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**WORKING PARTY ON CRIMINAL  
PENALTIES FOR CARTEL  
BEHAVIOUR**

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## EXECUTIVE SUMMARY

### 1 THE WORKING PARTY'S TASK

On 3 October 2003, the Treasurer announced a working party would consider whether an appropriate criminal offence for cartel conduct could be introduced into Australian law. The Government had accepted, in principle, the recommendation of the Review of the competition provisions of the *Trade Practices Act 1974* (the Dawson Review) that criminal penalties for serious cartel conduct be introduced. However, this was subject to a working party finding practical solutions to the problems that would arise in introducing criminal sanctions, as identified by the Dawson Review.

Principally, the problems identified in the Dawson Review centred on appropriately defining a criminal offence and implementing a leniency or immunity policy. However the working party had to resolve other related issues such as the implications of introducing criminal sanctions for the conduct of cartel investigations and the nature of appropriate penalties.

The working party comprised officials from the Department of the Treasury, the Attorney-General's Department, the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Director of Public Prosecutions (DPP).

#### 2.1 DEFINING THE OFFENCE

The first issue to resolve was the definition of what particular elements would set serious criminal cartel behaviour apart from other cartel conduct. Such elements had not previously been defined in a way that could be proved to a criminal standard in Australian law.

To define the criminal element, the working party discussed the notions of secrecy (cartel members concealing their conduct from the market) and dishonesty (cartel members deceiving the market dishonestly).

Establishing that the conduct was secret would differ from establishing it was dishonest. Establishing secrecy would require proving beyond reasonable doubt that the parties to the agreement did not make the agreement known to their customers or others, such as the regulatory authorities, and were reckless as to whether the agreement would be known to them. Establishing dishonesty would require proving

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beyond reasonable doubt that the agreement was dishonest according to ordinary people's standards, and that the parties to the agreement knew that it was dishonest according to those standards.

Hence, dishonesty would offer a less certain test than secrecy. This means it may be difficult for a jury to determine what is dishonest according to ordinary people's standards, particularly as these may vary. This could make the application of the dishonesty test inconsistent, creating uncertainty for business in making commercial agreements.

The working party recommends the use of secrecy to define serious cartel conduct. Secrecy is a critical element of serious cartel conduct because the economic harm to consumers results from them purchasing goods and services believing that price and supply were determined competitively, and the behaviour would be condemned and stopped, if discovered. Secrecy is a more certain test than dishonesty, and provides a simple mechanism for legitimate collaborative business arrangements to avoid criminal liability.

To provide certainty to business and to ensure the criminal cartel offence would be specific in dealing with serious cartel conduct, firms that want to enter legitimate collaborative arrangements that contain provisions that could otherwise be considered criminal cartel behaviour, could notify the ACCC before entering into the arrangements. This recognises the need for business certainty when entering such arrangements, where they may not be disclosed to the market.

Thus, notification to the ACCC would provide a general defence against accusations of secrecy.

## **Recommendations**

The working party recommends:

2.1.1 The concept of secrecy be used to distinguish criminal cartel conduct from the conduct caught by civil contraventions in the *Trade Practices Act 1974*.

2.1.2 Establishing secrecy requires proof of:

- the physical element (that the agreement was not generally known to customers); and
- the fault element (that the defendant was reckless as to whether the agreement was generally known to customers).

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2.1.3 The cartel offence capture price fixing, output restrictions, bid rigging and market sharing. In addition to the requirement for secrecy, the physical elements of the cartel offence (all of which must be satisfied) should comprise that:

- an agreement is made between two or more parties;
- the parties who made the agreement are competitors in the supply or acquisition of goods or services in a particular market; and
- the agreement is to fix prices, constrain supply, divide or allocate markets or rig bids.

2.1.4 The criminal cartel offence apply to individuals and corporations by incorporating it in the *Competition Code*, that is, Part IV (Restrictive Trade Practices) and Schedule 1 of the *Trade Practices Act 1974*.

2.1.5 The offence apply to all those who engage in criminal cartel conduct, regardless of size.

2.1.6 It would be a defence to notify the ACCC of the arrangement in writing before making or implementing the arrangement, or to have known that the ACCC had been so notified.

2.1.7 The following not be covered by the criminal cartel offence:

- existing general exemptions under the *Trade Practices Act 1974*;
- activities exempted from the per se price fixing provision (section 45A of the *Trade Practices Act 1974*), taking into consideration amendments to these flowing from Dawson recommendations 8.1 and 8.2; and
- other arrangements permitted under the civil regime.

## **2.2 IMMUNITY FOR CARTEL WHISTLEBLOWERS**

A major issue to resolve if serious cartel conduct is criminalised would be how to deal with people who helped in the detection and prosecution of the offence.

While imprisonment can deter criminal cartel conduct, international experience shows use of an immunity policy can assist in discovering serious cartel conduct. This, in turn, enhances the deterrent effect of criminal penalties. Since secrecy is a critical element of serious cartel conduct, and detection and exposure of cartels often relies on a cartel member breaking that secrecy, protection for possible whistleblowers is important.

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Generally, such a policy is accepted as an effective means of uncovering cartel conduct where immunity can be offered before an investigation begins. In Australia, however, the discretion to provide immunity from criminal prosecution is currently exercised by the DPP at the conclusion of an investigation. The exercise of this discretion is guided by the *Prosecution Policy of the Commonwealth* (Prosecution Policy).

This difficulty could be overcome if the Prosecution Policy were amended to enable the DPP to offer immunity at an early stage, where the ACCC recommends immunity and where the applicant meets certain conditions (see recommendation 2.2.2). Canada has a similar arrangement under its immunity policy and it appears to operate smoothly. In Canada, early and close cooperation between the Competition Bureau and the Department of Justice when a party approaches the Competition Bureau for immunity means the Attorney General usually follows any Bureau recommendation to grant immunity.

## Recommendations

The working party recommends:

- 2.2.1 Introducing an immunity policy with immunity granted by the DPP, as an undertaking under section 9(6D) of the *Director of Public Prosecutions Act 1983*, on recommendation by the ACCC and where the applicant meets certain conditions (specified in 2.2.2, below).
- 2.2.2 Amending the *Prosecution Policy of the Commonwealth* to provide that in cases of serious cartel conduct, the DPP may exercise his or her power to grant immunity by giving an undertaking under the *Director of Public Prosecutions Act 1983* where certain conditions are satisfied. These conditions would be:
  - the ACCC was not aware of the conduct;
  - the party was the first to come forward;
  - the party was not a clear individual leader;
  - the party had not coerced anyone to join the cartel; and
  - the party fully cooperates with the ACCC in providing full and truthful information and attending court to give evidence as required.
- 2.2.3 Dealing with subsequent applicants for immunity under the existing *Prosecution Policy of the Commonwealth*.
- 2.2.4 Publishing the immunity policy to ensure a clear understanding of the immunity programme.

## 2.3 MANAGING PARALLEL CIVIL AND CRIMINAL PROVISIONS

A subsequent issue to be resolved was what procedures and arrangements would need to be in place to investigate and prosecute a criminal cartel offence.

In Australian law, proving criminal cartel conduct will involve different procedures to proving a civil contravention and investigation and prosecution of a criminal cartel offence would involve more than one agency. This implies the need for clear procedures in handling cases, for example in deciding whether to pursue a civil or criminal investigation, and effective cooperative arrangements between the responsible agencies.

More specifically, while the ACCC can litigate civil cases under the Trade Practices Act, the DPP is responsible for deciding whether to prosecute a criminal case under federal law. Some restrictions on the use of evidence in multiple proceedings, and the higher standard of evidence in criminal cases, also make it desirable for investigators to determine early on in an investigation whether civil or criminal proceedings are appropriate. This will require the ACCC to consult the DPP accordingly.

