

# COMPETITION POLICY REVIEW

## Submission

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10 June 2014

### 1. Scope of this submission

We welcome the opportunity to make a submission to the Competition Policy Review (CPR).

This submission is concerned with the provisions of the *Competition and Consumer Act 2010 (CCA)* that deal with cartel conduct, and with the approach taken to the enforcement of those provisions.<sup>1</sup> It is relevant to the questions raised in the CPR Issues Paper 14 April 2014 regarding:

- anti-competitive agreements between competitors (see paras 5.21-5.23);
- exemptions, exceptions and defences (see paras 5.32-5.37);
- remedies, powers and pecuniary penalties (see paras 5.43-5.48);
- dispute resolution and private enforcement (see paras 5.49-5.53); and
- the administration of competition policy; particularly in relation to the effectiveness of the Australian Competition and Consumer Commission (ACCC) (see paras 6.1-6.2, 6.5-6.7).

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<sup>1</sup> The submission draws on the previous work of the authors, principally but not confined to C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011, Cambridge University Press) (ACR). Where aspects of this submission are developed in greater detail in previous or later work by the authors, references are provided, as relevant.

## **2. Approach to this submission**

In our view, the effectiveness of the CCA provisions relating to cartel conduct and their enforcement should be assessed having regard to the following criteria:

- the comprehensiveness of the statutory framework in providing for and distinguishing between civil and criminal liability for cartel conduct (see Part 3 below);
- the extent to which the rules governing liability for cartel conduct reflect the economic seriousness of that conduct (see Part 4 below);
- the provision made for fault-based liability for cartel offences (see Part 5 below);
- the workability of the rules governing liability for cartel conduct (see Part 6 below);
- the provision made for individual accountability for cartel conduct (see Part 7 below);
- the provision made for corporate accountability for cartel conduct (see Part 8 below);
- the transparency, clarity and comprehensiveness of the policy that guides enforcement decision-making in relation to cartel conduct (see Part 9 below);
- the transparency, clarity and comprehensiveness of policies relating to immunity and cooperation (see Part 10 below);
- the effectiveness of the sanctions applied for cartel conduct (see Part 11 below);  
and
- the extent to which the law and its enforcement achieves the objects of deterrence, punishment and compensation through a combination of public and private enforcement action (see Part 12 below).

This submission identifies the strengths and weaknesses of the CCA provisions and the approach taken to their enforcement, measured against each of the criteria specified above. Where weaknesses are identified, specific recommendations are made to address them.

### 3. A comprehensive framework

Cartel conduct takes a wide range of forms with varying degrees of seriousness in terms of economic harmfulness and culpability. To reflect this, the law should provide a comprehensive framework for distinguishing systematically between conduct subject to criminal liability and conduct subject to civil liability. The framework should provide for differentiation by way of types of liability, the rules governing liability (defining conduct that is subject to liability as well as the conduct that is excepted from liability), the applicable sanctions, the nature and roles of the institutions charged with enforcement, the policies guiding enforcement decisions, the mode of trial and rules of evidence and procedure.

An important strength of the Australian anti-cartel regime is that it provides for both civil and criminal liability for cartel conduct.

There is a degree of distinction between the types of conduct that should attract civil penalties and the types of conduct that should attract criminal sanctions provided for in the rules governing liability in that the cartel offences require proof of fault elements that are not required for the purposes of the civil prohibitions (see further Part 5 below).

The ACCC is able to use powers in investigating potential cartel offences that are not available in the investigation of potential civil contraventions (such as covert surveillance and telecommunications interception).

The cartel offences are to be prosecuted by the Commonwealth Director of Public Prosecutions (**CDPP**) in accordance with its *Prosecution Policy*. The CDPP exercises its prosecutorial discretion independently of the ACCC. This is an important safeguard against the overuse of criminal prosecutions and helps to limit prosecutions to cases where the cartel conduct is serious and warrants criminal rather than civil liability.

Trials for alleged cartel offences are to be before a jury applying the criminal rules of evidence and procedure, and upon conviction, offenders are to be sentenced under the sentencing provisions of the *Crimes Act* and the CCA to criminal penalties, including potentially a term of imprisonment. Offenders may also be subject to laws governing money laundering and confiscation of the proceeds of crime.

At the same time, the Australian framework does not distinguish criminal from civil treatment of cartel conduct in all possible significant ways. There are avenues for further distinction in relation to the physical elements of the offences, the exceptions applicable to the offences, the policy governing decisions to prosecute conduct as offences and the statutory labelling of the offences.

Specific recommendations to address these issues are as follows:

- A. The physical elements of the cartel offences could be defined more narrowly than the physical elements of the civil cartel prohibitions – in particular, any amendment to extend the element of collusion (‘contract, arrangement or understanding’) to apply to ‘concerted practices’ should be confined to the civil prohibitions (see further Part 4.1 below);
- B. The fault elements of exceptions to cartel offences should be defined in terms of subjective fault (ie intention, knowledge, belief or recklessness) whereas objective rather than subjective fault elements may be appropriate for the corresponding exceptions that apply to civil prohibitions, as in the case of exceptions for joint or collaborative ventures (see further Part 4.3 and Part 5 below);
- C. The Memorandum of Understanding between the CDPP and the ACCC (**ACCC-CDPP MOU**) should articulate more clearly and in greater detail the bases on which it will be decided to refer a matter for prosecution in the case of the ACCC and to prosecute in the case of the CDPP (see further Part 9 below);
- D. The title to Subdiv B of Div 1, Pt IV should be changed to ‘Collusion to subvert competition – Offences’ and the title to Subdiv C, to ‘Collusion against competition – Civil liability’.<sup>2</sup>

#### **4. Rules reflecting economic seriousness**

Rules governing liability for cartel conduct should reflect the seriousness of the conduct from an economic perspective and be consistent with the economic rationale that underpins the regulation of cartel conduct. The Australian rules governing liability for cartel conduct do not meet this criterion. The physical elements of the per se prohibitions, civil and criminal, fail in many respects to reflect their underlying economic rationale and, as a result suffer from either under-reach or over-reach. Many of the exceptions to the cartel prohibitions and offences are under-reaching, while others are over-reaching.

Key examples of these weaknesses in the cartel rules are found in:

- the definition of collusion in terms of a ‘contract, arrangement or understanding’;
- the definitions of a ‘cartel provision’ and an ‘exclusionary provision’;
- the exceptions for joint ventures;

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<sup>2</sup> See ACR, Ch 2, Section 2.4.4.

- the ‘anti-overlap’ exceptions and the absence of a supply agreement exception.

#### 4.1 Contract, arrangement or understanding

The definition of collusion is potentially under-inclusive in that the concept of an ‘understanding’ fails to address the phenomenon of facilitating or concerted practices that do not involve collusion, as traditionally conceived, but can have a similarly adverse economic effect.

Such practices are distinguishable from conduct associated with conscious parallelism or oligopolistic interdependence. In essence, they involve an activity, often the provision or exchange of information in the market place, which makes coordination between competitors easier and more effective – easier because it facilitates communication, and more effective because it facilitates detection of cheating and administration of punishment for deviations from a coordinated outcome. Such facilitation assists in overcoming the uncertainty associated with competition or the impediments to oligopolistic interdependence. Tacitly collusive or facilitating behaviour increases the likelihood of anti-competitive effects. However, it is recognised that such effects need not ensue – ‘the vice of a facilitating practice is its anti-competitive *tendency* rather than a proved anti-competitive *result* in the particular case.’<sup>3</sup> This concern is magnified by the difficulty in preventing or remedying the anti-competitive effects of oligopolistic interdependence as such.

Examples of tacit collusion or facilitating practices (sometimes referred to as signalling devices) are as infinite as the creativity of commerce. Commonly cited examples include: public speech involving discussion of conditions affecting price in the media or other competitively sensitive matters; and private information exchanges such as competitors sending price lists or manuals to each other; advance price announcements; price protection or ‘most favoured customer’ clauses; uniform delivery pricing methods; basing-point pricing; and product standardisation or benchmarking.

