MONASH UNIVERSITY

50 YEARS OF COMPETITION LAW AND ECONOMICS IN AUSTRALIA

14-15 November 2024

Session 1: Building the Law and Improving the Legislation (10.00 – 11.10 am)

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My comments at the panel session on 14 November largely reflected these notes and references, updated as at 20 December 2024.

Outline:

I CARTEL PROHIBITIONS

A SIMPLIFICATION OF CARTEL OFFENCES

Simplification o f the cartel offences is possible and much needed[1]

- The definition of the cartel offences under the CCA is even more complicated than that of the civil prohibitions against cartel conduct. That is because the cartel offences are subject to additional fault elements, some of which are default fault elements under the Criminal Code (Cth).[2]

- The need to be able to direct juries in terms readily understandable by them in cartel trials was recognised widely in 2008-2009 when the cartel offences first took legislative shape in Australia.

- The need to work backwards from how juries will be directed was emphasised by Greenwood J in his commentary, 'Considerations to be Taken into Account in Framing a Cartel Offence', at the Competition Law Conference in Sydney in May 2008:[3]

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

- Simplification has yet to occur despite having been recommended by the Harper Review in 2015 (part of Recommendation 27). Simplification was not attempted in the model provisions attached at the end of the Harper Review report.

- The *Country Care case*[4]decided in 2021 highlights the problem of undue complexity. Acquittals resulted soon after the jury had been directed (by Bromwich J). The

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1 As discussed in B Fisse, 'Australian Cartel Law: Recent Developments – First Set of Two Sets' (2023) 51 ABLR 70, 95-96.

2 See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (CUP, 2011) ch 5.

3 Justice A Greenwood, 'Considerations to be Taken into Account in Framing a Cartel Offence', Paper presented at the Competition Law Conference, 24 May 2008, Sydney.

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

directions related to eight charges extended over 30 succinct pages. Wigney J later made these observations extra-curially:[5]

> 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.
>
> 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!

- In the *ANZ bank cartel case*, Wigney J was forthright about the statutory maze into which juries in cartel trials must enter:[6]

> 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.

- Little interest in simplification of the cartel offences has been shown to date by the Treasurer, the Assistant Minister for Competition, Charities and Treasury, Treasury, the ACCC or the CPPP. Simplification of cartel offences does not appear to be on the agenda of the Competition Task Force.

Simplification it is not as easy as sometimes imagined

- There are no entirely satisfactory comparative models of cartel offences for adoption in Australia. The US model of s 1 of the Sherman Act is high level. The NZ cartel

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5 Justice M Wigney, 'Recent Developments in Competition Law: Cartel Cases', Speech given on 9 June 2022.

6 *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 5 – Indictment)* [2021] FCA 1345 [246].

offence provisions[7] are much simpler than the Australian but are jury-unfriendly in some respects (eg the 'purpose of a provision' element in a 'cartel provision').[8] The UK cartel offence is ill-drafted.[9] The OECD, ICN and others have talked about 'hard-core' cartels without attempting to define a cartel offence in workable terms.

- Some fraud and dishonesty offences are defined in relatively simple terms but those offences are not relevant models. Fraud and dishonesty offences relate to the unlawful acquisition of property. Cartel offences relate to the collusive subversion of market forces by competitors. It is a category mistake to treat them as if they are property offences.[10]

- Ideally, cartel offences would be defined differently from breaches of civil cartel prohibitions. Cartel offences are subject to fault elements that are not prescribed for civil cartel prohibitions. However, the fault required for cartel offences is often present on the facts of cases where a civil breach occurs.

One possible approach to simplification of cartel offences

A four-step approach:

(1) Remove the element of commitment from 'arrangement or understanding', in the context of criminal cartel prohibitions and also civil cartel prohibitions; see the discussion in IB below.

(2) Recast the cartel offences in terms of entering or giving effect to a CAU where the effect or likely effect of that conduct is to substantially lessen competition between D and one or more other competitors that are parties to the CAU.

- SLC here relates not to competition in a market but to competition between the competitors that are parties to the CAU.

- The concepts of price fixing, allocation of customers, restriction of output and bid rigging are not used − the technicality of these elements of the current civil cartel prohibitions is best avoided in jury trials.