It is proposed the ACCC and DPP manage these arrangements through a Memorandum of Understanding (MOU) to provide a clear statement of their roles and responsibilities. The ACCC also would release guidelines, developed in consultation with the DPP, which outline in general terms the factors relevant to determining whether to pursue a criminal or a civil investigation, and under which circumstances matters will be referred to the DPP (see Appendix A, Box A.3).

The existence of parallel civil and criminal provisions for potentially the same conduct could give rise to issues concerning double jeopardy, and raise practical issues in, for example, the order in which matters are litigated and the appeals process. Therefore, statutory bars should be incorporated in the Trade Practices Act to provide protection in terms similar to those in the *Corporations Act 2001*.

### Recommendations

The working party recommends:

2.3.1 Maintaining the distinction between the investigation and prosecution of a matter in criminal cartel cases. The ACCC will undertake investigations of, and the DPP will prosecute, criminal cases.

2.3.2 The ACCC and the DPP enter a Memorandum of Understanding that would:

- specify the responsibilities of each agency;

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- establish standards of cooperation between agencies in the investigation and litigation process;
- outline channels of communication to establish adequate liaison;
- indicate selection criteria for the referral of cases to the DPP; and
- specify processes for the consideration of immunity applications.

2.3.3 The ACCC publish guidelines, prepared in consultation with the DPP, which outline in general terms the criteria that will inform decisions as to whether to pursue a criminal or a civil investigation, and in which circumstances matters will be referred to the DPP.

2.3.4 The incorporation of statutory bars in the *Trade Practices Act 1974* to provide protection against double jeopardy in terms similar to those in the *Corporations Act 2001*.

## 2.4 SETTING THE PENALTY

The final issue to resolve was the appropriate penalties for a criminal cartel offence. These penalties would need to reflect the serious nature of the crime and be consistent with the treatment of other similar crimes in Australian law, and cartel offences internationally.

Penalties also would need to take account of the Dawson Review's recommendations on civil penalties under the Trade Practices Act, and other consequences of a criminal conviction.

The working party considered that a maximum term of imprisonment of five years would be appropriate in the Australian context, and was also within the range prescribed by other jurisdictions. The maximum fine for a person would be \$220,000 (2,000 penalty units). Under the *Crimes Act 1914* this implies a default maximum fine of \$1.1 million for corporations (five times the fine for individuals). Treasury and the ACCC note that a fine of this magnitude could be well below that applying in the civil regime (which is to be strengthened on the basis of Dawson Review recommendation 10.2.1). Treasury and the ACCC recommend that the maximum fine for a corporation mirror the civil fines.

The Attorney-General's Department recommends a maximum fine for a corporation of \$2.2 million given the other consequences of criminal convictions, including the application of the *Proceeds of Crime Act 2002*. While a cartel that operated for many years could have defrauded consumers for significantly more than \$2.2 million, it

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would be possible for proceedings to be brought under the Proceeds of Crime Act to confiscate further assets of the corporation, however the amount that would be applied for would be determined by the DPP.

Therefore, the working party recommends that the Government consider whether the maximum fine for a corporation should mirror the civil fine that will be introduced on the basis recommended by the Dawson Review, or whether the maximum fine for a corporation should be \$2.2 million, given the other consequences of a criminal conviction.

### **Recommendations**

The working party recommends:

- 2.4.1 The maximum term of imprisonment for a person be a five-year term.
- 2.4.2 The maximum fine for an individual be \$220,000 or 2,000 penalty units.
- 2.4.3 The Government consider whether:
  - the maximum pecuniary penalty for a corporation should mirror the civil penalty that will be introduced based on Dawson Review recommendation 10.2.1; or
  - the maximum pecuniary penalty for a corporation should be \$2.2 million, given the other consequences of a criminal conviction.
- 2.4.4 Other remedies apply under sections 80, 86C, 86D, 87 and 87A of the *Trade Practices Act 1974* where a person or corporation is convicted of the criminal cartel offence.
- 2.4.5 Consistent with Dawson Review recommendation 10.2.2, a person may be banned from being involved in managing a corporation if that person is convicted of the criminal cartel offence.

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## 2.5 OVERALL WORKING PARTY FINDINGS

The prohibition of serious cartel conduct is important because, to the extent that the evidence is available, it causes significant economic harm. This harm arises because consumers pay higher prices for goods and services in markets where cartels operate and cartels have negative consequences for the efficient operation of the economy.

In countries that have introduced criminal sanctions for serious cartel conduct, it has essentially been viewed as a fraud against or theft from consumers.

The Government has accepted, in principle, the Dawson Review recommendation that criminal penalties be introduced, subject to the working party finding solutions to the problems identified by the Dawson Review.

The working party considers it has been able to find practical solutions to the problems identified by the Dawson Review so as to make a criminal cartel offence workable in Australia.

Introducing criminal penalties for cartel conduct would support competitive markets, which benefit consumers and the economy through lower prices and increased choice, provide sustainability of supply and incentives for firms to innovate and reduce their costs.

### **Recommendation**

The working party recommends:

- 2.5 That criminal sanctions should be introduced for serious cartel behaviour, on the basis of the arrangements set out in this report.

## Part 1: OUTLINING THE ISSUES

### THE TASK OF THE WORKING PARTY

On 16 April 2003 the Treasurer announced that the Government had, in principle, accepted the proposal by the Dawson Review to introduce criminal sanctions for serious cartel behaviour, subject to a working party further examining the issue.

The Dawson Committee was persuaded that criminal sanctions would deter serious cartel behaviour and should be introduced; however, a number of problems first needed to be solved, and these should be further examined by a working party of officials from the Department of the Treasury, the Attorney-General's Department, the ACCC and the DPP.

On 3 October 2003, the Treasurer announced terms of reference for the working party to consider whether appropriate criminal offences for cartel behaviour could be introduced into Commonwealth law (Appendix B).

The two main issues the working party was asked to address were the development of an appropriate definition for a criminal cartel offence and a workable method of combining a clear and certain leniency or immunity policy for cartel whistleblowers within the criminal regime.

The working party was also asked to consider relevant matters related to the *Criminal Code Act 1995* (Criminal Code) and other legislation that establishes general principles for the framing and prosecution of criminal offences, and certain operational matters, such as the conduct of investigations.

### CARTEL BEHAVIOUR

Competitors form cartels by agreeing to act strategically in a market to manipulate pricing and supply. This strategic behaviour can take many forms. Cartels increase prices to consumers and reduce choice in the goods and services available in the market. Cartels also constrain the achievement of efficiencies and innovation in the market by supporting uneconomic production processes and enabling firms to maintain high costs.

The OECD defines hard core cartel conduct as anticompetitive agreements, concerted practices or arrangements where competitors fix prices, tender collusively, restrict output or establish quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. This definition does not include activities permitted or authorised by law, including efficiency enhancing arrangements, such as those that reduce costs or enhance output.<sup>1</sup>

This description of serious cartel conduct potentially captures a range of activities.

In Australia, price fixing is the only serious cartel conduct, as defined by the OECD, that is specifically prohibited by the Trade Practices Act. Section 45A prohibits a contract, arrangement or understanding between competitors to fix, control or maintain prices, or discounts, allowances, rebates or credit. The other activities listed by the OECD would fall under the general prohibition on exclusionary provisions (as defined in section 4D of the Trade Practices Act) and contracts, arrangements or understandings that substantially lessen competition, in section 45 of the Trade Practices Act.