There is a respectable case for adopting the concept of ‘concerted practice’ in the interpretation of an ‘understanding’ in the civil prohibitions on cartel conduct in Australia as a means of addressing the anti-competitive aspects of facilitating practices. The concept of ‘concerted practice’ is recognised in both European Union (EU) law (formally, under Art 101(1) of the EU Treaty) and United States (US) law (at least to some extent, albeit informally, in the context of considering whether there is a ‘contract, combination... or conspiracy’ for the purposes of s 1 of the *Sherman Act*).

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<sup>3</sup> PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 30 ¶1407.

The concept of ‘concerted practice’ is consistent with economic theory as to where the line should be drawn between legal and illegal horizontal coordination, based on recognition that such practices may have the same anti-competitive effects as collusive agreements.

Extension of liability beyond agreements to cover concerted practices would acknowledge that there is a growing trend towards deliberate adoption of tacit collusive behaviour in response to the toughening of anti-cartel laws and enforcement, aided by the emergence of the ‘electronic marketplace’ which facilitates instant universal exchange of volumes of market information.

Against extending liability in this way is the understandable concern about the potential for over-reach and over-deterrence. This is particularly so given that the concept of ‘concerted practice’, as applied in EU law, may be established having regard to the purpose of conduct, irrespective of its effects.

Communication between competitors can have at least ambiguous, if not pro-competitive and welfare-enhancing, effects. Information exchange between competitors often goes beyond information about prices and such exchange often has benefits for the competitive process. For example, benchmarking, whereby firms measure their performance against ‘best practice’ in their industry may enable them to improve their efficiency. Information may also be exchanged about new forms of technology and the results of research and development projects. By spreading technological know-how, information agreements may help to increase the number of firms capable of operating in the market.

Accordingly, there is a good argument that such practices should be subject to a competition or rule of reason test, so as to enable their effects to be assessed having regard to the nature of the practices and the market context in which they occurred. This would be consistent with the approach taken to information-sharing agreements in other jurisdictions. A per se rule may not be appropriate given that, in the absence of such an assessment, it is not possible to say that the majority of such practices would be likely to have anti-competitive effects.

In 2012 Div 1A of Pt IV was enacted, introducing additional prohibitions to the CCA intended to deal with one form of concerted / facilitating practice - anti-competitive information disclosure involving competitors (so-called ‘price signalling’). These provisions are ill-conceived and highly problematic. Div 1A imposes prohibitions on unilateral conduct, defined in terms of disclosure of information. However, as a matter of both established economic principle and international practice, information disclosure should attract liability only insofar as it evidences collusion or facilitates co-ordination of conduct between competitors, thereby removing the need for competitors to collude

explicitly. Information disclosure or exchanges between competitors are addressed overseas in the context of collusion. There is no equivalent to the prohibitions in Div 1A in the laws of the US,<sup>4</sup> Europe (at Community or national level), Canada or New Zealand.

The Div 1A prohibitions are over-reaching and capture conduct that may be benign, pro-competitive or welfare-enhancing in some other way. This is particularly so in the case of s 44ZZW which imposes per se liability for private disclosure of pricing information to a competitor. The over-reach of s 44ZZW is not addressed satisfactorily by the qualification that the prohibition does not apply to disclosures in the ordinary course of business. That qualification is misconceived and it also introduces unnecessary uncertainty into the law.<sup>5</sup> The requirement in s 44ZZX that the disclosure have the purpose of substantially lessening competition does not address the fact that the prohibition is misconceived (for the reason stated above). Further, the purpose element will be difficult to establish in practice.

The over-reach of the Div 1A prohibitions is not addressed by the exceptions in ss 44ZZY and 44ZZZ. Moreover, it is unsatisfactory to attempt to cure unnecessarily far-reaching prohibitions by creating a long and inevitably incomplete list of exceptions. Reliance on the authorisation or notification process to prevent the application of the prohibitions to legitimate information disclosure is also inappropriate. Authorisation is a useful mechanism in other contexts. However, it is difficult, costly, time consuming, public and hence impractical for all but the largest transactions. Notification is less cumbersome, but the factor of delay alone is likely to make it impractical in many situations.

Div 1A only applies selectively, by regulation, to prescribed classes of goods or services. This is manifestly inappropriate. There is no principled justification for selective application of these prohibitions. As a general policy, competition laws should apply across all sectors of the economy, and competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided. That policy, as adopted and applied by the Swanson Committee and the Hilmer Committee, and strongly endorsed by the Dawson Committee, is reflected in all of the existing prohibitions in Part IV of the CCA. The proposal that particular sectors, in effect, be made subject to the prohibitions by regulation is also highly unsatisfactory. Regulations are not subject to the same Parliamentary scrutiny as that to which legislation is subject. Clear and useful criteria for determining which sectors should be prescribed have not been properly articulated and in any event are difficult to formulate.

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<sup>4</sup> The extension of s 5 of the FTC Act (US) to an 'invitation to collude' in a few cases is a limited possible exception. See further WE Kovacic and M Winerman, 'Competition Policy and Section 5 of the Federal Trade Commission Act' (2010) 76 *Antitrust LJ* 929.

<sup>5</sup> See further B Fisse and C Beaton-Wells, 'Private Disclosure of Price-Related Information to a Competitor in the Ordinary Course of Business' (2011) 39 *Australian Business Law Review* 367.

Div 1A imposes an extensive regulatory burden on the businesses that are or would be, in the event that it was to be extended to other sectors, subject to it. Key aspects of the prohibitions (for example, the meaning of ‘disclosure’) create significant uncertainty for business regarding their ability to engage in the many forms of legitimate and necessary conduct that are or would be prohibited by the prohibitions even though that conduct may be competitively benign or pro-competitive. Accordingly, the prohibitions create or would create substantial uncertainty for business in relation to their compliance obligations, and consequently compliance is or would be costly and complicated for business to achieve. The authorisation or notification process is not an adequate response to this for the reasons stated above. Further, the ACCC is able to use its compulsory information gathering powers under s 155 to investigate possible breaches of the prohibitions, and the use of these powers imposes a heavy and, in the case of these prohibitions, an unwarranted burden on business.

Specific recommendations to address these issues are as follows.

- A. Div 1A of Pt IV of the CCA should be repealed.
- B. Consideration should be given to amending s 45(2) to add a prohibition against engaging in a 'concerted practice' as s 45(2)(c), defining 'concerted practice' along these lines:

A concerted practice is conduct engaged in by a corporation for the purpose of:

- (a) coordinating the terms or conditions on which goods or services are supplied or acquired, to be supplied or acquired or likely to be supplied or acquired with a person who competes, is likely to compete or would, but for the concerted practice, compete with the corporation in relation to the supply or acquisition of those goods or services; and
- (b) thereby substantially lessening competition between the corporation and that person in relation to the supply or acquisition of those goods or services.

The proposed prohibition seeks to adapt the EU concept of a concerted practice under Art 101(1) of the EU Treaty. The concept of a concerted practice is broader than the concept of an understanding but requires the facilitation of coordinated conduct by competitors. The indicative wording given above seeks to define the concept more closely than Art 101(1) while incorporating the familiar CCA precepts of 'purpose', 'substantial', 'lessening' and 'competition'. The competition test in the proposed definition is not a SLC test but focuses on whether or not there is a reduction of competition between two or more competitors. The concept of 'coordination' is new to the CCA but is a commonplace term that has been used and applied in numerous cases on the meaning and application of the term 'concerted practice' in Art 101(1). The



proposed broadening of the definition of collusion in the CCA would not have the benefit of the efficiencies defence under Art 101(3) which prevents the over-reach of Art 101(1). However, it is proposed instead that reliance be placed on exceptions that would apply to the new prohibition under s 45(2), specifically a new collaborative activity exception (see Part 4.3 below), a new supply agreements exception (see Part 4.4 below), and ultimately the avenue of authorisation.

