptions are set out in Part X of the Competition and Consumer Act 2010 (Cth) (the CCA).
>
> Should the Australian Government decide to repeal Part X, coordination among Liners may breach competition laws.
>
> A class exemption is a way for the ACCC to grant businesses an exemption from competition law for certain 'classes of conduct' that may otherwise carry a risk of breaching competition laws, but: do not substantially lessen competition, and/or are likely to result in overall public benefits.
>
> However, there is unlikely to be a strong case for pursuing work on a possible future class exemption without a clear position on the future of Part X. Part X and a class exemption may result in overlapping parallel exemption regimes which can cause confusion and result in administrative efficiencies.

148. The class exemption for collective bargaining by smaller businesses has generally been welcomed.[260] However, the steps taken towards class exemptions in Australia are tiny when compared with the extensive use that is made of block exemptions by the European Commission. The EC block exemptions include:[261]

- *Vertical block exemption:*
  Vertical Block Exemption Regulation ('VBER'),
  accompanied by Vertical Guidelines ('Vertical Guidelines');
- *Technology transfer (including licensing) block exemption*:
  Technology Transfer block exemption;
  accompanied by Technology Transfer Guidelines ('TT Guidelines');
- *Horizontal block exemptions:*
  The R&D block exemption:

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259 ACCC, 'Ocean liner shipping class exemption', 3 December 2019, at: https://www.accc.gov.au/public-registers/class-exemptions-register/ocean-liner-shipping-class-exemption. See also *Australian Cartel Regulation*, 8.10.

260 But see the critique in T Hardy & S McCrystal, 'Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Business' (2020) 42 Univ of Sydney LR 311.

261 EC, at: https://competition-policy.ec.europa.eu/antitrust/legislation/block-exemption-regulations_en; 'Block Exemption Regulations: An Overview of EU and National Case Law', Concurrences, 10 June 2021.

The specialisation block exemption;

- *Sector-specific block exemptions*:
  Motor Vehicle block exemption;
  Liner shipping block exemption
  Air transport block exemption.

149. Section 95AA envisages that the ACCC will develop class exemptions. That raises questions of priority, resources and interest. Those in the private sector who are concerned about the need for class exemptions may choose to act proactively by developing draft class exemptions as a starting point rather than to leave development solely to the initiative of the ACCC.[262]

Joint venture exceptions

150. The term "joint venture" is the core of the joint venture exceptions in s 45AO and s 45AP. The term has been given a broad interpretation in the *Cascade* case.[263] The resulting expansion of the scope of the joint venture exceptions is welcome. However, the difference between a contract and a joint venture remains far from clear.[264]

151. Contrast the concept of a collaborative venture that applies in the US, EU, NZ and Canada.[265] A collaborative venture encompasses consortia, partnerships, strategic alliances, syndicated lending arrangements, lender workout arrangements for insolvent borrowers, IT teaming agreements, and franchisors and franchisees under a franchise agreement.

152. The concept of a 'collaborative activity' has been adopted in s 31 of the *Commerce Act 1986* (NZ).[266] That approach is consistent with US, EU and Canadian competition law:

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262 See ACCC "'Class Exemptions', November 2017, at: https://www.accc.gov.au/business/exemptions/class-exemptions:
> The ACCC will identify types of conduct for class exemptions. While businesses do not apply for a class exemption they may wish to suggest options to the ACCC. The ACCC will consider such requests taking account of other organisational priorities. The ACCC will consult with a wide range of interested parties as it develops a particular class exemption. Interested parties will have an opportunity to make submissions during that process.

263 *ACCC v Cascade Coal Pty Ltd* [2019] FCAFC 154, [290]-[311]. See also A Coorey, 'Joint Venture Defence: The Cascade Decisions and Implications' in M Gvozdenovic & S Puttick (eds), *Current Issues in Competition Law: Practice and Perspectives* (Federation Press, 2021) Vol II, 26, 39-41.

264 See *United Dominions Corporation Limited v Brian Proprietary Limited* (1985) 157 CLR 1, at 10.

265 *Australian Cartel Regulation*, 271-272.