## International and Australian evidence

While studies have contributed to the understanding by governments and regulators of the effects worldwide of cartels, the impact of cartels on markets and the broader economy remains difficult to quantify. Such a calculation would require a comparison of the actual market situation under a cartel to that which would exist in a hypothetical competitive market. This analysis is seldom done by competition law enforcers because of its difficulty. Furthermore, it is not required for a successful litigation. Proxies have been developed such as looking at price mark up, but even this calculation can be difficult.<sup>2</sup>

An OECD survey of member countries found that the total commerce affected<sup>3</sup> by cartels in 16 cases exceeded US\$55 billion.<sup>4</sup> The survey also showed that there are significant variations in a cartel's impact on the price mark-up, and in some cases it is as much as 50 per cent or more.<sup>5</sup> The OECD is of the view that these cases represent a fraction of cartel activity.

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1 OECD Council (1998) *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, adopted by the Council at its 921st session on 25 March 1998 and reprinted in OECD (2002) *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris, p106.

2 OECD (2003) *Hard Core Cartels, Recent Progress and Challenges Ahead*, OECD Publications, Paris, p9.

3 Total revenues in a product line affected by a cartel.

4 Note 2, p9.

5 OECD (2002) *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris, p72.

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Hence the OECD has recommended Member countries ensure their laws adequately prohibit cartels and provide for effective sanctions, enforcement procedures and investigative tools with which to combat it.<sup>6</sup> The OECD also has been active in trying to enhance public understanding of the harm associated with cartels.

Cartel activity is both international and domestic. Some international cartels (including those colluding in lysine, vitamins and graphite electrodes) have received significant press. According to the OECD survey, the number of reported international cartels is relatively small, but the amount of commerce affected disproportionately large. While most reported cartels are domestic, they too can cause significant economic harm.

According to the OECD, domestic and international cartels tend to share the common characteristics of high concentration in the relevant market, homogeneous products and existence of an industry trade association that provided cover to the cartel meetings and facilitated their agreement in other ways.<sup>7</sup>

The Australian economy has not been immune to the detrimental economic effects of international and domestic cartel activity (Table 1.1). An example is the express freight cartel through which three of Australia's major express freight companies were able to escape detection for 20 years and hold 90 per cent of the market. This cartel was worth more than \$1 billion per annum. Using the OECD estimate above, the three firms may have benefited to the tune of \$3 to 4 billion.

A summary of some cartel cases prosecuted in Australia provides an insight into the type of activity, and the commerce affected (Table 1.1). Two case studies are provided in Boxes 1.1 and 1.2.

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6 Note 1.

7 Note 2, p.10.

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**Table 1.1: Cartel cases prosecuted in Australia**

Industry /name of case	International/Domestic	Type of cartel activity	Cartel duration	Affected commerce
Mayne/Nickless/TNT (express freight cartel)	Domestic	Market sharing/price fixing	It is believed to have commenced in the 1970's. It did not finish until 1992.	Cartel affected 90 per cent of \$1-2b market, cartel profit approx \$3-4b (assuming 15-20 per cent price increase).
Pre-mixed concrete case	Domestic	Market sharing/price fixing	5 years pleaded. But the arrangements existed for at least 10 years. Unknown date of commencement. Terminated in 1994.	Value of product sold in period (roughly) \$950m. No estimate of impact on price.
Animal vitamin cartel case	International	Price fixing	1994-1998.	Gross sales of affected products in excess of \$100m. No estimate of impact on price.
Fire protection cartel	Domestic	Bid rigging	1992-1997 pleaded, but the conduct commenced in the mid 1980's.	Economic harm approx \$45m. Affected commerce approx \$500m.
Transformer cartels	Domestic	Price fixing/bid rigging	Power: 1993-1995. Distribution: 1995 — 1998.	Power: Market worth \$60m per annum. Distribution: Market worth \$100m per annum. Participants held almost 100 per cent of the market. No estimate of impact on price.
Queensland foam cartel	Domestic	Price fixing/ market sharing	10 years.	No reliable estimate available.
Tasmanian frozen food cartel	Domestic	Price fixing	1991-1995 pleaded. However, there was evidence of ad hoc price fixing for at least 20 years.	The four market participants held 80-90 per cent of the market. Estimated price rise of 10-20 per cent. Gross turn-over of defendants in all markets exceeded \$50 m.

Source: Australian Competition and Consumer Commission.

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**Box 1.1: Case study — pre-mixed concrete cartel (domestic)**

The Pioneer, Boral and CSR cartel involved price fixing and market sharing in the pre-mixed concrete market in south-east Queensland from 1989 until 1994. Participants had more than 50 regular meetings and phone conversations that fixed prices, agreed on market shares and agreed not to compete on specified major projects. Company executives agreed, either at meetings or by telephone, which company would succeed in tendering for supply to specific projects. 'Unsuccessful' companies agreed to quote prices at a level designed to ensure the nominated company secured the work.

Companies also maintained market shares, recognised certain customers (referred to as 'pets') belonged to certain suppliers and agreed not to compete for their business. Participants even engaged an accountant to monitor market shares and enforce compliance with the agreement.

Penalties of \$6.6 million were imposed on each company and six executives received penalties up to \$100,000. The conduct was particularly reprehensible because each company or other companies within the groups had previously been found to have engaged in similar conduct. The behaviour did not cease after the introduction of the higher statutory penalties in 1993.

Source: Australian Competition and Consumer Commission

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**Box 1.2: Case study — animal vitamins (international)**

Three international pharmaceutical companies fixed the price for animal vitamins A and E, used primarily in poultry, swine and ruminant industry feeds.

The ACCC's investigation followed US Department of Justice proceedings against F. Hoffmann-La Roche Limited and against BASF Aktiengesellschaft. The ACCC's investigations revealed that arrangements were entered into between these two companies and a third, Aventis Animal Nutrition SA (formerly known as Rhone-Poulenc Animal Nutrition SA), to share the market and fix prices for the supply of animal vitamins A and E in various countries, including Australia.

The ACCC alleged that the arrangements in Australia involved senior management and involved regular meetings and telephone conversations to agree on the prices the companies would use to sell animal vitamins A and E in Australia and allocate tenders for some major customers.

The three respondents controlled around 90 per cent of the market and customers had limited alternative sources of supply. Australian arrangements started in 1994 and continued until 1998.

The cartel continued despite the companies involved being aware of the illegality of the conduct and after the court handed down multimillion dollar penalties in the freight and concrete industries.

The Federal Court imposed penalties totaling \$26 million. In the United States fines totaling US\$725 million were imposed.

Source: Australian Competition and Consumer Commission

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## **Part 2: RESOLVING THE ISSUES**

### **2.1 DEFINING THE CARTEL OFFENCE**

#### **Task of the working party**

The Dawson Review concluded that there are a number of difficulties in defining cartel behaviour and identifying the elements of cartel behaviour that would differentiate a criminal offence from a civil breach.

The Dawson Review examined the approach of the United Kingdom, which uses the test of dishonesty to identify serious, criminal cartel behaviour. It also examined the approach in Canada, where price fixing and market sharing involves the test that such behaviour unduly prevents or lessens competition. The Dawson Review considered that these sorts of tests were likely to cause difficulties for juries, as they would require a jury to make a subjective assessment of a person's intentions when forming the cartel or make a finding based on complex economic evidence.

The Dawson Review also identified a number of other issues in appropriately defining a cartel offence, for example whether criminal penalties should apply to both individuals and corporations, and whether criminal penalties should apply to businesses regardless of their size.

The working party therefore was required to consider whether a satisfactory definition of serious cartel behaviour that should be subject to criminal sanction can be developed.

#### **Working party's response**

The working party considered that an appropriate definition of the offence should be sufficiently clear to allow all elements of the offence to be able to be proven beyond reasonable doubt, and be framed so as not to capture collaborative business arrangements not detrimental to competition.

In addition, it must operate within the existing Commonwealth legal framework, including that established by the Criminal Code.

The working party also considered there should be guidance to investigators and prosecutors on whether a matter should proceed civilly or criminally.