#### **4.2 Cartel provision and exclusionary provision**

The CCA definitions of ‘cartel provision’ and ‘exclusionary provision’ are over-reaching and capture conduct that may be either benign or pro-competitive or in some other way welfare-enhancing.<sup>6</sup> They contradict in many respects the basic economic rationale which underpins the regulation of cartel conduct, namely the need to prohibit restraints that reduce or have the tendency to reduce output and thereby raise prices with resultant harm to consumer welfare. The CCA definitions are also duplicative and highly prescriptive which results in inflexibility and inefficiency in enforcement as well as undue compliance costs and inefficiency for business.

As in the US and EU, Australian law draws a distinction between per se infringements and infringements that depend on applying a competition test. Furthermore, in general terms, per se illegality attaches to conduct identified as warranting presumptive condemnation in the US and the EU, namely price fixing, output limitation, market allocation, bid rigging and collective boycotting.

However, the Australian approach to the definition of cartel conduct lacks the economic rigour and sophistication of the US and EU approaches. Under the CCA the approach to characterisation of cartel conduct for the purposes of ascertaining liability involves blunt bright line tests. Applying a dichotomous approach, it distinguishes between cases that require no competition analysis and those that require a full competition analysis. There is no capacity to undertake an initial characterisation of the provision in question to determine the type of inquiry that should apply to ascertain its objects or effects. There is no recognition of a general doctrine of ancillary restraint, either as part of an initial characterisation process or as a separate exception or defence. The existing exceptions and defences are inadequate to recognise the range of situations in which a restraint may in fact be a mechanism for increasing output and thus be pro-competitive and welfare enhancing. Nor is there otherwise any potential in the context of the per se prohibitions for a respondent to argue that, while anti-competitive, the provision is not substantially so – for example, because the parties do not control the market; in other words, where the restraint’s effect is non-existent or de minimis. The result is that the per se prohibitions

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<sup>6</sup> See ACR, Ch 4.

are over-inclusive and capture conduct that is either competitively benign or pro-competitive and welfare-enhancing.

There are two main explanations for the Australian approach, neither of which is satisfactory. The first is that, under the CCA, competition and economic efficiency are treated as two separate concepts. This explains the absence of an ancillary restraints doctrine as an exception or defence to the prohibitions in the Act. Competition assessments are seen as the province of the statutory prohibitions under Pt IV enforced by the courts, whereas efficiency assessments are the domain of the administrative agencies empowered to exempt conduct from the prohibitions under an authorisation procedure and in the case of certain specific restraints, a notification procedure.

However, it is contrary to economic principle to attempt to divorce competition and efficiency. It is not always necessary that competition and efficiency be traded off against one another. Competition and efficiency are often complementary.<sup>7</sup> Further, the availability of these ex ante procedures is not a satisfactory response to the over-reach of the per se prohibitions. Legitimate business conduct should not be subject to a procedure that requires parties to demonstrate public benefits even when the conduct may not be anti-competitive. Nor should such conduct be subject to conditions and time limitations on the protection granted. Authorisation is also impractical, imposing costs, delays, publicity and uncertainty in circumstances in which such imposts lack justification. Furthermore, the competition–efficiency distinction was based on a concern when the CCA was passed that courts could not handle efficiency analysis. It is highly questionable whether that remains the case today if indeed the contention was ever sound. The Federal Court has often grappled with detailed and complex economic evidence and analysis.

The second explanation for Australia’s economically unsound approach to the classification of horizontal restraints lies in its black-letter law style of statutory drafting. This is a style that reflects a rule-based rather than a principle-based approach to regulation and it is not unique to the CCA. As a result of this drafting approach, the Australian prohibitions are excessively prescriptive, attempting to define minutely all possibilities and close off any escape routes. In consequence, most of the provisions are replete with double negatives, proliferating alternatives, multiple cross-references, extensive qualifications and complex statutory interrelationships. As with the artificial distinction drawn between competition and efficiency, the drafting style reflects shallow faith in the judiciary’s capacity to characterise and assess conduct as being harmful or not harmful in terms of competition or consumer welfare. Perversely, it assumes that those

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<sup>7</sup> See P Williams and G Woodbridge, ‘The relation of efficiencies to the substantial lessening of competition test for mergers: substitutes or complements?’ (2002) 30 *Australian Business Law Review* 435.

drafting the legislation have such a capacity on an ex ante basis uninformed by case-by-case analysis of real fact situations.

Specific recommendations to address these issues are as follows.

- A. The per se prohibition on exclusionary provisions under ss 45(2)(a)/45(2)(b)(i) should be repealed.
- B. The definition of ‘cartel provision’ in s 44ZZRD should be repealed and a ‘cartel provision’ for the purposes of civil and criminal liability should be redefined along the following lines:

A cartel provision means a provision that is contained in a contract, arrangement or understanding to which the defendant and a competitor of the defendant are both parties and that has the effect or is likely to have the effect, directly or indirectly, or is intended by the defendant to have the effect, directly or indirectly, of:

- (a) fixing, maintaining or controlling the price for a good or service or any other term or condition of trade that affects the price for a good or service;
- (b) preventing, restricting or limiting the production, supply or acquisition of a good or service;
- (c) dividing a market by, for example, allocating customers, suppliers or territories as between any or all of the parties to the contract, arrangement or understanding;
- (d) excluding a competitor, customer, supplier or other participant in a market from the supply or acquisition of a good or service.

The key benefits of the proposed definition of a ‘cartel provision’ are as follows:

- First, it captures the four horizontal restraints generally seen as most likely to reduce output and thus as warranting per se liability on that basis, consistently with economic principle and the approach taken under US and EU law. However, while the enforcement advantages of per se liability are preserved, it remains necessary to cater for situations in which the restraints in question are ‘ancillary’ to a broader output-enhancing venture or agreement. It is proposed that this be achieved through the introduction of an exception for collaborative ventures between competitors that subsumes the current joint venture exceptions (see Part 4.3 below). The prohibition on SLC provisions in ss 45(2)(a)/45(2)(b)(ii) would be unaffected.
- Secondly, also consistent with the US approach as well as the economic rationale for per se liability, the formulation captures provisions that have or are likely to

have the effect of fixing prices, restricting output, dividing markets or excluding market participants, irrespective of the respondent's purpose or intention. Potential concerns about over-reach in this regard should also be addressed by the proposed exception for collaborative ventures between competitors.

- Thirdly, the suggested formulation has the benefits of brevity and flexibility and avoids the excessive prescriptiveness and prolixity of the current provisions. However, there remains the issue of how to deal with restraints which, while falling within the terms of the prohibitions and not being ancillary to a broader pro-competitive venture, nevertheless have an effect that is *de minimis*. This is not a problem to which further statutory prescription should be seen as the answer. There are thus only two other ways in which to tackle the issue. The first would involve a change in judicial approach to 'read down' the prohibitions in appropriate cases (consistent with the approach of the US judiciary). This was attempted in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1983) 48 ALR 361 and the generally negative reaction to that decision suggests that the traditionally conservative and literal approach taken to statutory interpretation by Australian judges in trade practices cases is unlikely to change in the short-term. The second option, reflective of the approach in the EU, is for the ACCC to issue guidelines that explain the circumstances in which it is likely to regard the effects of conduct as too insubstantial to warrant proceedings. To an extent this view is already reflected in the ACCC's general *Compliance and Enforcement Policy*. However, there is scope for more detailed administrative guidance, preferably with worked examples.<sup>8</sup>
- Fourthly, the problematic notion of a purpose of a provision is excised. Instead, the focus is on the intention of the defendant, consistently with the concept of intention under s 5.2(3) of the *Criminal Code*. The test of intention is subjective. The test for civil liability on the basis of 'effect' or 'likely effect' is objective. Criminal liability on the basis of 'effect' or 'likely effect' would be subject to the fault element that applies in relation to the alleged effect or likely effect, namely knowledge or belief. The concept of 'purpose of a provision' in the definition of the general prohibition against anti-competitive agreements in s 45(2) should also be replaced by a requirement of intention on the part of the defendant. This would eradicate unproductive debate about whose purpose is relevant in establishing breach of the prohibition.