266 See further Commerce Commission; 'Competitor Collaboration Guidelines', January 2018, at https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf. See further 'Commission declines clearance for Anytime NZ Limited's collaborative activity clearance application', 30 May 2022, at: https://comcom.govt.nz/news-and-media/media-releases/2022/commission-declines-clearance-for-anytime-nz-limiteds-

- Under s 1 of the Sherman Act (US) efficiency enhancing collaborations between competitors are exempted. Joint ventures are treated as one among many relevant kinds of competitor collaborations.[267]
- Horizontal co-operation agreements are regulated under Art 101(1) and (3) of the European Treaty. The concept of a horizontal co-operation agreement is broad and includes joint ventures and a wide range of other competitor collaborations.[268]
- In Canada, competitor collaborations are subject to a defence of ancillary restraint under s 45(4) of the *Competition Act 1985.* The defence of ancillary restraint applies to any kind of collaboration between competitors and is not limited to joint ventures.[269]

153. Given the comparative experience flagged above, and the uncertain difference between a contract and a joint venture, it is difficult or impossible to understand why Australian cartel law has retained the concept of 'joint venture'.

154. The joint venture exceptions in s 45AO and s 45AP as amended in 2017 require that the joint venture not be carried on 'for the purpose of substantially lessening competition'. This requirement does not follow US law or NZ law, which exclude exemption where the dominant purpose of the collaborative activity is to lessen competition between any 2 or more parties to the activity.[270] Incorporating a SLC test in an exemption to per se prohibitions, albeit a purpose test, is highly questionable. As discussed in Part IIB above, that is especially so in the setting of jury trials for cartel offences.

155. Apart from undue complexity, there is also the danger of underreach. Cases may arise where a sham joint venture is used for the dominant purpose of preventing competition

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collaborative-activity-clearance-application#:~:text=To%20be%20engaged%20in%20a,or%20any%20two%20of%20them); and the critique in S Keene, 'Setting the bar for collaborative activity Workouts', CLIPNZ 2022, copy on file.

267 See US Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

268 See European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (January 2011), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

269 See Canada Bureau of Competition, *Competitor Collaboration Guidelines* (2021), available at: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-BC-CCGs-Eng.pdf.

270 *Commerce Act 1986* (NZ) s 31(2)(b)); *Timken Roller Bearing Co v United States*, 341 US 593, 597–8 (1951). See further *Australian Cartel Regulation*, 8.4.3.2.

between two competitors but no further and not to the extent of substantially lessening competition in a market.[271]

Supply contracts between competitors

156. There is still no specific exemption for supply/acquisition agreements between competitors. The proposed s 44ZZRS in the Exposure Draft Bill did not appear in the Competition and Consumer Amendment (Competition Policy Review) Bill 2017. The Explanatory Memorandum to that Bill says that 'the vertical trading restriction cartel exception was removed from this Bill, to be given further consideration and progressed in a future legislative package together with amendments to section 47'.[272] There has been no such further legislature package.

157. There are many examples where pro-competitive supply or acquisition agreements between competitors are caught by the cartel prohibitions unless they are authorised.[273]

158. The Harper Report recommended that the CCA be amended to exempt supply/acquisition agreements between competitors (including intellectual property licensing) from the cartel prohibitions:

> An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by s 45 of the CCA (or s 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition. ... [274]
>
> [A]s is the case with other vertical supply arrangements, IP licences should be exempt from the per se cartel provisions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP. Such IP licences should only contravene the competition law if they have the purpose, effect or likely effect of substantially lessening competition.[275]

159. Yet s 51(3) has been repealed without the introduction of an exception that covers pro-competitive supply and IP licensing agreements between competitors. This lop-sided

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271 Eg two competing hospitals form a special purpose joint venture for rostering the provision of emergency services on Sundays.
272 [15.57].
273 *Australian Cartel Regulation*, 8.6.
274 Recommendation 27.
275 *Competition Policy Review: Final Report*, 110.

approach to reforming exceptions to the cartel prohibitions has been widely criticised.[276]

160. Consider by contrast the exemption for 'vertical supply contracts' under the *Commerce Act 1986* (NZ):

> **32 Exemption for vertical supply contracts**
>
> (1) Nothing in section 30 applies to a person who enters into a contract that contains a cartel provision, or who gives effect in relation to a cartel provision in a contract, if—
>
> (a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and
>
> (b) the cartel provision—
>
> (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, or to the maximum price at which the customer or likely customer may resupply the goods or services; and
>
> (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.