### **Defining serious cartel conduct**

In 1998, the OECD recommended member countries ensure that their competition laws halted and deterred hard core cartels.<sup>8</sup> The OECD defined serious cartel conduct as a concerted anticompetitive agreement, practice or arrangement by competitors to fix prices, rig bids, restrict output or establish quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.

For civil contraventions, the Trade Practices Act already prohibits conduct in the OECD's definition. However, only price fixing is set out explicitly, in section 45A. Exclusionary provisions (as defined in section 4D) are prohibited per se, and case law has defined the scope of exclusionary provisions to capture bid rigging, output restrictions, and sharing and dividing markets.

### **Defining the requisite degree of criminality**

A critical issue for the working party identified in the Dawson Review was how to distinguish serious cartel conduct that should be subject to criminal sanction from other conduct.

A recent OECD survey confirms that parties to cartel agreements recognise their conduct is harmful and unlawful and involves deliberate, organised and covert efforts to deceive the market.<sup>9</sup> For example:

- The conspirators in the US vitamins cartel went to great lengths to keep track of and destroy incriminating documents, including conducting internal audits to verify that such documents no longer existed and copying spreadsheets dividing up business onto disks and hiding them in the eaves of one employee's grandmother's house.
- In an international graphite electrodes case, top-level executives from major producers met to agree on the basic rules of how the cartel operated. Charts of anticipated demand, actual sales and target prices were created for world-wide markets at these meetings.

In attempting to capture this intent to deceive the market, the working party considered notions of dishonesty (that the parties deceived the market dishonestly) and secrecy (that the parties concealed their conduct from the market) as alternative

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8 Note 1, p106.

9 Note 2, pp11-12.

ways of defining criminality that could provide a principled and targeted means of differentiating criminal and other cartel conduct.

### **Dishonesty**

Dishonesty is used as the fault element in the UK to identify criminal cartel behaviour, but this law is, as yet, untested.

Under subsection 130.3 of the Criminal Code dishonesty is defined as:

- dishonest according to ordinary people's standards; and
- known by the defendant to be dishonest according to ordinary people's standards.<sup>10</sup>

Courts, prosecutors and the legal community are familiar with the concept of dishonesty as it is used in some other criminal offences, most notably in fraud related offences.

If a criminal cartel offence required the dishonest making of a cartel agreement, the prosecution would need to prove beyond reasonable doubt not only that the parties entered into an agreement that was inherently dishonest, according to ordinary people's standards, but that they entered into the agreement in a dishonest manner, according to the same standards.

References to ordinary people's standards may confuse a jury inexperienced in sophisticated or robust business affairs, or lacking an understanding of the competitive process. The defence may argue that the cartel behaviour was in the company's commercial interests, even though it was demonstrated to be detrimental to competition and the interests of consumers, and therefore could not have been dishonest. In addition, ordinary people's standards may vary. This could make the application of the dishonesty test inconsistent, creating uncertainty for businesses in making commercial agreements for collaborative business arrangements.

Accordingly, dishonesty may not be suitably precise in targeting serious cartel behaviour.

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<sup>10</sup> This definition is based on the Ghosh test, a familiar concept in Australian law. Paragraph (a) of the definition of dishonest seeks to achieve this by linking the definition of dishonesty to community standards and paragraph (b) of the definition requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people. This is crucial if the Criminal Code is to be true to the principle that for serious offences a person should not be convicted without a guilty mind. The question of whether a person is dishonest is only appropriate for the jury (or court, if there is no jury) as the trier of the facts to determine (see section 130.4).

### **Secrecy**

While businesses may choose not to disclose their arrangements to the market for various reasons, non-disclosure is central to the successful operation of a cartel. Cartels are compelled to keep their arrangements secret from customers and authorities, and possibly others, such as potential competitors. This is because they can only make the illegal gain when consumers believe that price and supply in the market are competitive, and cartels understand the arrangements will be terminated if regulators become aware of their conduct.

If secrecy makes cartel activity in the market invisible, deprives consumers of choice, and enables cartel conduct to continue undetected, then using secrecy to define criminal cartel conduct directly targets the type of behaviour that, if discovered, would be condemned and stopped.

The use of secrecy to define criminality would mean cartels that were not covert could not be prosecuted under a criminal cartel offence; instead they may face civil litigation. Box 2.1.1 provides examples of cartels in Australia which entered into anti-competitive arrangements but in each case there was no suggestion the agreement was secret or that the agreement was intended to deceive other parties.

#### **Box 2.1.1: Cartels in Australian law**

*Australian Society of Anaesthetists:* A number of members of the Australian Society of Anaesthetists agreed to charge a \$25 per hour 'on-call' allowance for anaesthetists to be available at certain private hospitals and indicated to the hospitals that unless such an allowance was paid their anaesthetic services would be withdrawn. The ACCC commenced proceedings against the doctors alleging that the arrangement amounted to price fixing. The ACCC did not seek penalties and settled proceedings by accepting a court enforceable undertaking from the anaesthetists not to engage in price fixing in the future.

*Western Australia Panel Beaters:* The Federal Court found four panel beating and spray painting businesses in the Pilbara had colluded on the prices they charged motor vehicle insurance companies for repair work. In August 2000, the four businesses sent a letter to 18 insurance companies specifying their agreed charges for repair work; therefore their activities could not be considered covert. The businesses cooperated with the ACCC and the matter was settled without imposing a penalty and with consent orders and injunctions, among other things, to prevent the four from engaging in similar conduct.

*Moonshadow Charters:* A number of tour operators in the Port Stephens area made an agreement to fix the prices of dolphin watching cruises in the October school holidays in 1996. The agreement was publicised by way of a roster of cruises at a uniform per head price. The matter was settled by consent without finding, involving only the issue of injunctions and payment of ACCC costs.

By contrast, Box 2.1.2 provides examples of cartel behaviour where cartel participants sought to keep the cartel secret. Such conduct should be treated as more serious, as it not only knowingly distorts the competitive process but, by stealth, undermines consumer sovereignty.

### **Box 2.1.2: Covert cartels in Australian law**

*Fire protection cartel:* A 10-year price fixing agreement between 56 companies and individuals – almost the entire fire alarm and fire sprinkler installation industry in Brisbane – involved participants meeting as the ‘Coffee Club’. Efforts kept the cartel secret and customers of parties to the agreement were deceived into believing prices were set competitively.

*Transformer cartel:* Domestic distribution transformer companies (in the 1990s) and domestic power transfer companies, manufacturers and suppliers (as early as the 1980s) in the power and distribution transformer industry agreed to fix prices and rig bids. The agreements were orchestrated in a series of covert meetings and phone conversations. Manufacturers and suppliers clearly intended to deceive their customers.

*Pre-mixed concrete cartel case:* The Pioneer, Boral and CSR cartel involved price fixing and market sharing in the pre-mixed concrete market in south-east Queensland from 1989 until 1994. Participants had more than 50 regular meetings and phone conversations to fix prices, agree on market shares and agree to not compete on specified major projects. Participants engaged an accountant to monitor market shares and enforce compliance.

To establish secrecy, the prosecution would need to prove, beyond reasonable doubt, that the parties to the agreement did not make the agreement known to their customers<sup>11</sup> (and possibly others, such as competitors and potential competitors) and were reckless<sup>12</sup> as to whether the agreement would be generally known to them. An agreement would not be secret if, for example, parties to a joint bidding arrangement could provide evidence that they had notified the person calling for tenders of the agreement, or evidence could be provided of a public announcement, or statement to an industry body or the Australian Stock Exchange.

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11 This accords with subsection 4.3(a) of the *Criminal Code Act 1995* under which an omission to perform an act can be a physical element of a criminal offence, if the law creating the offence makes it so.

12 Reckless, when used in the *Criminal Code Act 1995*, involves an awareness of a substantial risk that something will exist or occur and having regard to the circumstances it was unjustifiable to take that risk.