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<sup>8</sup> As in European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (January 2011).

- Finally, with respect to each of the four restraints identified in the proposed definition, the amendment would address various deficiencies in the current definition under s 44ZZRD as follows:
  - (a) of the proposed definition would catch fixing of both price and non-price elements insofar as they affect price;
  - (b) of the proposed definition would catch output restriction by sellers or buyers;
  - (c) of the proposed definition would recognise that markets can be divided in ways other than by allocation of customers, territories or suppliers (for example, through allocation of functional levels or product lines);
  - (d) of the proposed definition would deal with collective boycotts separately so as to distinguish them from output restriction but on the same liability footing as the other types of provision (unlike the prohibition against exclusionary provisions, which should be repealed);
  - there would be no separate provision for bid rigging – conduct of concern in this regard would be covered by one or more of the restraints defined in (a)-(d), which also would avoid the potential problems associated with joint bidding under s 44ZZRD(3)(c).<sup>9</sup>

### 4.3 Joint ventures

The joint venture exceptions do not operate effectively. They are seriously flawed in the following respects:

- The definition of a ‘joint venture’ under s 4J is far from clear. Collaborations between competitors should qualify for exemption from per se liability if they are pro-competitive or efficient and whether or not they happen to be a ‘joint venture’.
- The joint venture exceptions under ss 44ZZRO and 44ZZRP (and s 44ZZZ(3)) require the joint venture to be ‘for the production and/or supply of goods or

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<sup>9</sup> The Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), as reported by the Commerce Committee in May 2013, deleted the bid-rigging provisions that were in the original Bill. The Commerce Committee Report is available at: [http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH\\_SCR5848\\_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH_SCR5848_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm)

services'. The exclusion of joint ventures for the *acquisition* of goods or services is arbitrary and economically irrational.

- The joint venture exceptions under ss 44ZZRO and 44ZZRP (and s 44ZZZ(3)) require that the joint venture be carried on jointly 'by the parties to the contract' under consideration (ss 44ZZRO(1)(c) and 44ZZRP(1)(c)). This requirement can preclude reliance on a joint venture exception in cases of legitimate joint venture activity where all the parties to the contract do not carry on the joint venture activity jointly.
- The requirement for the joint venture exceptions under s 44ZZRO and s 44ZZRP that the cartel provision in issue be contained in a contract (or a proxy contract) is unduly onerous. Operational decisions or agreements by joint venturers may easily contain a cartel provision (as defined by s 44ZZRD) without being enshrined in a contract even though they are made for the purposes of a legitimate joint venture. The joint venture defence under s 76C does not require that the exclusionary provision in issue be contained in a contract. Nor is there any such requirement under the US, EU and Canadian competition laws on collaborations between competitors.
- The wording 'for the purposes of a joint venture' in ss 44ZZRO, 44ZZRP, and 76C (and s 44ZZZ(3)) is pivotal but highly uncertain. Does it mean: '*solely* for the purposes of a joint venture?'; '*predominantly* for the purposes of a joint venture?'; or '*substantially* for the purposes of a joint venture'? Are the relevant 'purposes' determined objectively or do they depend on the subjective intention of all or some of the parties to the joint venture? Must the cartel provision (or other provision) be reasonably necessary to achieve the commercial objectives of the joint venture?
- The joint venture defence under s 76C is defined in terms of a competition test whereas the joint venture exceptions under ss 44ZZRO and 44ZZRP are not. This divergence in approach is arbitrary. The s 76C defence would lapse if, as recommended in XX of this submission, the prohibitions under s 45(2) relating to exclusionary provisions were repealed.

Specific recommendations to address these issues are as follows:

- A. The joint venture exceptions under s 44ZZRO and s 44ZZRP should be repealed.
- B. A collaborative activity exception based on the exception in s 31 of the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ) (as

reported by the Commerce Committee in May 2013) should be introduced.<sup>10</sup>

The proposed s 31 of the Commerce Act (NZ) provides as follows:

**Exemption for collaborative activity**

- (1) Nothing in **section 30** applies to a person who enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or who gives effect to a cartel provision in a contract, arrangement, or understanding, if, at the time of entering into the contract arrangement, or understanding or giving effect to the cartel provision,—
  - (a) the person and 1 or more parties to the contract, arrangement, or understanding are involved in a collaborative activity; and
  - (b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.
- (2) In this Act, **collaborative activity** means an enterprise, venture, or other activity, in trade, that—
  - (a) is carried on in co-operation by 2 or more persons; and
  - (b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.
- (3) The purpose referred to in **subsection (2)(b)** may be inferred from the conduct of any relevant person or from any other relevant circumstance.

See also the proposed s 82B governing the cartel offence, including subsection (2) which provides:

- In a prosecution under this section, it is a defence, for a defendant involved in a collaborative activity, if—
- (a) the defendant honestly believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity; and
  - (b) that belief existed at the time the defendant entered into or arrived at the contract, arrangement, or understanding that contained the cartel provision, or at the time the defendant gave effect to the cartel provision, as the case requires.

The approach taken in the NZ Bill is based on a considered attempt by the NZ Government to avoid the flaws of s 44ZZRO and 44ZZRP identified above and to reflect the way that competitor collaborations are treated under US, EU and Canadian competition laws.

The proposed collaborative activity exception would apply not only to ‘joint ventures’ but also to consortia, partnerships, strategic alliances, syndicated lending arrangements, lender work-out arrangements for insolvent borrowers, litigation settlement agreements, franchisors and franchisees under a franchise arrangement, and other kinds of collaborative activity between competitors.

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<sup>10</sup> The Commerce Committee Report is available at: [http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH\\_SCR5848\\_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH_SCR5848_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm). See further B Fisse, ‘Proposed NZ collaborative activity exemption’ (e-Concurrences 11 July 2013), also at [http://www.brentfisse.com/images/Fisse\\_Proposed\\_NZ\\_collaborative\\_activity\\_exemption\\_010720\\_13.pdf](http://www.brentfisse.com/images/Fisse_Proposed_NZ_collaborative_activity_exemption_010720_13.pdf). See also J Land, ‘Joint Ventures and the Collaborative Activity Exemption’, Paper at 24<sup>th</sup> Annual Workshop of the Competition Law and Policy Institute of New Zealand, 2 August 2013.

A key requirement of the proposed NZ collaborative activity exception is that the cartel provision be ‘reasonably necessary for the purpose of the collaborative activity’ (or, in the context of a cartel offence, believed by the accused to be reasonably necessary for that purpose). This requirement is comparable to the rule of reason test that applies to collaborative ventures under s 1 of the *Sherman Act* (US) but the proposed statutory test would avoid the complexity of the US case law. Helpful practical guidance on the intended operation of this requirement is set out in the NZ Commerce Commission’s Draft Competitor Collaboration Guidelines (October 2013).

#### **4.4 Supply agreements**

Supply agreements between competitors are highly prevalent in trade and commerce. The competition laws in most countries do not subject such agreements to per se liability for price fixing or other cartel conduct except for some rare and controversial exceptions. The position in Australia is quite different. Under the CCA pro-competitive or harmless supply agreements between competitors may often involve a breach of the civil per se prohibitions against price fixing and other cartel conduct. Moreover, there is a risk of criminal liability for such conduct.

The exposure of supply agreements between competitors to per se liability for cartel conduct is reduced to some extent by the exception for exclusive dealing conduct under ss 45(6) and 44ZZRS of the CCA and by the competition condition in s 44ZZRD(4). However, some everyday kinds of pro-competitive or harmless supply agreements between competitors are not excepted from per se liability.<sup>11</sup> Nor are they excepted by any other provision. Authorisation by the ACCC could be sought but in most situations authorisation is impractical given the cost, delay, publicity and uncertainty of the authorisation process and the limited scope or period of immunity where authorisation is granted.

