

## **Observations of Julian Joshua and Christopher Harding regarding the Commonwealth of Australia invitation to submit comments on the Draft legislation introducing criminal penalties for serious cartel conduct\***

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\* Julian Joshua is a barrister and a partner in Howrey LLP in Brussels. Prior to returning to private practice in 2000 he was an official of the European Commission for 27 years and was responsible for developing its anti-cartel mechanisms besides leading many successful investigations and prosecutions. Christopher Harding is Professor of Law in the Department of Law and Criminology at Aberystwyth University. The authors have both written extensively on the criminal offence created by s 188 Enterprise Act 2002. They are the co-authors of *Regulating Cartels in Europe: a Study of Legal Control of Corporate Delinquency*, OUP 2003.

### **Introduction**

This submission is made in response to the invitation by the Government of Australia to interested parties to provide their views on the draft Trade Practices Amendment (Cartel and Other Measures) Bill 2008 as set out in the Exposure Draft. The views expressed in this submission are our own personal opinions and are not to be attributed to our respective law firm or university.

The comments are based on (1) the Exposure Draft Bill (2) the draft Memorandum of Understanding (MOU) between the DPP and the ACCC; and (3) the Discussion Paper.

We confine our comments to the problems likely to arise from using “dishonesty” as the touchstone for criminal liability especially when associated with “intention to make a benefit”. We suggest a framework for an alternative approach based on conspiracy.

### **Summary**

In summary, the main comments are:

- The bolt-on requirement of “intention dishonestly to obtain a benefit” is neither workable nor adequate as the differentiator between civil and criminal liability;
- However if the dishonesty requirement were simply removed from the criminal offence, leaving only intention as the fault element, (a) the current statutory language could catch conduct that falls short of what is commonly understood to constitute hardcore cartel behaviour; (b) leaving the decision whether to launch criminal proceedings to prosecutorial discretion would be an unsatisfactory delineator.
- We would suggest that the workability of the proposals would be enhanced by (a) narrowing the definition of the physical elements of the criminal offence so as to catch only objectively hard core cartel behaviour; (b) aligning the fault element of the offence on that required for conspiracy.

## **Preliminary comments**

Although we do not comment in detail on the definition of a cartel provision in s 44ZZRD, we believe the language in which the purpose/effect conditions in subs (2) and the competition condition in subs (3) are drafted is extremely dense and complicated. Although the task of adequately and succinctly defining the essential physical elements (*actus reus*) of a criminal cartel offence may be challenging, an important practical consideration is whether the trier of fact will be able to determine without difficulty whether what was agreed by the parties actually fell within the prohibited categories. We are concerned that it may not be easy for a judge to explain the elements of the offence to a jury in terms that are immediately understandable.

There should also be a clear distinction between criminal conduct and that which may be subject only to civil liability as noted in the Dawson Review. The draft bill does not however distinguish between the objective acts required for the criminal and civil offences. The physical acts are exactly the same, namely making or giving effect to a contract, arrangement or understanding (“CAU”) containing a “cartel provision”. Despite the loaded terminology, the definition of a cartel provision in s 44ZZRD even appears in a few respects to be wider than the existing *per se* civil penalty prohibitions. The draft bill attempts to draw the line by means of an additional bolt-on component of an “intention dishonestly to obtain a benefit”. Apart from the problems inherent in the concept of dishonesty, the danger of this approach is that it could well fail in its principal aim of limiting the reach of the criminal law to serious cartel conduct. Neither the concept of dishonesty nor the “intention to obtain a benefit” is an appropriate yardstick for determining whether cartel conduct should be prosecuted criminally. The proposal does not canvass the possibility of a tighter definition of the objective or factual element of the offence so as to capture only reprehensible “hardcore” cartel behaviour. If the physical component could be limited to such hardcore conduct, then the necessary fault component could be constituted by a less subjective element.