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An international precedent exists for the use of secrecy to define criminal cartel behaviour. Section 47 of Canada's Competition Act makes bid rigging an indictable offence where the agreement is not made known to the person calling for or requesting the bids or tenders at or before the time the bid is made. Canadian courts interpret these words to require express notification of the existence of the agreement for the offence not to apply.<sup>13</sup>

### **Using secrecy to define criminal cartel conduct**

As outlined above, the test of dishonesty poses a number of problems, so it may not be the most appropriate or certain means of distinguishing between criminal and civil cartel behaviour. The advantages of secrecy are that:

- Secrecy is a crucial element of pernicious cartels so it would be appropriate to use it to identify their activities as criminal.
- Secrecy is more readily defined than dishonesty in the cartel context and the prosecution would not need to refer to the standards of ordinary people which may vary. Businesses would have a more certain basis on which to conduct their business affairs.
- The use of secrecy is not new or novel in Australia. For many decades, secrecy was an element of Commonwealth secret commissions offences.

On balance, the working party recommends the use of secrecy to identify criminal cartel conduct.

### **Defining the activities to be captured**

The working party considers that the criminal cartel offence should capture the activities in the OECD's definition.

Other countries have these elements in their criminal cartel provisions, although the approach to defining the conduct varies to some degree.

In the United States, sections 1 and 2 of the Sherman Act prohibit, as criminal, contracts, combinations and conspiracies in restraint of trade, and monopolisation, combinations and conspiracies to monopolise and attempts to monopolise. Because this provision is very general, case law has built up the range of cartel activities prohibited.

Canada's criminal conspiracy provisions in section 45 of the Competition Act prohibit colluding where it will unduly lessen competition. This requires the court find the

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<sup>13</sup> Nozick, RS (1995) *The 1995 Annotated Competition Act*, Carswell, Canada, pp77-78.  
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effect be anticompetitive before a breach can be proved. Bid rigging is a separate, per se offence.

The UK has defined the activities that comprise cartel conduct in its criminal cartel offence (section 188 of the Enterprise Act) to be price fixing, bid rigging, output restrictions and dividing markets.

In Australia, under the civil regime, Part IV of the Trade Practices Act currently prohibits cartel conduct per se, specifically:

- provisions made by competitors which have the purpose or effect of fixing, controlling or maintaining prices are deemed to substantially lessen competition (subsection 45A(1)); and
- the making or giving effect to a contract, arrangement or understanding which contains an exclusionary provision (subparagraphs 45(2)(a)(i) and 45(2)(b)(ii)).<sup>14</sup>

An exclusionary provision (as defined in section 4D) is an agreement between persons in competition with each other which excludes or limits dealings with particular suppliers or customers.<sup>15</sup> This provision has been utilised to prosecute civil cartel activity such as bid rigging and market allocation cases.

Judicial interpretation has clarified the exclusionary provisions in section 4D. The working party considers the physical element of a criminal cartel offence should comprise those activities covered by the existing civil per se prohibitions under the Trade Practices Act. However, since these are only defined by case law, the working party recommends these physical elements of the offence be defined explicitly to ensure the activity captured is consistent with the OECD definition.

Further, the working party does not support the inclusion of a substantial lessening of competition provision in the criminal cartel offence (that is, the activities should be prohibited on a per se basis), for two reasons.

Firstly, evidence from the OECD indicates cartels are harmful to consumers and stifle innovation and efficiency by protecting firms from market forces.<sup>16</sup> Therefore,

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<sup>14</sup> The Government has accepted recommendation 8.1 of the Dawson Review that the *Trade Practices Act 1974* be amended so that it is a defence in proceedings, based upon the prohibition of an exclusionary provision, to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition.

<sup>15</sup> The Government has accepted recommendation 8.2 of the Dawson Review that the *Trade Practices Act 1974* be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates, to a competitor or competitors, actual or potential, of one or more of the parties to the exclusionary provision.

<sup>16</sup> The OECD conducted an extensive survey of member and non-member countries on the economic harm from cartels, and the results were published in its 2002 report, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, OECD Publications, Paris.

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provided a new cartel offence does not unintentionally capture efficiency enhancing arrangements, the conduct the offence seeks to prohibit is unambiguously welfare reducing, so need not be further qualified.

Secondly, the higher standard of proof required in criminal cases necessitates a clear statement of the physical elements to provide certainty in determining the accused's guilt beyond reasonable doubt. A physical element that cannot be defined clearly in legislation because it is subject to complex economic arguments before a court is less able to satisfy this requirement.

Therefore, proving the physical element of a substantial lessening of competition, together with a fault element of recklessness, would be unnecessarily complex. Inevitably, the argument would come down to a debate between expert economists and even if it could be established to the criminal standard that a substantial lessening of competition occurred, it is doubtful it could be proved the defendant was reckless as to that.

Canada's criminal conspiracy provisions which require an anti-competitive effect be demonstrated have proven difficult to prosecute. They require complex economic evidence be laid before the court and competition law experts believe that it is hard to enforce in a contested trial setting.<sup>17</sup> It also may deter competitors from pursuing pro-competitive alliances for fear of criminal prosecution.<sup>18</sup> Canada's House of Commons Standing Committee on Industry, Science and Technology recommended amending the conspiracy provisions to clearly define criminal behaviour, and set out what should be considered civil breaches.<sup>19</sup> Canada is examining this issue in its current review of its competition laws.

The working party noted the Dawson Review recommendations 8.1 and 8.2 that the Act be amended so it is a defence in proceedings to prove the exclusionary provisions mentioned above did not have the purpose, effect or likely effect of substantially lessening competition. The working party recommendations therefore would represent a departure from these Dawson Review recommendations, which were accepted in the Government response to the Review.

If the Dawson Review recommendations relating to the current per se prohibition of exclusionary provisions are to be implemented, the working party recommends the criminal cartel offence only apply to price fixing (that is, the remaining relevant per se prohibition). This could be a narrower definition than recommended by either the OECD or the working party, the legal uncertainty being that it could be argued that

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17 Government of Canada (2003) *Discussion Paper – Options for Amending the Competition Act: Fostering a Competitive Marketplace*, June, p13.

18 Note 17, p13.

19 Note 17, p14.

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other cartel behaviour (for example bid rigging) could be captured by a price fixing provision.

A draft of the proposed offence is at Box A.1.

### **Who should the offence apply to — individuals and corporations**

A key objective of the cartel offence is to deter business from engaging in cartel behaviour.

The deterrent effect of a criminal cartel offence would be strengthened if the offence applied to all types of business arrangements, including corporations and businesses run by people as sole traders or through partnerships. This deterrence could be further strengthened if people directly involved in establishing the cartel, even if those people claimed to be acting for another person or entity such as a corporation or partnership, could face imprisonment. If individuals are not held directly liable, then the threat of a penalty may be perceived to be remote and participation in anti-competitive cartel arrangements an acceptable risk.

The Constitution, however, limits the Australian Government's ability to legislate a cartel offence that would apply equally to all business arrangements. Numerous powers are set out in section 51 of the Constitution and the Trade Practices Act relies on a number of these. The most obvious power to legislate with respect to cartel conduct is that with respect to corporations. Under section 51(xx) of the Constitution, the Commonwealth has clear power to prohibit a trading, financial or foreign corporation from engaging in cartel behaviour. The Commonwealth also can prohibit a person, acting within their authority as a director, servant or agent of a corporation, from engaging in cartel behaviour.

The Commonwealth has in the main restricted primary or direct liability for contraventions of Part IV of the Trade Practices Act to corporations. Any liability imposed on people involved in a breach of the Act has usually been because that person can be shown to have knowingly assisted the corporation in committing the breach. Similarly, corporations are not held liable for the actions of a director, servant or agent unless it is proved that the person was acting with the corporation's authority.

