

Law Council of Australia
Trade Practices Committee
of the Business Law Section

Submission to the Treasury on the criminalisation of cartels

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Principal recommendations

The structure of the civil and criminal cartel prohibitions: Paras [8] – [22]

- Civil contraventions should not be substantially broadened as the Bill proposes. Doing so will result in a wide range of currently lawful conduct becoming unlawful for no corresponding policy benefit. In particular, arrangements such as joint ventures which may be viewed as economically efficient and pro-competitive may be prohibited under the new proposals which extend certain types of cartel conduct to those which have the 'effect' of exclusionary conduct.
- If civil contraventions for price fixing and exclusionary conduct are to be amended, that should be done in a way which retains and refines the existing elements (and defences) which work well. Amendments should only deal with identified shortcomings according to articulated principles.

Criminal cartel prohibitions are too broad: Paras [23] – [73]

- The criminal offences are also too broad. Only a sub-set of civil contraventions which constitute 'serious' or 'hard core' cartel conduct should be criminalised. As currently drafted, the offences will encompass legitimate and pro-competitive commercial conduct, which will cause considerable interference in economic activity and uncertainty for the business world. It will also undermine the utility of the TPA.
- The appropriate means of distinguishing between civil contraventions and criminal offences is to define them separately. The physical elements and fault elements of the offences should be stated with clarity and should be defined more narrowly and precisely and with greater reliance on existing non-overlap provisions and defences.
- The Bill proposes that the primary differentiator between civil and the current broadly drafted criminal prohibitions should be 'intention of dishonestly obtaining a benefit'. Having regard to our earlier recommendations, the Committee does not consider that this is an appropriate differentiator and instead the civil and criminal offences should be defined separately.
- The question of whether dishonesty should be included as an element of the proposed offence raises difficult and competing considerations. If the physical and fault elements of serious cartel offences are drafted appropriately, there may be no need for an additional element of an intention to dishonestly obtain a benefit. There are differing views on this among Committee members, depending upon the specificity of the cartel offences.

Additional defences – cartel offences not involving dishonesty: Paras [74] – [82]

- In the absence of any express statutory defence, the ACCC and DPP should issue guidelines (similar to that provided in the DoJ Handbook) detailing how prosecutorial discretion will be applied in circumstances of reasonable reliance on professional advice.
- It is recommended that there be a joint venture defence applying to the cartel offences and that it also allow for a test that the defendant had no knowledge of the likelihood of a substantial lessening of competition.

Telephone interception warrants: Paras [83] – [97]

- We consider that, on balance, it is probably desirable for the ACCC to have access to the issue of telecommunications interception powers during a serious cartel investigation, having regard to the serious nature of such offences.
- The final decision on conferring such a power may need reconsideration in light of the fault elements which are ultimately included in the definition of a cartel offence.
- If given such powers, the ACCC should in any event be required to state in its Annual Report the extent of its use of such powers.

Expansion of the civil liability prohibition: Paras [98] – [144]

- The Commonwealth has not explained or disclosed the policy reasoning identifying:
 - what objective or objectives it seeks from the application of an effects test to the proposed cartel provision in sub-section 44ZZRD(2)(b)(iii) of the Bill;
 - why an anti-overlap provision in the manner of sub-section 45(6) is not applied to sub-section 44ZZRD(2)(b)(iii).
- In the absence of a clear and cogent policy objective for retention of an effects test as applied to sub-section 44ZZRD(2)(b)(iii):
 - the cartel provision in sub-section 44ZZRD(2)(b)(iii) should be excepted from the application of the effects test by placing it in a discreet sub-section, subject only to a purpose test, and made subject to an appropriate anti-overlap provision; or
 - sub-section 44ZZRD(2)(b)(iii) should be deleted.
- If the cartel provision in sub-section 44ZZRD(2)(b)(iii) is retained but amended as recommended above, the Commonwealth should also repeal the existing prohibition against exclusionary provisions in section 45 (via section 4D). The Commonwealth should also amend sub-section 44ZZRD(2)(b) to include acquisitions.

- The Commonwealth should delete 'directly or indirectly' in the introductory words in sub-section 44ZZRD(2), because those words introduce an unnecessary element of uncertainty as to the causal connection required between the provision and the various proscribed purposes or effects.
- The joint venture defence should include incorporated joint ventures.
- Consideration should be given to whether a broader range of defences should be available to exclude from the prohibited conduct legitimate competitor collaborations, whether or not they are a joint venture.

Evidentiary issues: Paras [146] – [174]

- Section 157B of the proposed Bill should be enacted.
- If section 157C is enacted, the ACCC should be required to notify and seek submissions from persons who have an interest in protected cartel information, prior to exercising a discretion to disclose that information in accordance with sub-section 157C(3) or (4) of the Bill.
- Section 157C should be amended to clarify that it does not affect the normal requirement to disclose evidence to an accused in advance of the trial.
- If the proposed section 157B is enacted, a provision in the form of section 157D is necessary to ensure that substantive injustice is not done to a person who is not granted leave to compel the ACCC to produce protected cartel information.
- Sub-section 155AAA(12) should be reconsidered in light of the above.

The level and nature of the penalties: Paras [175] – [189]

- The proposed 5 year maximum term of imprisonment is consistent with overseas jurisdictions and the penalty for offences under the Corporations Act involving dishonest, market rigging and insider trading.
- The provisions of section 77A, prohibiting indemnification against the imposition of a civil penalty and the attendant legal costs, should be extended to deal with fines and the legal costs incurred in unsuccessfully defending a prosecution (assuming this is not already covered in the Bill).

ACCC Immunity Policy: Paras [190] – [239]

- The ACCC's Immunity Policy should be extended to make available automatic immunity (that is immunity conditional only upon specified criteria) from criminal prosecution on the conditions set out in the ACCC's Immunity Policy.

- The ACCC and the Commonwealth DPP should assess applications for immunity jointly. Alternatively, the DPP's prosecution policy should be amended such that it is consistent with the ACCC's immunity policy.
- In the event of a disagreement between the ACCC and the DPP as to whether an applicant meets the conditions for automatic immunity (from both civil and criminal prosecutions) the question should be resolved in the applicant's favour.
- As already provided in the Draft MOU, the ACCC should act as a single contact point and 'one-stop shop' for applicants for immunity.
- Decisions by the ACCC/DPP that an applicant for immunity does not meet the required criteria, and decisions to revoke immunity, should be able to be reviewed at the instance of the applicant/recipient.
- Such reviews should be confidential, independent and timely. It might therefore be appropriate for them to be conducted by a retired senior judicial officer agreed on by the ACCC/DPP and the applicant.

MOU between the ACCC and the DPP: Paras [240] – [255]

- The Draft MOU should not limit the DPP, in deciding whether to commence a criminal prosecution, to the financial significance of the cartel conduct and whether the cartel member has committed prior contraventions.
- The Draft MOU should provide that, in making that decision, the DPP will consider matters bearing on the morality of the cartel member's conduct. The Committee makes suggestions as to how this should be done.

Extradition and double jeopardy: Paras [263] – [300]

- Consideration ought to be given to whether double jeopardy should apply where civil proceedings are commenced before criminal proceedings for the same cartel conduct so as to prevent both civil and criminal fines being imposed for the same cartel conduct.

Introduction

- 1 This submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia, ('Committee') in response to the *Discussion Paper: Criminal Penalties for Serious Cartel Conduct* ('Discussion Paper') published by the Commonwealth on 11 January 2008 upon the issue of the exposure draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* ('Bill').
- 2 The Trade Practices Committee is constituted by experienced lawyers and economists who deal regularly with the provisions of the Australian *Trade Practices Act 1974* ('TPA') and related law.
- 3 The Committee welcomes the opportunity to comment, and in this submission comments on the two specific discussion issues set out in the Discussion Paper, namely:
 - whether there should be a distinction between the criminal and civil prohibitions, and if so how that distinction should be made; and
 - the appropriateness of providing telephone interception powers in relation to the proposed offences, and whether the proposed term of imprisonment of 5 years is appropriate.
- 4 The Committee has also taken this opportunity to raise a number of other issues in relation to the Bill. The amendments to the TPA proposed in the Bill do more than criminalising cartel conduct. They propose substantial changes to civil prohibitions relating to price fixing and exclusionary conduct (such as dividing markets collective boycotts and supply restrictions). The Discussion Paper offers a very brief description of only some of the proposed changes and little or no explanation of any of them. This is particularly unfortunate in the light of recent experience with the 'Birdsville Amendment' to s46 of the TPA, which was made without appropriate consultation.
- 5 The specific issues addressed in this submission are:
 - The structure of the civil and criminal cartel prohibitions;
 - Evidentiary issues (including, amendments to information gathering and access to information);
 - The level and nature of the penalties (a comparison with overseas penalties and their deterrent effect);
 - ACCC Immunity Policy;
 - The MOU between the DPP and the ACCC;

- Expansion of the prohibition against exclusionary provisions;
- Omission of the anti-overlap provision in sub-section 45(6);
- Repeal of section 45A but not of s4D;
- Implications of section 80 of the Constitution; and
- Extradition and double jeopardy.

6 The Bill, if enacted, also will have a major impact on the practical workings of the immunity policy of the ACCC. There are several matters in the Bill which are unexplained or unclear. This submission makes a number of recommendations in relation to these matters.

7 Given their great practical importance, the Committee suggests that the Commonwealth engage in a further round of consultation on these topics.

The structure of the civil and criminal cartel prohibitions

Introduction

- 8 The general approach of the Bill is to:
- Repeal section 45A of the TPA (dealing with price fixing);
 - Retain section 45(2)/4D of the TPA (dealing with exclusionary provisions);
 - Introduce very broadly defined civil cartel contraventions which substantially overlap sub-section 45(2)/4D, but which contain a number of (mostly undesirable or, at best, ill-explained) differences from the sub-section 45(2)/4D regime;
 - Define criminal cartel offences in similarly broad terms, subject to an overriding requirement that the relevant conduct be perpetrated with the intention of 'dishonestly obtaining a benefit'.
- 9 This general approach is not well founded. It would be preferable to:
- Make considered, incremental amendments to sub-section 45(2)/4D and section 45A to address articulated concerns;
 - Alternatively, repeal sub-section 45(2)/4D and section 45A and redraft the civil contraventions for price fixing and exclusionary conduct, but in a way which retains and enhances the existing elements (and defences) which work well. The amendments should only deal with identified shortcomings according to articulated principles; and
 - Define 'serious cartel conduct' more precisely and more narrowly than civil price fixing/exclusionary conduct so as to clearly specify the 'physical elements' and the 'fault elements'¹ of a criminal offence of engaging in such serious cartel conduct.
- 10 It may be appropriate, at least in the initial instance, to limit the definition of 'serious cartel conduct' to egregious price fixing, collusive tendering and bid rigging, leaving aside the more difficult territory of exclusionary conduct. Such an approach would achieve the central objective of imposing criminal sanctions, including the jailing of individuals, who engage in the most pernicious form of anti-competitive behaviour, with the attendant educative and deterrent results.
- 11 If this alternative approach is pursued, careful consideration should be given to whether fixing the price at which goods are *acquired* should constitute an offence.

¹ As those expressions are used in the *Criminal Code Act 1995* (Cth).

Whether acquirers of goods or services are relevantly 'in competition' is not properly settled under Australian Law.² In contrast, the scope of competition in relation to the *supply* of goods and services is generally clear.

- 12 This alternative approach would better achieve the original intention of the Bill, of which the Committee is strongly supportive – to visit criminal consequences, including jail terms, on perpetrators of serious cartel conduct.³
- 13 If the current approach of the Bill is maintained, the most far-reaching changes will not be in relation to criminalisation, but in relation to the dramatic and unwarranted extension of the *per se* civil contraventions. The Dawson Review recommended that the over-reaching scope of sub-section 45(2)/4D be reduced in several respects, but the effect of the Bill as drafted will be to substantially extend the prohibitions against exclusionary conduct.
- 14 The aspect which contributes most significantly to the unwarranted extension of the *per se* territory is the breadth of exclusionary conduct contemplated by sub-sections 44ZZRD(2)(b) and (c). Those paragraphs say that any provision of a contract, arrangement or understanding ('CAU') which has the purpose *or effect* of restricting *production, capacity* or supply, or of *allocating customers or territories*, will be illegal, irrespective of whether the provision adversely affects competition. Sub-section 45(2)/4D is concerned only with purpose (not effect) and supply (not production or capacity). The over-reaching of sub-sections 44ZZRD(2)(b) and (c) is illustrated in the examples below.
- 15 The next most significant aspect is that there is no relief for 'vertical' restrictions, which are ubiquitous in modern commercial arrangements with customers and suppliers. In markets with vertically integrated players (or prospective players), sub-section 45(6) has the effect of applying a substantial lessening of competition ('SLC') test to restrictions which constitute exclusive dealing under section 47 (other than 'third line forcing'). Unless a corresponding exemption is provided in respect of the cartel contraventions and offences, many restrictions currently imposed in vertical relationships will constitute *per se* contraventions (and perhaps even criminal offences).
- 16 There is a defence in proposed section 44ZZRO for joint ventures which do not have an SLC purpose or effect, but:

² The options, broadly, are: (a) parties are only 'in competition' in relation to the acquisition of goods and services if they are competitors in downstream markets; (b) parties are only 'in competition' in relation to the acquisition of goods and services if there is some scarcity of the goods/services to be acquired, alternatively some direct and immediate rivalry for the particular goods/services or (c) all parties potentially in the market for the acquisition of the goods and services from the relevant suppliers are 'in competition'. Section 44ZZRD(3)(d) does not expressly address this issue, although it may arguably rule out option (a).

³ See the statement of the Treasurer, 'Criminal Penalties for Cartel Behaviour, 2 February 2005.

- it applies only to unincorporated joint ventures and should be extended to incorporated joint ventures to (which are common in the resources sector in particular); and
- the defence applies only to civil contraventions, not the proposed criminal cartel offences. This could produce the absurd result of a joint venturer being convicted for a cartel offence on the basis of conduct which would not constitute a civil contravention.

17 Under the existing law, there is an exemption (under sub-section 45A(4)) from the current price fixing prohibition (under section 45A) for collective acquisition. There is no corresponding exemption from the new price fixing prohibition in sub-section 44ZZRD(2)(a). This is a significant omission. No policy reason has been advanced for it.

18 Other issues with the recasting of the civil contraventions in respect of price fixing and exclusionary conduct include:

- If a body corporate is a party to a CAU, each related body corporate is taken also to be a party (sub-section 44ZZRC) – which could result in all subsidiaries in a corporate group being liable for pecuniary penalties for conduct in which only one company was engaged. This is bad enough in a wholly owned group (because creditors of the non-defaulting company are potentially affected), it is even worse in a non-wholly owned group, because investors in the non-defaulting company face diminution in the value of their investment without corresponding fault.
- There is no equivalent of the anti-overlap provision in section 45(7) which removes the provisions of mergers and acquisitions from *per se* consideration under the price fixing and exclusionary conduct prohibitions. Unless a similar exemption is inserted, restraints commonly imposed in merger and acquisitions arrangements may expose the parties to pecuniary or criminal penalties;
- The new definition of price fixing does not exclude arrangements in upstream markets where parties are not competitive which have the likely effect of controlling prices in a downstream market where they do compete (eg bank interchange fees) (sub-section 44ZZRD(2)(a) and see the definition of 'likely' as 'a possibility that is not too remote' – section 44ZZRB)); and
- The new price fixing definition does not permit maximum price fixing by sellers, which is pro-consumer;
- section 4D catches restrictions on acquisition, whereas the new exclusionary restrictions do not;

- section 4D requires that an exclusionary boycott be directed at a 'particular class of persons', whereas the new restrictions do not;
- section 4D relates to restrictions 'in particular circumstances or on particular conditions' whereas the new provisions cover general restrictions on production, capacity or supply;
- sub-section 44ZZRD(2)(c) deals with 'allocating' between persons and geographical areas. It is not clear what 'allocating' involves;
- There appears to be substantial, if not complete, overlap between sub-section 47ZZRD(2)(d) dealing with bid rigging and sub-section 44ZZRD(2) dealing with price fixing. The application of both to consortium bidding is unclear;
- It is also unclear whether all, or just some, parties to a price fixing or exclusionary CAU are required to be in competition with each other;
- It is also unclear whether all, or just some, parties to a CAU must share a price fixing or exclusionary purpose for a contravention to arise.

19 A number of these issues are amplified in later sections of this submission.

20 Some of the practical implications of these amendments are summarised in the following table:

Example	Current breach?	New breach?⁴
Two restaurants in separate ownership have a combined capacity of 100 seats. The owners agree to close them and together build a single new restaurant with a capacity of 60.	No ⁵	Yes ⁶
Rather than investing in a new oven to bake croissants, a bakery enters into a tolling arrangement under which a competitor bakery bakes croissants for it.	No	Yes ⁷
A franchisor/importer/manufacturer/master distributor makes and/or gives effect to arrangements with distributors which contain restrictions as to customers or territories whilst reserving the right effectively to compete with distributors.	No	Yes ⁸

⁴ Subject to the test of 'dishonestly obtaining a benefit', contraventions of the proposed provisions will also constitute criminal offences.

⁵ See *Rural Press* 216 CLR 53; 88 -89.

⁶ The effect would be to reduce capacity (sub-sections 44ZZRD(2)(b)(ii) and (iii)), subject to possible application of the joint venture defence in section 44ZZRO.

⁷ The arrangement would have the effect of restricting or limiting the production of croissants by the acquiring bakery in breach of section 44ZZRD(2)(b)(i).

⁸ These ubiquitous types of restrictions would appear to fall within sub-section 44ZZRD(2)(b)(iii), (c)(i) and (c)(ii).