The Discussion Paper focuses on dishonesty although advertent briefly to fraud and secrecy as alternative distinguishing elements. Each of these concepts is troublesome and unlikely to operate as a sufficient or apt differentiator between criminal and civil liability. If it appears necessary to have a distinguishing fault element, we believe that a more appropriate component for any new criminal offence could be derived from exploring the notion of conspiracy.

## **The problem of requiring dishonesty as an element of the criminal offence**

In the Discussion paper, the architects of the legislation reassert the importance, highlighted in the Dawson Review, that the new criminal offence should only cover the most serious cases of cartel conduct and not extend further.

The physical components of the civil and criminal offences and the civil penalty provision are defined in identical terms. In very summary outline, there are in each case two separate violations:

- (a) making a contract or arrangement, or arriving at an understanding (CAU) that contains a cartel provision;
- (b) giving effect to a CAU containing a cartel provision.<sup>1</sup>

The sole differentiator in the Exposure Draft between the civil provisions and the criminal offences is the additional fault requirement in the latter of “the intention of dishonestly obtaining a benefit”.<sup>2</sup>

*Intention of dishonestly obtaining a benefit is inapposite as a fault element of a cartel offence:*

The underlying criminality of the cartel offence in the proposed draft legislation is thus predicated upon “dishonesty” as evinced in the dual fault element of an “intention dishonestly to make a benefit”. It is submitted that both these concepts are unnecessary and confusing as a requisite fault element of the offence especially when run together. An “intention to obtain a benefit” (which seems to have been derived from the offence of conspiracy to defraud, another source of potential confusion) is at the heart of every commercial transaction. Dishonesty, especially in the terms of the proposed *Ghosh* test, is not an appropriate hallmark in this context. It should not turn an action that was too unimportant in terms of its harmful effect on competition into a serious crime. And given that cartel conduct is generally known to be illegal, most examples of cartels that it might be appropriate to pursue as a civil matter would probably in any event involve (a) an intention to make a gain (b) some element of dishonesty in its ordinary meaning.

As a matter of policy, both the seriousness of the criminal cartel offence contemplated by the legislative reform and the culpability of its perpetrators derive not just from the intrinsically “bad” nature of the conduct engaged in but also its impact on the competitive market economy and the detriment to consumers and the public. We think that this balancing operation should as far as possible be captured in the definition of the offence itself and not left to an administrative discretion as to whether or not to prosecute.

As it stands at present in the draft legislation, exactly the same objective conduct is involved in a criminal offence and one which will be pursued by administrative sanctions only. Concerns have been expressed by authoritative sources at blurring the line between criminal and civil enforcement.<sup>3</sup> However as a matter of policy, it might be appropriate to impose civil penalties on anti-competitive conduct which objectively falls short of that required to constitute the *actus reus* of a criminal offence. Having precisely the same physical elements as a criminal offence (with a differentiator which may not prove apt for the task anyway) could mean that arrangements which are anticompetitive and merit deterrence via a civil sanction escape the ambit of any prohibition. To put it another way,

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<sup>1</sup> According to s 44ZZRD (1) a provision is a cartel provision if it satisfies (a) the purpose/effect condition set out in subs (2) the competition provision contained in subs (3).

<sup>2</sup> The draft MOU is intended to guide and constrain the exercise of prosecutorial discretion in the bringing of prosecutions to reinforce the objective of limiting criminal proceedings to the most serious cases.

<sup>3</sup> See e.g. Chief Justice Murray Gleeson, *Civil or Criminal - What is the Difference?* 2006 Law Summer School, Perth, 24 February 2006, pp 15-16.

while criminal sanctions should be reserved for hardcore cartels, anticompetitive arrangements should not have to be hardcore cartels to warrant the imposition of civil penalties.

The current drafting of the proposed Bill thus risks (a) failing to capture adequately the essential turpitude of the hardcore conduct it is sought to control and (b) being both over- and under inclusive.