(3) Make the main fault element for cartel offences a dominant anti-competitive purpose, defined in this way: was the dominant purpose of the conduct in entering into or giving effect to the CAU to substantially lessen competition between D and one or more other competitors that are parties to the CAU?

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7 Commerce Act 1986 (NZ) s 82B.

8 The 'purpose of a provision' element in the cartel prohibitions in the Competition and Consumer Act 2010 is criticised in B Fisse, 'Australian Cartel Law: Biopsies', Competition Law Conference, Sydney, 5 May 2018, [24]-[33], at: https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf.

9 See especially the highly problematic carve-outs in Enterprise Act 2002 (UK) ss188A and 188B.

10 Beaton-Wells and Fisse, *Australian Cartel Regulation*, 2.4.1.4.

- The rationale of the dominant purpose test proposed is:

  (a) to limit criminal cartel liability to cartel conduct that plainly is a 'naked restraint' (quintessentially, a restraint on competition that has no actuating purpose other than to restrain competition);[11] and

  (b) to differentiate criminal and civil cartel prohibitions by requiring a type of fault that signifies a more serious level of offending than contravening a civil cartel prohibition.

(4) Redefinition of cartel offences needs to be road-tested in simulated jury trials before being adopted as legislation. The current cartel offences were not road-tested before being rolled out. The test eventually conducted in the *Country Care* trial was the real thing for the accused.

If it is too difficult to redefine cartel offences in terms that are workable in jury trials, they should be repealed

- The expressive or denunciatory value of cartel offences is badly undermined unless that value can be upheld in jury trials. There has yet to be a conviction for a cartel offence in a contested case in Australia.[12] It is impossible for judges to direct juries on the elements of cartel offences under the CCA in terms that are clear, straightforward, and easy to understand.
- Repeal of the cartel offences would not throw out the baby with the bath water. Civil penalties apply to cartel conduct, are easier to establish, and can be used to impose serious sanctions.[13]

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[11] For a detailed attempt to pin down what is meant by a 'hard-core cartel' see N Dunne, 'Characterizing Hard Core Cartels Under Article 101 TFEU' (2020) 65 Antitrust Bulletin 376.

[12] See further B Fisse, 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns' (2024) at: https://brentfisse.com/wp-content/uploads/2024/09/Sanctions-against-Corporations-and-Individuals-under-Competition-and-Consumer-Legislation-Usage-Patterns-31-July-2024.pdf.

[13] On sanctions see further B Fisse, 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition law and Economics in Australia* (Routledge, 2025) Vol II.

B ARRANGEMENT OR UNDERSTANDING – ELEMENT OF 'COMMITMENT'

A major difficulty with the definition of cartel conduct in Australia is the element of 'commitment' that has been read by the courts into the statutory concepts of 'arrangement' and 'understanding'

- The element of commitment has created a loophole in Australian cartel law.[14] Discussions with competitors can be conducted in a way calculated to help counter possible later allegations by the ACCC or private litigants that the participants are parties to an understanding:[15]

> Liability can .. be avoided by the obvious tactic of discussing prices (or output, allocation of customers or bids) but studiously stopping short of making any commitment. This is a glaring loophole in the law. Consider the following possible instruction that would seek to exploit that loophole:
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> > If discussing anything sensitive with a competitor, always express a reservation to the effect that you will be making up your own mind about what you will be doing. Make sure that you make a file note recording that you expressed that reservation.

- In *ACCC v BlueScope Steel Limited*[16] O'Bryan J held that, for an 'understanding', 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. Dispensing with the concepts of obligation and commitment, as O'Bryan J did, is a welcome advance. The interpretation adopted by O'Bryan J is limited to the element of understanding and does not apply to the element of arrangement but that does not matter much. In most, perhaps all, cases it is possible for the ACCC or a private litigant to allege an understanding instead of alleging an arrangement. However, twenty years after the infamous *Apco* decision,[17] query whether the element of commitment can be purged judicially from the element of understanding.

This aspect of the law could be improved by statutory redefinition so as to remove the element of commitment

- The introduction of the prohibition against concerted practices in 2017 is not a good or sufficient solution.[18] 'Commitment' is not a requisite element of a 'concerted practice'.