Example	Current breach?	New breach? ⁴
Two general practitioners in a country town agree that one will work on Saturdays and the other on Sundays.	No	Yes ⁹
Two operators of competing plants have the opportunity to upgrade to more efficient machines which will cause less pollution of the local environment than their existing machines. They agree to install the new machines, notwithstanding that they will have reduced production capacity during the period when they are both undertaking replacement works.	No	Yes ¹⁰
Tenders are offered for a major construction project. Two bidders decide to pool resources and submit a joint bid on the basis that neither will submit a competing bid.	No	Yes ¹¹
Two insurance companies spend substantial amounts on rehabilitation services for injured claimants. They agree to collectively acquire such services and, for this purpose, agree a list of targeted acquisition prices.	No	Yes ¹²
A franchised gardening service 'poaches' a leading franchisee from a competing franchise. The poached gardener is allocated a defined territory and customer list.	No	Yes ¹³
Two or more customers for farm inputs join a buying group seeking terms for collective acquisition from major suppliers. A representative of the buying group proposes prices for aggregated volumes to a supplier agreed by members of the buying group.	No ¹⁴	Yes ¹⁵
A manufacturer or importer of motor vehicles distributes vehicles through company owned as well as franchisee car dealerships. The manufacturer agrees with franchisees that they will honour specified maximum resale prices in order to facilitate a national promotional campaign conducted by the manufacturer/importer on behalf of participating company owned and franchisee dealers.	No ¹⁶	Yes ¹⁷

⁹ The effect of the roster would be to limit the supply of medical services on both days which would appear to fall within section 44ZZRD(2)(b)(iii).

¹⁰ Again, the effect of the arrangement would be to limit production or capacity in breach of section 44ZZRD.

¹¹ This would appear to breach sub-sections 44ZZRD(2)(d)(i) and (ii).

¹² There is no collective acquisition protection, corresponding with section 45A(4).

¹³ Because there is no anti-overlap equivalent of s 45(6), this would be a *per se* breach of sub-sections 44ZZRD(2)(b)(ii) and (iii) and

¹⁴ The buying group's activities will fall within the collective acquisition exemption to price fixing in section 45A(4) and will be legal provided the members of the buying group do not agree to boycott a particular supplier in contravention of section 45/4D and the arrangements do not otherwise substantially lessen competition.

¹⁵ The conduct would be caught by sub-section 44ZZRD(2)(a)(ii), subject to the possible application of joint venture defence in section 44ZZRO in some (rare) cases. There is no collective acquisition protection corresponding with sub-section 45A(4).

¹⁶ The maximum resale price exception in sub- section 45(5)(c)(iii) will apply.

¹⁷ The conduct would be caught by sub-section 44ZZRD(2)(a)(i). The joint venture defence in section 44ZZRO is unlikely to apply and there is no corresponding maximum resale price exception corresponding with sub-section 45(5)(c)(iii).

Recommendations on structural aspects

- 21 Civil contraventions should not be substantially broadened as the Bill proposes, and in particular, to cover certain conduct with exclusionary 'effect' that may be viewed as economically efficient and pro-competitive such as joint ventures. Doing so will result in a wide range of currently lawful conduct becoming unlawful for no corresponding policy benefit. In particular, arrangements such as joint ventures which may be viewed as economically efficient and pro-competitive may be prohibited under the new proposals which extend certain types of cartel conduct to those which have the 'effect' of exclusionary conduct.
- 22 If civil contraventions for price fixing and exclusionary conduct are to be amended, that should be done in a way which retains and refines the existing elements (and defences) which work well. The amendments should only deal with identified shortcomings according to articulated principles

Criminal cartel prohibitions are too broad

Introduction

23 The Bill creates two criminal offences which require proof of the mental element of dishonesty. These offences are:

- making; or
- giving effect to –

a contract, arrangement or understanding containing a cartel provision (as defined) with the intention of dishonestly obtaining a benefit.

24 These offences apply to:

- a corporation (sections 44ZZRF and 44ZZRG);
- a person (including an individual) who aids, abets, counsels, procures, induces, attempts to induce, is knowingly concerned in, a party to or conspires with others to contravene a cartel provision (section 79); and
- a person (including an individual) (sections 44ZZRF and 44ZZRG of the Schedule version of Part IV which applies under the various State and Territory *Competition Code Acts*¹⁸ and and section 6 as it is proposed to be amended extends the definition of 'corporation' in the TPA to include individuals where the Commonwealth has Constitutional power over individuals).

25 For the purposes of these new cartel offences, 'dishonest' is defined to mean:

- '(a) *dishonest according to the standards of ordinary people; and*
- (b) *known by the defendant to be dishonest according to the standards of ordinary people.'*

26 In this submission, the test in paragraph (a) is referred to as 'the objective limb' and the test in paragraph (b) is referred to as 'the subjective limb'.

27 For the purposes of establishing the subjective limb in relation to a body corporate, the Bill proposes an amendment (to section 84) to the effect that:

'...it is sufficient to show that:

- (c) *a director, employee or agent of the body corporate engaged in that conduct; and*

¹⁸ See, for example, the *Competition Policy Reform (Victoria) Act 1995* (Vic) and equivalent legislation in each other State and Territory.

(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.'*

28 This section of our submission deals with how the proposed criminal cartel offences should be distinguished from the civil contraventions in respect of cartel conduct and, in particular, whether the element of dishonesty affords an appropriate and workable distinction.

How should the criminal prohibitions be distinguished from the civil prohibitions?

29 This is one of the two principal questions posed by the Discussion Paper.

30 As stated in the previous section of this submission, the Committee believes that the appropriate means of distinguishing between civil contraventions and criminal offences is to define them separately. The physical elements and fault elements of the offences should be stated with clarity. The Committee does not support the approach of the Bill – which relies upon the test of 'intention of dishonestly obtaining a benefit' as the primary differentiator between civil and criminal prohibitions.

31 If the physical and fault elements of a serious cartel offence are drafted appropriately, there may be no need for the additional element of an intention to dishonestly obtain a benefit. In other words, if the elements of the offence are appropriately defined, they could amount to, in effect, a statutory statement of the standards of ordinary people. For example, if the offence of price fixing is defined so as to be limited to pernicious, horizontal arrangements entered into, or given effect to, by parties knowing that they are competitors and intending to fix prices, that could be enough – without a jury being asked to 'second guess' whether such conduct accords with the standards of ordinary people.

32 Depending upon the final form of the specification of cartel offences, views may differ as to whether an overriding dishonesty test is required. The remainder of this section discusses the advantages and disadvantages of such a test. This further discussion should not be taken as any endorsement of the test as it is currently used in the Bill – as a crude differentiator between a broad spectrum of conduct which may or may not be anti-competitive (and indeed may sometimes be pro-competitive) and criminal offences.

33 The proposed civil cartel offences, as drafted, involve questions of the purpose and effect of the relevant 'cartel provision' (affecting price, production, capacity, supply, allocation and/or bidding) and whether the parties are, or are likely to be, in competition in a relevant sense.

- 34 Similar technical distinctions have given rise to difficulties of interpretation of existing price fixing and exclusionary provisions.¹⁹
- 35 The Bill and the TPA expressly recognise that not all collaboration between competitors is inherently inimical to competition or contrary to the public interest. The Bill proposes that cartel provisions may be authorised, just as price fixing and exclusionary conduct can be authorised under the TPA as it stands. Moreover, the Bill proposes a joint venture defence where there is no substantial lessening of competition (section 44ZZRO), recognising that such joint ventures should not be unlawful. Inexplicably, the defence relates only to the civil cartel contraventions, not the criminal offences.
- 36 The critical issue for competition law is to draw the line between lawful and unlawful conduct in a way which ultimately enhances competition and which is consistent with sound economic principles. The additional challenge for criminalising anti-competitive conduct is to define the elements precisely, so that the moral reprehensibility of the offence is clear.

The dishonesty test

- 37 The dishonesty test proposed in the Bill emerged from the common law in the United Kingdom. In *Feely*²⁰ the Court of Appeal considered that, as dishonesty is an ordinary word in the English language, the jury, not the judge, should determine whether the defendant's conduct was dishonest according 'to the current standards of ordinary, decent people'. The Court of Appeal in *Ghosh*²¹ modified this formulation into the objective and subjective limbs contemplated by the Bill.
- 38 After extensive consultation and examination of the criticisms of the *Feely/Ghosh* test by the Australian courts and commentators, the Model Criminal Code Officers Committee recommended in its final report²² that dishonesty be the distinguishing fault element for a range of offences which might colloquially be called 'white collar crimes'. The Committee said:

'Opponents of the Feely/Ghosh test tend to paint it as though it casts the law forth into a sea of moral confusion and uncertainty. In fact the cases where dishonesty is a genuine issue are few... Dishonesty raises very difficult questions in the borderline

¹⁹ See, for example, *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1. In that case, the non-compete provision was held at first instance to not be an exclusionary provision because it constituted permissible exclusive dealing with no substantial lessening of competition. The finding was overturned by a majority of the Federal Court, which was upheld by a majority of the High Court, resulting in a pecuniary penalty of \$500,000 for the corporate defendant. It is submitted that there was no policy justification for the distinction ultimately drawn in that case between lawful and unlawful conduct.

²⁰ *Feely* [1973] QB 530

²¹ *Ghosh* [1982] 3 WLR 110

²² Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code Chapter 3: Theft, Fraud, Bribery and Related Offences Final Report (1995).

cases. The great virtue of Feely/Ghosh test is that it provides a framework in which those questions can be asked and answered so that justice can be done in the individual case.... Although, as the arguments for and against the Feely/Ghosh test reveal, there are strong philosophical disagreements about how far such concepts should be used in legislation and applied by courts and juries, the Committee's view is that the best that the law can do with such general concepts is to commit them to the juries or magistrates as the arbiters of community standards in such cases... The prediction that the Feely/Ghosh test will produce uncertainty and inconsistent verdicts in a large number of cases does not seem to be borne out in England or in Australia where it is already used in a number of jurisdictions for a variety of offences.'

39 The recommendation was adopted and 'dishonest' is defined in the Criminal Code and the Corporations Act in identical terms to the Bill.

40 Dishonesty is an element of certain crimes which may be regarded as analogues for making or giving effect to a collusive arrangement, as summarised in the following table (although this has been argued to be a serious 'category mistake'²³):

Offence (Criminal Code provision)	Fault Element
Theft (section 131.1(1))	Dishonestly appropriates the property of another with the intention to permanently depriving the other of the property.
Obtaining property by deception (section 134.1(1))	Dishonestly (through the use of deception) obtains property belonging to another with the intention of permanently depriving the other of property.
Obtaining a financial advantage by deception (section 134.2(1))	Dishonestly (through the use of deception) obtains a financial advantage from another person.
General dishonesty (obtaining a gain or causing a loss) (section 135.1)	Intention to dishonestly obtain a gain from or cause a loss to another person.
Conspiracy to defraud (obtaining a gain or causing a loss) (section s135.4)	Conspiring with another person with the intention of dishonestly obtaining a gain from or causing a loss to a third person.

41 It is arguable that some price fixing and exclusionary conduct already constitutes a criminal offence (making a price fixing or exclusionary arrangement may constitute conspiracy to defraud and giving effect to such an arrangement may constitute obtaining property or a financial advantage by deception).²⁴

²³ Fisse and Beaton-Wells argue that the cartel offences are most closely comparable with interference or subversion of the share market or the administration of justice – see Beaton-Wells, C & Fisse, B (2008) 'Criminalising serious cartel conduct: issues of law and policy: A Critique of the Exposure Draft Bill, Draft ACCC-DPP MOU and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia' at Part 6.3.1.

²⁴ In *Norris v Government of the United States of America and Anor* [2007] EWHC 71, it was found that cartel conduct amounted to a conspiracy to defraud which is an offence under UK law. On this basis, British nationals were exposed to extradition to stand trial for criminal cartel conduct in the United States. This decision has been appealed.

In relation to the above offences, dishonesty distinguishes lawful conduct from criminal conduct, by focussing on the moral reprehensibility of the perpetrator's state of mind and the perpetrator's actual knowledge of that reprehensibility. In the cartel context, dishonesty is proposed in the Bill to distinguish one species of unlawful conduct from another – that is, a criminal cartel offence from a civil cartel contravention. There are other instances of dishonesty defining the line between criminal offences and civil contraventions, some examples of which are summarised in the following table:

Offence (Corporations Act)	Fault Element
<i>Good faith—directors and other officers (sub-section 184(1))</i>	<p>If</p> <ul style="list-style-type: none"> reckless; or intentionally dishonest; <p>and fail to exercise powers and discharge duties:</p> <ul style="list-style-type: none"> in good faith in the best interests of the corporation; or for a proper purpose.
<i>Use of position—directors, other officers and employees (sub-section 184(2))</i>	<p>Use of position dishonestly:</p> <ul style="list-style-type: none"> with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.
<i>Use of information—directors, other officers and employees (sub-section 184(3))</i>	<p>Use of information dishonestly:</p> <ul style="list-style-type: none"> with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.
<i>Dishonest involvement in contravention (sub-section 209(3))</i>	<p>If involved in a contravention of section 208 (need for member approval for financial benefit) and the involvement is dishonest.</p>
<i>Dishonest involvement in contravention (sub-section 245L(3))</i>	<p>If involved in a contravention of section 254J or 254K (redemption of shares) and the involvement is dishonest</p>
<i>Dishonest involvement in contravention (sub-section 256D(4))</i>	<p>If involved in a contravention of section 256B (reductions in share capital not otherwise authorised by law) and the involvement is dishonest.</p>
<i>Dishonest involvement in contravention (sub-section 259F(3))</i>	<p>If involved in a contravention of section 259A or subsection 259B(1) (directly acquiring own shares) and the involvement is dishonest.</p>
<i>Dishonest involvement in contravention (sub-section 260D(3))</i>	<p>If involved in a contravention of section 260A (financial assistance by a company for acquiring shares in the company or a holding company) and the involvement is dishonest.</p>
<i>Inducing persons to deal (section 1041F)</i>	<p>Inducing another person to deal in financial products...by a dishonest concealment of material facts.</p>
<i>Dishonest conduct (section 1041G)</i>	<p>Engage in dishonest conduct in relation to a financial product or financial service</p>
<p><i>(Note in sections 1041F and 1041G dishonest is defined to mean: dishonest according to the standards of ordinary people; and known by the person to be dishonest according to the standards of ordinary people)</i></p>	

Offence (Corporations Act)

Fault Element

Dishonest contravention (sub-section 344(2))

If contravene subsection 344(1) (failure to take reasonable steps to comply with, or to secure compliance with, Part 2M.2 or 2M.3) and the contravention is dishonest.

Director's duty to prevent insolvent trading by company (sub-section 588G (3))

Failure to prevent the company incurring the debt was dishonest

43 The Bill proposes that dishonesty apply to 'obtaining a benefit', and 'obtaining' is defined to include:

'(a) *obtaining for another person; and*

(b) *inducing a third person to do something that results in another person obtaining.'*

44 The *Enterprise Act 2002* (UK) ('Enterprise Act') takes a somewhat different approach. It establishes a criminal cartel offence for individuals (not corporations) *dishonestly agreeing* with one or more other persons that 'undertakings' (i.e. businesses) will engage in prohibited cartel activities including price fixing, limiting supply or production, market sharing or bid rigging. There is no element of an intention to obtain a gain, dishonestly or otherwise. Nor is there any offence for giving effect to (whether dishonestly or otherwise) a cartel arrangement.

What are the alternatives to dishonesty?

45 Dishonesty has been criticised as a proposed element of cartel offence in Australia.²⁵ The primary criticisms are:

- dishonesty involves *'an infinite field of subjective and value-laden factors which logically should be considered pre-prosecution, as part of prosecutorial discretion'*²⁶;
- dishonesty does not limit cartel offences to 'serious' or 'hard core' cartel conduct, which was said to be the focus of the proposal for criminalisation²⁷;
- dishonest obtaining of a gain does not strike at the essence of the moral reprehensibility. If parties engage in conduct knowing that it is wrong, that should be enough; the gain is of no consequence²⁸;
- the subjective limb may be too difficult to establish, particularly for a corporation;

²⁵ See for example: Caron-Beaton-Wells and Brent Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', 26 February 2008; Brent Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 *Australian Business Law Review* 235; Julie Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10 *Deakin Law Review* 141.

²⁶ Heerey J, Commentary on the Paper of Brent Fisse and Caron Beaton-Wells, Seminar on Criminalising Cartel Conduct, University of Melbourne, 25 February 2008

²⁷ Treasurer, Criminal Penalties for Cartel Behaviour, 2 February 2005.

²⁸ Julie Clarke, *ibid*, 160.

- it is unclear who are the ordinary people, in particular whether they are hypothetical consumers or merely representatives of the community at large. In either case there is an issue as to the evidence to be led, including possibly expert evidence; and
- juries might be confused or distracted by it and place undue emphasis on the moral aspects at the expense of the practical and economic aspects.

46 This section canvasses the main alternatives.

(a) Fraud

47 The Discussion Paper suggests fraud as a possible alternative. The Discussion Paper notes that fraud is an element of some criminal offences in Australia (and also the criminal cartel offence in France), but that such fraud offences often require proof of dishonesty or the use of dishonest means.

48 It is submitted that fraud is not a desirable fault element. It was considered, but rejected, by the Model Criminal Code Officers Committee²⁹. Fraud is an older common law term which has largely been superseded by dishonesty as a result of the implementation of the Criminal Code. The offences listed in the tables at paragraphs 40 and 42 above all use dishonesty rather than fraud.

(b) Secrecy

49 This is another alternative suggested by the Discussion Paper.

50 It is submitted that, whilst secrecy may indicate a guilty mind, it does not adequately describe the requisite state of mind. The likelihood is that a jury will have little difficulty finding that clandestine conspirators had dishonest intent. It is submitted that they should be asked to focus on that intent, not the evidence of it. Moreover, there may be legitimate reasons for secrecy, such as to retain commercial confidence over joint venture or other collaborative arrangements thought by the participants to be legitimate. Secrecy is not necessarily a reliable indicator of a guilty mind.

(c) Intention to harm competition

51 In Canada, the prosecution in a criminal cartel case must prove that:

- the cartel conspiracy unduly lessened competition;
- the defendant subjectively intended to enter into the conspiracy and had knowledge of its terms; and

²⁹ Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code Chapter 3: Theft, Fraud, Bribery and Related Offences Final Report (1995).

- a reasonable business person would or should have known that the likely effect of the conspiracy would be to cause an undue lessening of competition.³⁰

52 A test along these lines would require a jury to comprehend the effect on competition and the expectations of reasonable business persons. The focus would be on whether the defendant intended to enter into the agreement, not upon whether the defendant did so with a reprehensible state of mind sufficient to warrant criminal consequences.