Although the cartel offence was supposed to define cartel conduct more narrowly than the current *per se* prohibitions under the Trade Practices Act, the new provisions, especially those covering price fixing, appear in certain respects to be broader than the existing legislation, and could thus catch conduct which could not be characterized objectively as “hard core” cartel conduct. The add-on element of “intention dishonestly to obtain a benefit” does not on its own operate as an adequate differentiator of criminality so as to turn an anticompetitive arrangement which is not inherently sufficiently serious or harmful into a criminal offence. Conduct that is unquestionably dishonest by any standard may not have any real effect on competition (as implicitly recognized in the MOU’s threshold volume of \$ 1 million worth of affected commerce); while those who knowingly engage in conduct that is undeniably serious in terms of its economic harm could well avoid conviction by exploiting the opportunities presented by the proposed test to claim before the jury that their subjective belief (a) was not dishonest according to ordinary standards, or (b) so motivated them that it negated any awareness on their part of its possible technical dishonesty.

*“Ghosh” Dishonesty is inappropriate*

As is well known in Australia, the concept of dishonesty has proven one of the most troublesome areas of controversy in the criminal law of theft and fraud. The two-stage *Ghosh* test of the English Court of Appeal says in effect that “dishonest” in relation to the Theft Act 1968 means (a) dishonest according to the ordinary standards of “reasonable and honest” people and (b) known by the defendant to be dishonest according to those standards.<sup>4</sup> Framing the test in this objective/subjective way (which is not in fact a definition at all) has long been a bone of contention in the criminal law. It invites a complex social and moral judgment on which different juries might give different answers. There is an extensive academic literature, most of it highly critical of the English Court of Appeal.<sup>5</sup> The Law Commission wrestled unhappily with the concept for years. It pointed out that even inside the Theft Act 1968, “dishonesty” was used in different senses, either as “positive dishonesty” where it “did all the work” in acting as the pivotal factor for liability turning what was not even facially unlawful into a crime (as

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<sup>4</sup> *R v Ghosh* [1982] QB 1053. The authors do not know if there any significance should be attached to the truncation of the *Ghosh* standard of “ordinary standards of reasonable and honest people” in the Code to “standards of ordinary people”, but given that there has been argument as to whether the test might be different where (a) “dishonestly” appears as an adverb modifying designated conduct (b) the adjective “dishonest” is used to qualify the means used by the accused ; and (c) dishonesty is an ingredient of an offence, the subtleties could prove a defence lawyers’ playground.

<sup>5</sup> Elliot, *Dishonesty: a Dispensable Concept ?* [1982] *Crim. Law Rev.* 395; Griew, *Dishonesty: The Objections to Feely and Ghosh* [1985] *Crim. L. Rev.* 341; Halpin, *The Test for Dishonesty* [1986] *Crim. L. Rev.* 283; see also Sir Brian McKenna, *The Undefined Adverb In Criminal Statutes* [1966] *Crim. L. Rev.* 548.

in theft) or as “negative” dishonesty where its absence served to exculpate behaviour which would otherwise be regarded as criminal (as in obtaining property by deception).<sup>6</sup> In *Peters* the High Court of Australia failed to come up with a satisfactory answer to the problems dishonesty poses.<sup>7</sup>

The Discussion Paper glosses over the difficulties in its assertion that:

*“Dishonesty is a well-established principle of comparable criminal offences in Australia. Dishonesty is an element of many offences under the Criminal Code.”*

However compelling the views the High Court in *Peters*, *Ghosh* in modified form was rehabilitated and given statutory force by the Criminal Code.

Given the statutory confirmation of *Ghosh*, we will not rehearse in detail the objections expressed by the justices of the High Court in *Peters* even if they have lost little of their force as regards the application of this standard to a possible cartel offence. The very complexity and intractability of the issues raised is underlined by the fact that the justices could agree on neither the appropriate jury direction nor the role of dishonesty as an element in the offence of conspiracy to defraud. Their difficulties in that latter respect should act as a warning against bringing in the super-added notion of “obtaining a benefit”, which tends to blur the line between conspiracy to defraud and the cartel offence and invites the raising of arguments that will ultimately confuse rather than elucidate.