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14 See B Fisse and R Nicholls, 'Anticompetitive Agreements Between Competitors and Cartel Enforcement' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition law and Economics in Australia* (Routledge, 2025) Vol 1, 2.2.

15 *Australian Cartel Regulation*, 559-560.

16 [2022] FCA 1475. That decision is on appeal.

17 [2005] FCAFC 161. See further 'Anticompetitive Agreements Between Competitors and Cartel Enforcement', 2.2.

18 'Anticompetitive Agreements Between Competitors and Cartel Enforcement', 2.4.

However, the concerted practices prohibition does not address the root cause of the problem. The root cause is the element of commitment that has been read into the wording 'arrangement or understanding' in the definition of cartel prohibitions.

- The SLC test that applies to the prohibitions against concerted practices creates a significant enforcement hurdle. Contrast the cartel prohibitions, which are not subject to a SLC test. Largely because of the SLC test, the concerted practices prohibition seems to be a dead letter. Only one case of enforcement action against a concerted practice is mentioned on the ACCC website since the prohibition was introduced in 2017.[19]
- The concerted practices prohibition is unsatisfactory in other respects:[20]
    - lack of clear definition of 'concerted practice';
    - no competition condition;
    - not limited to horizontal conduct - applies potentially to wide range of vertical conduct.
- A useful starting point for statutory redefinition of the concepts of arrangement and understanding is to go back to underlying models of agreement. Oliver Black's work *Agreements* (CUP, 2012) is a good starting point.[21]
- The element of commitment required for an arrangement or understanding appears to stem from a promise-based model of agreement (Promise Model).
- The Promise Model is only one of several different models of cartel agreement. Other models include:
    - the US model of inferring an agreement under s 1 of the Sherman Act from so-called plus factors (Plus Factors Model);[22]
    - the EU model of "concurrence of wills" under Article 101 of the EU Treaty (Concurrence of Wills Model);[23] and
    - the model of offer and acceptance developed by Oliver Black in *Agreements* (Offer and Acceptance Model).[24]

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19 ACCC, 'Turf breeder to address concerted practices concerns', 18 November 2022, at: https://www.accc.gov.au/media-release/turf-breeder-to-address-concerted-practices-concerns. This case resulted in an undertaking under s 87B.

20 'Anticompetitive Agreements Between Competitors and Cartel Enforcement', 2.4.

21 See 'Australian Cartel Law: Biopsies', [9]-[15].

22 See RC Marshall and L Marx, *The Economics of Collusion: Cartels and Bidding Rings* (MIT Press, 2012) ch 11.

23 Black, *Agreements*, 8.1.

24 Black, *Agreements*, chs 2, 8.

- There is no definitive element of commitment under the US Plus Factors Model or the EU Concurrence of Wills Model. Nor is commitment necessary for an agreement under the Offer and Acceptance Model.
- The approach taken in the draft Fijian competition and consumer legislation in the pipeline is to provide that: 'agreement' includes a contract, covenant, arrangement or understanding, but does not require a commitment, an undertaking or the assumption of an obligation.
- It may be better to reflect the Offer and Acceptance Model explicitly in legislation by defining 'arrangement or understanding' in terms of offer and acceptance and specifying what essentially amounts to offer and acceptance in this context. See my proposal in an earlier paper.[25]

A prohibition against unfair trading practices might conceivably be defined in terms that extend liability to forms of cartel conduct such as invitations to collude where there is no element of commitment

- The Government has said that it proposes to introduce a general prohibition and specific prohibitions against unfair trading practices.[26] There are two consultation papers.[27] Exposure draft provisions have yet to be provided.
- A prohibition against unfair trading would be an oblique way of addressing the unsatisfactory element of commitment. Removal of the element by statutory change is recommended.

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[25] 'Australian Cartel Law: Biopsies', [16]-[20].

[26] Media Release, 'Albanese Government to stop the rip offs from unfair trading practices', 16 October 2024, at: https://www.pm.gov.au/media/albanese-government-stop-rip-offs-unfair-trading-practicesl.