53 It is submitted that such a test of specific subjective intention may not appropriately capture the essence of the wrongfulness. More would be required to appropriately define the physical and fault elements along the lines contemplated by the Criminal Code.

(d) Other intentions

54 Another alternative would be to retain the element of intention to obtain a benefit, but delete the 'dishonesty' component.

55 It is submitted that mere intention to obtain a gain is not, in itself, a sufficient indicator of a guilty mind or moral reprehensibility. Most conduct in the commercial world is done for the purposes of obtaining a gain or advantage. Legitimate collaborative conduct between competitors is often done to achieve pro-competitive or other benefits. Such an intention is not indicative of criminality.

56 Another alternative is to apply the 'default' fault elements in the Criminal Code. For a cartel offence, they would require that the defendant:

- intentionally made, or intentionally gave effect to, the cartel provision; and
- was reckless as to the result of the cartel provision.

57 In this context, 'intention' is defined as the defendant meaning to make or give effect to the provision, and 'reckless' is defined as:

- the defendant being aware of a substantial risk that a particular result will occur (in the cartel context, presumably one of the various cartel effects in the definition of 'cartel provision' or perhaps that a gain will be obtained); and
- having regard to the circumstances known to the defendant, it is unjustifiable to take that risk.

58 There are some 'white collar crimes' to which the default elements apply, as summarised in the following table:

³⁰ Section 45 Competition Act

Offence (Corporations Act)	Result / Effect
<i>Market manipulation (section 1041A)</i>	<p>A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):</p> <ul style="list-style-type: none"> • a transaction that has or is likely to have; or • more transactions that have or are likely to have; <p>the effect of:</p> <ul style="list-style-type: none"> • creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or • maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction. <p>Failure to comply with this section is an offence (see subsection 1311(1)). This section is also a civil penalty provision (see section 1317E).</p>
<i>False trading and market rigging—creating a false or misleading appearance of active trading etc (section 1041B)</i>	<p>A person must not do, or omit to do, an act if that act or omission has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance:</p> <ul style="list-style-type: none"> • of active trading in financial products on a financial market operated in this jurisdiction; or • with respect to the market for, or the price for trading in, financial products on a financial market operated in this jurisdiction.
<i>False trading and market rigging—artificially maintaining etc. trading price (section 1041C)</i>	<p>A person must not enter into, or engage in, a fictitious or artificial transaction or device if that transaction or device results in:</p> <ul style="list-style-type: none"> • the price for trading in financial products on a financial market operated in this jurisdiction being maintained, inflated or depressed; or • fluctuations in the price for trading in financial products on a financial market operated in this jurisdiction.
<i>Offence against insider trading (section 1043A)</i>	<p>If a person (the insider) possesses inside information and the insider knows, or ought reasonably to know, that the matters specified in the definition of <i>inside information</i> are satisfied in relation to the information, the insider must not (whether as principal or agent):</p> <ul style="list-style-type: none"> • apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or • procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products

59 The Committee submits that a similar approach could be taken to defining cartel offences, particularly in relation to price fixing, collusive tendering and bid rigging. The drafting should make clear:

- the conduct of an individual which constitutes the physical elements of the offence, and
- the effect which the individual must have intended.

In the light of the drafting of the other elements, consideration should be given to whether recklessness as to the anti-competitive result of the conduct should be sufficient to establish the offence, as it may where the 'default' elements under the Criminal Code apply.

(e) Omitting the subjective limb

60 There has been criticism of the *Feely/Ghosh* test on the basis that assessment of the objective limb may involve a subjective element of the defendant's actual knowledge³¹. In other words, whether certain conduct would be regarded according to the standards of ordinary people as dishonest depends upon the knowledge and intention of the perpetrator. In this respect, the two part definition of 'dishonest' proposed in the Bill may be confusing and difficult to apply in some contexts.

61 This concern could be addressed by omitting the subjective element, or incorporating it into the objective limb by, for example, amending the definition of 'dishonest' to mean –

'dishonest according to the standards of ordinary people, having regard to the knowledge and intention of the defendant'

62 Dispensing with the subjective limb may also assist in relation to assessing the guilt of corporations. The subjective limb faces particular difficulties in the corporate context, as discussed below.

63 The disadvantages of omitting or incorporating the subjective element are:

- in some situations, particularly for natural person defendants, the subjective limb may be the touchstone of the criminality. Whilst ordinary people may have regarded the obtaining of a benefit as dishonest, if the defendant did not know that, the defendant's intentions may be regarded as lacking the degree of moral reprehensibility to warrant criminal conviction and the possibility of a jail term;
- the test would be inconsistent with the dishonesty test in the Criminal Code and the test applied in the analogue offences referred to at paragraphs 40 and 42 above.

64 The Committee submits, on the basis of these disadvantages, that this alternative is not to be preferred.

Subjective intention of a corporation

65 If the two part definition of 'dishonest' is employed, the key question for an offence by a corporation will be whose knowledge is ascribed to the corporation for the purposes of the subjective limb.

³¹ *Peters v R* [1988] 192 CLR 493.

- 66 As outlined in the Introduction above, the Bill proposes that it is sufficient that a director, employee or agent of the corporation who is engaged in the relevant conduct has the relevant state of mind – that is, knows that the obtaining of the relevant benefit is dishonest according to the standards of ordinary people.
- 67 This constitutes a significant departure from the corporate responsibility provisions under the Criminal Code. The Code requires fault at the corporate level, not just at the level of the individual perpetrator. Under sub-section 12.3(2) of the Code, the corporate fault element can be established by proof that:
- (a) the board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
 - (b) a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence³²;
 - (c) a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - (d) the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- 68 The Committee submits that the Criminal Code approach is preferable to that proposed by the Bill. The Criminal Code approach applies to the analogue offences referred to at paragraphs 40 and 42 above. The Discussion Paper does not indicate any significant distinction between cartel offences and the analogue offences which is sufficient to justify a departure from the Criminal Code approach.
- 69 Whilst it might be argued that the prosecution of a cartel offence against a corporation will face a difficult burden in proving the subjective limb in accordance with the Criminal Code approach, the Committee submits that does not warrant the adoption of an approach akin to strict liability.³³

Recommendations on dishonesty

- 70 The criminal offences are also too broad. Only a sub-set of civil contraventions which constitute 'serious' or 'hard core' cartel conduct should be criminalised. As currently drafted, the offences will encompass legitimate and pro-competitive commercial

³² A defence is available if the corporation can show that it exercised due diligence to prevent the conduct or the authorisation or permission.

³³ For amplification of the criticism of vicarious liability as a form of strict liability 'inconsistent with the general principle that criminal responsibility is personal, not vicarious, and requires fault' – see Brent Fisse, 'The Australian Cartel Criminalisation Proposals: an overview and critique', (2007) 4(1) *Public Law Review* 51, at 62.

conduct, which will cause considerable interference in economic activity and uncertainty for the business world. It will also undermine the utility of the TPA.

- 71 The appropriate means of distinguishing between civil contraventions and criminal offences is to define them separately. The physical elements and fault elements of the offences should be stated with clarity and should be defined more narrowly and precisely and with greater reliance on existing non-overlap provisions and defences.
- 72 The Bill proposes that the primary differentiator between civil and the current broadly drafted criminal prohibitions should be 'intention of dishonestly obtaining a benefit'. Having regard to our earlier recommendations, the Committee does not consider that this is an appropriate differentiator and instead the civil and criminal offences should be defined separately.
- 73 The question of whether dishonesty should be included as an element of the proposed offence raises difficult and competing considerations. If the physical and fault elements of a serious cartel offence are drafted appropriately, there may be no need for an additional element of an intention to dishonestly obtain a benefit. There are differing views on this among Committee members, depending upon the specificity of the cartel offences.

Additional defences – cartel offences not involving dishonesty

Introduction

74 Under formulations of cartel offences that do not involve dishonesty, the accused would have available the defence of mistake or ignorance of fact in section 9.1 of the Criminal Code (strictly speaking, these defences would be available if dishonesty is included, but in practical terms, the prosecution would have to prove dishonesty rather than honesty being raised as a defence). The defendant would bear the evidentiary onus of proving this on the balance of probabilities. In addition, if proceedings were commenced against an individual under Part VI for attempt, aiding and abetting or conspiracy, he or she would be able to avail themselves of sub-section 85(6) of the TPA, which allows the defendant to be excused, in whole or in part, if it appears the person acted honestly and reasonably, and having regard to all the circumstances ought fairly to be excused.

Defence of reasonable reliance on legal advice

75 There is no legislative defence of mistake of law based on reasonable reliance on legal advice. However, the section 9.3 of the Criminal Code (mistake or ignorance of statute law) envisages that an Act may provide for this type of defence. Such a defence would be unusual as these matters are normally dealt with under prosecutorial discretion.

76 In practice, the ACCC has applied leniency when a contravention of Part IV has occurred as a result of a respondent acting under erroneous professional advice. A similar position exists in the United States, where the US Department of Justices' ('DoJ') manual for antitrust enforcement specifically states that the DoJ will not prosecute cases where there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their actions. Reliance on erroneous advice will also presumably be a significant factor considered by the ACCC in deciding whether to refer a criminal matter to the DPP.

77 **Recommendation:** In the absence of any express statutory defence, the ACCC and DPP should issue guidelines (similar to that provided in the DoJ Handbook) detailing how prosecutorial discretion will be applied in circumstances of reasonable reliance on professional advice.

Joint Venture Defence

78 A joint venture defence should apply to the cartel offence especially if the dishonesty element is removed.

- 79 This defence should at least provide the same protections as that applying under the civil regime (now proposed section 44ZZRO).
- 80 Under the civil regime, the defendant must prove, among other things, that the 'cartel provision does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition'. This requires the defendant to establish that there is no objective likelihood of substantially lessening competition. To apply this requirement to a criminal offence is inconsistent with general principles of criminal responsibility that conduct should involve intention, knowledge or recklessness.
- 81 **Recommendation:** There should be a joint venture defence applying to the cartel offences and it should also allow for a test that the defendant had no knowledge of the likelihood of a substantial lessening of competition.
- 82 The submission makes further recommendations about the joint venture defence below at 143.

Telephone interception warrants

Introduction

83 Is it appropriate for there to be telephone interception powers in relation to the proposed offences?

(a) Existing Law

84 Presently, the ACCC has broad information gathering powers under Part XII and the recently introduced search and seizure powers under Part XID of the TPA, in investigating contraventions of section 45. As a Commonwealth agency that enforces laws imposing pecuniary penalties, the ACCC can also obtain stored communication warrants or telecommunications data authorisations under Chapter 3 and Chapter 4 respectively of the *Telecommunications (Interception and Access) Act 1979* ('TIAA').

85 The TIAA prohibits the ACCC from intercepting communications passing over telecommunications systems. State legislation limits the ACCC from using surveillance and listening devices. The installation of listening devices to record private 'cartel' conversations is prohibited in all Australian jurisdictions. However, the ACCC (using an informant) could record private conversations to which an informant was a party in Victoria, Queensland, and Northern Territory.

86 Australian jurisdictions have been moving to protect privacy by restricting the use of all surveillance devices including data surveillance devices, listening devices, optical surveillance devices, and tracking devices.

(b) Proposed Law

87 In addition to its existing powers, the enactment of the proposed criminal cartel laws will allow the ACCC to request the Australia Federal Police to obtain a surveillance devices warrant under the *Surveillance Devices Act 2004* ('SDA'). Such a warrant is available for the investigation of an offence which may involve a penalty of not less than 3 years imprisonment. However the ACCC will be unable to request the Australian Federal Police to obtain a telecommunications intercept warrant to investigate criminal cartel offences unless section 5D of the TIAA is amended to define sections 44ZZRF and 44ZZRG as serious offences. Examples of such serious offences already mentioned in the section are 'serious fraud', and offences involving, 'serious loss revenue to the Commonwealth, a State or Territory', but only where the offence is punishable by imprisonment for a period of at least 7 years.

Discussion

(a) Arguments for Telecommunications Intercepts

- 88 Subject to some of the issues raised elsewhere in this submission, serious cartel offences, by definition, may give rise to significant loss to the community and other business enterprises, akin to the serious offences mentioned above for which interception powers may be available.
- 89 Cartels are by their nature secretive. There are particular evidentiary difficulties with cartel offences as cartel participants generally seek to avoid documenting their arrangements, and endeavour to conceal cartel communications. Telecommunication systems (including the Internet) are an increasingly common and prevalent method of communication.
- 90 Interception warrants, particularly used in conjunction with an informant, could be a useful resource in ongoing cartel offence investigations, in those cases where cartel communications are predominately made over telecommunications systems including in relation to the implementation phase. However, a final decision should not be taken until the fault elements (dishonesty etc) to be included in the definition of serious cartel offence have been determined.

(b) Arguments against Telecommunication Intercepts

- 91 The ACCC already has (and will have) access to considerable investigatory powers, including recently introduced powers under Part XIX of the TPA, which have not yet been fully tested.
- 92 The evidentiary difficulties with cartel offences that would justify telecommunications intercepts are significantly addressed by the access to surveillance devices and stored communications warrants. Surveillance devices can record audio and video of face-to-face communications that would constitute more probative evidence than telephone intercepts with or without the participation of an informant. Stored communications warrants will provide access to many of the communications that pass over telecommunications systems, particularly with more technologically sophisticated corporate suspects. It has not been demonstrated at this stage that further investigative measures are required.
- 93 With the exception of the use of an informant, telecommunication intercepts will record all communications through a relevant line. There is a significant risk that such intercepts in a cartel investigation will in the main record private personal communications, of which many will involve individuals that are not involved in any criminal activity. There are strong public policy grounds favouring protecting the privacy of these individuals by not exposing them to such surveillance.

(c) Safeguards

- 94 Section 46 of the TIAA appears to provide adequate safeguards with respect to the issue of interception warrants by judicial officers. It is understood any application for a warrant would be made by the Australian Federal Police following a request by the ACCC during the investigation phase.

Recommendations

- 95 The Committee considers that, on balance, it is probably desirable for the ACCC to have access to the issue of telecommunications interception powers during a serious cartel investigation, having regard to the serious nature of such offences.
- 96 The final decision on conferring such a power may need reconsideration in light of the fault elements which are ultimately included in the definition of a cartel offence.
- 97 If given such powers the ACCC should in any event be required to state in its Annual Report the extent of its use of such powers.

Expansion of the civil liability prohibition

Introduction

98 The new sub-section 44ZZRD(2)(b)(iii) includes, as a cartel provision, wording substantially similar to that which appears in the definition of exclusionary provisions in section 4D of the TPA . However, the drafting of the new provision, and its interaction with other provisions in the TPA, raises serious issues that are discussed in this part of the submission.

99 These issues include:

- (1) the proposed sub-section couples an 'effects test' with the exclusionary provision wording, which broadens the scope of the new civil contravention and criminal offence to capture conduct that:
 - (A) has a pro-competitive purpose; and
 - (B) is not prohibited by the existing prohibition of exclusionary provisions;
- (2) the proposed sub-section prohibits an increased amount of collaborative conduct by competitors without regard to the *effect* on competition (a new *per se* prohibition) by failing to include an anti-overlap provision such as that in sub-section 45(6); and
- (3) the existing prohibition of exclusionary provisions in section 45 (via section 4D) will remain, raising issues of consistency and complexity in an already complex prohibition.

100 Some further issues with the recasting of the civil contraventions in respect of price fixing and exclusionary prohibitions are:

- if a body corporate is a party to a CAU, each related body corporate is taken also to be a party (section 44ZZRC);
- the new definition of price fixing does not exclude arrangements in upstream markets where parties are not competitive which have the likely effect of controlling prices in a downstream market where they do compete (eg bank interchange fees) (sub-section 44ZZRD(2)(a) and see the definition of 'likely' as 'a possibility that is not too remote' – section 44ZZRB)); and
- the new price fixing definition does not permit maximum price fixing by sellers;

- section 4D catches restrictions on acquisition, whereas the new exclusionary restrictions do not;
- section 4D requires that an exclusionary boycott be directed at a 'particular class of persons', whereas the new restrictions do not;
- section 4D relates to restrictions 'in particular circumstances or on particular conditions' whereas the new provisions cover general restrictions on production, capacity or supply;
- sub-section 44ZZRD(2)(c) deals with 'allocating' between persons and geographical areas. It is not clear what 'allocating' involves;
- there appears to be substantial, if not complete, overlap between section 47ZZRD(2)(d) dealing with bid rigging and sub-section 44ZZRD(2) dealing with price fixing. The application of both to consortium bidding is unclear;
- it is also unclear whether all, or just some, parties to a price fixing or exclusionary CAU are required to be in competition with each other;
- it is also unclear whether all, or just some, parties to a CAU must share a price fixing or exclusionary purpose for a contravention to arise;
- there is an exemption for unincorporated but not incorporated joint ventures;
- the joint venture exemption applies only to civil contraventions, not criminal offences;
- the existing exemption for collective acquisition (under sub-section 45A(4)) has been deleted, without explanation.

Discussion

(a) **The existing prohibition of exclusionary provisions and recommendations for reform**

101 The present per se prohibition on exclusionary provisions in section 4D has been the subject of much debate. In addition to conduct which is generally accepted as anti-competitive, such as group or collective boycotts, section 4D also potentially covers conduct that may not be anti-competitive and that may be pro-competitive.

102 Joint ventures can have a wide range of competitive effects. They should be subject to scrutiny under the Act. However, there should be no presumption that they are anti-competitive in nature. They can:

- create additional productive capacity through the formation of a new operating unit;
- engage in research and development for a new product, which would not have been carried out otherwise;

- lower costs through economies of scale and scope;
- achieve synergies through pooling of complimentary resources;
- facilitate entry into new markets;
- share and diversify risk.

103 Although collaboration between competitors is often harmful to competition, to consumers and to welfare, sometimes it can be welfare enhancing. The US antitrust authorities expressly recognise this fact.

'In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.

Such collaborations often are not only benign but pro-competitive.³⁴

104 The TPA does not currently provide a coherent statement of what kinds of collaboration between competitors are good and what kinds are harmful. Instead, economic actors and lawyers must negotiate a complex set of rules to discover what kinds of collaboration between competitors are prohibited.