In the past, significant difficulties have arisen in imposing Trade Practices Act liability on individuals for anti-competitive conduct. Three reasons for this are:

- Anti-competitive conduct might be beyond the constitutional power of the Commonwealth because it involves an unincorporated business, for example, a person who is a sole trader.
- Although there may be evidence that a director, servant or agent of a corporation established a cartel, there may be insufficient evidence that the

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person was acting with the authority of the corporation. Thus, if primary liability is imposed on a corporation neither the corporation nor the individual may be held liable.

Even if there is sufficient evidence to hold the corporation liable there may be insufficient evidence to show that the director, servant or agent knowingly assisted the corporation.

These difficulties were addressed by the 1995 signing of the intergovernmental *Conduct Code Agreement*. As a result of this agreement, states and territories passed identical enabling legislation that imposes a schedule version of Part IV of the Trade Practices Act as a law in each respective state and territory. The enabling legislation for New South Wales is the *Competition Policy Reform (New South Wales) Act 1995*. The enabling legislation for the other jurisdictions is similarly named. The Commonwealth also passed enabling provisions, found in Part XIA of the Trade Practices Act.

In this way, the Constitutional limitations have been overcome. The laws, when taken together, are referred to as the *Competition Code*. The Code has enabled consistent competition laws to apply to all business arrangements in Australia.

It would be possible for the offence only to be applied directly to corporations and then rely on complicity, incitement and conspiracy in the Criminal Code to prosecute individuals. The offence could also apply directly to directors, servants or agents of a corporation acting within their authority.

Alternatively, the offence could be incorporated in Part IV of the Trade Practices Act, and the Schedule version of those provisions, so that the offence becomes part of the *Competition Code*. This would ensure the offence applied to all business arrangements in Australia.

As this would strengthen the deterrent effect of the cartel offence, the working party recommends that the offence form part of the *Competition Code*. In accordance with the *Conduct Code Agreement*, the Commonwealth and at least three of the states or territories would need to agree to this change.

To ensure consistent and efficient enforcement of the cartel offence, it would be appropriate to seek state and territory agreement for all investigations and prosecutions of the offence to be undertaken exclusively by Commonwealth officers and agencies using powers established under Commonwealth law. Arrangements of this type are already possible under the existing *Competition Code* enabling legislation of each state and territory.

### **Who should the offence apply to — big and small business**

The Dawson Review indicated criminal penalties should apply to all who engaged in cartel conduct, not just large corporations.

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Some submissions to the Dawson Review and the working party proposed applying the cartel offence only to large businesses. This would be similar to the UK approach, where the Serious Fraud Office investigates and prosecutes the cartel offence, but only takes cases where the value of the fraud exceeds £1 million.

The working party does not recommend that the offence be limited to large businesses in Australia.

If the conduct is detrimental the working party considers it should apply to both small and large businesses. In Australia's small economy, a cartel could involve one large corporation with one or more smaller corporations.

As the discretion to prosecute properly rests with the DPP (exercised according to the Prosecution Policy) limiting the offence to large businesses would involve the DPP making difficult assessments as to the quantum of the gain or loss caused by the crime. This would not provide an adequate basis for certainty for the DPP to determine whether a prosecution should proceed.

### **Where the cartel offence will not apply**

A key issue in competition regulation is to ensure prohibitions on anti-competitive conduct do not rule out some types of business activities that benefit the economy or are in the public interest.

The OECD specifically excludes activities permitted or authorised by law, including efficiency enhancing arrangements, such as those that reduce costs or enhance output, from its definition of serious cartel behaviour.<sup>20</sup>

Section 51 of the Trade Practices Act currently exempts a range of conduct from constituting a contravention of the restrictive trade practices provisions in Part IV of the Act. These exemptions include:

- conduct specifically authorised by a Commonwealth or State law, including under a licence made under such a law (subsections 51(1) and 51(1A) );
- contracts or arrangements designed to meet prescribed standards (such as those of Standards Australia) (subsection 51(2));
- arrangements between individual partners within a partnership, except those involving corporations (subsection 51(2));
- any provision of a contract, arrangement or understanding relating exclusively to the export of goods from Australia, or the supply of services outside Australia, if particulars such as the method of fixing, controlling or maintaining

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<sup>20</sup> Note 1.

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prices, are given to the ACCC within 14 days of the contract being made (subsection 51(2));

- conduct related to certain intellectual property rights (subsection 51(3)); and
- conduct related to consumer boycotts (subsection 51(2A)).

The Act also does not apply to the non-business activities of the Commonwealth, states and territories (sections 2(A), 2(B) and 2(C)) and certain local government activities (section 2(D)).

There are also a range of exemptions from the per se prohibition on price fixing in section 45A of the Trade Practices Act, and an exemption for conduct between related entities in subsection 45(8).

The working party therefore recommends that the criminal cartel offence should not apply to these activities, which are lawful under the Trade Practices Act.

Further amendments to the Trade Practices Act will flow from recommendation 9.1 of the Dawson Review regarding joint ventures, and the Government response to the Intellectual Property and Competition Review Committee.<sup>21</sup> These amendments may permit certain types of conduct where it does not substantially lessen competition.

Joint ventures can provide a scale and scope that single businesses cannot achieve. The Trade Practices Act currently exempts these from the per se prohibition on agreements to fix prices. Joint ventures often involve agreements between competitors to fix prices (of goods or services jointly produced and supplied by the joint venture) and to divide or allocate markets through non-compete clauses (so competition from any joint venture parents in the investment does not undermine the investment).

The Dawson Review observed joint ventures make an important contribution to Australia's economy.

Recommendation 9.1 of the Dawson Review proposes replacing section 45A(2) of the Trade Practices Act with a provision stating that the prohibition on price fixing does not extend to price fixing provisions for the purpose of a joint venture (as defined in s4j of the Trade Practices Act) and the joint venture does not substantially lessen competition.

The amendments to subsection 51(3) of the Trade Practices Act, will make intellectual property licensing subject to the provisions of Part IV, but a contravention of the per se

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21 The Intellectual Property and Competition Review Committee (the Ergas Committee) was established in 1999 to report on the interaction and appropriate balance between competition policy and intellectual property legislation. The Committee completed its report in September 2000 and the Government response was released on 28 August 2001.

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prohibitions of sections 45, 45A and 47, or of section 4D would be subject to a substantial lessening of competition test.

The working party considers that, in framing the cartel offence, it will be important to ensure that legitimate collaborative business activities, for example joint ventures and intellectual property licensing arrangements permitted under the civil regime, are not criminalised. This may require the incorporation of an additional defence or defences to allow a defendant to escape liability if they can show that the relevant arrangement was made for the purpose of a legitimate joint venture (an activity in trade or commerce that the parties are carrying on jointly), or that the arrangement is an intellectual property licensing arrangement, and that the arrangement does not substantially lessen competition.

The working party considers that, through careful drafting, it will be possible to minimise any loophole through which entities may try to escape liability by cloaking price fixing or other arrangements in a joint venture arrangement that involves fairly minimal cooperation .

The working party notes these defences are likely to be utilised only where notification or authorisation have not taken place.

#### **Providing additional certainty to business**

As the aim of the proposed cartel offence is to target covert arrangements – hence the use of secrecy to define criminality – arrangements that were not covert and did not attempt to deceive the public and the market as to their existence would not be caught by the offence provision.

#### **Notification**

To ensure that legitimate collaborative business arrangements are not covered by the criminal cartel offence, a general defence should be available. Where businesses notify the ACCC in writing of a proposed contract, agreement or understanding before the contract, agreement or understanding is made or implemented, or know that the ACCC had been so notified, those businesses will have a complete defence to criminal liability. They would bear an evidential burden which means they have the burden of adducing or pointing to evidence that suggests a reasonable possibility that they had notified the ACCC or knew the ACCC had been notified. Once the evidential burden was satisfied the prosecution would bear the legal burden of proving there had been no notification.