[27] Treasury, Consultation on Regulatory Impact Statement, *Protecting consumers from unfair trade practices*, November 2023; Treasury, *Unfair trading practices – supplementary consultation paper,* November 2024.

II PURPOSE OR EFFECT OF SUBSTANTIALLY LESSENING COMPETITION

A PURPOSE LIMB OF SLC TEST

The purpose limb of the SLC test is unsatisfactory

- The interpretation of 'purpose' as meaning subjective purpose,[28] is inconsistent with the focus of economic analysis on objective indicators of economic causes and effects. It is axiomatic that competition law seeks to promote workable competition. Workable competition relates to how markets actually work, not the good, bad or indifferent intentions of human or corporate economic actors.

- Judicial contradiction of s 4F of the Act has allowed an ultimate legitimate purpose to trump an immediate substantial purpose to engage in the anticompetitive conduct alleged.[29] This sophistry was showcased by the High Court of Australia in the *South Sydney case* (2003).[30]

> In *News Ltd v South Sydney*, a majority of the High Court held that the 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:
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> The overall purpose of the agreement was to save the game from financial ruin. The purpose of the term was to restrict the number of teams in a financially viable competition to 14. The question arose as to whether the '14 team term' was an exclusionary provision. Acknowledging that the effect of the provision was plainly exclusionary, the High Court made much of the nature of the relevant purpose, emphasising that it must be ascertained not from the terms of the provision in isolation but from the contract, arrangement or understanding as a whole and its surrounding circumstances. With the benefit of this context, the purpose of the provision could be construed from the perspective of the parties as 'the end they had in view'. In this case, the 'end they had in view' was the resurrection of the game of rugby league as distinct from the exclusion of the South Sydney team from the unified competition.
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> Although the decision in *News Ltd v South Sydney* avoided an "uncommercial" outcome, the reasoning in law is problematic: Contrary to earlier authority which characterised the relevant purpose as the 'immediate' purpose associated with the

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[28] *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ), 581 [46] (McHugh J, but with reservations), 587 [65] (Gummow J), 638 [216] (Callinan J). Cf Kirby J, at 605 [127], 606 [130]. Contrast the objective interpretation of purpose by the New Zealand courts: see J Land, 'New Zealand Perspectives on Australian Competition Law' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition law and Economics in Australia* (Routledge, 2025) Vol II.

[29] *Australian Cartel Regulation*, 104-105.

[30] *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563.

provision, the South Sydney approach invites or requires a distinction between that purpose, which may be exclusionary and thus impermissible, and the 'ultimate' purpose of the transaction as a whole, which may be non-exclusionary and thus permissible. The need to apply this distinction on the facts of each case undermines considerably the value of the per se prohibition from an enforcement perspective, both for the ACCC and for parties potentially subject to the prohibition, and also makes for potentially inconsistent outcomes. The distinction is also difficult or impossible to reconcile with s 4Fwhich provides that, where a purpose is one of several purposes and is a substantial purpose, it qualifies as a 'purpose' under the TPA. One substantial purpose of the restrictive term in the South Sydney case was to restrict the supply or acquisition of services. However, the contorted interpretation of the majority of the High Court is an inevitable consequence of a prohibition that has always been too widely drawn for the purposes of per se liability.

The SLC test is capable of application in the context of digital markets, but reliance on general SLC prohibitions is unlikely to work adequately to control market power and prevent harm to consumer welfare

I agree with the position expressed in ACCC, Digital platform services inquiry, Interim report No. 5 – Regulatory reform (2022), 8:

> The dynamic nature and economic characteristics of digital platform services means that the harm from anti-competitive conduct can be significant. Enforcement of existing laws through litigation may take a long time, and available remedies may have a limited ability to address the effects of the conduct. The fast-moving, opaque, and complex nature of digital platform markets also makes it difficult to address systemic competition issues in these markets through enforcement of economy-wide competition law alone. Even when enforcement action is successful, it may not be able to adequately address systemic and widespread harmful conduct. This can be a particular challenge where digital platforms change their conduct to achieve a similar outcome by a different means.
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> The ACCC has undertaken a large-scale digital services inquiry and has issued seven major reports with many recommendations. The Fifth Interim Report recommends that new measures be taken to address competition harms. Targeted up-front (or ex ante) competition obligations should be implemented through mandatory service-specific codes. These codes would complement existing competition laws. They would apply to digital platforms that meet designation criteria in respect of specific digital services they supply. The service-specific codes envisaged would be flexible, targeted, and clear and certain. The guiding objective would be to promote competition and innovation in the provision of digital platform services and related products and services. Supported principles would focus on:

- ‘competition on the merits’;
- informed and effective consumer choice; and
- fair trading and transparency for users of digital platforms.