Provisions such as s 45(6) and s 44ZZRS of the CCA are often referred to as ‘anti-overlap’ provisions. However, this focus on removing or minimising the overlap between different categories of prohibition has diverted attention away from the fundamental policy issue that needs to be addressed. The issue is not whether s 45 should overlap with s 47, or whether ss 44ZZRG and 44ZZRH or ss 44ZZRJ and 44ZZRK should overlap with s 47. The issue is whether vertical supply agreements between competitors should be subject to per se liability for price fixing or other cartel conduct and, if so, in what kinds of situation. Section 45(6) and s 44ZZRS and s 44ZZRD(4) do not address that issue squarely. Nor does any other provision in the CCA. There is therefore a significant gap in the law and one that has generated much unnecessary commercial uncertainty and costly

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<sup>11</sup> See the examples in ACR, Ch 8, Sections 8.6.2-8.6.4.



litigation (see eg *ACCC v Flight Centre Ltd (No. 2)* [3013] FCA 1313; *ACCC v Australia and New Zealand Banking Group* (2013) FCA 1206).

A specific recommendation to address this issue is as follows:

- A. A specific exception for supply agreements between competitors based on the exception in s 32 of the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ) should be introduced.<sup>12</sup>

The proposed s 32 of the Commerce Act (NZ) provides as follows:

**Exemption for vertical supply contracts**

- (1) Nothing in **section 30** applies to a person who enters into a contract that contains a cartel provision, or who gives effect to a cartel provision in a contract, if—
- (a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and
  - (b) the cartel provision—
    - (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, or to the maximum price at which the customer or likely customer may resupply the goods or services; and
    - (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.
- (2) The purpose referred to in **subsection (1)(b)(ii)** may be inferred from the conduct of any relevant person or from any other relevant circumstance.

Such an exception should exclude per se liability for price fixing or other cartel conduct unless the relevant provision in the supply agreement between competitors is a sham or contrivance used in an attempt to get around a cartel prohibition.<sup>13</sup>

**5. Fault-based liability**

Cartel offences should be fault-based, consistent with the general principle that criminal responsibility requires fault. Fault should be required in relation to not only the cartel offences but also the exceptions to those offences, in particular where, contrary to the defendant's belief as to the relevant facts, the physical elements of an exception are not present.

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<sup>12</sup> The Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), as reported by the Commerce Committee in May 2013. The Commerce Committee Report is available at: [http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH\\_SCR5848\\_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH_SCR5848_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm).

<sup>13</sup> It is unlikely that the proposed s 32 exemption would extend to a situation such as that in *ACCC v Flight Centre Ltd (No 2)* [2013] FCA 1313 where the cartel provision in an agreement by Competitor A with Competitor B for the supply of goods or services by Competitor B to Competitor A does not relate to the price or other terms on which Competitor A will supply those goods or services but the price or other terms on which Competitor B will supply such goods or services to third parties. It is questionable whether exemption from per se liability is justified in that type of situation.

Australia's cartel offences are defined in terms of fault elements that are not elements of its civil prohibitions. However, in practice, those additional fault elements may mean little because they would also be present in most cases where civil liability is also likely to arise. If the civil prohibitions are extended to encompass 'concerted practices' (see Part 3 above), the fault elements required for criminal but not civil liability will be more significant as a differentiator between the cartel offences and civil prohibitions.

A further weakness of the Australian regime is that criminal liability for cartel offences can be imposed on the basis of vicarious responsibility.<sup>14</sup> This violates principle and the attempt in s 84(4A) to exclude vicarious responsibility where jail is imposed is an unsatisfactory compromise.<sup>15</sup> An additional concern is that criminal liability can be imposed notwithstanding that the defendant has made a mistake of fact about the physical elements of an exception to the cartel offences and has thereby acted on the basis that an exception applies.<sup>16</sup>

Specific recommendations to address these issues are as follows.

- A. Section 84 of the CCA should be amended so as to exclude vicarious responsibility for the state of mind of a director, employee or agent in all cases where the defendant is subject to liability for a cartel offence;
- B. Exceptions should apply to cartel offences where, on the facts as the defendant takes them to be, an exception applies and the defendant is not at fault in proceeding on that basis.
- C. In the context of liability for a cartel offence, the collaborative activity exception proposed in Part 4.3 above should include a subjective fault element, namely a belief by the defendant that the cartel provision was reasonably necessary for the purposes of the collaborative activity.<sup>17</sup>

## **6. Rules that are workable**

Liability rules, including prohibitions and exceptions, need to be drafted in plain language and structured so as to define and communicate legal obligations clearly, concisely and

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<sup>14</sup> See ACR, Ch 6, Section 6.2.3, Section 6.3.4; Ch 7, Section 7.1.1.

<sup>15</sup> See ACR, Ch 6, Section 6.2.3.

<sup>16</sup> See ACR, Ch 5 Section 5.5.1, Ch 7, Section 7.6.

<sup>17</sup> As under proposed s 82B(2) of the Commerce Act (NZ) under the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), as reported by the Commerce Committee in May 2013. The Commerce Committee Report is available at: [http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH\\_SCR5848\\_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH_SCR5848_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm). See also ACR, Ch 8, p 295.

consistently. This is particularly important in the context of jury trials for cartel offences. At the same time, legal rules should not be unduly prescriptive so as to foreclose the purposive interpretation that may be needed to accommodate economic rationales.

The cartel provisions under the CCA fail the test of workability.<sup>18</sup> They suffer from undue complexity, technicality and prolixity. They have multiple layers, intricate cross relationships, and hidden definitions. These features generate uncertainty and difficulties in formulating intelligible jury directions.

Further, the provisions are excessively prescriptive. This exacerbates the uncertainty by introducing numerous new and untested concepts and terms. It also makes the provisions inflexible and hinders the purposive interpretation needed to ensure that the provisions conform to economic principle and cater for unforeseen circumstances.

Specific recommendations to address these issues are as follows.

- A. The prohibition on exclusionary provisions should be repealed and the definition of ‘cartel provision’ should be reformulated (see Part 4.2 above).
- B. The forms of individual liability for complicity should be rationalised and simplified.<sup>19</sup>
- C. The forms of inchoate liability should be rationalised to bring the CCA provisions into conformity with Pt 2.4 of the *Criminal Code*;<sup>20</sup>
- D. Consideration should be given to the nature and extent of double inchoate liability for cartel conduct and how the danger of abuse should be controlled.<sup>21</sup>

## **7. Individual accountability**

Individuals participating in cartel conduct should be held accountable.

However, the threat of jail, or some other form of legal sanction, should not be seen as the only way to secure individual accountability. Corporations should also be required to hold

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<sup>18</sup> See the recent scathing criticisms by a High Court judge and a Federal Court judge in S Rares, ‘Competition Fairness and the Courts’, Paper at Competition Law Conference, Sydney, 24 May 2014; D Heydon, ‘Is the Competition and Consumer Act 2010 in Competition with Itself’, Paper at Competition Law Conference, Sydney, 4 May 2013.

<sup>19</sup> See ACR, Ch 6, Section 6.3.6.

<sup>20</sup> See ACR, Ch 6, Section 6.4.1.

<sup>21</sup> See ACR, Ch 6, Section 6.4.1.

their individual officers and employees accountable for participating in cartel conduct or failing to prevent it.

The Australian regime recognises the importance of individual accountability by subjecting individuals involved in cartel conduct to liability, civil and criminal, and potentially significant sanctions that include imprisonment and disqualification from management. The value of individual accountability is also reflected by the offence prohibiting the indemnification of penalties and costs associated with cartel proceedings.