105 The Dawson Committee recommended that an exclusionary provision not be per se illegal, unless the 'target' of the boycott was in fact an actual or potential competitor of the parties to exclusionary provision. The Dawson Committee also recommended that a defence be available in proceedings based upon the prohibition of an exclusionary provision, by proving that the provision did not have the purpose or effect of substantially lessening competition. This is the position in the United States, where under the Sherman Act, a collective boycott is subject to the rule of reason analysis. It is also the case in New Zealand under section 29 of the Commerce Act.

106 Various reviews of the Act have highlighted this difficulty, especially in relation to the proper scope of the prohibition against exclusionary provisions (section 4D) and the limited breadth of the exemption from the price fixing prohibition for joint ventures (the exceptions to the deeming provisions in section 45A). The new joint venture defences (sections 76C and 76D) introduced in 2007 assist in demarcating good collaborations from harmful collaborations, but do not resolve the problem. There is still a considerable area of difficulty in their application.³⁵

³⁴ US Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), p.1.

³⁵ Andrew Harpham, Donald Robertson and Philip Williams, 'The competition law analysis of collaborative structures' (2006) 34 *Australian Business Law Review* 399.

(b) The new provision

107 The new provision is relevantly worded as follows:

(1) *'For the purposes of this Act a provision of a contract or arrangement or understanding is a cartel provision if the following conditions are satisfied in relation to the provision:*

The purpose/effect conditions set out in subsection (2);

The competition condition set out in subsection (3)

(2) *The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:.....*

(b) *preventing, restricting or limiting:.....*

(iii) *the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract arrangement or understanding.....'*

108 The proposed new section 44ZRD(2) also explicitly deals with price fixing (sub-section 44ZRD(2)(a)), bid rigging (sub-section 44ZRD(2)(d)) and collusive tendering (sub-section 44ZRD(2)(c)) – all forms of conduct that fall within the rubric of an exclusionary provision.

(c) Policy objective of proposed new provisions

109 The focus and impetus behind the criminalisation of cartel conduct has been the imposition of criminal sanctions for 'hard core' cartel conduct. That submission was made by the ACCC to the Dawson Committee, and has formed the basis for the present Bill.³⁶

110 The Dawson Committee recommended that before criminal sanctions were introduced, a satisfactory definition of serious cartel behaviour needed to be developed. As noted in the Dawson Report, the ACCC adopted the Organisation for Economic Co-operation and Development (OECD) definition of hard-core cartel conduct:

'... an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.'

111 The Dawson Committee stated that criminal sanctions would be appropriate only for those restrictive trade practices which amounted to 'serious cartel conduct' or 'the

³⁶ Dawson Report, Chapter 10.

most serious kinds of cartel behaviour', as distinct from other restrictive trade practices which would continue to be dealt with as civil contraventions of Part IV.³⁷

112 Against this background, it is relevant to consider whether the proposed new provisions are consistent with the broad objectives of Australian competition law and the specific and stated policy objectives of the new provisions. For the reasons stated below, it appears that the new provisions are, to varying extents, inconsistent with these objectives and potentially damaging to the effective functioning of Australian competition law.

(d) Extension of civil prohibition of exclusionary provisions

113 In effect, the proposed sub-section 44ZZRD(2)(b)(iii) of the Bill proposes the expansion of the TPA's prohibition on exclusionary provisions to include an 'effects test'. This provision will apply in the context of both the civil prohibition and criminal offence established under the new cartel provisions. No rationale for this extension has been stated.

114 The present prohibition on exclusionary provisions only applies to a provision in a contract, arrangement or understanding which has the *purpose* of restricting the supply or acquisition of goods and services. The proposed cartel provisions include a prohibition against contracts, arrangements or understandings that have exclusionary *effect*, not just purpose. This 'expansion' to include consideration of the effect (as well as purpose) is a significant departure from existing jurisprudence on exclusionary provisions and cartel conduct where effect is irrelevant.

115 The expansion of the civil test for exclusionary provisions does not appear to be consistent with objectives of cartel criminalisation reforms as discussed above.

116 Moreover, the inclusion of an effects test for exclusionary provisions is arguably inconsistent with prevailing economic theory and the policy basis of the TPA. The historical origins of per se prohibitions of exclusionary provisions suggests that they were only intended to capture collective or group boycotts and that such conduct is only definable by reference to the purpose for which it was engaged. Early United States case law notes:

'The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates. The group may accomplish its exclusionary purpose by inducing suppliers

³⁷ Extracted from Committee's submission to the Working Party on penalties for Cartel behaviour (dated 12 December 2003), para 2.

*not to sell to potential cases by refusing to deal with would-be competitors, by inducing customers not to buy from them, or, in some cases by refusing to deal with would-be competitors themselves. In each instance, however, the hallmark of the 'group boycott' is the effort of competitors to 'barricade themselves from competition at their own level'. It is this purpose to exclude competition that has characterised the Supreme Court's decisions invoking the group boycott per se rule.'*³⁸

- 117 Absent this 'hallmark', US courts did not consider boycotts to necessarily be sufficiently harmful to warrant per se prohibition. Outright prohibition of arrangements between competitors that have merely an exclusionary effect (even allowing for authorisation) is likely to deter a range of arrangements that may have either a pro-competitive effect (in which case the extension of section 4D is not efficiency enhancing) or are competitively neutral (in which case the extension of section 4D unnecessarily imposes compliance and regulatory costs and erodes contractual certainty).
- 118 It is clearly foreseeable that an arrangement may have an exclusionary effect but a pro-competitive purpose; notwithstanding that the interpretation of 'purpose' as 'the end in view' obviously means they are not entirely distinct concepts. That is, there will be instances in which an efficiency-enhancing horizontal arrangement may have an exclusionary effect upon individual firms or groups of firms. It is these unintended effects of otherwise defensible conduct that are currently likely to be beyond the scope of a purposive test but are caught within an effects test.
- 119 In short, the expansion exposes many kinds of collaborations that are not harmful to competition to breaching a per se civil offence. For example, the provision found not to have the alleged exclusionary purpose in the *Souths* case (*News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563) would be likely to be regarded as a cartel provision under the new provisions.
- 120 Applying an effects test to some forms of conduct is appropriate. There is a strong argument to apply effects tests to price fixing conduct, which is subject to both a purposive and an effects-based test. Arrangements as to price are generally more pernicious, more easily identifiable and predictable and easier to circumscribe. Similarly, the effects tests applied to the substantial lessening of competition test in sections 45, 47 and 50 function appropriately. However, this may be distinguished from the proposed legislation, which applies an effects test to the supply or acquisition of goods and services. An inquiry as to the likely effect of conduct upon competition or prices is more suited to predictive analysis than an enquiry as to the effect of conduct upon the supply or acquisition of goods or services.

³⁸ *Smith v Pro Football Inc* (US Ct of Appeals DC, 1889) *Antitrust & Trade Regulation Reports* p E3 (1978).

121 The subtle differences in the wording of the proposed cartel provisions and the prohibition on exclusionary provisions (including the use of new terms such as *'directly or indirectly'*, *'production'* and *'capacity'* and the omission of the requirement that the restriction relate to a *particular* class of persons or classes of persons) raise additional uncertainties about the scope of the provisions.

(e) Application of criminal penalties to the extended conception of exclusionary provisions

122 The application of criminal liability adds an additional layer of regulatory/enforcement risk to the problems identified above. It would generally be expected that 'hard-core' cartel conduct would be a sub-set of the category of conduct falling within the existing per se prohibitions in the TPA. This does not appear to be the case in the Bill.

123 The Bill proposes to criminalise conduct which is not currently prohibited per se by the TPA, and which is not prohibited per se on a civil basis in other jurisdictions. Such conduct is not properly regarded as 'hard core' cartel conduct and it is difficult to see how its criminalisation could be justified.

124 There is considerable doubt whether it is appropriate or just for individuals to be held criminally liable for contravention of a law of the complexity, and predictive difficulty, as the proposed new provision. The inclusion of an effects test would require a person or corporation to consider the effect or likely effect of their conduct prior to engaging in particular conduct. This may create an unreasonable or inappropriate burden where the consequences of an incorrect judgment may result in criminal sanctions³⁹ or a high pecuniary penalty.

125 It appears possible that conduct that might have resulted in a 'technical' contravention of section 45 (through section 4D) could result in criminal liability under sub-section 44ZZRD(2)(b)(iii).

126 The dishonesty requirement may mitigate some of these risks in relation to the criminal offence. However, there are two problems with reliance on the dishonesty requirement:

- it is not applicable to the civil prohibition;
- even in relation to the criminal offence, it may not be sufficient to address the likelihood of a 'chilling effect' brought on by concern that legitimate conduct may become the subject of ACCC investigation, notwithstanding that an investigation may not result in proceedings.

³⁹ Recent cases, such as *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, suggest that even trained lawyers may have difficulty in applying the concepts in section 4D and the anti-overlap provision in section 45(6).

127 If the dishonesty element is removed, the detrimental impact of these amendments is increased significantly by exposing a great number of non-harmful collaborations to criminal penalties. This threat of criminal penalties may also result in parties not proceeding with 'good' collaborations that are pro-competitive.

128 The increased scope inherent in an effects-based prohibition for regulatory error resulting in the improper allegation of criminal conduct also has the potential to cause substantial unnecessary damage to personal and corporate reputations.

(f) No anti-overlap provision

129 The proposed cartel provisions do not contain the anti-overlap provisions that currently appear in section 45. Such provisions clarify which section of the Act is to take precedence over another when both might otherwise apply. Conduct which falls within both sections 45 and 4D, and exclusive dealing under section 47, for example, will fall to be considered under section 47 – taking it out of per se territory and making it subject to a competition test. The failure to 'extend' these anti-overlap provisions means that:

- certain kinds of conduct that currently fall within section 47 (which are subject to a competition test) will be subject to per se prohibition under the civil cartel offence, and potentially a criminal offence if done dishonestly. Conduct of this kind includes restrictions on intra-brand competition and franchising arrangements;⁴⁰
- certain kinds of price fixing conduct falling within both sections 45A and 48 that would currently be taken out of section 45A to be considered under section 48 will become subject to the per se prohibition under the civil cartel offence, and potentially a criminal offence if done dishonestly; and
- some acquisitions that currently fall within section 50, which are subject to a competition test, could be subject to per se prohibition under the civil cartel offence, and potentially a criminal offence if done dishonestly.

(g) Duplication by the retention of the sections 45 and 4D prohibition

130 The proposed amendments mean that the cartel provisions and the prohibition on exclusionary provisions would operate concurrently, resulting in significant overlap and uncertainty. In theory, parties who engage in conduct which is capable of characterisation as market sharing could, for example, be liable for contravention of the civil cartel provision, the prohibition on exclusionary prohibitions and, if done dishonestly, also the criminal cartel provision.

⁴⁰ See the High Court decision in *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1.

- 131 The fact that multiple provisions of the TPA might apply to conduct does not itself call for complaint, although it does add legal costs to the analysis of commercial arrangements. However, the new provisions extend the uncertainty by the breadth of the prohibited conduct.
- 132 The result of such expansion and complexity, in conjunction with the overlap discussed below, is that in circumstances where only effect (not purpose) can be established, a party which would otherwise not be in breach of the prohibition on exclusionary provisions may still be liable under the new cartel provisions. In summary, the proposed provisions will prohibit conduct which is currently lawful.
- 133 The Committee notes that section 44ZZRD(2)(b) as presently drafted does not catch 'acquisition' of good and services in the same way as sub-section 44ZZRD(2)(b)(iii) catches 'supply' of good or services. To that extent, the present section 4D of the TPA will still have work to do in relation to acquisitions. However, there is no policy reason why acquisitions should not be included in the cartel offence.

(h) Joint ventures not properly dealt with

- 134 Given the significant expansion of civil liability which the Bill proposes, the Commonwealth needs to be careful about excluding legitimate collaborative activity between competitors, even if that activity is not strictly part of a joint venture.
- 135 The Bill provides for a joint venture defence similar to the joint venture defences under sections 76C and 76D in section 44ZZRO . However, the section 44ZZRO defence applies only to the civil penalty prohibitions under sections 44ZZRJ and 44ZZRK – it does not apply to the new cartel offences under sections 44ZZRF and 44ZZRG.
- 136 Beaton – Wells and Fisse suggest three problems with this:

'First, the failure to include a joint defence parallel to that provided for in ss 76C and 76D is impossible to reconcile with the former Treasurer's Press Release where it is stated that:

'Further amendments to the Trade Practices Act 1974 (Cth) will flow from the Dawson Review recommendations relating to joint ventures and the report of the Intellectual Property and Competition Review Committee. These amendments may permit certain types of conduct where it does not substantially lessen competition.

Legitimate joint ventures and intellectual property arrangements will not be penalised under the cartel offence and will only be penalised under the revised per se civil prohibitions where they substantially lessen competition.'

Secondly, the rationale behind s 44ZZRO may be that legitimate joint ventures will not involve an intention dishonestly to obtain a gain and hence will fall outside the scope

of the new cartel offences. However, the concept of an intention dishonestly to obtain a gain is ill-defined and its application will depend on whatever content juries happen to give to it. By contrast, the test of liability under a defence based on s 76C or s 76D is relatively well defined⁷⁷ and far more conducive to promoting certainty in commercial arrangements.

Thirdly, the thinking behind s 44ZZRO may be that the competition test under the s 44ZZRO defence is unsuitable for determination by a jury. However, if the aim is to preclude jury consideration of the competition effects of joint ventures, that aim would be forlorn. As part of a denial that an accused acted with an intention dishonestly to obtain a gain, defence counsel will introduce evidence of the reasons why an accused used a joint venture and why the use of that joint venture was believed by the accused to be pro-competitive. It may be noted that denial of an intention to dishonestly obtain a gain does not impose a persuasive burden of proof on a accused – the prosecution must prove its case beyond a reasonable doubt. By contrast, the joint venture defence under s 44ZZRO imposes a persuasive burden on an accused to establish that the cartel provision did not have the purpose, effect or likely effect of substantially lessening competition in a market.⁴¹

137 Another issue with section 44ZZRO is that, unlike the defences under sections 76C and 76D, it applies only in relation to unincorporated joint ventures as defined in sub-section 4J(a)(i) of the TPA. The Commonwealth has not explained or provided a justification for not including incorporated joint ventures under the joint venture defence.

(i) Conclusion

138 The proposed amendments in the criminalisation of cartels Bill further muddies the distinction in the TPA between collaboration that is good and collaboration that is bad. For example:

- The proposed definition of a 'cartel provision' covers conduct which currently falls within the scope of an 'exclusionary provision', but does not propose to repeal the existing prohibition on exclusionary provisions in section 4D.
- The civil cartel offence expands the type of conduct currently prohibited by section 4D to include provisions that have exclusionary effect.
- Both the civil and criminal cartel offences do not contain an anti-overlap provision for conduct falling within sections 47 and 48.

⁴¹ Beaton-Wells, C & Fisse, B (2008) 'Criminalising serious cartel conduct: issues of law and policy: A Critique of the Exposure Draft Bill, Draft ACCC-DPP MOU and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia'

Recommendations

- 139 The Commonwealth has not explained or disclosed the policy reasoning identifying:
- what objective or objectives it seeks from the application of an effects test to the proposed cartel provision in sub-section 44ZZRD(2)(b)(iii);
 - why an anti-overlap provision in the manner of sub-section 45(6) is not applied to sub-section 44ZZRD(2)(b)(iii).
- 140 In the absence of a clear and cogent policy objective for retention of an effects test as applied to sub-section 44ZZRD(2)(b)(iii):
- the cartel provision in sub-section 44ZZRD(2)(b)(iii) should be excepted from the application of the effects test by placing it in a discreet sub-section, subject only to a purpose test, and made subject to an appropriate anti-overlap provision; or
 - sub-section 44ZZRD(2)(b)(iii) should be deleted.
- 141 If the cartel provision in sub-section 44ZZRD(2)(b)(iii) is retained but amended as recommended above, the Commonwealth should also repeal the existing prohibition against exclusionary provisions in section 45 (via section 4D). The Commonwealth should also amend sub-section 44ZZRD(2)(b) to include 'acquisitions'.
- 142 The Commonwealth should delete 'directly or indirectly' in the introductory words in sub-section 44ZZRD(2), because those words introduce an unnecessary element of uncertainty as to the causal connection required between the provision and the various proscribed purposes or effects.
- 143 The joint venture defence should include incorporated joint ventures.
- 144 Consideration should be given to whether a broader range of defences should be available to exclude from the prohibited conduct legitimate competitor collaborations, whether or not they are a joint venture.

Evidentiary issues

Introduction

145 The proposed amendments contained in sections 157B - 157D of the Bill regulate the circumstances in which the ACCC will be required, or may choose, to disclose protected cartel information and the consequences of a decision whether to make such a disclosure.

Section 157B

146 The proposed amendment contained in sub-sections 157B(1) and (2) provide that the ACCC will not be required to produce protected cartel information to a court or tribunal, unless the court or tribunal has granted leave after considering certain identified matters.

147 The amendments contained in sub-sections 157B(4) and (5) complement those in sub-sections 157B(1) and (2) insofar as they confer on the ACCC a discretion to produce protected cartel information to a court or tribunal after considering certain identified matters.

148 Under the proposed sub-section 157B(6), if material is disclosed to a court or tribunal in a manner noted above, then that information may only be used for the purposes of that proceeding.

149 The amendments contained in section 157B apply both to proceedings to which the ACCC is a party and proceedings to which the ACCC is not a party. Accordingly, they would regulate the production of documents by compulsory processes including subpoenas and notices to produce.

(a) Effect of section 157B

150 The legislative scheme established in section 157B of the Bill largely mirrors the position that exists at common law. Under common law, if a public regulator, such as the ACCC was required to produce documents to a court, for example pursuant to a subpoena, then the public regulator could object to production of those documents on the basis of public interest immunity privilege.

151 In the case of the ACCC and protected cartel information, the factors that a court would consider in determining whether documents are subject to public interest immunity privilege would be likely to include those factors set out in the proposed sub-section 157B(2).

152 The advantage of the legislative scheme envisioned by sub-section 157B(2) of the Bill is that it sets out with clarity the matters to which a court should refer in determining whether documents should be produced.

(b) Prevention of interference with regulatory investigations

153 An additional benefit of the legislative scheme created by section 157B is that it prevents litigants from seeking information that would interfere with the investigatory activities of the ACCC.