New service-specific codes are proposed to help to address a range of anti-competitive conduct in digital platform markets. The types of anti-competitive conduct to be combatted in that way include:

- anti-competitive self-preferencing where a platform supplying third-party apps gives preference to its own apps, as by charging a higher price for the third-party apps
- anti-competitive tying (eg where a platform ties the supply of app store services to the use of their own in-app payment services);
- exclusive pre-installation agreements and defaults (eg where platform agreements give the platform exclusive pre-installation of their services on smart phones or other devices);
- conduct that frustrates consumer switching by unnecessarily making it difficult for a consumer to switch to a different supplier);
- denying interoperability (eg restrictions on interoperability that affect third-party app developers, browser engines and app stores);
- restricted data portability;
- lack of transparency about auction, verification and pricing transparency on digital platforms;
- unfair dealings with business users (eg unfair restrictions on a business’s ability to exercise rights it has in relation to its own intellectual property) terms of service);
- exclusive agreements and price parity clauses with business users, if these were to be used.

The ACCC’s digital inquiry and recommendations have sparked a public debate about the nature and extent of necessary regulation in digital sectors of the economy. One question is whether or not service-specific codes are a good idea given the delay and regulatory capture to which they may be prone. By contrast, the Digital Markets Act and other measures in the EU avoid service-specific codes.

The Government’s response to the ACCC’s proposals? On 8 December 2023 the Government stated that it ‘supports in-principle the recommendations made by the ACCC and will undertake further work to implement its recommendations, including consulting

on the development of a new ex-ante digital competition regime'. Proposals for consultation emerged on 2 December 2024.[31]

B SECTION 46

Section 46 as amended in 2017 has improved the effectiveness of the law but is far from ideal

There are several unsatisfactory features:

- *Overreach and efficiencies*. The SLC test is concerned with competitive rivalry. Efficiencies are an important consideration when applying the SLC test. However, pursuit of efficiencies may have the effect or likely effect of substantially lessening competitive rivalry and yet also promote consumer welfare.[32]
- *Overreach and ex post assessment of 'effect'*. Under the 'effect' limb of the SLC test, conduct is exposed to potential liability on the basis of its actual effects. The analysis of actual effects is conducted ex post. The actual effects may not have been reasonably foreseeable ex ante at the time of the conduct.[33]
- *There is no 'exclusionary' element*. The s 46 prohibition does not specify that the conduct must be likely to exclude, deter or impair rivalry on the part of existing or potential competitors.[34]
- *Subjective purpose*. Under the 'purpose' limb, the test is subjective.[35] Subjective purpose does not adequately capture anti-competitive economic harm.[36] Liability should not depend on a firm's subjective assessment of the competitive impact of its conduct. The subjective assessment may possibly be accurate. However, it may be foolhardy, mistaken, self-preferring, reckless or careless. Overreach is also possible where a defendant mistakenly believes that conduct will have anti-competitive market effects.
- *Strategic underlying SLC purpose is sufficient*. The subjective SLC purpose may be merely a strategy or plan that has yet to be implemented, or has been implemented by taking a preliminary step that does not have the effect or likely effect of substantially lessening competition. In *Universal Music Australia Pty Ltd v ACCC*[37] UMA was held not

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31 Treasury, *Digital platforms – a proposed new digital competition regime*, 2 December 2024, at: https://treasury.gov.au/consultation/c2024-547447.

32 See B Fisse, 'Misuse of Market Power: Improving the Australian SLC Model' (2020) 48 ABLR 450, 455-456.

33 'Misuse of Market Power', 456.

34 'Misuse of Market Power', 452-453.