That said, the approach taken to individual accountability by the Australian regime relies heavily on the availability of imprisonment as a sanction. No attempt has been made to consider how corporate liability could be used as an avenue for securing individual accountability via corporate internal disciplinary systems.<sup>22</sup> Nor has an adequate attempt been made to make sanctions other than imprisonment, including pecuniary penalties and disqualification orders, more effective against individuals.<sup>23</sup>

Further, the cartel prohibitions and the forms of ancillary liability are vulnerable to evasion by superiors who tolerate and/or exploit unlawful conduct by inferiors under their watch ('shut-eyed sentries') who may use various tactics to avoid personal liability.<sup>24</sup> Managers may also escape being held accountable where enforcement action is brought only against a corporation or only a few of the individuals who participated in the cartel conduct.

Specific recommendations to address these issues are as follows:

- A. Internal disciplinary orders should be introduced against corporations (in particular, with a view to capturing shut-eyed sentries).<sup>25</sup>
- B. ACCC enforcement decisions in relation to individuals should be exposed to a higher level of scrutiny by explicitly empowering to require the ACCC to provide relevant details of enforcement action taken or not taken against individuals when proceeding against a corporation.<sup>26</sup>
- C. The level of civil pecuniary penalties against individuals should be increased (see further Part 11 below).<sup>27</sup>

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<sup>22</sup> See ACR, Ch 6, Section 6.6.

<sup>23</sup> See ACR, Ch 11, Section 11.3.6, Section 11.3.7.

<sup>24</sup> See ACR, Ch 6, Section 6.5.

<sup>25</sup> See ACR, Ch 6, Section 6.6.3

<sup>26</sup> See ACR, Ch 6, Section 6.6.2.

<sup>27</sup> See ACR, Ch 11, Section 11.3.6.

- D. The scope of disqualification orders should be broadened so that an individual subject to a disqualification order is excluded from ‘being involved’ in the management of a corporation (for example, by acting as a consultant or as a significant shareholder).<sup>28</sup>
- E. The scope of the offence against indemnification should be broadened so that it applies to:
- indemnification of employees or agents;
  - indemnification of a fine imposed for a cartel offence; and
  - indemnification of any monetary or non-monetary benefit for the substantial purpose of reducing or off-setting the impact of a penalty or sentence imposed on an individual.<sup>29</sup>

## **8. Corporate accountability**

Corporate liability is a necessary complement to individual liability as a means of holding corporations accountable for cartel conduct.

However, the ‘corporateness’ of corporate cartel conduct should be recognised and reflected by the design and definition of the liability rules and sanctions that apply to corporations engaging in cartel conduct. Such rules should also be designed to help ensure that the law is not vulnerable to corporate manipulation.

Cartel conduct is subject to corporate criminal liability as well as corporate civil liability in Australia.

A further strength of the Australian regime is that corporate civil liability for cartel contraventions is imposed on the basis of vicarious responsibility.<sup>30</sup> Vicarious responsibility guards against the danger of corporations being able to deny liability on the basis of compliance programs that are mere window-dressing.

However, there are weaknesses in the Australian approach to corporate liability for cartel conduct. Firstly, the coverage of liability has gaps. Corporate criminal liability for cartel conduct does not extend to unincorporated associations and Crown immunity has been preserved to an extent that is questionable.<sup>31</sup> Secondly, corporate criminal liability for

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<sup>28</sup> See ACR, Ch 11, Section 11.3.7.

<sup>29</sup> See ACR, Ch 11, Section 11.3.8.

<sup>30</sup> See ACR, Ch 7, Section 7.1.1, Section 7.4.

<sup>31</sup> See ACR, Ch 7, Section 7.3.3, Section 7.3.4.

cartel offences does not require corporate fault.<sup>32</sup> Thirdly, the liability rules and sanctions for cartel conduct are based on humanoid conceptions of wrongful conduct and do not reflect the typical ‘corporateness’ of cartel conduct.<sup>33</sup>

Specific recommendations to address these issues are as follows:

- A. Liability for cartel conduct should be extended to unincorporated partnerships.<sup>34</sup>
- B. Corporate criminal and civil liability for cartel conduct should be extended to the Crown whether or not the Crown is acting through an authority or is itself carrying on a business.<sup>35</sup>
- C. Section 84 of the CCA should be amended to exclude the directing mind principle and extend s 84 to exclusionary and SLC provisions (assuming the prohibition on exclusionary provisions is retained).<sup>36</sup>
- D. The CCA should provide for a defence of corporate reasonable precautions and due diligence.<sup>37</sup>
- E. The CCA should provide for civil liability to orders under ss 80 and 86C for failure to take reasonable precautions and exercise due diligence.<sup>38</sup>
- F. Reactive corporate fault should be made a factor specifically relevant to penalty assessment.<sup>39</sup>
- G. The principles governing the attribution of an exception to a corporation should be clarified.<sup>40</sup>

## **9. Enforcement policy**

It is important that there be an enforcement policy that articulates the roles of and relationship between the agencies involved in anti-cartel law enforcement. The policy should also identify clearly the criteria that govern enforcement decision-making – specifically decision-making as to whether there should be proceedings taken in respect

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<sup>32</sup> See ACR, Ch 7, Section 7.4.

<sup>33</sup> See ACR, Ch 7, Section 7.5.

<sup>34</sup> See ACR, Ch 7, Section 7.3.3.

<sup>35</sup> See ACR, Ch 7, Section 7.3.4

<sup>36</sup> See ACR, Ch 7, Section 7.1.1

<sup>37</sup> See ACR, Ch, Section 7.4.5.

<sup>38</sup> See ACR, Ch, Section 7.4.5.

<sup>39</sup> See ACR, Ch 7, Section 7.5.5.

<sup>40</sup> See ACR, Ch 7, Section 7.6.

of particular conduct, whether the proceedings should be civil or criminal and in what sequence such proceedings should be brought.

While accommodating the need for flexibility and discretion, the policy should be readily accessible and sufficiently detailed, clear and consistent so as to provide certainty and guidance to stakeholders, including those within an agency and external parties. The extent of the detail required in such a policy is inversely related to the extent to which the rules of liability are clearly and properly defined (see Part 4 above).

Various documents encapsulate the policy governing enforcement of Australia's anti-cartel regime and deal with the roles of and relationship between the ACCC and CDPP and the criteria that shape their decision-making in relation to whether to bring proceedings, what type of proceedings to bring and in what order.<sup>41</sup> These documents are the ACCC–CDPP MOU, the CDPP *Prosecution Policy*, the ACCC *Investigation Guidelines* and, to a lesser extent, the ACCC *Compliance and Enforcement Policy*. These documents also contain material relating to immunity and cooperation policies, adding to the material in the ACCC *Immunity Policy for Cartel Conduct* and the ACCC *Cooperation Policy for Enforcement Matters* (proposed to be consolidated as the ACCC *Immunity and Cooperation Policy for Cartel Conduct*).

A weakness of the Australian approach to enforcement policy is the number and the duplicity of policy documents and guidelines. This approach leads to inconsistencies and hinders transparency, accessibility and effective communication of the policy.<sup>42</sup>

Another weakness is that the various policy documents lack detail and clarity in relation to the criteria that govern enforcement decision-making (especially the decision whether or not to treat conduct as a cartel offence) and have numerous gaps, particularly in relation to the roles of and relationship between the ACCC and CDPP.<sup>43</sup> More adequate provision should be made for the potential pitfalls that can easily arise under a bifurcated model of enforcement.<sup>44</sup>

Specific recommendations that have been made to address these issues are as follows:

- A. The ACCC–CDPP MOU should be developed to deal more fully with enforcement roles and decision-making (see immediately below). The ACCC *Investigation Guidelines* should be pared back to deal just with investigation issues<sup>45</sup> and the information relating to immunity and cooperation in the ACCC–

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<sup>41</sup> See ACR, Ch 9.

<sup>42</sup> See ACR, Ch 9.

<sup>43</sup> See ACR, Ch 9, Section 9.3.