The point in the Discussion Paper that dishonesty features widely as an element in the definition of fraud offences in Australia is of course correct as far as it goes. To be sure, dishonesty has not been much of an issue in the ordinary run of criminal cases.<sup>8</sup> It is however difficult to understand at first sight the relevance of a concept taken from its primary criminal law context of offences against property to the very different circumstances of cartel misconduct.<sup>9</sup>

As been pointed out by one Australian commentator, “whatever the rhetoric used in an attempt to equate serious cartel conduct with theft or fraud, cartel cases often bear no direct factual resemblance to mainstream cases of fraud or offences by mainstream cases of fraud or offences by corporate officers under the Corporations Act....(T)he particular circumstances of cartel cases are likely to test the workability of the concept of dishonesty in new ways, especially given that the cartel offence is to be tried by a jury.”<sup>10</sup>

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<sup>6</sup> Law Commission Consultation Paper No 155, *Legislating the Criminal Code* (March 12, 1999) paras 3.12-3.17.

<sup>7</sup> *R. v. Peters* (1988) 192 CLR 493 (High Court of Australia).

<sup>8</sup> In England, mid-level judges trying crime are told to avoid using the two-step *Ghosh* direction except in cases where there is a real issue on dishonesty and to revert to the pre-*Ghosh* language of *Feely* [1973] QB 530 (stating per Lawton LJ that no judicial definition should be attempted as juries could be trusted to apply the “current standards of ordinary decent people”). However the express definition proposed in the Exposure Draft excludes any notion that “obvious dishonesty” requires no *Ghosh* direction.

<sup>9</sup> Harding and Joshua, *Breaking up the Hard Core: the Prospects for the Proposed Cartel Offence* [2002] Crim.L.R. 933, 937.

<sup>10</sup> Fisse, *The Cartel Offence: Dishonesty?* (2007) 35 ABLR 235, at p 257.

Notions that work well enough in the context of the law of theft will not necessarily translate effortlessly into the cartel arena. In ordinary speech, “dishonesty” has connotations of mendacity or (in the financial context) making an illicit gain, while the gravamen of cartel behaviour lies more in the element of secret, surreptitious and conspiratorial planning between ostensible competitors.<sup>11</sup>

There are numerous practical and conceptual difficulties with making *Ghosh* dishonesty the touchstone of criminal liability in the case of cartels. In the normal run of criminal prosecutions, juries have to determine the subjective intent or belief of the accused at the time of the criminal act in order to decide whether a crime has been committed. As the *Ghosh* test is formulated, the jury has to determine guilt “on the basis of a criminal intention derived from a fiction based on objective standards rather than on the foundation of the accused’s actual intention, subjectively held at the time of the criminal act charged.”<sup>12</sup> In most cases of “ordinary crime” involving theft or fraud, juries probably ignore the legal fiction and just apply common sense. It may not be so simple in a cartel case for juries to cut through the verbiage. Jurors will be asked to apply the standards of “ordinary people” to matters which are far from their own normal experience.<sup>13</sup> No attempt is actually made to define “dishonest”, the task of finding a comprehensive definition having (as Kirby J remarked in *Peters*) “eluded legislatures, law reform bodies, official committees and judges”. Precisely what the jury will make of this invitation (with the complicated overlay of the partially idealised “ordinary person” test and the component of moral evaluation) is going to differ from case to case and jury to jury. The way the dishonesty test would be framed in the proposed Draft Bill invites a populist judgment of the “morality” of the actions involved with the potential of inconsistent results. The borderline between sharp business practice and criminality might not be so easy to draw. The objective element of *Ghosh* could be problematic in the cartel context. Unreconstructed entrepreneurs on the jury may think the whole point of private enterprise is to make a fast buck. Other, more “socially-aware”, jurors could respond sympathetically to assertions that the defendants had to agree prices to stop factories being closed and thousands being thrown into the dole queue.<sup>14</sup> Some of the arguments that could succeed may not be unmeritorious at all in terms of morality: juries could well be sympathetic to claims that middle managers were pressured by their superiors (who are too clever to leave a paper trail) to participate in cartel arrangements under threat of dismissal or retaliation. However, they are matters which in the case of other offences are normally not relevant to the issue of guilt.