It could be argued that, in practice, larger corporations, which would have the resources to familiarise themselves with the defence, would be more likely to avail themselves of the defence than smaller firms.

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Given the relative sophistication of the target group for the proposed offence, in practice, this is unlikely to be the case, however it would be addressed through ACCC publicity to promote compliance.

The notification mechanism proposed by the Dawson Review to allow small businesses to bargain collectively when dealing with large business would ensure that such arrangements are not criminalised.

**Authorisation**

A criminal cartel offence would not affect businesses where the ACCC formally authorised the arrangements.

The ACCC would not be able to authorise conduct that would be criminal if secrecy was an element of the offence. If a participant seeks authorisation, the agreement cannot be secret.

**Recommendations**

The working party recommends:

2.1.1 The concept of secrecy be used to distinguish criminal cartel conduct from the conduct caught by civil contraventions in the *Trade Practices Act 1974*.

2.1.2 Establishing secrecy requires proof of:

- the physical element (that the agreement was not generally known to customers); and
- the fault element (that the defendant was reckless as to whether the agreement was generally known to customers).

2.1.3 The cartel offence capture price fixing, output restrictions, bid rigging and market sharing. In addition to the requirement for secrecy, the physical elements of the cartel offence (all of which must be satisfied) should comprise that:

- an agreement is made between two or more parties;
- the parties who made the agreement are competitors in the supply or acquisition of goods or services in a particular market; and
- the agreement is to fix prices, constrain supply, divide or allocate markets or rig bids.

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- 2.1.4 The criminal cartel offence apply to individuals and corporations by incorporating it in the *Competition Code*, that is, Part IV (Restrictive Trade Practices) and Schedule 1 of the *Trade Practices Act 1974*.
- 2.1.5 The offence apply to all those who engage in criminal cartel conduct, regardless of size.
- 2.1.6 It would be a defence to notify the ACCC of the arrangement in writing before making or implementing the arrangement, or to have known that the ACCC had been so notified.
- 2.1.7 The following not be covered by the criminal cartel offence:
- existing general exemptions under the *Trade Practices Act 1974*;
  - activities exempted from the per se price fixing provision (section 45A of the *Trade Practices Act 1974*), taking into consideration amendments to these flowing from Dawson recommendations 8.1 and 8.2; and
  - other arrangements permitted under the civil regime.

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## 2.2 PROVIDING IMMUNITY FOR CARTEL WHISTLEBLOWERS

### Task of the working party

The Dawson Review noted protection of whistleblowers is important in uncovering cartel activity. As secrecy is a crucial element of covert cartels, detecting and exposing cartels often relies on a cartel member breaking that secrecy. While terms of imprisonment can assist in deterring cartel behaviour, the effectiveness of this deterrence may be enhanced through the use of an immunity policy as a prosecution is more likely where authorities are alerted to the cartel's existence.

The Dawson Review concluded that in Australia there are difficulties in implementing an immunity policy for a criminal cartel offence. This is because immunity would need to be offered at an early stage, so as to encourage disclosure. However, in Australia, statutory discretion to grant immunity resides with the DPP (not the competition enforcement agency) and indemnities against prosecution, which are rarely given, are only provided at the conclusion of an investigation and are considered a last resort. Therefore, to make an immunity policy effective for a criminal cartel offence, new arrangements would need to be developed.

The Dawson Review endorsed an immunity policy that provided clear and certain incentives to give evidence. Potential applicants for immunity must have a degree of certainty that, providing they meet the requisite conditions, they will receive immunity from prosecution. Certainty as to the consequences and clarity of the conditions are thus essential to entice cartel participants to come forward. However, the Dawson Review concluded that further work was needed before a workable arrangement could be developed. Developing such an arrangement was therefore a central task of the working party.

### Working party's response

As noted, an immunity policy provides a low cost and effective compliance tool for cartel enforcement.

International experience suggests that immunity programmes have been highly successful in combating cartel activity.

Five out of nine OECD countries that provide for terms of imprisonment for cartel activity (US, UK, Canada, Ireland and Korea) have adopted leniency or immunity policies in the presence of criminal sanctions regimes.

The US claims its immunity programme has led to the detection and successful prosecution of more international cartels than all other investigative tools available to

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anti-cartel enforcers.<sup>22</sup> The US immunity programme now uncovers more than 20 cartels per year and has led to numerous individual convictions and substantial corporate fines. In the past five years alone, the US Department of Justice has obtained over US\$2 billion in fines and the vast majority of its international cartel cases arise from use of its immunity programme.

While economic theory states that cartels may be fundamentally unstable as individual members could make a greater return if they cheated on the arrangement, cartels do not always fall under the weight of these incentives.<sup>23</sup>

The difficulty competition authorities have in detecting and deterring collusive arrangements is evidenced by the tendency for cartels to persist for years, if not decades. In Australia, the express freight cartel ran for 20 years, the pre-mixed concrete cartel for seven years and the fire-protection cartel for ten. These examples may be at the higher end of the international scale – a 1990s sample of US Department of Justice and EC prosecutions found that cartels operated, on average, for six years.<sup>24</sup>

The working party concluded therefore that an immunity policy in cartel cases would be very valuable in uncovering cartels and breaking them down.

### **Ensuring certainty for whistleblowers**

An effective immunity policy provides an individual with sufficient incentive to defect from the cartel. The prospect of lenient treatment by authorities must outweigh an individual's risk of prosecution from confessing to their part in the illegal activity.

The US Department of Justice identifies six elements critical to a successful immunity policy in the presence of severe penalties:

- transparency and predictability (removing prosecutorial discretion where possible);
- provision of the maximum possible reward for those who qualify;
- a grant of immunity only to the first to qualify, and this should be automatic where an investigation has not already begun;
- full protection for executives who cooperate and are exposed to individual liability under the competition legislation;

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22 Scott Hammond, Director of Criminal Enforcement, Anti-trust Division, US Department of Justice; International Workshop on Cartels, Brighton, England, Nov 2000.

23 Evenett, SJ, Levenstein, MC and Suslow, VY (2002) 'International Cartel Enforcement: Lessons from the 1990s' in *World Economy*, September 2001, 24(9), pp1221-45, p1221.

24 Note 23, p1226.

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- immunity that is not subject to an assessment of the evidence; and
- early notification to applicants that they do or do not qualify for immunity.

Australia's ability to apply these criteria in an immunity policy will be guided by existing frameworks and policies.

The ACCC has an existing policy applying to civil cartel offences to provide lenient treatment for whistleblowers. Under this policy, both individuals and corporations may obtain full immunity from ACCC-instituted court proceedings. Full immunity is available to the first person that applies, where the ACCC is unaware of the existence of the cartel and where the applicant provides ongoing cooperation and complies with certain other conditions. Where the applicant does not satisfy all these conditions, the ACCC may agree not to seek a pecuniary penalty or to seek a reduced penalty. The ACCC states it has had several applications under its policy in the last six months.

In a criminal context, immunity falls within the domain of the DPP, which cannot grant a general amnesty, as it is subject to the provisions of the Prosecution Policy and the *Director of Public Prosecutions Act 1983*.

In Australia, immunity, charge-bargaining<sup>25</sup> and leniency in sentencing are all used in certain circumstances. The DPP, which prosecutes criminal cases under Commonwealth law, does not plea bargain.<sup>26</sup>

The DPP is authorised by statute to give two types of undertakings. Section 9(6) of the Director of Public Prosecutions Act empowers the Director to give an undertaking that any evidence the person gives and anything derived from that evidence will not be used against the person in civil or criminal proceedings. Section 9(6D) empowers the Director to give a person an undertaking that they will not be prosecuted for a specified Commonwealth offence or in relation to specified conduct that may constitute a Commonwealth offence.