161. The NZ vertical supply contract exemption is subject to the requirement that the cartel provision in issue 'not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.' The NZ safeguard is commendable but would be improved by making the dominant purpose referable to the purpose of the accused or defendant, not the 'purpose of the provision'.[277]

162. The status of pro-competitive supply/acquisition agreements between competitors has been a known problem for a long time, certainly before the cartel law changes in 2009. Moreover, the Australian Treasury and the ACCC have had around 7 years since the Harper Review to come up with something useful to resolve this problem.[278]

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276 See Clifford Chance, 'The IP Rights exemption to the Australian Competition Law Rules to be Repealed', December 2018, at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/12/the-ip-rights-exemption-to-the-australian-competition-law-rules-to-be-repealed.pdf; A Duke, ''The repeal of section 51(3) of the Competition and Consumer Act: A mistake in need of correction' (2020) 43 UNSWLJ 250; B Fisse, 'Competition Law and Intellectual Property in Australia – Traps for Unwanted Catches', *Competition Policy International*, October 2019; B Fisse, 'Harper Report Implementation Breakdown: Repeal of Section 51(3) of the Competition and Consumer Act 2010 (Cth) and lack of Proposed Supply/Acquisition Agreement Cartel Exception' (2019) 47 ABLR 127; Justice M O'Bryan, Federal Court of Australia, 'The repeal of s 51(3) of the Competition and Consumer Act 2010 (Cth)' at: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-obryan/obryan-j-20190410.

277 'Australian Cartel Law: Biopsies', [29]-[33].

278 See 'Australian Cartel Law: Biopsies', [67]-[76].

Attempts to find escape routes other authorisation: IP licensing example

163. The unduly limited scope of exceptions to the cartel prohibitions generates attempts to find escape routes preferably without having to apply for authorisation by the ACCC. The attempts can be desperate. That is especially so where the parties to a cartel come to realise that they have a cartel problem after the time limit for an application for authorisation has expired.[279]

164. Some try to get off the hook by invoking the 'ultimate purpose' reasoning in *News Limited v South Sydney*.[280] Consider this example, which involves a quality restriction in an IP licensing agreement between competitors:[281]

> A and B compete in the market for building cladding products. A supplies 'SafeClad' cladding materials. A has a registered trademark for SafeClad materials. B is contracted to distribute SafeClad cladding materials in Australia. The contract licenses the use of the trademark SafeClad by B. One condition is that B will not use the SafeClad trademark on any cladding materials unless the materials have been tested by an independent testing lab and have passed the exacting "X-FLAM" anti-flammatory safety standard specifications specified by A in the licensing agreement (the 'Anti-Flammatory Provision').

165. An IP licensing condition of this kind is hardly uncommon and will rarely be anti-competitive. Such a provision is intended to ensure that the IP owner's brand reputation is not damaged by a defective or unsafe product.[282]

166. In my view, the patent licence in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii) is likely to apply: one substantial purpose of the Anti-Flammatory Provision is to restrict or limit the supply of goods bearing the SafeClad mark in Australia. The competition condition under s 45AD(4) applies: A is a competitor of B in relation to the supply of building cladding products.

167. A s 51(3) exception would have applied in this example before d 51(3) was repealed: see s 51(3)(c).

168. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).

169. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP do not apply.

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279 See especially CCA, s 45(9)].
280 2003) 216 CLR 53.
281 'Harper Report Implementation Breakdown', 133.
282 TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 25.