The subjective limb of the *Ghosh* test would also provide numerous possibilities for defendants to deny liability on the basis of a subjective belief state. As has been pointed out, it allows an “unacceptably open-ended range of defences”.<sup>15</sup> Fisse has identified an extensive catalogue of such situations ranging from mistake of law to arguments of belief

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<sup>11</sup> Joshua, *The UK’s new Cartel Offence and its Implications for EC Competition Law: a tangled Web* (2003) 28 E.L.Rev 620, 626.

<sup>12</sup> Per Kirby J in *Peters*, n 7 above.

<sup>13</sup> Black, *Conceptual Foundations of Antitrust*, (CUP, 2005), p 128. see also Griew, n 5 above, at p 345.

<sup>14</sup> A recent study in England showed that only 60 per cent of those surveyed believed that price fixing was dishonest.

<sup>15</sup> Black, n 13, above pp 127-128 observes that it does not even fulfill its stated purpose of excluding the “Robin Hood defence” and seems to allow mistake of law as a defence, especially in the context of a cartel prohibition.

as to economic necessity or even pro-competitive intention.<sup>16</sup> If a jury believes a defendant who argues that he thought the cartel's price was fair, it is difficult to say that he also knew it was dishonest. One recent Australian study showed that while the majority of cartel participants know their actions are illegal, at least a third claimed they had good reason for forming cartels (they argued variously that cartels were preserved jobs, built good working relationships, ensured business viability and "improved competition").<sup>17</sup>

As the Law Commission in England has observed, even an anarchic verdict would not be perverse: the jury applying *Ghosh* would simply be doing the job the law confers on them.<sup>18</sup> In our opinion, defining the physical elements of the offence with sufficient clarity so as to catch only objectively hardcore cartel conduct, would allow the jury to exercise its traditional role of (a) deciding the facts (b) determining the subjective intention or belief of the accused. It would also be more apposite to the analytical and policy framework in which the whole issue of the criminality of cartel conduct has been discussed and debated.

The Discussion Paper argues that incorporating a requirement of "dishonesty" (or some other distinguishing mark) will signal the seriousness of the offence, the implication being that dispensing with it will undermine the educative message by failing to highlight the particular wrongdoing to be the subject of criminal as opposed to civil sanction. But we find this a circular argument that misses the point. Obtaining convictions and securing jail terms would serve any didactic purpose equally well.<sup>19</sup>

#### *International Precedent: the Enterprise Act 2002*

While the Discussion Paper claims the support of "international precedent" for the use of the element of dishonesty, the sole example of its being used in antitrust legislation is in the cartel offence created by s 188 of the Enterprise Act 2002.<sup>20</sup> The formulation of the UK cartel offence and its reliance on dishonesty has been criticised by several commentators, including the present authors. One Australian commentator found the justifications advanced in the White Paper for the dishonesty formulation to be

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<sup>16</sup> Fisse, op cit, n 10, at p 263.

<sup>17</sup> Berzins and Sofo, *Non-compliance with Competition laws and Offenders' Reasons for forming a Cartel*, Competition Law International, Oct 2007, p 36. By way of justifying such claims, the door could even be opened to the introduction of the very sort of complex economic evidence in support of "honest belief" that the advocates of a conduct based criminal offence presumably hoped to prevent.

<sup>18</sup> Law Commission Consultation Paper No 155, n 6, above.

<sup>19</sup> Similar reasoning was deployed in the United Kingdom to defend the cartel offence provision in the Enterprise Act 2002. It was also argued that introducing the element of dishonesty would also go a long way towards helping to overcome defence arguments that the conduct is not reprehensible. The UK White Paper then proceeded to undermine its own argument by volunteering the unfortunate view that it would be a defence for defendants to show they "honestly believed" that their arrangement was not a violation of Article 81, thus giving the opportunity to bring in complex economic argument in addition to the possibility of arguing mistake of law (Department of Trade and Industry, *A World Class Competition Regime*, Cm 5223, "White Paper", July 2001).