154 In recent times, some litigants have sought to use court processes to gain access to information gathered by public regulators in the course of investigations.⁴² The use of court processes in this way has the potential to be used as a substitute to obtaining discovery from a defendant and will often result in the costs of producing documents being shifted from the defendant to the public regulator. Moreover, the documents that are sought from the public regulator may contain confidential information, the disclosure of which may jeopardize ongoing or future investigations undertaken by the public regulator.⁴³

155 The amendments proposed in section 157B attempt to reduce the potential for litigants to use court processes to interfere with regulatory investigations undertaken by the ACCC by requiring that leave of a court or tribunal be obtained before the ACCC will be required to produce information that is likely to hinder regulatory investigations. Under sub-section 157B(2), in order to grant such leave, the court must have regard to various matters which relate to the effect of disclosure on the ACCC's existing investigations and its ability to carry out future investigations.

156 While the effect of the disclosure of documents on investigations would ordinarily be considered by a court in assessing whether a document is subject to public interest immunity privilege, the specific identification in section 157B of such matters is useful in emphasising their importance.

(c) Recommendation

157 Section 157B of the proposed Bill should be enacted.

Section 157C

158 The proposed amendments contained in section 157C apply to a proceeding to which the ACCC is not a party.

⁴² See for example, *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1044.

⁴³ See *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1659.

159 Under sub-section 157C(1), the ACCC cannot be required to produce to a person documents that contain protected cartel information, where that person is a party to proceedings to which the ACCC is not a party. Under sub-section 157C(2), the ACCC cannot be required to produce to a person documents that contain protected cartel information, where that person is considering instituting proceedings.

160 Sub-sections 157C(3) and 157C(4) confer on the ACCC a discretion to provide a person with protected cartel information if that person is a party to proceedings to which the ACCC is not a party or is considering instituting proceedings. In order to provide such documents to a person, the ACCC must first have regard to certain identified matters.

(a) Relationship between section 157C and procedural fairness

161 One matter of particular concern in relation to section 157C is the discretion conferred on the ACCC by sub-sections 157C(4) and (5) to choose to disclose protected cartel information to a person. Under those provisions, the ACCC can choose to reveal protected cartel information to a person after consideration of certain identified matters. The matters specified in sub-section 157C(5) to which the ACCC must have regard in determining whether to make a disclosure constitute an exhaustive list and exclude from consideration the interests of persons who may be affected by such disclosures.

162 Frequently, protected cartel information that is given to the ACCC will contain information that is confidential and commercially sensitive to a particular business. This information may include documents relating to pricing, customers or profit margins. The disclosure of such information to competitors or customers of the business may have a significant detrimental impact.

163 The amendments contained in section 157C do not impose any restriction on the persons who may request information from the ACCC. Accordingly, those persons may include competitors or customers of the persons who are referred to in the protected cartel information. Moreover, section 157C of the draft bill does not contain any provision for the ACCC to impose conditions on the disclosure of protected cartel information, such as limitations on the purposes for which it may be used or the persons to whom it may be disclosed.⁴⁴

164 In order to prevent commercially-sensitive information from being misused, the Committee recommends the section be amended to provide that prior to disclosing any protected cartel information, the ACCC is required to provide notice to a person who has an interest in the protected cartel information and allow them the opportunity to make submissions as to why the disclosure should not be made. Such an approach

⁴⁴ While subsection 157C(6) restricts the ability to use protected cartel information in other court or tribunal proceedings, it does not impose any broader limitation on the use of such information.

is consistent with the approach adopted by the Australian Securities and Investments Commission in respect of the disclosure of information that it has acquired through the exercise of its investigatory powers⁴⁵ and the basic requirements of procedural fairness as outlined by the High Court in *Johns v ASC*.⁴⁶

165 The Committee further recommends that the proposed section be amended to include either an explicit limitation on the use of protected cartel information which has been disclosed under section 157C or the ACCC be given the power to impose conditions on the disclosure of such information.

(b) Disclosure to accused

166 The proposed section is silent on the question whether it overrides the ordinary obligation on a prosecutor to disclose evidence to an accused, including evidence that may assist the defence case. Such an obligation may yield to an overriding public interest but it is generally considered that, for it to do so, it should be shown that the public interest in preservation of secrecy outweighs the likely prejudice to the accused through non-disclosure. In some jurisdictions the obligation is specified in prosecution guidelines. The Committee suggests that, as the proposed section 157C may be interpreted as a code, the position should be expressly stated, i.e. that the possible prejudice to an accused is to be weighed in the balance.

(c) Disclosure to overseas agencies

167 Although not arising out of the Bill, a related issue is of concern to the Committee. It arises out of the new section 155AAA which was introduced in 2007 without apparent consultation, and by sub-section 155AAA(12) permits the Australian Competition and Consumer Commission to provide information given to it in confidence or obtained by use of compulsory powers to a foreign government agency in connection with the performance of that agency's functions. While the decision to make the disclosure may technically be reviewable, the fact of the decision being made is unlikely to be known to the persons potentially affected. The provision should be reconsidered in the context of the new sections 157B-D.

(d) Recommendation

168 If section 157C is enacted, the ACCC should be required to notify and seek submissions from persons who have an interest in protected cartel information, prior to exercising a discretion to disclose that information in accordance with sub-sections 157C(3) or (4) of the Bill.

⁴⁵ ASIC Regulatory Guide 103, *Confidentiality and Release of Information* ([http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps103.pdf/\\$file/ps103.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps103.pdf/$file/ps103.pdf)).

⁴⁶ (1993) 178 CLR 408.

169 Section 157C should be amended to clarify that it does not affect the normal requirement to disclose evidence to an accused in advance of the trial.

Section 157D

170 Section 157D of the Bill specifies that a court is able to stay proceedings, whether civil or criminal, in the event that leave is not given in accordance with section 157B to require the ACCC to produce protected cartel information.

(a) Effect of section 157D

171 Under section 157D, if a person is denied access to protected cartel information by reason of a court's refusal to grant leave to compel the production of documents by the ACCC, then the court may choose to stay proceedings.

172 A provision of this kind is necessary as the effect of section 157B of the Bill may, in certain circumstances, deny a person the documents necessary to conduct his or her defence of a proceeding. Such a provision is particularly important in the context of criminal proceedings, where the sanctions individuals may face are much greater.

(b) Recommendation

173 If the proposed section 157B is enacted, a provision in the form of section 157D is necessary to ensure that substantive injustice is not done to a person who is not granted leave to compel the ACCC to produce protected cartel information.

174 Sub-section 155AAA(12) should be reconsidered in light of the above.

The level and nature of the penalties

Introduction

- 175 One of the issues being considered by the working group is whether, in terms of their nature as well as the level of penalties, are the new sanctions proposed by the Bill:
- consistent with overseas jurisdictions; and
 - a sufficient deterrent?
- 176 The table below contains a comparison of the penalties that are imposed in various jurisdictions for cartel conduct.

Discussion

- 177 The effect of the proposed Bill is to render individuals who engage in cartel conduct liable to a jail term of up to 5 years. An individual is otherwise subject to a lesser financial penalty (the maximum civil penalty being \$500,000, compared to a maximum fine of \$220,000). A company is liable to the same financial penalty under each regime.
- 178 The availability of imprisonment as a penalty provides the rationale for the proposed amendments, it no doubt being considered by the proponents of the Bill that:
- the prospect of imprisonment will act as an effective deterrent;
 - serious cartel conduct is sufficiently reprehensible to be punishable by imprisonment.
- 179 The criminal sanction to which individuals will become liable under the TPA is consistent with the sanction to which company directors are liable for offences involving dishonesty under the Corporations Act.
- 180 The table of comparative penalties (below) contains a comparison of the penalties that are imposed in various jurisdictions for cartel conduct.
- 181 According to the 2002 OECD survey referred to in the Dawson Report, 9 of 30 member countries provide for terms of imprisonment for breaches of competition laws, with maximum terms ranging from two to six years.
- 182 The Dawson report notes that the OECD survey revealed that only the United States and Canada have actually imprisoned individuals for anti-competitive conduct. The United States, for example, imprisoned 18 individuals (for an average term of eight months) in the year 2000. In Canada three individuals have been sentenced to prison for anti-competitive conduct (with two of those people being ordered to serve their sentences in the community).

(a) Disqualification from managing Corporations

183 Sub-section 86(1) of the TPA provides that, on application by the ACCC, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:

- the Court is satisfied that the person has contravened, has attempted to contravene or has been involved in a contravention of Part IV; and
- the Court is satisfied that the disqualification is justified.

184 Section 206EA of the Corporations Act 2001 provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

185 In determining whether the disqualification is justified, the Court may have regard to:

- the person's conduct in relation to the management, business or property of any corporation; and
- any other matters that the Court considers appropriate.

186 Not surprisingly, the Act is to be amended to allow the DPP to obtain a disqualification order where the Court is satisfied that the person has contravened or has been involved in a contravention of sections 44ZZRF or 44ZZRG.

(b) Indemnification

187 It does not appear that the provisions of s77A, prohibiting indemnification against the imposition of a civil penalty and the attendant legal costs, has been extended to deal with fines and the legal costs incurred in unsuccessfully defending a prosecution.

Recommendations

188 The proposed 5 year maximum term of imprisonment is consistent with overseas jurisdictions and the penalty for offences under the Corporations Act involving dishonesty, market rigging and insider trading.

189 The provisions of s77A, prohibiting indemnification against the imposition of a civil penalty and the attendant legal costs, should be extended to deal with fines and the legal costs incurred in defending a prosecution (assuming this is not already covered in the Bill).

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
Australia (current)	Currently, the prohibitions in the <i>Trade Practices Act 1974</i> (Cth) for cartel conduct are civil in nature.	<p>For a breach by a corporation, a penalty of up to a maximum of:</p> <ul style="list-style-type: none"> • \$10 million, or • when the value of illegal benefit can be ascertained, three times the value of the illegal benefit, or • when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover in the preceding 12 months, whichever is the greater. <p>A civil penalty of up to \$500,000 can be imposed on an individual.</p> <p>There are no minimum sanctions under the Act. The Court has discretion not to impose pecuniary penalties according to the circumstances of the case.</p>	(There are currently no criminal sanctions.)	Subject to judicial discretion, sanctions can be imposed by the Court on any party (corporations and natural persons) found to have engaged in a contravention, or been knowingly concerned in a contravention of the Act.
Australia (proposed amendments)	The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 will criminalise serious cartel conduct under the Act.	As above.	<p>The maximum penalties for the offences would be:</p> <ul style="list-style-type: none"> • for an individual – a term of imprisonment of five years and a fine of \$220,000; and • for a corporation – a fine that is the greater of \$10 million, or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual turnover. 	As above.

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
United States of America	Criminal.	A conviction for price fixing brings with it automatic debarment from dealing with the government. Convicted individuals, because they are felons, may lose certain privileges of US citizenship, such as the right to vote.	<p>An individual may be fined, incarcerated or both. Corporations can be criminally fined.</p> <p>For corporations, the fine may be either</p> <ul style="list-style-type: none"> • US\$100 million; • twice the total gain to the conspirators; or • twice the total loss to the victims, whichever is greater. <p>For individuals, the fines may be either</p> <ul style="list-style-type: none"> • US\$1 million; • twice the total gain to the individual; or • twice the total loss to the victims, whichever is greater. <p>The maximum term of imprisonment has been increased by recent legislation from three to 10 years.</p>	Sanctions may be imposed on individuals and corporations.
United Kingdom	Civil and criminal.	Under the Competition Act 1998, the maximum fine for an undertaking is 10 per cent of its worldwide turnover in the year before the decision was issued.	<p>A cartel offence was introduced by section 188 of the Enterprise Act 2002. Individuals who are found guilty of the cartel offence may be liable to criminal sanctions, including imprisonment of up to five years and/or unlimited fines.</p> <p>(Prior to the Enterprise Act 2002, it had been technically possible to prosecute cartel conduct under the common law offence of 'conspiracy to defraud', but historically, it was not used to prosecute cartel activity.)</p>	Under the Competition Act 1998, sanctions for cartel conduct can only be imposed on undertakings (including associations of undertakings) and sole traders. However, cartel activity prosecuted under the Enterprise Act 2002 can result in fines and/or imprisonment of individuals.

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
Canada	Criminal.	Cartel cases are prosecuted under the criminal provisions of the Canadian Competition Act.	<p>Cartel activity is subject to criminal sanctions.</p> <p>Offences under section 45 of the Canadian Competition Act (price fixing, market allocation, etc.) are punishable by fines up to C\$10 million (approx. \$11.2 million) and a term of imprisonment of up to 5 years. Corporations convicted of offences under section 46 of the Act (implementation of foreign directives to fix prices, allocate markets, etc.) are liable to a fine in the discretion of the court. Bid rigging under section 47 of the Act is punishable by fines at the discretion of the court and imprisonment for a term not exceeding five years or both.</p> <p>While C\$10 million is the statutory maximum for a single count conspiracy, it is common for the prosecution to proceed on multiple counts. As a result, multimillion dollar fines were obtained following guilty pleas in a number of conspiracy cases.</p>	Fines can be imposed on both companies and individuals. Individuals may also be subject to imprisonment.
New Zealand	Civil.	<p>The Commerce Act 1986 provides that any party who engages in cartel conduct can be ordered to pay the following penalties:</p> <ul style="list-style-type: none"> • for bodies corporate, up to the greater of NZ\$10 million, three times the commercial gain from the conduct or, if such gain cannot be ascertained, 10 per cent of turnover of the group of which the party is a part; and • for individuals, up to NZ\$500,000. <p>There is no minimum level of penalty, however, the Court is required under the Commerce Act 1986 to order an individual who has engaged in cartel conduct to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.</p>	(There are currently no criminal sanctions for cartel conduct in New Zealand.)	Fines can be imposed on companies and individuals. Individuals can also be fined as employees.

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
Japan	Both criminal and civil.	<p>The Japan Fair Trade Commission (JFTC) will order payment of an 'administrative surcharge' by cartel participants, to be calculated as a percentage of the participant's gross revenue arising from the sale of the goods or the provision of the services in question during the period of cartel participation.</p> <p>In principle, the following amounts apply:</p> <ul style="list-style-type: none"> • manufacturers, etc: 10 per cent • retailers: 3 per cent • wholesalers: 2 per cent • For medium and small enterprises, a reduced surcharge applies. <p>An increased rate of 150 per cent of the respective rate set out above applies to repeated offenders.</p> <p>If both an administrative surcharge and a criminal fine are imposed on the same entrepreneur based on the same conduct, the administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine.</p>	<p>Unlawful restraints of trade are subject to criminal penalties including:</p> <ul style="list-style-type: none"> • for a corporation, a fine of up to 500 million Japanese yen (approx. \$5.2 million); and • for an individual (eg, an employee in charge of a cartel), servitude (ie, labour in a prison) for up to three years, a fine of up to 5 million Japanese yen (approx. \$52,000) or both. 	<p>Administrative measures may be imposed on any entrepreneur. Criminal sanctions may be imposed on corporations and individuals.</p>
Korea	Administrative and criminal.	<p>Administrative fines may be imposed on violating companies of up to ten per cent of their annual sales. Corporate violators are also subject to cease-and-desist orders and other appropriate administrative corrective orders.</p>	<p>Corporate violators are subject to a criminal fine of up to 200 million Korean won (approx. \$235,000).</p> <p>Company executives who sponsor a cartel on behalf of their company are subject to imprisonment of up to three years or a criminal fine of up to 200 million won (approx. \$235,000).</p>	<p>Administrative sanctions can be imposed on businesses or associations of companies, not on individuals.</p> <p>Criminal sanctions can be imposed on individuals also.</p>
European Union	Administrative.	<p>The sanction available to the Commission is the imposition of fines on the undertakings or associations of undertakings concerned. Fines can be up to 10 per cent of the worldwide group turnover in the preceding business year where an undertaking or association of undertakings has, either intentionally or negligently, infringed article 81 (cf. article 23(2) of Regulation 1/2003).</p> <p>Fines may exceed the turnover in products concerned by the infringement, provided that they stay within the 10 per cent ceiling.</p> <p>There is no minimum fine.</p>	<p>Regulation 1/2003 states that fines imposed for breaches of article 81 are not of a criminal nature. Nevertheless, member states may also impose criminal sanctions.</p> <p>(See below for details of those jurisdictions in which criminal sanctions are or were previously in place, or where their introduction was contemplated).</p>	<p>EU law sanctions only undertakings, not individuals. Nevertheless, member states may also impose sanctions on individuals.</p>

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
Austria	Mainly administrative.	Prohibited cartel activities can draw a fine ranging between €10,000 and €1 million or, beyond that, 10 per cent of the worldwide turnover achieved by each of the enterprises involved in the violation during the last business year.	Until 2002, the Austrian cartel law had been among the regimes not only providing for fines, but also for criminal penalties including imprisonment. However, these provisions were rarely applied, and thus eventually removed and replaced with a system of pecuniary fines in harmonisation with the relevant provisions of EC law. The only exception to this concerns tender cartels, which are governed by the Austrian Criminal Act and are punishable by imprisonment of up to three years for the responsible individuals.	Fines do not apply to individuals, but only to the respective undertakings themselves. Individuals responsible for bidding cartels, however, face criminal sanctions.
Cyprus	Civil and criminal.	<i>Inter alia</i> , the Commission for the Protection of Competition (CPC) may impose a fine of up to 10 per cent of the undertakings' turnover in the year in which the infringement took place or of the year which immediately preceded the infringement.	A person who continues to give effect to an agreement that is prohibited under section 4 of the Act for the Protection of Competition (the Act) or abuses its dominant position within the meaning of section 6 of the Act, in contravention of a decision by the CPC that orders termination of the agreement or the abuse, commits a criminal offence punishable with imprisonment of up to one year or a pecuniary penalty, or both.	
Denmark	Criminal fines.	(n/a)	Unless other legislation provides for a more severe penalty, fines may be imposed on any party that intentionally, or by gross negligence, infringes the prohibition against anti-competitive agreements. There are no absolute minimum or maximum fines. Determination follows the principles of the European Commission's Guidelines on the method of setting fines, although the Danish Competition Authority asserts that its fines shall be set at a lower level than the fines imposed by the Commission.	Criminal fines may be imposed both on companies and on individuals.
Estonia	Criminal.	There are no administrative sanctions for cartel activity provided for in Estonian legislation.	Pursuant to the Estonian Penal Code, a violation of the prohibition of anti-competitive agreements, concerted practices and decisions is a criminal offence punishable by a fine of €3,200 to €16 million for a legal person and by a fine of 30 to 500 times the daily average wage or up to three years' imprisonment, or both, for an individual.	Criminal sanctions apply both to companies and to individuals.