<sup>44</sup> See ACR, Ch 9, Section 9.3.1.

<sup>45</sup> See ACR, Ch 9, Section 9.4

CDPP MOU and ACCC *Investigation Guidelines* should be moved to an even further consolidated comprehensive policy on immunity, cooperation and sanctions relating to cartel conduct.<sup>46</sup>

- B. The ACCC–CDPP MOU should address potential areas of vulnerability in the ACCC–CDPP relationship, e.g., information sharing, counsel selection and briefing, bail and sentencing submissions and media statements.<sup>47</sup>
- C. The criteria used to identify cases as candidates for referral and prosecution should be developed to clarify how assessments of economic seriousness and culpability will be made for this purpose.<sup>48</sup>
- D. The gaps in the ACCC–CDPP MOU relating to the roles of individual and corporate liability and to decision-making on referral and prosecution and dual proceedings should be filled.<sup>49</sup>

#### **10. Immunity and cooperation policies**

An immunity policy is a tried and tested way of uncovering cartels that might not otherwise be discovered. To be effective, an immunity policy for cartel conduct should provide maximum transparency and certainty for prospective immunity applicants. It should also be supported by tough sanctions, the extent and application of which is predictable in the event that immunity is not attained. Further, its interaction with other elements of the system for enforcement and compliance should be carefully considered.

The immunity policy should be complemented by a policy governing cooperation by parties that miss out on immunity. Like an immunity policy, a cooperation policy should provide sufficient transparency and certainty as well as predictability and adequacy in the incentives available for cooperation, while not undermining the immunity policy.

The implications for immunity and cooperation of a dual civil/criminal regime and the involvement of an independent criminal prosecutor, in particular, should be carefully considered and spelt out clearly in the relevant policy or policies.

The ACCC *Immunity Policy* offers a powerful inducement to corporations and individuals to approach the ACCC quickly and cooperate by providing information that is likely to result in enforcement actions against other participants in a cartel. The availability of

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<sup>46</sup> See ACR, Ch 13, Section 13.3.9.

<sup>47</sup> See ACR, Ch 9, Section 9.4.

<sup>48</sup> See ACR, Ch 9, Section 9.3.2.2.

<sup>49</sup> See ACR, Ch 9, Section 9.4.



cartel offences and criminal sanctions should mean that participants in cartels have a stronger incentive to apply for immunity than existed prior to the criminalisation of cartel conduct.<sup>50</sup> The ACCC also may more readily access information and assistance from overseas regulators in relation to cartels that have international reach. However, there is a risk that the ACCC has or may become over-reliant on the immunity policy as a means of detecting cartel activity and fail to invest in other pro-active and reactive detection tools that would complement the immunity program.

Pursuant to Annexure B to its *Prosecution Policy*, the CDPP has modified its standard restrictive approach to the granting of immunity by indicating that it makes immunity decisions having regard to the recommendation of the ACCC and based on the same criteria that apply under the ACCC *Immunity Policy*.<sup>51</sup> Decisions about civil and criminal immunity were intended to be communicated to an applicant at the same time and in a timely manner. However, the experience to date has not met aspirations in that regard. Recently proposed changes to the CDPP's approach, involving the provision of a letter of comfort, should assist in facilitating such communication.<sup>52</sup>

The ACCC has used its *Cooperation Policy* to much advantage in securing enforcement outcomes and penalties under the civil regime.<sup>53</sup> However, the implications of the operation of a dual civil/criminal regime for defendants seeking to cooperate are uncertain. The ACCC *Cooperation Policy* is likely to play a more limited role than it has to date and there is much less scope for negotiated outcomes in the criminal context, under the CDPP's policy on charge negotiation. However, it is still possible to achieve greater certainty, transparency and predictability the policy relating to cooperation, in both civil and criminal contexts, than at present.

While the proposed consolidated *Immunity and Cooperation Policy for Cartel Conduct* represents an advance on the existing ACCC policies, there remains considerable scope for further consolidation and improvement.<sup>54</sup> The approach taken by the Canadian Competition Bureau in relation to its Immunity Program and Leniency Program Bulletins is an instructive model in this regard.

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<sup>50</sup> However, to date, this does not appear to be borne out by an increase in immunity applications since the cartel offences were introduced: see C Beaton-Wells, 'The ACCC immunity policy for cartel conduct: Due for Review' (2013) 4 *Australian Business Law Review* 171, 201.

<sup>51</sup> See ACR, Ch 10, Section 10.2.1.2.

<sup>52</sup> See Draft ACCC Immunity and Cooperation Policy for Cartel Conduct, April 2014, p11.

<sup>53</sup> See ACR, Ch 10, Section 10.2.2.1.

<sup>54</sup> See C Beaton-Wells, Submission on the *Review of the ACCC immunity policy for cartel conduct*, 30 September 2013; C Beaton-Wells, 'The ACCC immunity policy for cartel conduct: Due for Review' (2013) 4 *Australian Business Law Review* 171.

Specific recommendations to address these issues are as follows:

- A. The ACCC and CDPP should publish a single policy that deals with immunity, cooperation and sanctions in relation to cartel conduct in the following way:<sup>55</sup>
- in relation to immunity, the policy should explain in detail the criteria and process governing decisions on immunity applications and the roles of the ACCC and CDPP in relation to such decisions (reflecting the material currently in the ACCC–CDPP MOU, ACCC *Immunity Policy* and CDPP *Prosecution Policy*, Annexure B);
  - in relation to cooperation, the policy should explain in detail the criteria and process governing negotiation with cooperating respondents and the roles of the ACCC and CDPP in relation to such decisions;
  - in relation to sanctions, the policy should outline the sanctions applicable to cartel conduct and provide guidance on the approach that will be taken by the ACCC and CDPP to submissions on penalties and sentences;<sup>56</sup>
  - the policy should include sample templates of the following agreements:
    - an immunity agreement for a corporate applicant;
    - an immunity agreement for an individual applicant;
    - a statutory undertaking by the CDPP for a corporate applicant;
    - a statutory undertaking by the CDPP for an individual applicant;
    - a leniency agreement for a corporate applicant; and
    - a leniency agreement for an individual applicant.
- B. The immunity policy should include as a condition of eligibility that the corporate immunity applicant undertake to take reasonable steps to implement a or revise its compliance program.

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<sup>55</sup> See ACR, Ch 10, Section 10.4; Ch 11, Section 11.6.

<sup>56</sup> See ACR, Ch 13, Section 13.3.10. Such guidance should take heed of judicial concerns about the practice of providing recommendations on penalty ranges: see *Barbaro v The Queen* (2014) 88 ALJR 372, as to which see *Australian Competition and Consumer Commission v Flight Centre Limited (No 3)* [2014] FCA 292 at [56]; cf *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2014] FCA 336 (4 April 2014) at [113]-[152].

- C. Without disclosing confidential information, the ACCC should publish annually details of the use and outcomes under its immunity policy.
- D. The ACCC should invest resources in developing a range of pro-active methods of detecting cartel conduct with a view both to strengthening and reducing its reliance on its immunity policy. Such measures could include a policy of offering monetary rewards to whistleblowers (persons who are not implicated in the relevant conduct), similar to the approach taken in the UK and Korea.
- E. The protections against intimidation or victimisation of those who report cartel conduct provided by s 162A of the CCA should be strengthened, having regard to similar initiatives taken recently to protect cartel whistleblowers in the US and Canada, and experience under a range of whistleblowing provisions under other domestic Australian legislation.

## **11. Effective sanctions**

The sanctions available against individuals and corporations for cartel conduct need to be well designed to achieve the objects of the legal regime (see Part 12 below). Given the limitations of monetary penalties, non-monetary sanctions also need to be available. Monetary penalties are unlikely to achieve the aim of deterrence unless imposed in an amount sufficient to provide a credible threat.

The principles governing the determination of sentences and penalties need to be clear and consistent and expressed in a form that recognises the characteristics of corporate as well as individual offenders (see Part 8 above).