<sup>20</sup> In the Enterprise Act the term ("dishonestly") is used to qualify the "agreement" between the individuals to make or implement the alleged cartel arrangements, not their intent to obtain a benefit. Indeed, under the Enterprise Act, there is no statutory requirement that any benefit or loss should accrue other than what might be inherent in the meaning of dishonesty.

unconvincing.<sup>21</sup> The notion of taking dishonesty as a predicate of criminal liability in cartel cases has no respectable or indeed any pedigree. There was no substantive discussion of the alternative approaches in the White Paper: instead the decision was pre-empted by the presentation of dishonesty as preferable to the option (immediately debunked) of attempting to criminalize a breach of Article 81 of the EC Treaty and the equivalent provisions in the UK Competition Act.

No prosecutions have yet been brought under the Act after five years in force. While three individuals have recently been charged in *Marine Hoses*, this development was not the result of an independent investigation by the UK authorities but rather was driven by an “unprecedented” plea arrangement in the United States and the extensive degree of cooperation between the Department of Justice and the British authorities.<sup>22</sup> There is thus no convincing record of successful prosecutions for the cartel offence.

#### *Alternative differentiators: Fraud and Secrecy*

Fraud and secrecy are mentioned as possible alternative differentiators. No clear idea is however given of how they might be harnessed to capture better than dishonesty the essential criminality of cartel conduct. They are open to the same basic objections as dishonesty. They will not cure any deficiencies in the drafting of the physical components of the offence and are apt to inject further confusion. To add to the ambiguity, the three concepts are closely interlinked and are also the subject of some controversy. Thus “dishonesty” has become identified since *R v Scott*<sup>23</sup> as a separate component of conspiracy to defraud; and while “secrecy” may in certain circumstances be sufficient element to constitute “dishonesty”, the holding is currently the subject of an appeal to the House of Lords in *Norris v United States*.<sup>24</sup>

#### *Implications of Dishonesty for Extradition*

The oral arguments in the House of Lords in *Norris* highlight a further difficulty arising from the incorporating the notion of dishonesty as an element of a cartel offence. While it is certainly not the main justification of criminalisation from an Australian policy perspective, an important side-effect of introducing a new criminal offence is the availability of enhanced international cooperation in the form of extradition and mutual legal assistance between the jurisdictions that have a criminal law regime. The add-on requirement of “dishonesty” in s 188 Enterprise Act 2002 has raised serious questions in terms of dual criminality. The Extradition Act 2003 requires the “conduct” that is alleged in the requesting state to constitute a (notional) serious criminal offence had it occurred

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<sup>21</sup> Fisse, n 10 above, characterizes the White Paper as “deeply flawed”.

<sup>22</sup> Department of Justice Press Release 07-995, 12 December 2007. The plea agreements can be found on <http://www.usdoj.gov/atr/cases/allison.htm>. The background is set out in O’Kane, *A New Dimension in International Cartel Enforcement*, BIICL International Cartels Conference, London, 26 February 2008.

<sup>23</sup> [1975] AC 819. See the long discussions and divergent of *Scott* in *Peters* (complex relationship between dishonesty, deceit and conspiracy to defraud).