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
France	Mainly administrative.	<p>The main penalties for breach of the cartel prohibition contained in article L420-1 of the French Code de Commerce (the Code) are fines of up to 10 per cent of worldwide turnover, and, as of recently, periodic penalties of up to 5 per cent of the daily average turnover for every day of delay in implementing a decision or injunction by the Competition Council (Conseil de la Concurrence).</p> <p>Turnover to be taken into account for the calculation of fines will be the highest amount realised by the undertaking in any financial year during the period in which the practices took place.</p> <p>The sanctions that may be imposed by the French competition authorities extend not only to undertakings, but also to individuals engaged in economic activities (eg, sole traders) where fines of up to €3 million may be imposed.</p>	<p>Antitrust enforcement under the French competition acts of 1953 and 1958 was exclusively criminal. After a first reform in 1977, the competition act of 1986 introduced the current French system, which relies essentially on administrative fines for companies, imposed by the Competition Council, a specialized administrative authority.</p> <p>Criminal sanctions, including imprisonment, are however still provided for in French law: In addition to civil sanctions applied to individuals and to undertakings, individuals may also be subject to criminal penalties (fines of up to €75,000 and terms of imprisonment of up to four years) where they have 'fraudulently taken a personal and decisive action in the conception, organisation or execution' of the prohibited conduct.</p>	Administrative and/or criminal fines can be imposed on companies and individuals. Individuals may also face imprisonment.
Germany	Mainly administrative.	<p>The Federal Cartel Office may impose administrative fines for violations of section 1 of the Act on Restraints of Competition against individuals and undertakings of an amount up to €1 million. Fines in excess of €1 million can be imposed on companies up to a maximum amount of 10 per cent of worldwide turnover in the last completed business year.</p> <p>(This calculation based upon 10 per cent of worldwide turnover has replaced the previous calculation method of fining up to three times the proceeds gained from the infringement. However, in determining the amount of the fine, the Federal Cartel Office can still take into account the proceeds gained as a consequence of the infringement.)</p>	<p>German law does generally not provide for criminal sanctions for cartel conduct, with the exception of bid rigging (in tender proceedings conducted under the public procurement rules), which is punishable by fine or imprisonment for up to five years (cf. section 298 of the German Criminal Code).</p> <p>Cartels concerning single tender actions have successfully been tried as fraud pursuant to section 263 of the Criminal Code. Fraud carries a maximum prison term of five years or the imposition of a fine.</p>	Fines can be imposed against undertakings, associations of undertakings and their representatives. Bid-rigging-cartels constitute a criminal offence for individuals.
Greece	Civil/administrative and criminal.	The Greek Competition Commission (GCC) may impose on an undertaking a fine of up to 15 per cent of its turnover as well as fines of up to approx. €10,000 for each day of non-compliance with a decision by the GCC.	Any individual who, either personally or as a representative of a legal entity, concludes agreements, takes decisions or performs a prohibited concerted practice is punishable by a fine of not less than €3,000 and not more than €30,000. In the case of repeated offences, the above penalties are doubled.	Non-criminal fines for companies (with joint and several liability for managers) are complemented by criminal fines for individuals.

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
Ireland	Civil/administrative and criminal.	For cartels, which are considered 'hard core' infringements, criminal sanctions are preferred over civil ones. Also, the Irish Competition Authority does not have power to impose administrative sanctions or fines. Fines are considered a function of the criminal process and can only be imposed by a court.	The maximum fine for cartel activity is €4 million or 10 per cent of the turnover in the preceding financial year, whichever is higher. Individuals (including company directors, managers or similar company officers) who consented to anti-competitive behaviour may also be criminally prosecuted for cartel activities and, if found guilty, are liable to the same fines as undertakings, imprisonment for up to five years or both. Directors and managers are presumed to have consented to anti-competitive behaviour unless they can prove the contrary.	Criminal sanctions apply both to companies and to individuals.
Italy	Administrative.	The Italian competition authority may impose a fine of no more than 10 per cent of the turnover of each undertaking or entity involved for the previous financial year. No minimum fine is provided by the law.	There are no criminal sanctions for cartel activity provided for in Italian antitrust legislation. However, under article 501 of the Italian Criminal Code, a person who, in the exercise of a business, either through speculative practices or otherwise, hides, interrupts the supply of or buys raw materials or primary goods or foodstuffs so as to noticeably alter the prices of these and to cause them to become scarce, shall be sentenced to prison (from six months to three years) and shall be fined up to €25,822. Therefore, if a cartel is involved in the aforementioned activities, some criminal issues may arise. Criminal sanctions are also provided in the event of boycotts. Individuals involved in boycotts may be sentenced to up to three years in prison (article 507 of the Italian Criminal Code).	Fines can be imposed on every subject which can be qualified 'undertaking' under Italian competition law (undertaking, associations of undertakings, companies, individuals, public bodies exercising an economic activity).
Luxembourg	Administrative.	Administrative fines and daily penalties may be imposed. The maximum of the fines is ten per cent of the annual world wide turn over 'realised during one of the financial year closed since the financial year preceding the one during which the infringement took place'. The maximum of the daily penalties is five per cent of the medium daily turnover realised during the precedent financial year.	(In Luxembourg, the 2004 Competition Act abolished an earlier competition regime with criminal enforcement by a new regime with only administrative fines that may be imposed on companies.)	The Council for Competition Matters may only levy fines and penalties against an undertaking involved in a cartel.
Malta	Criminal.	(n/a)	An infringement of the cartel prohibition in Malta is an offence punishable by a fine of from one to ten per cent of the turnover of the undertaking in the economic interests of whom the person found guilty was acting. Directors, managers, secretaries or other similar officer deemed to be vested with legal representation may be held jointly and severally liable with the company for these fines.	Essentially only criminal fines for companies are provided for, but directors may be liable for their payment.

Table of comparative penalties

Country	Nature of available sanctions	Level of civil/administrative penalties	Level of criminal sanctions	On whom can penalties be imposed?
Netherlands	Administrative.	The Netherlands Competition Authority (NMa) may impose fines, not exceeding €450,000, or, if this greater, ten per cent of the turnover of the undertaking or aggregated turnover of the undertakings that are members of the association of undertakings, in the financial year preceding the decision. The NMa may also impose a fine on individuals for giving instructions to or exercising de facto leadership with regard to an infringement of the cartel prohibition. This fine is based on the income and the assets of the person in the year preceding the fining decision. The starting point will be determined within the bandwidths €50,000 to €400,000. The fine will be determined considering seriousness and duration of the infringement and aggravating or mitigating circumstances. It is not to exceed €450,000.	There are currently no criminal sanctions under the Dutch Competition Act. Until the end of 1997, anticompetitive behaviour, especially hard core conduct, was criminally enforced in the Netherlands. Reasons for the change included: <ul style="list-style-type: none"> • the belief that competition law was complex and that its enforcement would be better off in the hands of a specialised body than in the hands of the public prosecutor; • a perceived lack of interest of public prosecutors in enforcing competition rules; • the need for cooperation with the European Commission; and • achieving greater consistency of enforcement by giving responsibility to a single public body (rather than different criminal courts). 	Fines may be imposed on undertakings and on natural persons.
Slovak Republic	Administrative and criminal.	The Antimonopoly Authority of the Slovak Republic may impose a fine on an undertaking of up to ten per cent of its turnover for the preceding closed accounting period and a fine of up to SKK 10,000,000 (approx. \$485,000) on an undertaking that attained a turnover of not more than SKK 10,000 (approx. \$485), or on an undertaking the turnover of which cannot be calculated.	The Authority may impose a fine only on individuals qualifying as entrepreneur. Such entrepreneur could further be accused of the criminal offence of misuse of participation in economical competition, which carries a criminal penalty of imprisonment for a term of two to six years.	
Spain	Administrative.	The sanctions for companies having participated in cartel arrangements can reach up to 10% of the total annual turnover concerning all products and activities of the company.	Spanish legislation does not provide for criminal sanctions for antitrust infringements. There have been some attempts to bring criminal actions against price-fixing cartels but these have been unsuccessful so far.	Fines primarily apply to companies; sanctions for individuals can reach up to €60,000 for each of the legal representatives participating in the cartel agreement.
Sweden	Civil/administrative.	Parties engaged in cartel conduct may, upon application by the Swedish Competition Authority, be ordered by a court to pay fines as an economic sanction for their illegal activities. The amount of the fine may be between 5,000 kronor and 5 million kronor (approx. \$900 to \$900,000) or a maximum of 10 per cent of the turnover of the undertaking concerned (rather than the turnover of all undertakings belonging to the same group). Fines may be increased if the infringing undertaking in question is found to have previously violated cartel laws.	In Sweden, there are currently no criminal sanctions for cartel activity. Plans to introduce criminal sanctions did exist but appear to have been abandoned after a proposal in 2005 to implement such rules received much criticism, inter alia from the European Commission, for fear that it would undermine the existing leniency system.	The regime for cartels only covers companies; Swedish competition law does not provide for any personal liability.

ACCC Immunity Policy

Introduction

190 Although the Discussion Paper does not specifically seek views on this topic, the ACCC's Immunity Policy for Cartel Conduct (Immunity Policy) is a key feature of the current enforcement regime for the anti-cartel provisions of the TPA. In essence, the Immunity Policy provides that a member of a cartel is entitled to immunity from civil prosecution by the ACCC if that member is the first to apply for immunity in respect of a particular cartel and agrees to cooperate in the investigation and prosecution of other cartel members. The Immunity Policy therefore provides a powerful incentive for a cartel member to break ranks and report the cartel to the ACCC.

191 The advent of immunity policies around the world has transformed the way competition authorities detect, investigate, and deter cartels. These policies have led to the detection and dismantling of the largest global cartels ever prosecuted and have resulted in record-breaking fines in jurisdictions such as the US, Canada and the European Union.⁴⁷ Statistics across jurisdictions consistently demonstrate that an effective immunity policy is a critical component of anti-cartel enforcement.⁴⁸

192 The need for an immunity policy for cartel conduct, as opposed to other forms of illegal activity, is due to the often covert and clandestine nature of cartels and the fact that they are able to operate without producing any clear evidence of their existence. As the ACCC's Immunity Policy Interpretation Guidelines (Interpretation Guidelines) explain:

*'Cartels usually involve secrecy and deception. Collusion is difficult to detect – there may be little documentary evidence and parties often go to great lengths to keep their involvement secret. In these circumstances, the discovery of and the proof of the existence of cartels can be more difficult than other forms of corporate misconduct. An immunity policy in relation to cartels is justified as it encourages insiders to provide information and penetrates the cloak of secrecy.'*⁴⁹

193 The introduction of criminal sanctions for cartel conduct raises a number of significant issues for the operation of the Immunity Policy:

- Will immunity be extended to criminal liability?
- Who will decide whether an applicant is eligible for immunity?

⁴⁷ Scott D Hammond, 'Cornerstones of an Effective Leniency Program' (Paper presented at the Cracking Cartels Conference, Sydney, 24 November 2004) 2.

⁴⁸ D. Martin Low QC and Casey Halladay, 'Cartel Enforcement in Canada' (Paper presented to the Competition Law and Policy in a Global Context, Global Competition Forum, Seoul, Korea, April 2004) 10.

⁴⁹ Interpretation Guidelines, para 8.

- How will evidence provided in support of an application for immunity be treated?
- Will there be any avenue for reviewing decisions as to an applicant's eligibility for immunity or decisions to revoke immunity?

These issues will have a significant impact on the effectiveness and workability of the Immunity Policy.

Discussion

(a) Will Immunity Be Extended to Criminal Liability?

194 The Draft MOU does refer to immunity from both civil prosecutions by the ACCC and criminal prosecutions by the DPP. It provides:

7.3 *The ACCC will receive and manage requests for immunity from both criminal and civil proceedings, and make recommendations to the DPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's immunity policy in relation to cartel conduct. The ACCC will decide whether to grant immunity from civil proceedings in accordance with its published policy.*

7.4 *The DPP will decide whether to grant immunity from criminal proceedings in accordance with the Prosecution Policy of the Commonwealth and upon the recommendation of the ACCC.*

195 Accordingly, the ACCC will continue to grant immunity from civil proceedings under the Immunity Policy. The ACCC will also make recommendations to the DPP with respect to the granting of immunity from criminal proceedings. Those recommendations will be based on the Immunity Policy. However, critically, the Draft MOU provides that the DPP will not decide whether to grant immunity from criminal proceedings in accordance with the ACCC's Immunity Policy. Rather, the DPP will decide whether to grant that immunity in accordance with the Prosecution Policy of the Commonwealth (Prosecution Policy) and upon the ACCC's recommendation.

196 This means that the ACCC and the DPP will not be applying the same standards in determining whether to grant immunity. This could lead to an applicant for immunity receiving immunity from civil prosecutions from the ACCC but not immunity from criminal prosecutions from the DPP or (perhaps less likely) vice versa.

197 Unlike the ACCC's Immunity Policy, the Prosecution Policy does not provide for automatic immunity provided an applicant satisfies certain specified criteria. The Prosecution Policy emphasises that the criminal justice system should operate without the need to grant concessions to those who participate in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them

immunity from prosecution).⁵⁰ Although the Prosecution Policy recognises that there may be public-interest arguments in favour of granting immunity to informers, it states that the powers available to the DPP to grant undertakings not to prosecute persons for a particular offence should only be used as a last resort.⁵¹

198 The discretionary nature of the DPP's decision to prosecute criminally, and its policy against granting immunity from criminal prosecutions, would greatly undermine the certainty of automatic immunity (provided the specified criteria are met) under the ACCC's Immunity Policy.

199 The crucial importance of certainty in the granting of immunity is widely recognised. The Interpretation Guidelines state:

*'When the extent of the immunity to be provided is certain, persons are more likely to take advantage of such a policy and disclose illegal and harmful conduct.'*⁵²

200 The Draft MOU itself explicitly recognises the importance of certainty of immunity under the Immunity Policy:

7.1 The DPP and the ACCC recognise that maximisation of certainty and minimisation of discretion as far as reasonably possible are crucial to the effective operation of immunity policies for cartel conduct.

However, this explicit recognition is not consistent with the DPP's Prosecution Policy, or its application to the granting of immunity from criminal prosecution for cartel conduct.

201 The importance of certainty to the effectiveness of an immunity program can also be seen in the history of the immunity policy in the US. The revisions made to the US immunity policy in 1993 to largely eliminate prosecutorial discretion have enormously increased the effectiveness of the policy.⁵³

202 The US and the UK, both of which have criminal sanctions for cartel conduct, have decided that the need to detect and prosecute cartels, and the difficulties in doing so

⁵⁰ Prosecution Policy, para 5.4.

⁵¹ Ibid.

⁵² Immunity Guidelines, para 9.

⁵³ Hammond, above n 47, 3. The number of applications rose from one per year in 1993 to approximately one per month by 2003: see William Kolasky, 'Criminalising cartel activity: Lessons from the US experience' (2004) 12 *Competition & Consumer Law Journal* 207, 212. See also Gary R. Spratling and D. Jarrett Arp, 'International Cartel Enforcement and Leniency Programs - a Global Perspective' (Paper presented at the Cracking Cartels Conference Sydney, 24 November 2004). At the same conference, Simon Williams, Director of Cartel Investigations of the UK Office of Fair Trading, explained:

'If a criminal offence for cartel conduct is to be introduced, then any existing leniency policy operating in the context of the civil regime for cartel enforcement would be significantly undermined without parallel capacity to grant immunity from criminal sanction.'

Simon Williams, 'Cracking Cartels: Trends and Issues: The UK Perspective' (Paper presented to the ACCC Conference, Sydney, 2004).

without cooperation from a cartel participant, justify the availability of automatic immunity for criminal conduct.⁵⁴ The alternative is that the proven benefits of an effective immunity policy are sacrificed for criminal sanctions, the effectiveness of which as a deterrent is unproven. This is what the current Draft MOU would achieve.

203 On the other side of the coin, if automatic immunity from criminal prosecution was made available this could dramatically increase the effectiveness of the ACCC's Immunity Policy. It would provide a significantly greater incentive for cartel members to apply for immunity. The incentives would be greatest for an individual within a business that participates in the cartel, who faces a personal risk of being labelled a criminal and facing time in jail.

(b) Who will make the decision whether an applicant is eligible for immunity?

204 As explained above, the Draft MOU provides that the decision whether to grant immunity from civil prosecution will rest with the ACCC, the decision whether to grant immunity from criminal prosecution will rest with the DPP and the two bodies will apply different (and fundamentally inconsistent) policies in doing so.

205 It is essential that the granting of civil immunity and the granting of criminal immunity be consistent — both in the principles that are applied and in their application to particular applications for immunity. The granting of both civil and criminal immunity should therefore be made as one decision and, in principle, rest with one body. However, there are good reasons why both the ACCC and the DPP should be involved in the decision to grant immunity. The ACCC has experience with prosecuting cartel conduct and in assessing applications under the terms of its Immunity Policy. The DPP has experience in criminal prosecutions and is able to give undertakings not to conduct a criminal prosecution.

206 Accordingly, the decision whether to grant immunity (from both civil and criminal prosecutions) for cartel conduct should rest with the ACCC and the DPP jointly. The Draft MOU should be amended to provide that both bodies will nominate an individual responsible for deciding, in conjunction with the other individual, whether the applicant is entitled to immunity from both civil and criminal prosecution.