170. The only escape route is authorisation. Care would be needed to comply with the requirements for authorisation including the time limits on when application for authorisation must be made.

171. The ACCC 'Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)' contend that there is no cartel provision in this example:[283]

> '… the ACCC does not consider that the provision satisfies the purpose condition. In other words, it does not appear to be a substantial purpose of Firms A and B[284] to restrict or limit the supply of building cladding materials.
>
> Instead, the purpose of the possible cartel provision appears to be placing quality requirements on the production of cladding material bearing the SafeClad trademark in order to assure the safety of the materials and maintain the goodwill associated with the SafeClad trademark.'

172. That contention is difficult to accept: The test under s 4F(1) is one of substantial purpose, not dominant purpose, ultimate purpose or ultimate substantial purpose. The *ultimate* purpose of the Anti-Flammatory Provision is to ensure that the IP owner's brand reputation is not damaged by association with a defective or unsafe product. The *immediate* purpose of the Anti-Flammatory Provision is to restrict or limit the supply of cladding materials bearing the SafeClad mark by B to persons unless those cladding materials comply with the Anti-Flammatory condition. That immediate purpose is a *substantial* purpose within the meaning of s 4F(1) of the CCA. It is a 'large or weighty' purpose given the importance attached by A to preventing B from supplying cladding materials with the SafeClad trademark unless those cladding materials have passed a safety test.

173. The necessary repair to the CCA indicated by this and other examples is the introduction of an exception for pro-competitive supply and licensing agreements between competitors. That repair has been recommended by many including now the Harper Review[285] and the Law Council of Australia.[286] Neither Treasury nor the ACCC has yet published a constructive proposal for undertaking that repair.

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283 August 2019, 8, at: https://www.accc.gov.au/by-industry/telecommunications-and-internet/copyright-regulation/guidelines-on-the-repeal-of-subsection-513-of-the-competition-and-consumer-act.

284 Firm A and Firm B need not necessarily have a shared substantial purpose. If Firm A sought and caused the inclusion of the Anti-Flammatory Provision in the trademark licensing agreement (as is almost certain), then Firm A's intention will be the purpose of the Anti-Flammatory Provision. It is immaterial whether Firm B has a different intention: *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, [859]-[887] (Dowsett and Lander JJ).

285 Recommendation 27.

286 Law Council of Australia, 'Reform to ss 47 and 45AR of the *Competition and Consumer Act 2010* (Cth)', Submission to Treasury, 3 September 2021, at:

IX Immunity — Recurring questions; Comparison of ACCC and CDPP cartel immunity policies with US DOJ cartel leniency policy after the changes to the DOJ policy in April 2022

A Recurring questions

174. A revised *ACCC immunity and cooperation policy for cartel conduct* was issued in 2019.[287] The revised policy takes a more rigorous approach to conditional immunity. A cornerstone of conditional immunity is a cooperation agreement between the applicant and the ACCC.

175. The ACCC & AER *Annual Report 2020-2021* (October 2022) provides this update on cartel immunity applications:[288]

> **Cartel immunity applications**
>
> The ACCC endeavours to detect, stop and deter domestic and international cartels operating in Australia or affecting Australians. International experience and the experience of the ACCC has demonstrated that effective immunity and cooperation policies encourage businesses and individuals to disclose cartel behaviour. This in turn assists the ACCC to stop the harm arising from this illegal conduct and to take action against participants.
>
> Table 3.5: Cartel immunity applications 2021–22

	Number
Approaches	6
Immunity application proffers	0
Proffers not resulting in conditional immunity	2#
Civil conditional immunity granted	3#
Criminal conditional immunity granted by CDPP upon ACCC recommendation	0

> # The 5 immunity decisions made in 2021–22 relate to proffers made in 2020–21.

176. That information indicates that the cartel immunity process was of limited practical significance during the period to which it relates. That may be partly because, as a result of Covid-19 and climate change, authorisations of cartel conduct are in place to

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https://www.lawcouncil.asn.au/publicassets/9a550778-e715-ec11-9440-005056be13b5/4083%20-%20Reform%20to%20ss%2047%20and%2045AR%20of%20the%20Competition%20and%20Consumer%20Act%202010%20%20Cth.pdf

287 ACCC, 6 September 2019, at: https://www.accc.gov.au/about-us/publications/accc-immunity-and-cooperation-policy-for-cartel-conduct.