<sup>24</sup> For the judgment of the Divisional Court (Auld LJ, Field J) under appeal to the House of Lords see *Norris v Government of the United States* [2007] EWHC 71 (Admin).

within the jurisdiction of the UK. To be sure, “equivalence of offence” arguments have been roundly rejected but the issue raised in *Norris* (and other cases) is whether the conduct that has to amount to an extradition offence is that asserted in the request alone or whether it can be embellished by an accompanying narrative. In *Edwards v Government of USA*<sup>25</sup> the Divisional Court held (in a judgment rendered six months after the High Court judgment in *Norris*) that the “conduct” that was the subject of the dual criminality inquiry in terms of the law of England had to be that referred to in the US indictment. Since dishonesty is not an element of the Sherman Act offence, and is not alleged in the *Norris* indictment, this could be a determining issue in the awaited decision of the House of Lords. While the dual criminality issue may not arise in precisely the same acute form in the extradition law of Australia, given the different drafting of the Extradition Act 1988 (Cth), the question of conduct constituting the extradition offence as described in the request and supporting material is still complicated and problematic.<sup>26</sup>

### **The Distinction between criminal and civil infringements**

We fully agree that there should be a clear distinction between criminal and civil offences. We see no compelling reason for defining the physical components of the criminal and the civil offence in identical terms. Ideally, the distinction between serious cartel conduct and anticompetitive conduct subject to civil penalties should be made at the stage of defining the objective elements. A criminal offence should be defined so as to catch only hardcore price fixing, bid-rigging and market sharing.<sup>27</sup> In such a case there would be no need to resort to problematic concepts like dishonesty or its “secrecy” subset. The culpability would thus be explicitly captured in the definition of the physical element of the offence.

In the United States, Section One of the Sherman Act does not call for any additional element such as dishonesty. To be clear, we would not suggest the Sherman Act as a model for Australia to follow as the language of the Act itself makes no distinction between civil and criminal violations. However, even in the sphere of public enforcement by the Department of Justice, a clear demarcation is drawn deriving from enforcement history, practice and judicial interpretation over more than a century between the cases which are appropriate for criminal prosecution and those which are pursued civilly.<sup>28</sup> It is thus possible for companies, individuals and legal advisers to predict with some certainty when a potential fact situation is likely to result in criminal prosecution. However, absent

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<sup>25</sup> [2007] EWHC 1877 (Admin). The Divisional Court (Sedley LJ, Nelson J) relied on the decision of the House of Lords in *Dabas v High Court of Justice in Madrid* [2007] 2 AC 31 (in relation to the European Arrest warrant). The judgment in *Norris* (handed down during the oral argument in *Dabas*) was apparently not cited to the House of Lords.

<sup>26</sup> See e.g. *Tervonen v Minister for Justice and Customs* (No 2) [2007] FCA 1684.

<sup>27</sup> By contrast, civil penalties could legitimately attach to behavior that falls short of hardcore cartel activity. The proposed regime however foresees an overlapping three-level hierarchy of infringements: criminal offences under the new Division 1 of Part IV TPA; (2) civil offences under the new Division 1; (3) the existing TPA provisions which will give rise under Division 2 to civil action by third parties and enforcement proceedings with civil penalties.

<sup>28</sup> Only hard core cartels are prosecuted criminally, and while all criminal violations are *per se* violations, not all *per se* violations are criminal offences. The 1955 report of the Attorney General’s National Committee to study the Antitrust Laws concluded that criminal prosecution should be reserved for “those circumstances where the law was relatively clear and the conduct egregious.”

a developed body of case law, it would appear essential to capture the criminality of the conduct in the statutory definition of the offence.

This distinction between a civil and a criminal violation has consequences as regards the necessary fault element. In criminal cases, the Supreme Court has imposed more exacting requirement than in cases giving rise to civil liability (or administrative enforcement by the Department of Justice).<sup>29</sup> Even in the absence of statutory language, the default *mens rea* (as in Australia) is intent. To prove guilt in a Sherman Act conspiracy case prosecuted criminally, the prosecution must show (a) a deliberate intent to enter the agreement; (b) knowledge of its probable anticompetitive consequences. The jury must be satisfied that the accused was aware of the nature of his conduct, did not act through ignorance, mistake or accident, knew of the goal of the conspiracy and intended to accomplish it.<sup>30</sup> It is irrelevant for a Sherman Act conviction whether the prices fixed were reasonable or whether the defendant's intentions were good. Both of these are however likely to provide fertile ground for wide-ranging defence arguments seeking to buttress a *Ghosh* claim of "honest belief".