207 In the event of disagreement between the ACCC and the DPP as to whether the applicant is entitled to immunity, the issue should be resolved in the applicant's favour. This would be consistent with providing certainty to applicants for immunity and the policy

⁵⁴ See Spratling, above n 14, 20. The situation is also similar in Canada. Although the Competition Bureau's recommendation to grant immunity is, strictly speaking, not legally binding on the Attorney General, there is a clear practice that the recommendation is followed (at 15). The situation in Canada can therefore be distinguished from the Draft MOU, which gives the DPP discretion and requires the DPP to follow the inconsistent policy contained in the Prosecution Policy.

in the Interpretation Guidelines that ambiguity in the interpretation of those guidelines should be resolved in favour of the applicant.⁵⁵

208 The Draft MOU also provides that the ACCC 'will receive and manage requests for immunity from both criminal and civil proceedings'.⁵⁶ The Committee supports this proposal because it is far more efficient for an applicant for immunity to deal with one body (a 'one-stop shop'), rather than two.⁵⁷

(c) Protection of Information Provided in Support of an Application for Immunity

209 There is a major disincentive to a cartel member coming forward and applying for immunity if there is a risk that information provided by the cartel member in support of the application might be used against the cartel member. This is recognised in the Interpretation Guidelines, which provide that:

*'the ACCC will accept information in support of an application for immunity on the basis that the ACCC will not use the information as evidence in proceedings against the applicant in respect of the relevant cartel.'*⁵⁸

210 Further, where the applicant is a corporation, the ACCC will not use information provided by the applicant against employees granted the benefit of derivative immunity (that is, personal immunity for employees of a corporation that has been granted immunity).

211 The exception to this rule is that if immunity is granted and subsequently revoked 'the ACCC is free to use any information obtained from the applicant against the applicant (and employees of the applicant) in any action for breaches of the Act and obstruction proceedings'.⁵⁹ Since failure to comply with the obligation to cooperate with the ACCC is a ground for revoking immunity, the exception provides a significant incentive to a recipient of immunity to cooperate. Also, the fact that immunity may be revoked if the ACCC later forms the view that an applicant for immunity does or did not satisfy the conditions for immunity provides a significant incentive to an applicant for immunity to be truthful in making the application.

212 The Interpretation Guidelines also make clear that potential applicants for immunity may approach the ACCC on a 'hypothetical basis'⁶⁰ and that applications may be oral because:

⁵⁵ Immunity Guidelines, para 15.

⁵⁶ Draft MOU, para 7.3.

⁵⁷ Brent Fisse, 'The Australian Cartel Criminalisation Proposals: An Overview and Critique' (2007) 4(1) *The Competition Law Review* 51, 69

⁵⁸ Interpretation Guidelines, para 42.

⁵⁹ Interpretation Guidelines, para 43.

⁶⁰ Interpretation Guidelines, para 36.

*'A paperless process permits the applicant to make an application without generating any new documents which may involve admissions or provide a road map to others.'*⁶¹

213 However, while the ACCC may not use information in support of an immunity application 'in evidence in proceedings against the applicant', this does not mean that the ACCC is required to 'close its eyes' to the existence of the cartel should the application be unsuccessful. This is notwithstanding the fact that the ACCC might have been completely unaware of the existence of the cartel if not for the unsuccessful immunity application. It is even possible that the ACCC could rely on information provided to it in support of an unsuccessful application for immunity as 'reason to believe' the unsuccessful applicant (or other cartel members implicated by the unsuccessful applicant) may be able to furnish information relating to a contravention of the TPA. This would enliven the ACCC's investigatory powers under s155 of the TPA.

214 If cartel conduct is criminalised, however, these issues assume an added degree of complexity. Perhaps the biggest concern, as far as a potential applicant is concerned, would be whether information provided to the ACCC in support of an immunity application could be used against the applicant in a criminal prosecution by the DPP. In some cases, information provided in support of an application for immunity would constitute a criminal confession. It is also possible that by making an application for immunity to the ACCC, the applicant could be waiving its right to silence — a fundamental common law right.

215 Again, the ACCC's policy of agreeing not to use evidence provided by persons against them is in sharp contrast to the policy of the DPP. The Prosecution Policy states that the powers available to the DPP to grant undertakings not to use certain evidence provided by persons against them should only be used as a last resort.⁶²

216 The Draft MOU refers to the ACCC 'referring' matters to the DPP.⁶³ This apparently denotes the situation where the ACCC positively recommends to the DPP that it commence a prosecution, or at least that the DPP consider doing so. Therefore, the issue of whether the ACCC 'refers' a matter to the DPP is not the same as whether the DPP learns of a matter as a result of an application for immunity. In fact, although it speaks repeatedly of the ACCC deciding whether to refer a matter to the DPP, the Draft MOU specifically provides that in making that decision 'the ACCC will consult the DPP and the DPP will provide a preliminary advice as to whether the matter should be pursued with a view to possible criminal proceedings.'⁶⁴

⁶¹ Interpretation Guidelines, para 40.

⁶² Prosecution Policy, para 5.4.

⁶³ Draft MOU, section 4.

⁶⁴ Draft MOU, para 4.1.

217 This suggests that it is highly likely that the DPP will learn of the matter regardless of whether the ACCC decides to 'refer' the matter to the DPP formally or not. Once the DPP is aware of the matter, it is not clear whether there is any impediment to the DPP using information provided by a person to the ACCC against that person in support of an application for immunity, even if the matter is not formally referred by the ACCC.

218 Moreover, even if the ACCC grants civil immunity in relation to cartel conduct, the ACCC may still refer the conduct to the DPP. The Draft MOU makes clear that the decision whether to refer will be based upon considerations of the gravity and significance of the conduct, as well as matters such as the achievement of 'general and specific compliance' (which is very unclear but might be similar to general and specific deterrence) and 'factors to which the DPP has regard in considering whether to prosecute.'⁶⁵ None of these matters are consistent with the Immunity Policy.

219 The fact that the ACCC, based on its Immunity Policy, may have recommended that the DPP grant immunity from criminal conduct will be cold comfort to an applicant for immunity if the ACCC nevertheless refers the applicant's conduct to the DPP and the DPP decides to commence a criminal prosecution. If the ACCC decides that an applicant for immunity is eligible for immunity, the applicant's conduct plainly should not be referred to the DPP.

220 Clearly, these matters would significantly deter a potential applicant from coming forward and providing information in relation to cartel conduct to the ACCC under the Immunity Policy. They would, however, be substantially overcome if the automatic immunity available under the Immunity Policy was extended to immunity from criminal liability.

(d) An Avenue for Review of Immunity Decisions

221 The Immunity Policy currently does not provide any system for review of decisions made under it that concern whether:

- an applicant meets the criteria for immunity;
- an applicant does not meet the criteria for immunity; or
- immunity should be revoked

('immunity decisions').

222 If the ACCC and DPP apply a consistent policy for granting immunity based on the ACCC's Immunity Policy, it should not be controversial whether an applicant satisfies

⁶⁵ Draft MOU, paras 4.2–4.3.

most of the conditions for eligibility. There should be no dispute as to whether an applicant satisfies the following criteria of the Immunity Policy:⁶⁶

- the applicant is or was a party to a cartel (para 4(a)(i) for corporate applicants and para 11(a)(i) for individual applicants);
- the applicant admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the TPA (paras 4(a)(ii) and 11(a)(ii));
- the applicant is the first person to apply for immunity in respect of the cartel (paras 4(a)(iii) and 11(a)(iii));
- the applicant indicates to the ACCC that it will cease its involvement in the cartel (paras 4(a)(v) and 11(a)(v)); and
- at the time the ACCC receives the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the Act arising from the conduct in respect of the cartel (paras 4(b) and 11(b)).

223 Review of an immunity decision would only be required in the (possibly few) cases where it turned on less straightforward criteria such as whether:

- the applicant has not coerced others to participate in the cartel and was not the clear leader in the cartel (paras 4(a)(iv) and 11(a)(iv));
- the applicant has not ceased its involvement in the cartel (paras 4(a)(v) and 11(a)(v)); and
- in the case of a corporate applicant, the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives) (para 4(a)(vi)); and
- the applicant has not provided full disclosure and cooperation to the ACCC (paras 6 and 13).

224 In cases where an immunity decision had turned on such matters, there are a number of good reasons why there should be an avenue of review. First, as explained above, if a cartel member applies for immunity and is unsuccessful there is a very real prospect the cartel member will become the subject of an ACCC and/or DPP investigation and/or prosecution as a direct result. This is a significant disincentive against applying for immunity. An applicant for immunity that believes it is entitled to immunity would be comforted by the fact that, if the ACCC or DPP disagrees as to that entitlement, the

⁶⁶ Immunity Policy, paras 4 and 11.

applicant would have an opportunity to argue its entitlement in a review of the unfavourable decision.

225 Second, there is an inherent conflict of interest within the ACCC (and, for that matter, the DPP) in being charged, on the one hand, with enforcing the law and securing prosecutions and, on the other hand, administering an immunity policy. Within the ACCC/DPP, there could be pressures applied by the department that handles enforcement action upon the department that handles immunity decisions to try to find a way to reject an application for immunity so that enforcement action can be taken. This could be the case if, for example, a prosecution of the applicant for immunity would generate considerable media coverage — in particular, if it relates to an industry which the ACCC has not previously investigated — and therefore be valuable in terms of public education and reinforcing the need for compliance by other businesses. The existence of an avenue of review would reduce the prospect of such pressure because an incorrect decision could be overturned on review.

226 Third, in the conduct of an investigation of cartel activity, it is desirable for the ACCC/DPP to have certainty as to who is entitled to immunity, and who is not. It is not clear whether, if the ACCC/DPP rejected an application for immunity and then prosecuted the applicant, the applicant could argue in the prosecution proceeding that its immunity application was wrongfully rejected and that it is entitled to immunity. If such an argument was upheld, the applicant could not be successfully prosecuted. This could take place after the ACCC/DPP had expended extensive resources in investigating and prosecuting the matter, and even after the ACCC/DPP had (unnecessarily) granted immunity to another member of the cartel. The ACCC/DPP cannot reasonably be expected to apply the Immunity Policy 100% correctly 100% of the time. It is therefore in all parties' interests for any errors in the application of the Immunity Policy to be corrected in a timely and efficient manner.

227 Fourth, the introduction of criminal sanctions 'raises the stakes' involved in an immunity decision. With individuals involved in cartel conduct facing the prospect of jail terms, the need for a system to correct errors is increased. The introduction of criminal sanctions would also increase the power that the ACCC/DPP has in making immunity decisions. It would therefore be even more appropriate that such decisions be subject to some form of review.

228 A review of immunity decisions might not, however, be desirable in all situations. For example, the situation where two cartel members both consider each other to have been the ringleader, may be relatively common. It would be undesirable if a review of an immunity decision invariably became the first stage of every prosecution for cartel conduct where immunity had been granted to one cartel member.

- 229 For this reason, reviews of immunity decisions should only be available at the instance of the applicant for immunity in respect of which the decision was made (and not at the instance of third parties, eg other cartel members). This should also allow a review at the instance of any employee or officer of a decision to refuse that individual derivative immunity. Any corporation or individual whose immunity is revoked should also be able to seek a review of the revocation decision.
- 230 But what form could such a review take? A judicial review of immunity decisions would be undesirable as it could not be made confidentially and could substantially impede the ACCC/DPP's investigation. Judicial review would also be undesirable from the point of view of an applicant for immunity as it could require the applicant to make admissions of illegal conduct in open court.
- 231 An internal review of the decision within the ACCC/DPP would solve the problem of confidentiality. However, an internal review would not address some of the reasons for having a review. It would not be entirely independent and would not be seen as independent by potential applicants for immunity.
- 232 The Committee therefore suggests that the best solution might be for immunity decisions to be capable of review by a retired senior judicial officer agreed upon by the ACCC/DPP and the applicant for immunity. This could provide a confidential, timely and independent avenue of review.
- 233 If such an avenue of review were established, it would be appropriate for a corporate applicant for immunity to bear the costs charged by the retired judicial officer.

Recommendations

- 234 The ACCC's Immunity Policy should be extended to make available automatic immunity (that is immunity condition only upon specified criteria) from criminal prosecution on the conditions set out in the ACCC's Immunity Policy.
- 235 The ACCC and the Commonwealth DPP should assess applications for immunity jointly. Alternatively, the DPP's prosecution policy should be amended such that it is consistent with the ACCC's immunity policy.
- 236 In the event of a disagreement between the ACCC and the DPP as to whether an applicant meets the conditions for automatic immunity (from both civil and criminal prosecutions) the question should be resolved in the applicant's favour.
- 237 As already provided in the Draft MOU, the ACCC should act as a single contact point and 'one-stop shop' for applicants for immunity.

- 238 Decisions by the ACCC/DPP that an applicant for immunity does not meet the required criteria, and decisions to revoke immunity, should be able to be reviewed at the instance of the applicant/recipient.
- 239 Such reviews of should be confidential, independent and timely. It might therefore be appropriate for them to be conducted by a retired senior judicial officer agreed on by the ACCC/DPP and the applicant.

MOU between the ACCC and the DPP

Introduction

240 The Draft MOU sets out the respective roles and responsibilities of the ACCC and DPP in relation to the investigation and prosecution of cartel conduct, and how they will interact with each other.

241 In broad terms, the ACCC would be responsible for investigating (civil and criminal) cartel conduct, managing the immunity process (albeit ‘in consultation with the DPP’) and referring ‘serious cartel conduct’ to the DPP for consideration for prosecution.⁶⁷ The DPP would have responsibility for prosecuting criminal cartel offences and seeking associated remedies (such as under proceeds of crime legislation).⁶⁸

Discussion

(a) Distinguishing Matters for Criminal Prosecution and Matters for Civil Prosecution

242 A key issue addressed by the Draft MOU is how to decide which cartel conduct should be prosecuted as a crime by the DPP and which should only be the subject of civil proceedings brought by the ACCC. The Draft MOU also foreshadows that some matters may be subject to both civil and criminal prosecutions.⁶⁹

243 The Draft MOU indicates that the key consideration in determining whether cartel conduct will be prosecuted criminally will be its seriousness, and that this is to be measured in terms of the financial significance of the conduct (ie, the amount of the economic harm caused) and whether the cartel members are ‘repeat offenders’. Paragraph 4.3 of the Draft MOU explains:

4.3 *The ACCC will not ordinarily refer relatively minor cartel conduct to the DPP for consideration for prosecution. Referral of possible serious cartel conduct will concentrate upon conduct of the type that can cause large scale or serious economic harm, and the ACCC will have regard to considerations such as whether:*

- *the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred; or*

⁶⁷ Draft MOU, para 2.3.

⁶⁸ Draft MOU, para 2.2.

⁶⁹ Draft MOU, para 6.1.

- *the conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants; or*
- *one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil;*

and

- *the value of the affected commerce would exceed \$1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12 month period); or*
- *in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12 month period.*

244 Similarly, paragraph 5.2 of the Draft MOU provides that:

5.2 *In considering whether a prosecution should be commenced the DPP will have regard to:*

- *The impact of the cartel on the market;*
- *The scale of the detriment caused to consumers or the public; and*
- *Whether any of the cartel members have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behaviour.*

245 By adopting these criteria for distinguishing criminal and merely civilly-wrong cartel conduct, the Draft MOU is to some extent at odds with the Bill, which adopts the criterion of dishonesty in distinguishing between criminal and civil contraventions. This would not in itself make the new regime unworkable, but it does appear to introduce financial significance as, in effect, a de facto element of the criminal cartel offence ‘through the back door’ without the imprimatur of Parliament.

246 Apart from concerns as to the legitimacy of such a course, there are good reasons why financial significance and prior contraventions should not be the only considerations as to whether a matter should be prosecuted as a crime. If cartel conduct is to be criminalised on the basis that it is morally wrong, and must be condemned accordingly, then such conduct is morally wrong whether ‘the value of the affected commerce’ or ‘the value of the bid or series of bids’ is \$1 million or \$1.

247 Further, the existence of the \$1 million threshold for criminal conduct may send an unwanted signal that price fixing is not serious, and is not really criminal, if it is conducted on a small scale and only small amounts of money are involved. This may be interpreted by small businesses as meaning that the criminal cartel conduct offences do not apply to them. It may also engender feelings of resentment by big business that the new criminal cartel offences are targeted at them while the ACCC and DPP turn a blind eye to cartel conduct by small businesses.

248 Perversely, the threshold may also mean that small businesses are not protected to the same extent as bigger businesses by the new laws. If a small business requests bids for the supply of a relatively small amount of goods or services, the value of the bids may fall under the \$1 million threshold. Similarly, if a small business is operating in a niche market then the value of commerce in that market may be less than \$1 million. In both cases, cartel conduct would not exceed the threshold and the cartel members need not fear criminal prosecution.

249 The Committee suggests that, in deciding whether to commence a criminal prosecution of cartel conduct, the financial significance of the conduct should not be the only consideration (apart from prior contraventions). The ACCC and DPP should also take into account other matters indicating that the cartel conduct was immoral. These could include:

- whether the cartel member acted dishonestly or fraudulently;
- whether the cartel member actively took steps to conceal the cartel conduct / whether the cartel conduct was clandestine;
- whether the cartel conduct was motivated by greed or financial gain;
- the extent to which the cartel member was coerced or pressured (by other cartel members or by other matters or circumstances) to commit the cartel conduct;
- in the case of an individual within a corporation that was a member of the cartel, the seniority of the individual within the corporation and whether the individual was pressured by his or her superiors to engage in the cartel conduct;
- all of the surrounding circumstances in which the cartel conduct was engaged;
- whether the cartel member honestly believed that its conduct was legal based on legal advice.

250 On the issue of motive, it is important to recognise that conduct that is technically 'cartel conduct' may sometimes be engaged in for legitimate and even altruistic motives. For example:

- competing suppliers agree that both will offer their competing products to a certain disadvantaged section of the community at a price that is fixed below their regular prices;
- competing suppliers agree to limit or cease production of a particular product on the ground that it is harmful to the environment;
- competing purchasers agree not to purchase from a particular supplier because the goods supplied by that supplier are produced overseas with child labour;
- competing growers of agricultural produce, tired of the massive bargaining power of a large supermarket chain to which they supply, attempt to collectively bargain.

251 Even where cartel conduct is motivated by financial gain, the surrounding circumstances may still bear on the morality of the conduct. For example, price fixing may be committed in order to end an irrational and unsustainable price war, in which prices are below cost and which threatens to wipe out all the competitors in a market and create significant job losses and corporate insolvencies. It is at least arguable that that situation would be less morally reprehensible than cosy oligopolists with already fat profits price fixing to extort even more money from consumers.