288 46, at: https://www.accc.gov.au/about-us/publications/accc-and-aer-annual-report/accc-and-aer-annual-report-2020-21.

a much greater extent than previously.[289] The trend in some jurisdictions overseas has been a decrease in the number of leniency applications.[290] By contrast, the number of leniency applications in NZ appears to have increased, probably as a result of cartel conduct criminalisation coming into force in 2021. [291]

177. It is some time now since the deep-diving research of Caron Beaton-Wells into the effectiveness of the ACCC cartel immunity policy and cartel leniency polices in the US, the EU and other jurisdictions.[292] That research may be contrasted with economic models of cartel immunity that venture theoretical optimal, suboptimal and other possible effects.[293]

178. One major concern raised about the *ACCC immunity and cooperation policy for cartel conduct* is the exclusion of concerted practices from the scope of full immunity under the immunity scheme. In many situations there may be cartel conduct and/or a concerted practice that may not pass the SLC test.[294] Where that is so, a potential immunity applicant is put in a quandary: [295]

> … It is difficult to imagine a firm wanting to supply the regulator with information where it is unclear whether the ACCC will determine that the evidence points to a cartel or a concerted practice. It creates an additional risk factor for potential defectors: is it worth coming forward with condemning information when there is a real risk that they will find themselves having admitted to illegal conduct but being granted no immunity?

179. Denis Kayis and Rob Nicholls have discussed this issue at length in an article that illuminates the underlying game-theoretic implications.[296] They conclude that a discounted degree of immunity (eg 50%) should apply to a first-in immunity applicant

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289 As suggested by D Kayis & R Nicholls, 'When the carrot resembles a stick: The exclusion of concerted practices from the ACCC's revised immunity policy' (2020) 27 Competition & Consumer Law Journal 187, 188.

290 See OECD, *Competition Trends 2022*, 46.

291 Thanks to John Land for drawing this to my attention.

292 C Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2 Journal of Antitrust Enforcement 126; C Beaton-Wells & C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015).

293 See eg G Spagnolo, 'Leniency and Whistleblowers in Antitrust' in P Buccirossi (ed), *Handbook of Antitrust Economics* (Cambridge, MIT Press, 2008); M Polo and M Motta, 'Leniency Programs' in American Bar Association, *Issues in Competition Law and Policy:* Volume III (Chicago, American Bar Association, 2008); C Aubert, P Rey & WE Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' (2006) 24 International Journal of Industrial Organization 1241.

294 See C Davies & L Wainscoat, "Not quite a cartel: Applying the new concerted practices prohibition" (2017) 25 Competition & Consumer Law Journal 173; R Nicholls & D Kayis 'Concerted practices contested: Evidentiary thresholds' (2017) 25 Competition & Consumer Law Journal 125.

295 'When the carrot resembles a stick', 199.

296 'When the carrot resembles a stick'.

where the ACCC takes enforcement action against a concerted practice rather than cartel conduct:[297]

> The need for clarity and a greater level of certainty in a regulatory context is widely recognised. Indeed, in its Revised Immunity Policy, the ACCC comments that:
>
> > When the extent of the immunity to be provided, or the process for recognising cooperation with law enforcement authorities is certain, persons are more likely to take advantage of such a policy and disclose illegal and harmful conduct.
>
> This is why the recent amendments to the ACCC's immunity approach are perplexing. The ineligibility of parties engaging in concerted practices for immunity changes the 'game' in which leniency enforcement lives. It adjusts the parameters such that there is a lower incentive to defect if a party perceives its conduct to be on the fringes of cartel conduct and a concerted practice; a space of wide overlap, and one subject to a distinction between conduct not found in other jurisdictions.
>
> This article proposes an alternative approach, shown in Figure 3, which uses an appropriated 'descending discount'. However, instead of the descent in discount applying to subsequent defectors, it is attached to the conduct engaged in. That is, where the ACCC elects to pursue a matter as a concerted practice, the first-in defector will be eligible for a publicly known fixed rate of leniency that is below 100%. This proposal addresses both the ACCC's desire to not allow overly easy access to full immunity and the need to incentivise cartelists to defect in order for Australia to offer an effective immunity policy.