### **Alternative Approach**

For the reasons set out above, we do not believe that dishonesty (whether on its own or as incorporated as qualifying an intention to make a benefit) is an appropriate or adequate fault component in a proposed criminal offence. However simply dropping it as a requirement would create in turn as many problems as it resolves: it would leave the MOU as the sole differentiator of what cases are appropriate for criminal prosecution. Even the \$ 1 million "value of affected commerce" considerations set out in clause 4.3 of the MOU are not thresholds that have to be met in order for the ACC to decide to refer. There should be greater clarity as to what conduct is sufficiently serious as to warrant prosecution as a criminal offence. Given that the current legislative programme may not allow for a complete overhaul of the proposals, one option is to incorporate the indicative factors (appropriately modified) as components of the statutory offence.

If time is available for a more complete review of the proposals, we would suggest that in order to achieve the objective of confining criminal liability to the most serious cases both the physical and the mental elements of the offence should be narrowly defined.

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<sup>29</sup> *US v US Gypsum* 438 U.S.422 (1978); *US v Andreas* 216 F 3d 645 (7<sup>th</sup> Cir 2000). It should be noted that this is an enhanced *mens rea* requirement required for conviction when a violation is prosecuted criminally, not a differentiator between the elements of a civil and a criminal offence.

<sup>30</sup> As pointed out by McHugh J in *Peters*, the elements of conspiracy do not divide easily into *actus reus* and *mens rea* since the agreement between the parties is the *actus reus* of the offence but involves a primarily mental element. See also the position in English law where common law conspiracy has all but disappeared and the Criminal Law Act 1977 defines the *mens rea* for a statutory conspiracy as an intention that the requisite course of conduct be pursued.

*(a) Physical elements*

The physical elements of the offence should be narrowly defined in precise, clear and pertinent language to cover only the most serious hardcore cartel conduct: price fixing, bid-rigging, output restrictions and quotas and market sharing.

We would also suggest that the element of agreement, understanding or arrangement be explicitly aligned on the notion of conspiracy and should include a common design on the part of all the participants to achieve the same objective.<sup>31</sup>

Besides being a well known concept in Australian law, the notion of conspiracy with its connotations of furtive planning would better capture the element of delinquency, cynical manipulation and bad conduct that merits the criminal pursuit of cartels. We do not believe there would be any disadvantage to the prosecution or any injustice to defendants in harnessing the notion of conspiracy. Resistance to its use by the architects of the Enterprise Act may have been due to a misunderstanding as to its role in the Sherman Act (and the Canadian legislation). In the antitrust context, conspiracy is not an inchoate offence. Rather it is being used to define the type of agreement which will ground liability in circumstances which are covert, clandestine and difficult to prove. The core of the Sherman Act conspiracy is a “conscious commitment to a common scheme” and the operation of a continuing unlawful enterprise.

In addition, we suggest that a suitable jurisdictional threshold (say \$ 1 million worth of affected commerce) should be required as a component of the offence.

*(b) Fault elements*

As the mental element, we would suggest (on the lines of a conspiracy) that there should be a requirement of an intention on the part of each defendant (1) to enter an agreement (2) in order to put the common design into effect, i.e. to bring about the prohibited price fixing, bid rigging, etc. The combined requirement of agreement and common design within the mental element captures the sense of a deliberated and planned awareness of the prohibited anticompetitive character of the contemplated act, and a determination to work with other parties to achieve a known unlawful advantage. As such the definition would encapsulate the level of delinquency – a jointly conceived and self-serving defiance of competition policy and law – which underlies the idea of a ‘hard core cartel’.

Commensurate with the common law on conspiracy, this would restrict criminal liability to cases where there was a specific intention to commit the particular prohibited act, i.e. recklessness would not be sufficient.

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<sup>31</sup> This suggested limitation would also have the likely effect of excluding liability for an attempt to commit the cartel offence. It should also ensure that no offence is committed between two persons unless at the time of the agreement both parties intended to carry it out.