35 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ), 581 [46] (McHugh J, but with reservations), 587 [65] (Gummow J), 638 [216] (Callinan J). Cf Kirby J, at 605 [127], 606 [130]; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460, 474.

36 'Misuse of Market Power', 453-454.

37 (2003) 131 FCR 529.

liable for misuse of market power – UMA did not have a substantial degree of market power. However, UMA was held liable for unlawful exclusive dealing. The degree of lessening of competition sought purposefully would not itself have been sufficient to substantially lessen competition in a market. But the purpose of the alleged exclusive dealing conduct was to impose a restraint that would lessen competition *in pursuance of an overall SLC strategy*. That decision is difficult to reconcile with the wording of s 47(10)(a) ('the engaging in .. the conduct that constitutes the practice of exclusive dealing has the purpose of [SLC]'). The ACCC did not rely on s 47(1)(b) (SLC test in s 47 applicable to conduct alleged and 'other conduct of the same or a similar kind').[38] The decision in *Universal Music* considerably extends the scope of s 46 and other prohibitions with a SLC test. Critical analysis of the 'overall SLC strategy' interpretation of purpose under s 47, s 46 and other prohibitions is overdue.

Too much should not be expected of s 46. Consumer protection prohibitions are important because they are easier to enforce than the prohibition against misuse of market power

- Consumer protection law serves as a proxy where competition law is too difficult to apply. For instance, the prohibition against unconscionable conduct can be enlisted in cases where it would be difficult to establish the requisite elements of liability for misuse of market power[39] (the requisite elements that occasion difficulty are the requirement that the defendant had a substantial degree of market power and the substantial lessening of competition test).
- The attraction of using consumer protection law to bypass competition law would increase if, as is currently under consideration by the Government, a general prohibition against unfair trading practices is introduced.[40]

[38] (2003) 131 FCR 529, [239].

[39] See eg *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405. See further 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.

[40] See references n 26, n 27 above.

III JUDICIAL AND ADMINISTRATIVE ADJUDICATION

The merger law reform is not a first step toward Australia adopting a model of administrative adjudication of competition law more broadly

The recent merger law reform[41] is a response to the perceived ineffectiveness of the adjudicatory model in a particular area. It is more a check and balance than an ideological shift.

There are other areas where more reliance on regulation and administrative adjudication is likely:

- The main area is likely to be digital platforms and digital services.[42]
- We are likely to see greater reliance on the authorisation process as an avenue for addressing the relationship between competition and environmental sustainability.[43]
- The class exemption process (s 95AA) has been a sleeper to date.[44] It may be used more frequently.

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41 Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024.

42 Consider eg Digital Services Act 2022 (EU); Digital Markets, Competition and Consumers Act 2024 (UK); Treasury, *Digital platforms – a proposed new digital competition regime*, 2 December 2024, at: https://treasury.gov.au/consultation/c2024-547447

43 Consider eg Brookfield LP and MidOcean proposed acquisition of Origin Energy Limited, authorisation granted with conditions 23 October 2023 https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/brookfield-lp-and-midocean-proposed-acquisition-of-origin-energy-limited. In NZ there is much less need for authorisation given the cooperative activity and supply agreement exceptions to cartel prohibitions under the Commerce Act 1986 (NZ); see B Fisse, 'Australian Cartel Law: Recent Developments – Second Set of Two Sets' (2023) 51 ABLR 258, 269.

44 See 'Australian Cartel Law: Recent Developments – Second Set of Two Sets', 270-272.

IV SANCTIONS AGAINST CORPORATIONS AND INDIVIDUALS

A CHALLENGES AHEAD

Questionable ability of competition law to deter or prevent breaches of the Act by large corporations

Sanctions against corporations and individuals under the Act and the ACL are discussed in a chapter in the 50 Year anniversary book.[45] The appraisal is sobering:

> Breaches of the Competition and Consumer Act and the Australian Consumer Law are subject to an array of sanctions. The array is extensive but weaknesses are apparent in the capacity to prevent law-breaking. Corporations, especially large corporations, have the ability to treat monetary sanctions as manageable costs of doing business. Individuals implicated in corporate breaches of the Act often are not brought to account.
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> Part 1 describes the sanctions, their legislative evolution and main usage patterns. Diagnostic scans are then carried out in Parts 2–6. They show:
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> - individual liability for breaches of the Act often is not imposed and individual accountability at the level of internal discipline is neglected when courts impose monetary sanctions on corporations (Part 2);
> - fines or pecuniary penalties against corporations are determined by reference to 'shopping lists' of factors that give insufficient attention or weight to the internal corporate controls upon which specific and general deterrence depend (Part 3);
> - fines and pecuniary penalties against corporations often have been too low to provide a credible specific or general deterrent threat (Part 4);
> - non-monetary sanctions are available against corporations but their current statutory design is unsatisfactory in significant respects (Part 5); and
> - courts often lack evidence of facts material to the determination of fines or pecuniary penalties or other sanctions against corporations (Part 6).
>
> The 16 main recommendations made are summarised in Part 7.

B INDIVIDUAL LIABILITY

Individual liability often is not imposed for breaches of the Act or the ACL

- A conviction for a cartel offence under the Act has been recorded against seven individuals and seven corporations since 2009.[46] Four of the seven individuals

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[45] B Fisse, 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition law and Economics in Australia* (Routledge, 2025) Vol II.

[46] 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation', 1.2.

convicted were co-accused in the same case (the Vina Money case). In three of the seven cases where a corporation was convicted no individuals were prosecuted.

- In 25 cases between 1 January 2016 and 30 June 2024 where a pecuniary penalty of $10 million or more was imposed on a corporate respondent, a penalty or other sanction was imposed on an individual implicated in the corporate contravention in only five cases.
- In seven cases between 1 January 2016 and 30 June 2024 where a pecuniary penalty of $40 million or more was imposed on a corporate respondent, a penalty or other sanction was imposed on an individual implicated in the corporate contravention in one case (*BlueScope Steel*).[47]
- In three cases between 1 January 2016 and 30 June 2024 where a pecuniary penalty of $100 million or more was imposed on a corporate respondent, no penalty or other sanction was imposed on an individual implicated in the corporate contravention.[48] More recently, a penalty of $100 million was agreed upon by the ACCC and Qantas in the ghost flights case;[49] no individual was the subject of that enforcement proceeding.
- In December 2024, the ACCC started civil cartel proceedings in the Federal Court against two companies - Spotless Facility Services Pty Ltd (a subsidiary of Downer EDI Limited - ASX: DOW) and Ventia Australia Pty Ltd (a subsidiary of Ventia Services Group Limited ASX: VNT) - and four senior executives, for alleged price fixing relating to estate maintenance and operation services for the Department of Defence (Defence).[50] It is unclear whether or not this instance represents a change in enforcement policy towards individual liability in serious civil penalty cases.

There are various explanations for the limited extent to which individual liability has been imposed:[51]

> One explanation is the difficulty of proving accessorial liability on the part of the individuals implicated in contraventions, especially those pulling the strings from high places.[52].

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47 *ACCC v BlueScope Steel Limited (No 6)* [2023] FCA 1029.

48 *ACCC v Volkswagen AG* [2019] FCA 2166; *Australian Institute of Professional Education Pty Ltd (in liq)* (No 5) [2021] FCA 1516; *Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement) (No 3)* [2023] FCA 859.

49 [2024] FCA 1219.

50 'Spotless, Ventia and senior executives in Court for alleged price fixing cartel for services at Defence bases', 12 December 2024, at: https://www.accc.gov.au/media-release/spotless-ventia-and-senior-executives-in-court-for-alleged-price-fixing-cartel-for-services-at-defence-bases#:~:text=Spotless%2C%20Ventia%20and%20senior%20executives%20in%20Court%20for%20alleged%20price%20fixing%20cartel%20for%20services%20at%20Defence%20bases.

51 See further B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (CUP, 1993) ch 2.

52 See *Australian Cartel Regulation*, 6.5.

Secondly, the elements of cartel offences are complex and decrease the chance of successful prosecution.