180. A second concern is the tension between the disclosure obligations of conditional immunity and preserving legal professional privilege over internal investigation records at the critical early stages of interview of possible cartel participants, immunity application, and cooperation pursuant to a cooperation agreement. This is the subject of very useful guidance by Ayman Guirguis and Mei Gong.[298] The decision in *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd*[299] indicates that legal professional privilege will be waived in some circumstances during the immunity application process but not in all. Nor does the *ACCC immunity and cooperation policy for cartel conduct* or the FAQ resolve the

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297 Id, at 210.

298 A Guirguis & Mei Gong, 'Piercing the privilege veil in criminal cartels in Australia: Practical considerations for immunity (and leniency) applicants in seeking to reconcile their disclosure obligations', 15 July 2022, at: https://competitionlawblog.kluwercompetitionlaw.com/2022/07/15/piercing-the-privilege-veil-in-criminal-cartels-in-australia-practical-considerations-for-immunity-and-leniency-applicants-in-seeking-to-reconcile-their-disclosure-obligations/

299 [2021] FCA 511.

tension.[300] Contrast the CMA 'Applications for leniency and no-action in cartel cases' guide (in force since 1 July 2013 [301] which does largely resolve the tension.[302]

181. Thirdly, the detection capability of immunity does not necessarily lead to liability.[303] There is the perennial concern about the credibility of immunity witnesses and the circumstances under which their evidence has been gathered.[304] This was one major line of defence in the bank cartel case.[305] To give another of many examples, the *Country Care* prosecution[306] was based partly on the evidence of immunity applicants. James Panichi made these observations about what happened at trial: [307]

> When it came time for the judge to offer his final directions to the jury, he urged extreme caution when dealing with that testimony. His warning was both general — that the evidence of all immunity witnesses needed to be taken with a grain of salt — and remarkably specific about Cuddihy and his motives. For his part, the ACCC's other immunity witness had been unable to produce clear evidence that Country Care had attempted to set up a price-fixing agreement or had successfully established a cartel — a deficiency that made the jury's job a lot easier. As it turned out, the jury didn't need that lock to reach its unanimous verdict.
>
> Immunity witnesses can create serious challenges for any prosecutor taking on a case of this kind before a jury. In Britain, where criminal-cartel offences have been on the books since 2002, the Competition and Markets Authority has struggled to secure convictions in contested cases, with juries particularly reluctant to return guilty verdicts. The role of immunity witnesses has played a part in their deliberations — with some juries failing to grasp why one company or individual was being offered a free pass despite having behaved like the person on trial. If the jury is expected to believe that those on the receiving end of the charges are criminals, then why should it believe the testimony of someone equally criminal who has cut an immunity deal?

182. Fourthly, the *ACCC immunity and cooperation policy for cartel conduct* still allows cartel recidivists[308] to apply successfully for immunity. Recidivist sharks are eligible for

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300 'Piercing the privilege veil in criminal cartels in Australia'.

301 CMA, 24 September 2020, at: https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases

302 'Piercing the privilege veil in criminal cartels in Australia'.

303 'Two Steps Forward, Four Steps Back', 45-47.

304 'Two Steps Forward, Four Steps Back', 41-47; PN Grabosky, 'Prosecutors, Informants, and the Integrity of the Criminal Justice System' (1992) 4 Current Issues in Criminal Justice 47.

305 'Two Steps Forward, Four Steps Back', 45-47.

306 *Commonwealth Director of Public Prosecutions v The Country Care Group Pty Ltd* [2019] FCA 2200.

307 'Immunity in the dock', *Inside Story*, 10 June 2021, at: https://insidestory.org.au/immunity-in-the-dock/.