A key strength of the Australian approach to cartel sanctions is that provision is made for monetary sanctions that reflect the harm/gain associated with the conduct. Further, the CCA provides not only for monetary sanctions against individuals and corporations but also for non-monetary sanctions. The non-monetary sanctions against individuals for a cartel offence include jail and for, a cartel offence or civil contravention, disqualification from managing a corporation. For corporations, the non-monetary sanctions that can be imposed for cartel offences or civil contraventions include probation orders, community service orders and adverse publicity orders.

However, there has been a failure to exploit the civil sanctions that are available as a means of achieving higher levels of deterrence. Monetary penalties have been too low,<sup>57</sup> while non-monetary sanctions have been under-utilised and are poorly designed.<sup>58</sup> The

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<sup>57</sup> See ACR, Ch 11, Section 11.3.1, Section 11.3.6.

<sup>58</sup> See ACR, Ch 11, Section 11.3.5.

application of criminal sanctions is likely to be compromised by weaknesses in federal sentencing law and, in the absence of precedent and relevant overseas comparators, there is considerable uncertainty as to how the ACCC, CDPP and courts are likely to approach the task of sentencing cartel offenders.<sup>59</sup>

Specific recommendations to address these issues:

- A. Less reliance should be placed on ACCC settlements to secure civil penalties and the ACCC should be less conservative in its ‘negotiations’ as to agreed penalties.<sup>60</sup>
- B. A more structured and transparent approach to penalty calculations should be adopted by the ACCC – consideration should be given, in particular, to adopting the concept of a ‘base fine’ based on turnover or volume of affected commerce as a means of reflecting the gravity of the contravening conduct in terms of the gain yielded or harm caused, and to which adjustments are then made by applying aggravating and mitigating factors.<sup>61</sup>
- C. Greater use should be made of non-monetary sanctions against corporations and the range of such sanctions should be expanded to include more punitive options.<sup>62</sup>
- D. There should be a publicly accessible bench book on federal sentencing law and procedure.<sup>63</sup>
- E. The key recommendations made by the ALRC in relation to sentencing and the amendment of Pt IB of the *Crimes Act* should be implemented.<sup>64</sup>
- F. A consolidated ACCC–CDPP policy on immunity, cooperation and sanctions in cartel cases (see Part 10 above) should identify and explain the approach that the ACCC and CDPP will take to sentencing submissions, including their views on the purposes and principles of sentencing, as well as aggravating or mitigating factors and the types of sanctions that the ACCC and CDPP will regard as appropriate in cartel sentencing.<sup>65</sup>

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<sup>59</sup> See ACR, Ch 11, Section 11.4.

<sup>60</sup> See ACR, Ch 11, Section 11.3.2.

<sup>61</sup> See ACR, Ch 11, Section 11.3.3.

<sup>62</sup> See ACR, Ch 11, Section 11.3.5.

<sup>63</sup> See ACR, Ch 11, Section 11.6.2.

<sup>64</sup> See ACR, Ch 11, Section 11.6.2.

<sup>65</sup> See ACR, Ch 11, Section 11.6.2; see also Ch 10, Section 10.4.

## 12. Deterrence, punishment and compensation through public and private enforcement

Deterrence is an important object of an anti-cartel regime. However, the objects of a dual civil/criminal regime governing cartel conduct should not be confined to deterrence. In addition to deterrence, the objects should include punishment and compensation.

To facilitate the attainment of each of these objects, adequate provision should be made for both public and private modes of enforcement. Further, mechanisms are needed for reconciling tensions between public and private enforcement so to ensure that neither is unduly compromised by the other.

By providing for both civil and criminal liability and sanctions, Australia's regime has the armoury to achieve the objects of both deterrence and punishment. It also has a public enforcement agency that is well-equipped to pursue enforcement action directed at those aims. The ACCC is an independent, activist and experienced agency that is generally respected or feared by the business community. Enforcement action by the ACCC has resulted in numerous cases of cartel conduct where the ACCC has secured penalties and where the conduct and the penalties have received considerable publicity in the media.

The CCA also has long-standing provisions that empower private actions for damages to compensate for losses caused by cartel conduct (ss 82 and 87). However, contrary to trends overseas (in the US and EU in particular), the important role of private enforcement in securing compensation has been inadequately recognised and supported, relative to the emphasis given to public enforcement.<sup>66</sup> Private claimants face substantial and, in several respects, unnecessary hurdles in prosecuting their claims. These include:

- uncertainty as to when the limitations period commences;
- requirements imposed by s 5 of the CCA to seek ministerial consent in relation to proceedings involving extraterritorial conduct;
- difficulties in obtaining access to information generally and information from the ACCC in particular;
- the apparent inability to rely on admissions made in ACCC proceedings, owing to the uncertain scope of s 83 of the CCA;
- challenges in proving and quantifying loss, including uncertainty surrounding the concept of causation in the context of s 82 and relatedly, the uncertainty relating to the status of the 'pass on / through' defence in Australia.

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<sup>66</sup> See C Beaton-Wells and K Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35(3) *UNSW Law Journal* 650.

Further, where there is potential for private actions to undermine public enforcement (the effectiveness of immunity and cooperation policies, in particular), insufficient attention has been given to ways in which to accommodate the functions of both.<sup>67</sup>

Specific recommendations to address these issues are as follows:

- A. Section 82(2) of the CCA should be amended to provide that a cause of action for damages will only accrue, and hence the limitations period commence to run, from the time that the plaintiff knows or can be reasonably expected to know about the behaviour that is the subject of the alleged contravention.
- B. The ministerial consent requirements imposed on private litigants pursuing damages in relation to international cartel activity should be removed or relaxed.<sup>68</sup>
- C. Operation of the ‘protected cartel information’ scheme under ss 157(1A), 157B-D of the CCA, should be reviewed to ascertain whether it has struck the right balance between the competing interests affected by the scheme and, in particular, consideration should be given to including the interests of private claimants as a relevant factor in the exercise of ACCC and judicial discretion in relation to the disclosure of PCI.<sup>69</sup>
- D. The ACCC should require cooperating respondents to make reasonable admissions as to any harm caused or likely to have been caused by their conduct for the purposes of agreed statements of facts.
- E. Section 83 of the CCA should be amended to provide that ‘findings of fact’ for the purposes of that section include facts that are agreed or admitted so as to ensure that private litigants derive the full benefit of ACCC settlements in bringing follow-on actions.<sup>70</sup>
- F. The courts should explore ways in which to encourage respondents to cooperate with private claimants and reward payment of compensation when setting pecuniary penalties or fines, consistent with the approach taken under s 79B.<sup>71</sup>
- G. Consideration should be given to measures that would incentivise immunity applicants to cooperate with private claimants and more generally to facilitate settlement in cases involving multiple respondents. Such measures could include limiting an immunity applicant’s liability to the harm caused to its own direct or indirect purchasers or, more generally, the removal of joint and several liability

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<sup>67</sup> See ACR, Ch 10, Section 10.3, Ch 11, Section 11.5.

<sup>68</sup> See ACR, Ch 2, Section 2.3.2.

<sup>69</sup> See ACR, Ch 10, Section 10.3, Section 10.4.

<sup>70</sup> See ACR, Ch 11, Section 11.5.2.

<sup>71</sup> See ACR, Ch 11, Section 11.5.3.

for cartel conduct, removal of rights of contribution between cartel members, or to similar effect, the introduction of bar orders similar to those available in Canada.

- H. The concept of punitive redress facilitation orders should be explored as part of a reconsideration and overhaul of non-monetary sanctions against corporations. Such orders would enable a court to require a corporate contravenor to prepare and publish a form of victim impact report setting out, to the extent that is known or should reasonably be known, details of the transactions affected by the contravening conduct and categories of persons likely to have been affected as a result of the conduct.<sup>72</sup>

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<sup>72</sup> See ACR, Ch 11, Section 11.3.5.