Thirdly, individual liability may be taken off the table as part of a deal with the ACCC under which the liability of a manager is in effect bought off by agreement to pay a civil monetary penalty.[53]

Fourthly, individuals implicated in contraventions may work from offshore and be beyond territorial jurisdiction or, if within jurisdiction, be impossible to bring to justice in Australia (for example, extradition does not apply to civil penalty prohibitions).[54]

Lastly, there is no apparent enforcement strategy to seek to impose individual liability where possible. The ACCC 2024-25 Compliance and Enforcement Policy and Priorities[55] statement does not articulate the importance of individual liability nor the balance to be struck between individual and corporate liability. The same applies to the Prosecution Policy of the Commonwealth.[56]

One advance would be for the ACCC and the CDPP to revise their statements of enforcement policy so as to bring them into line with world best practice

See eg US Department of Justice Memorandum, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (15 September 2022):[57]

> 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 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 …

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53 See eg *ACCC v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673.

54 See further 'Australian Cartel Law: Biopsies', [85]-[98]. Individual accountability may nonetheless be imposed in internal discipline systems, which is one reason for equipping courts with the power to make internal discipline orders.

55 March 2024, at: https://www.accc.gov.au/system/files/compliance-enforcement-policy-priority-2024_0.pdf . Contrast the importance given to individual liability in Commerce Commission, *Enforcement Response Guidelines* (July 2024), at: https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines..

56 See at: https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf.

57 At: https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf.

Another advance would be to take the non-imposition of individual liability into account as an explicit factor when determining a fine or pecuniary penalty against a corporation

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 calculation.[58] A deterrence deficit that arises from inability to prosecute individual persons should be offset by an increase in the fine or penalty imposed on the corporation. Section 16A(2) of the Crimes Act, s 76 of the Act and s 224 of the ACL should be amended accordingly.

C INDIVIDUAL ACCOUNTABILITY WITHIN CORPORATE OFFENDERS

In addition to individual liability, account needs to be taken of internal corporate systems and their capacity to deliver individual accountability for breaches of the law by corporations[59]

The capacity of internal corporate systems to deliver individual accountability for breaches of the law by corporations has yet to be fully recognised in our law. Individual accountability is not treated explicitly as an impact to be achieved by means of monetary sanctions against corporations. Section 16A(2) of the Crimes Act, s 76(1) of the Act and s 224(2) of the ACL are mute on this subject. The case law on fines and pecuniary penalties gives scant direction. For instance, the 'French Factors' in *Trade Practices Commission v CSR Ltd*[60] refer to a 'culture of compliance' and 'disciplinary and other corrective measures' without focussing on the basic importance of individual accountability.

Given that individual accountability is not a focus of the statutory framework or the case law, it is unsurprising that this factor has been neglected by the courts and that corporate respondents have been allowed to get way with non-disclosure of whether or not individual accountability has been imposed. *ACCC v Telstra Corporation Limited* [61] is an example (Telstra ordered to pay $50 million for unconscionable conduct; no agreed facts about what, if anything, happened to the staff who engaged, on the ground, in the egregiously unconscionable conduct). So is *ACCC v Qantas Ltd* (2024) [62] (consider the adequacy or otherwise of the consideration of individual accountability in the Statement of Agreed Facts and Submissions, and in the judgment of the Federal Court).

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58 'Australian Cartel Law: Biopsies', [94]-[98].

59 See *Corporations, Crime and Accountability*; *Australian Cartel Regulation*, 6.6. Consider eg the clawback by Qantas of $9.3 million from Mr Joyce (former CEO) partly by reason of the 'ghost flights' debacle: 'Qantas cuts former CEO Alan Joyce's pay by $9.3 million following damning review', Sydney Morning herald, 8 August 2024. Left to their own devices, organisations may fail to deliver and demonstrate internal accountability; see further B Fisse, 'Accountability and the PwC Tax Leak Scandal' (2023) 51 ABLR 120.

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

61 [2021] FCA 502. Consider also what happened and did not happen in *ACCC v Qantas Airways* [2024] FCA 1219.

62 [2024] FCA 1219.

The statutory framework should be amended to require account to be taken of individual accountability and other internal corporate controls when determining sentence or penalty.[63] Internal corporate controls should also be part of the prescribed content of pre-sentence and pre-penalty reports.[64]

[63] 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation', Part 3.

[64] 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation', Part 6.