308 See further: C Marvão, 'Cartel Activity and Recidivism' in P Whelan (ed), *Research Handbook on Cartels* (Edward Elgar, 2023), ch 19; WE Kovacic, RC Marshall & MJ Meurer, 'Serial Collusion by Multi-Product Firms' (2018) 6 Jnl of Antitrust Enforcement 296.

immunity. That is so even where the other cartel participants are minnows. Giving cartel recidivists an incentive to report their cartel conduct and gain immunity is a rogue's charter.

B Comparison of ACCC and CDPP cartel immunity policies with US DOJ cartel leniency policy after the changes to the DOJ policy in April 2022

183. Significant changes were made to the US Leniency Policy in April 2022.[309] The conditions of 'leniency' (ie immunity) are demanding and go much beyond what is required for conditional immunity by the ACCC and CDPP cartel immunity policies.

184. First, to qualify for leniency under the revised US Leniency Policy, a corporation must 'promptly' self-report after discovering wrongful conduct. A self-report is made promptly If the corporation either disclosed the conduct at the first indication of possible wrongdoing or after conducting a timely, preliminary internal investigation to confirm that a violation occurred.[310]

185. Secondly, to qualify for leniency, a corporation is required to undertake remedial measures to redress the harm it caused (restitution) and improve its compliance program.[311] The implications in relation to compliance programs have been elucidated by Clifford Chance:[312]

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309 US, DOJ, 'Antitrust Division Updates Its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions;, 4 April 2022, at: https://www.justice.gov/opa/pr/antitrust-division-updates-its-leniency-policy-and-issues-revised-plain-language-answers..

310 US DOJ, *DOJ Justice Manual, Criminal Antitrust Enforcement*, 7-3.300 - Antitrust Division Leniency Policy and Procedures, 7.3.310, 2.; 7.3.320, 2.

311 US DOJ, *DOJ Justice Manual, Criminal Antitrust Enforcement*, 7-3.300 - Antitrust Division Leniency Policy and Procedures, 7.3.310, 5.; 7.3.320, 5. See further B Fisse, 'Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015) ch 10. ACCC interviewees in a research inquiry appeared to suggest that adding a compliance program condition would be futile given that most of the corporate immunity applicants to date already had compliance programs in place at the time of the conduct: C Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2 Journal of Antitrust Enforcement 126, 161. As Beaton-Wells points out, however, even if that is so, the absence of such a condition is still highly questionable because 'a condition that required the applicant to update, revise or reinforce its program would readily address such situations and serve the overall policy objective of encouraging "the effective use of compliance systems'. The ACCC interviewees also expressed some reservations about adding a potential disincentive to immunity applications and pointed out that there is or should not be a 'one size fits all' approach to compliance programs — 'a programme for a large company operating in many markets in more than one country would have to differ in scale and scope to that required, if one was required at all, for a sole trader or small business'. However, as Beaton-Wells responds, there is no reason why a compliance condition could not be tailored to accommodate such differences.

312 'DOJ Antirust Division Updates Leniency Policy', 31 Mat 2022, at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/05/DOJ%20Antitrust%20Division%20Updates%20Leniency%20Policy.pdf

> Each applicant must now use "best efforts" to "improve its compliance program to mitigate the risk of engaging in future illegal activity." The Division will assess the applicant's compliance program using its July 2019 "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" ("2019 policy").3 The evaluation is a fact-specific inquiry, which will vary from applicant to applicant (i.e., no "one size fits all" approach). As the Division made clear at the time of that policy announcement, formal compliance programs should be appropriately tailored to the applicant's size and lines of business.
>
> Further, to guard against "the risk of recidivism," the Division expects leniency applicants to "conduct a thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and undertake remedial efforts tailored to address the root causes." The additional steps may include the "implementation of measures to reduce the risk of repetition of the illegal activity, including measures to identify future risks." Additionally, the Division will consider "the applicant's efforts to discipline or remove its culpable, non-cooperating personnel." This is a concept that is also reflected in the 2019 policy. Under the 2019 policy, remedial efforts that a company has undertaken since the detection of a violation, including "an analysis to detect why the antitrust compliance program failed to detect the antitrust violation earlier," should be considered by the Division's prosecutors during both the charging and sentencing stage of an investigation. Adding these requirements to the Leniency Policy seems to suggest that a mere abandonment of the alleged antitrust violation will not be enough to qualify for leniency. Instead, it seems that, to meet the new leniency requirements, companies will have to conduct a deep-dive analysis of—for example—their internal policies, control systems, or incentives to identify the factors that allowed the violation to happen in the first place and will have to take appropriate remedial measures.