252 Clearly, in some of the examples referred to above, the cartel members would have been well advised to seek authorisation for their conduct from the ACCC. Such matters could also be taken into account in the assessment of penalties. There are, however, no defences that would apply for such conduct. If the DPP is to have prosecutorial discretion as to whether to commence criminal proceedings, then surely it should have regard to matters bearing on the morality of the relevant conduct and surely it would do so. If that is the case, the Draft MOU should reflect this.

(b) The Granting of Immunity

253 These issues are addressed in the previous section of this submission.

Recommendations

254 The Draft MOU should not limit the DPP, in deciding whether to commence a criminal prosecution, to the financial significance of the cartel conduct and whether the cartel member has committed prior contraventions.

255 The Draft MOU should provide that, in making that decision, the DPP will consider matters bearing on the morality of the cartel member's conduct. (Some examples of these types of matters are listed above.)

Implications of section 80 of the Constitution

256 Section 80 of the Constitution provides that:

'The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.'

257 In *Cheatle*⁷⁰ the High Court held that the verdict of any jury in the trial on indictment of any offence against any law of the Commonwealth had to be unanimous. This requirement, having been set by the Constitution, cannot be waived.

258 The laws of the States do not require jury verdicts to be unanimous.

259 Clause 127 of the Bill inserts, before section 45 of the Schedule to the TPA, provisions in the Code replicating proposed new sections 44ZZRA to 44ZZRO of the Bill.

260 A prosecution under the Code in whatever Court will not lead to an avoidance of the application of section 80 and its requirement that such prosecutions which are upon indictment be tried by juries, and that conviction in such cases result only from a unanimous verdict. This is because the States' *Competition Policy Reform Acts* in 1995 provide by sections 24 and 25 that the Commonwealth laws apply as laws of the particular state in relation to offences against the Competition Code of that state as if that Code were a law of the Commonwealth and not a law of the state. They also provide that an offence against the Code is to be taken to be an offence against a law of the Commonwealth.

261 Thus, to the extent that section 80 would have applied if it had been an offence against Commonwealth law, section 80 will continue to apply in relation to a prosecution under the Code in a State Court.

262 As each of the proposed sections 44ZZRF(3) and 44ZZRG(4) of the bill provide that the relevant offences are indictable offences, section 80 will apply to the conduct of any trial of a prosecution under the Code.

⁷⁰ *Cheatle v The Queen* (1993) 177 CLR 541

Extradition and double jeopardy

Introduction

- 263 The Bill would allow persons in Australia to be extradited to a foreign country for trial under the laws of that foreign country for criminal cartel conduct.
- 264 Generally, if the laws of a foreign country include a similar offence to criminal cartel conduct (including similar sanctions), as defined by the Bill, it will be possible to extradite a person from that country to Australia for proceedings for criminal cartel conduct.

Extradition

- 265 Extradition is the process of compulsion by which one country sends a person to another country to face criminal charges or to serve a prison sentence under the laws of that other country. Whether or not a person is extradited depends upon the domestic law of the place where the person is located. It also depends upon whether the state to which it is proposed that he be extradited has an extradition treaty with the state from which extradition is sought.
- 266 At present, Australia has extradition treaties or extradition arrangements with 130 countries.

(a) Extradition in Australia

- 267 The relevant legislation is the *Extradition Act* 1988 (Cth). The Act codifies the law relating to the extradition of persons from Australia to other countries.
- 268 It:
- sets out the procedure by which an Australian court may determine whether a person in Australia is eligible to be extradited to a foreign country, without determining the guilt or innocence of the person; and
 - facilitates the making of requests for extradition of persons in a foreign country to Australia.

(b) Extradition from Australia to Foreign Countries

- 269 Australia can only accept a request for extradition from a country that has been declared as an 'extradition country' in the regulations to the Extradition Act.
- 270 An 'extradition country' is usually a party to a bilateral or multilateral extradition treaty with Australia. There are also some 'extradition countries' that have no treaty

- relationship with Australia, but that have entered into some other form of agreement with Australia on extradition.
- 271 To accept a request for extradition from a foreign country, the Commonwealth Attorney-General must be satisfied that:
- the person is an 'extraditable person' in relation to an 'extradition country';
 - the offence is an 'extradition offence';
 - there is dual criminality; and
 - there is no double jeopardy.
- 272 Section 6 of the Extradition Act provides that an '**extraditable person**' is a person who has been convicted in a foreign country, or a person for which a foreign country has issued an arrest warrant.
- 273 Under section 5 of the Extradition Act, conduct constitutes an '**extradition offence**' if it is:
- an offence against a law of Australia for which the maximum penalty in Australia is not less than 12 months imprisonment; and
 - an offence against a law of the foreign country seeking extradition for which the maximum penalty is not less than 12 months imprisonment in the foreign country, or is deemed by the applicable treaty obligation to be an extradition offence.
- 274 '**Dual criminality**' is not defined in the Extradition Act. It simply means that the conduct would be an offence in both Australia and the foreign country.
- 275 '**Double jeopardy**' is not defined in the Extradition Act. Relevantly, it occurs where a fine and/or a jail sentence may be imposed on the same person in respect of the same conduct in Australia and the country seeking extradition.
- 276 The Bill proposes a maximum sentence of 5 years imprisonment for criminal cartel conduct.
- 277 The offence created by the Bill will be an 'extradition offence' and will therefore allow persons to be extradited from Australia to a foreign country for criminal cartel conduct.
- 278 It is important to appreciate that conduct which will under the Bill amount to criminal cartel conduct may already be a criminal offence which is punishable by at least 12 months imprisonment under Australia's general criminal laws and therefore an 'extradition offence'. To the extent to which this is the case, the Bill does not change the extradition status of that conduct.

- 279 In *Norris*,⁷¹ currently on appeal to the House of Lords, the High Court concluded in its appellate jurisdiction, that Mr Norris' alleged conduct as a party to a price fixing cartel amounted to conspiracy to defraud under the general criminal laws of the United Kingdom.
- 280 At the time of the conduct alleged, cartel conduct was not an 'extradition offence' in the United Kingdom because it was not criminal, but conspiracy to defraud was. Because the United States authorities framed the application for extradition in terms of conspiracy to defraud and not as a cartel offence, the High Court held that Mr Norris could be extradited from the United Kingdom to face criminal cartel charges in the United States. Currently, the offence of conspiracy to defraud under Australian criminal laws carries a maximum penalty of not less than 12 months imprisonment and could therefore be relied upon to extradite persons from Australia to a foreign country for criminal cartel conduct.⁷²
- 281 In some cases, the double jeopardy bar may be triggered in Australia to prevent extradition of a person from Australia to a foreign country for proceedings for criminal cartel conduct under the laws of that country. This may occur, for example, where the criminal cartel conduct has an international dimension.

(c) Extradition of Foreign Nationals to Australia

- 282 The laws of the foreign country determine whether a person may be extradited from that country to Australia.
- 283 If the laws of the foreign country include a similar offence to criminal cartel conduct (including the necessary minimum sanctions), it will be possible to extradite a person from that country to Australia to face prosecution for criminal cartel conduct under the laws of Australia.
- 284 In some cases, the double jeopardy bar may be triggered in the foreign country to prevent extradition of a person from that country to Australia for proceedings for criminal cartel conduct under the laws of Australia. This may occur, for example, where the criminal cartel conduct has an international dimension.

⁷¹ *Norris v Government of the United States of America* [2007] EWHC 71 (Admin). The appeal was heard in January 2008.

⁷² *Criminal Code Act 1995* (Cth), section 135.4; *Crimes Act 1900* (NSW), section 475A(4) and schedule 10, section 1(e); *Crimes Act 1958* (Vic), sections 320, 321F(1), and 321F(2); *Criminal Code 2002* (ACT), section 334; *Criminal Code Act Compilation Act 1913* (WA), sections 409 and 558; *Criminal Code Act 1899* (Qld), section 430; *Criminal Law Consolidation Act 1935* (SA), sections 133 and 270; *Criminal Code Act 1924* (Tas), section 297(1)(d); *Criminal Code Act 1983* (NT), section 284.

(d) Australian Policies on Extradition

- 285 The previous Coalition government directed the Attorney-General's Department to conduct a comprehensive review of Australia's extradition and mutual assistance policies. Pursuant to that direction, on 22 December 2005, the Attorney-General's Department issued a public discussion paper.
- 286 The discussion paper stated that reform was necessary to ensure that 'Australia can extradite to and from a large number of countries and can grant extradition for a wider range of offences. The process must also be more responsive and streamlined in order to prevent lengthy delays and offer appropriate safeguards.'⁷³
- 287 Public submissions closed on 7 April 2006.
- 288 The newly elected Labor government has not yet stated how it will proceed in relation to the ongoing review.

Double Jeopardy

- 289 The Bill may result in individuals and companies being penalised in different jurisdictions for the same conduct because, as currently drafted, the Bill would permit:
- extradition of persons to Australia for proceedings for criminal cartel conduct, where those persons could be found guilty of criminal cartel conduct and fined and/or imprisoned in Australia for the conduct, even if they have been imprisoned and/or fined in the foreign country for the same conduct;
 - where a foreign corporation is subject to the jurisdiction of the TPA, the corporation could be penalised in Australia for criminal cartel conduct, and penalised again for the same conduct in one or more foreign jurisdictions. The basis on which the fines are calculated in Australia would not necessarily take into account the basis on which the fines were calculated in the foreign jurisdictions;
 - where a foreign corporation is subject to the jurisdiction of the TPA, the corporation could be ordered to pay civil damages in Australia for criminal cartel conduct, and ordered to pay civil damages in one or more foreign jurisdictions for the same conduct. The basis on which the damages are calculated in one country may not necessarily take into account the basis on which the damages are calculated in the foreign jurisdictions; and

⁷³ Attorney-General's Department, 'A New Extradition System – A Review of Australia's Extradition Law and Practice' (December 2005) at page 6.

- if criminal proceedings are commenced in Australia before civil proceedings are commenced in Australia for the same cartel conduct, the Bill would result in the civil proceedings being stayed until the criminal proceedings are determined. However, the Bill does not deal with the possibility that civil proceedings may be commenced before criminal proceedings. As drafted, the Bill would permit double jeopardy in that situation.

290 Generally, Australian law embodies the principle that a person should not be penalized twice for the same conduct.

291 For example, sub-section 45(6) of the TPA prevents a corporation or person from being penalized under sub-sections 45(2) and 47(1) for the same conduct and sub-section 45(7) prevents a corporation or person from being penalized under sub-sections 45(2) and 50(1) for the same conduct.

292 Further, and as a consequence of the non-overlap provisions in sub-sections 45(6) and 45(7) of the Act, the corporation or person could not be liable in Australia to the same person/s for two amounts of civil damages for the same conduct.

293 However, the Bill does not embody the principle that a person should not be penalised twice for the same conduct.

294 To a limited extent, this may be consistent with the practices in some other jurisdictions. For example, the European Court of Justice recently held that when calculating cartel fines, the European ACCC is not bound to take into account fines already paid by the same undertaking in non-European Union countries.⁷⁴ The Court found that the European ACCC has a distinct objective of ensuring compliance with the competition rules within the common market, separate from that of other countries outside the European Union.

295 Notwithstanding the finding of the European Court of Justice, some jurisdictions do take into account a sanction that has already been imposed:

- in a foreign jurisdiction;
- on the same corporation or person; and
- in relation to the same conduct.

296 For example, in the international marine hoses cartel, simultaneous investigations by the Department of Justice in the United States and the Office of Fair Trading in the United Kingdom resulted in those two agencies closely co-ordinating their criminal investigations of the cartel conduct.

⁷⁴ *SGL Carbon AG v Commission* (case C-328/05 P, 10 May 2007).

297 As a consequence of their close co-ordination, three British nationals were arrested while at a trade fair in the United States.⁷⁵ Subsequently, the Department of Justice issued a statement that the three British nationals had agreed to plead guilty to beaching criminal cartel laws in the United States, and to pay fines and to serve jail sentences of 30, 24 and 20 months respectively in the United States prison system.

298 Further, as part of their plea bargains in the United States, the three British nationals agreed to be escorted in custody back to the United Kingdom to plead guilty to the Office of Fair Trading's allegations that they had breached criminal cartel laws in the United Kingdom.

299 We understand that the Department of Justice, the Office of Fair Trading and the three individuals have agreed that if the British Court imposes prison sentences with lesser terms than those imposed in the United States, the individuals will serve their time in British prisons and then return to the United States, where they will serve the remainder of the term of their prison sentences imposed in the United States.

Recommendations

300 Consideration ought to be given to whether double jeopardy should apply where civil proceedings are commenced before criminal proceedings for the same cartel conduct so as to prevent both civil and criminal fines being imposed for the same cartel conduct.

⁷⁵ In contrast to the *Norris* case, since the British nationals were arrested on United States soil, the Department of Justice was able to avoid the extradition process (see the section of extradition).

Annexure A

Countries that have an extradition relationship with Australia

Source: The following table is based on information provided by the Attorney-General's Department which is available online at:
http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Relationshipwithothercountries_Alphabeticalcountrylist.

The right-hand column of the table lists the type of 'extradition relationship' that Australia has with each country.

The types of extradition relationships that Australia is a party to include:

- bilateral extradition treaties;
- inherited extradition treaties (extradition treaties between the UK and other countries that were 'inherited' by Australia and implemented by the Extradition (Foreign States) Amendment Act 1985);
- extradition arrangements with Commonwealth countries (made under The London Scheme, as amended in November 2002 and implemented by the Extradition (Commonwealth Countries) Regulations 1998);
- non-treaty extradition arrangements that are based on understandings of reciprocity;
- multilateral conventions to which Australia is a party that include obligations to facilitate extradition in relation to particular offences (such as terrorist acts, piracy, drugs, torture and genocide offences); and
- the special arrangement between Australia and New Zealand which is administered by police forces, with no Ministerial involvement.

Country name	Extradition relationship
Akrotiri and Dhekelia (the Sovereign base areas on the Island of Cyprus)	London Scheme
Albania	Inherited Treaty
Anguilla	London Scheme
Antigua and Barbuda	London Scheme
Argentina	Bilateral Treaty
Austria	Bilateral Treaty
Bahamas	London Scheme
Bangladesh	London Scheme
Barbados	London Scheme

Belgium	Bilateral Treaty
Belize	London Scheme
Bermuda	London Scheme
Bolivia	Inherited Treaty
Botswana	London Scheme
Brazil	Bilateral Treaty
British Antarctic Territory	London Scheme
British Indian Ocean Territory	London Scheme
British Virgin Islands	London Scheme
Brunei Darussalam	London Scheme
Cambodia	Regulations
Canada	Regulations
Cayman Islands	London Scheme
Chile	Bilateral Treaty
Colombia	Inherited Treaty
Cook Islands	London Scheme
Croatia	Regulations
Cuba	Inherited Treaty
Cyprus	London Scheme
Czechoslovakia (now the Czech Republic and Slovakia)	Inherited Treaty
Denmark	Regulations
Dominica	London Scheme

Ecuador	Bilateral Treaty
El Salvador	Inherited Treaty
Estonia	Regulations
Falkland Islands	London Scheme
Fiji	Regulations
Finland	Bilateral Treaty
France	Bilateral Treaty
Gambia	London Scheme
Germany	Bilateral Treaty
Ghana	London Scheme
Gibraltar	London Scheme
Greece	Bilateral Treaty
Grenada	London Scheme
Guatemala	Inherited Treaty
Guyana	London Scheme
Haiti	Inherited Treaty
Hong Kong	Bilateral Treaty
Hungary	Bilateral Treaty
Iceland	Regulations
India	London Scheme
Indonesia	Bilateral Treaty
Iraq	Inherited Treaty

Ireland	Bilateral Treaty
Israel	Bilateral Treaty
Italy	Bilateral Treaty
Jamaica	London Scheme
Japan	Regulations
Jordan	Regulations
Kenya	London Scheme
Kiribati	London Scheme
Korea, Republic of	Bilateral Treaty
Kyrgyzstan	Regulations
Latvia	Bilateral Treaty
Lebanon	Regulations
Lesotho	London Scheme
Liberia	Inherited Treaty
Lithuania	Regulations
Luxembourg	Bilateral Treaty
Malawi	London Scheme
Malaysia	Bilateral Treaty
Maldives	London Scheme
Malta	London Scheme
Marshall Islands	Regulations
Mauritius	London Scheme

Mexico	Bilateral Treaty
Monaco	Bilateral Treaty
Montserrat	London Scheme
Namibia	London Scheme
Nauru	London Scheme
Netherlands	Bilateral Treaty
New Zealand	Special arrangement
Nicaragua	Inherited Treaty
Nigeria	London Scheme
Norway	Bilateral Treaty
Pakistan	London Scheme
Panama	Inherited Treaty
Papua New Guinea Lon	London Scheme
Paraguay	Bilateral Treaty
Peru	Inherited Treaty
Philippines	Bilateral Treaty
Pitcairn, Henderson, Ducie and Oeno Islands	London Scheme
Poland	Bilateral Treaty
Portugal	Bilateral Treaty
Romania	Inherited Treaty
San Marino	Inherited Treaty
Seychelles	London Scheme

Sierra Leone	London Scheme
Singapore	London Scheme
Slovenia	Regulations
Solomon Islands	London Scheme
South Africa	Bilateral Treaty
South Georgia and South Sandwich Islands	London Scheme
Spain	Bilateral Treaty
Sri Lanka	London Scheme
St Helena	London Scheme
St Helena Dependencies	London Scheme
St Kitts and Nevis	London Scheme
St Lucia	London Scheme
St Vincent and the Grenadines	London Scheme
Swaziland	London Scheme
Sweden	Bilateral Treaty
Switzerland	Bilateral Treaty
Tanzania	London Scheme
Thailand	Regulations
Tonga	London Scheme
Trinidad and Tobago	London Scheme
Turkey	Bilateral Treaty
Turks and Caicos Islands	London Scheme

Tuvalu	London Scheme
Uganda	London Scheme
United Kingdom	Regulations
United States	Bilateral Treaty
Uruguay	Inherited Treaty
Vanuatu	London Scheme
Venezuela	Bilateral Treaty
Western Samoa	London Scheme
Yugoslavia	Inherited Treaty
Zambia	London Scheme
Zimbabwe	London Scheme