186. These changes indicate that the US requires much more to be done to qualify for cartel immunity than does Australia.

187. The strength or weakness of the incentive to report cartel conduct today in Australia is an open empirical question. Potential immunity applicants doubtless will take into account the acquittals in the *Country Care* case, the collapse of the bank cartel case, the exclusion of concerted practices from immunity, and the possible risk of losing legal professional privilege in relation to internal investigations. Reflecting the DOJ US Leniency Policy changes in Australia would make the immunity process more difficult to administer and reduce the incentive to report cartel conduct to the ACCC.

188. That said, the present ACCC and CDPP immunity polices seem perverse in the way they allow immunity to be granted to a corporation that is skilled at being the first to get

a marker but unfit or recalcitrant in the main game of compliance.[313] Consider this scenario: [314]

> XCO and YCO engaged in price-fixing. XCO did not have a compliance programme. YCO had a programme that failed on this occasion despite YCO's best endeavours. XCO made an immunity application one hour before YCO did and YCO was the second marker-holder. XCO agreed to cooperate with the investigation of the cartel but was too busy to discuss the possible introduction of a compliance program, and was not required to undertake to introduce a program for the purposes of gaining immunity. XCO qualified for immunity despite its non-existent compliance efforts. By contrast, YCO improved its compliance program and planned to keep on implementing and continuously improving it at the time it applied for immunity and thereafter. Yet YCO did not qualify for immunity despite its far superior compliance efforts, past and future.

189. The ACCC introduced an online portal in 2019 for the anonymous reporting of potential cartel conduct.[315] Has that initiative worked reasonably well? What is the data? Does a duty to report cartel conduct need to be introduced as well?[316] Corporate regulation is pervaded by statutory duties to report suspected unlawful conduct.[317] Why not a duty to report suspected unlawful cartel conduct?

X Interplay

190. There have been positive developments in Australian cartel law over the past year or so. However, possible hopes of having a well-designed and smooth-working regime of criminal and civil liability have yet to be realised.

191. Many points have been made in this paper with a view to improving the design of the engine, pointing the vehicle in a better direction, and enhancing the road-holding. I hope they help to give a bigger picture of how Australian cartel law might move along. But filling in some missing dots is not nearly enough to indicate the coherence required. A great deal of detailed work is needed on the many fronts discussed here, and

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313 'Reconditioning Corporate Leniency'.

314 Id, at 185.

315 ACCC, 'Cartel immunity policy strengthened, whistleblowing tool launched', 6 September 2019; at: https://www.accc.gov.au/media-release/cartel-immunity-policy-strengthened-whistleblowing-tool-launched

316 See eg, L Danagher, 'Strict liability and the mens rea of cartel crime' (2020) 9 Criminal LR 789, 803-804; RJ Hoerner, 'Misprision of Antitrust Felony' (1979) 28 Cleveland State Law Review 529.

317 Eg ASIC, Regulatory Guide 238 Suspicious Activity Reporting (RG 238); *Crimes Act 1900* (NSW) s 316(1); *Criminal Justice Act 2011* (Ir) s 19; *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Sch 11; UK, Financial Conduct Authority, Handbook SUP 15.3.32 (2015).

doubtless more. That work can be done only over time but needs to reflect the system of cartel law as a whole and cohere in a principled way.[318]

318 Thanks are due to John Braithwaite for suggesting that I frame the conclusion much like this.