The Prosecution Policy sets out the principles on the manner in which that discretion will be exercised. Under the Prosecution Policy, immunity to secure testimony before the courts is a matter of last resort. Paragraph 5.6 of the Prosecution Policy provides that the exercise of the discretion is conditional on several factors, including that the evidence be essential to ensuring a conviction and not be available elsewhere, and the person in question be significantly less culpable than the accused. The Prosecution Policy also provides guidance on the use of charge-bargaining but does not allow charges to be laid to provide scope to bargain.

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<sup>25</sup> Charge bargaining involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with.

<sup>26</sup> Plea bargaining involves consultation with the trial judge as to the likely sentence to be imposed in the event a defendant pleads to the criminal charge.

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Judicial discretion provides for leniency in sentencing in cases where a person gives evidence against others involved in criminal activity. The court must consider a range of factors and the circumstances of the case, such as assistance to authorities, hardship to offenders, character and the likelihood of rehabilitation.

The Commonwealth DPP is not an investigative body. Instead, it prosecutes on the basis of a brief of evidence referred to it. In the normal course, the DPP will have received a brief of evidence from the investigator and will have assessed the case for prosecution. In any investigation the investigator may recommend that an undertaking under the Director of Public Prosecutions Act be provided so that a participant in the criminal activity will give evidence against others involved in that activity.

While the DPP can provide advice to an agency while an investigation is underway, the Prosecution Policy requires certain conditions be satisfied before immunity is granted. These currently preclude granting immunity before an investigation has begun.

The working party examined approaches to immunity in other jurisdictions to determine whether a successful immunity policy could be provided for, given it would be the DPP's decision as to whether immunity would apply.

The US policy involves a full immunity for the first person to confess, providing the person cooperates fully and is not a cartel leader. Immunity is automatic if no investigation is underway and still possible after the investigation has begun.

In the UK, Section 190(4) of the Enterprise Act gives the Office of Fair Trading discretion to issue 'no action' letters which prevent prosecution for the cartel offence, except for circumstances specified in the letter. Before qualifying for a 'no action' letter, an individual must admit their participation in the cartel; provide all information to the Office of Fair Trading; cooperate with the investigation; not have coerced another cartel member to take part in the cartel; and cease participating in the cartel, unless otherwise directed by the Office of Fair Trading. The UK introduced its policy in 2002, and it is, as yet, untested.

While the US Department of Justice and the UK's Office of Fair Trading may grant immunity in criminal cartel cases, the ACCC is not able to offer immunity against criminal prosecution, as this discretion is exercised by the DPP. There is no precedent in Australian law for an investigating authority to grant immunity for criminal prosecutions or to provide a 'no action' letter, and any legislation to give this power to the ACCC would preclude the DPP from considering whether that person should be prosecuted for the cartel offence. This approach would represent a significant change from Australia's current system.

The working party examined whether the Canadian cartel immunity policy might provide a better model for Australia. Canada's criminal prosecutions are the

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responsibility of the Attorney General (their DPP equivalent), who has sole authority to grant full immunity to parties implicated in cartel offences. Under Canada's immunity policy, the Canadian Competition Bureau recommends the Attorney General offer immunity, and the Attorney considers whether immunity will best serve the public interest. Immunity is granted where the applicant is not the instigator, leader or sole beneficiary of the activity, subject to the applicant meeting certain conditions, such as terminating their participation in the cartel and providing full cooperation.

Canada's immunity programme was developed in consultation with its Attorney General and is consistent with the Attorney's own immunity programme. While the Attorney is not legally bound by the policy, there is a higher degree of certainty in practice that those who met the conditions of the immunity programme will receive immunity.

Early and close cooperation between the Competition Bureau and the Department of Justice when a party approaches the Competition Bureau for immunity means that the Attorney generally follows any Bureau recommendation to grant immunity.

This certainty, and the transparency of the programme, are considered to provide a strong incentive for cooperation with the Competition Bureau, and since the programme's introduction, the numbers of domestic and international cartels convicted has increased significantly.<sup>27</sup>

The working party recommends Australia adopt the Canadian model. The Canadian model works well in practice and is most consistent with Australia's legal traditions and systems. Adopting this model would require amendment to the Prosecution Policy to state that in circumstances of cartel conduct, where certain conditions are met, the DPP, on the advice of the ACCC, proposes to exercise his or her discretion and grant immunity from prosecution at an early stage.

### **Placing conditions on granting immunity**

From OECD member countries' experiences with immunity programmes it appears that placing conditions on the granting of immunity assists with cartel enforcement.<sup>28</sup>

For example, a general offer to reduce penalties may not be sufficient to persuade individuals or firms to come forward. To maximise the incentive, the first party, (whether an individual or firm), to approach authorities before they are aware of the cartel should receive the most favourable treatment. If parties delay until there is

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<sup>27</sup> 'Roundtable on Sanctions Against Individuals, Including Criminal Sanctions in Prosecuting Cartels', Canadian submission to the OECD Competition Committee, 10 October 2003.

<sup>28</sup> See 'Report on Leniency Programmes to Fight Hard-Core Cartels' in OECD (2002) *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris.

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sufficient evidence to institute proceedings, or they are not the first to approach authorities, they should not receive immunity.

Cases may occur where more than one application for immunity is received, but the value of evidence provided may also differ between applicants.

Approaches to this vary between jurisdictions. While the UK does not restrict its 'no action' letters to one per cartel investigation, Ireland grants only one immunity to preserve the incentive.<sup>29</sup>

In addition, to preserve the deterrent effect, authorities would need to be sure that ringleaders could not escape prosecution by seeking immunity.

The working party therefore recommends that the following conditions be placed on the granting of immunity from a criminal prosecution of a cartel offence in Australia:

- the party was the first to come forward;
- the ACCC was not aware of the conduct;
- the party was not a clear individual leader;
- the party had not coerced anyone to join the cartel; and
- the party fully cooperates with the ACCC in providing full and truthful information and in attending court to give evidence as required.

Immunity should apply to both individuals and corporations, to provide immunity from prosecution for directors, servants or agents of the corporation where the corporation is the first to come forward and give up the cartel.

The working party also recommends an immunity policy be developed covering the conditions for the granting of immunity (see Appendix A, Box A.2). The roles and responsibilities of the ACCC and DPP and how they will work together would need to be defined in an MOU (see Appendix A – Box A.3). Any discussions between the ACCC and the DPP on immunity for a particular case would be guided by provisions in an MOU clearly stating each agency's role and authority. This would assist in achieving a level of cooperation similar to that in place under Canada's immunity policy.

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<sup>29</sup> In Ireland, the prosecutor may proceed with a summary prosecution, rather than taking the case on indictment, for second and subsequent applicants for immunity.

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The immunity policy would help publicise the immunity programme in business and legal circles and ensure a clear understanding of the immunity programme. This is critical in ensuring the effectiveness of the programme.

While an immunity policy sets out how authorities will make decisions in certain circumstances, it does not affect the rights of third parties to act (for example, to obtain restitution for loss or damage suffered) under Part VI of the Trade Practices Act.

## **Recommendations**

The working party recommends:

- 2.2.1 Introducing an immunity policy with immunity granted by the DPP, as an undertaking under section 9(6D) of the *Director of Public Prosecutions Act 1983*, on recommendation by the ACCC and where the applicant meets certain conditions (specified in 2.2.2, below).
- 2.2.2 Amending the *Prosecution Policy of the Commonwealth* to provide that in cases of serious cartel conduct, the DPP may exercise his or her power to grant immunity by giving an undertaking under the *Director of Public Prosecutions Act 1983* where certain conditions are satisfied. These conditions would be:
  - the ACCC was not aware of the conduct;
  - the party was the first to come forward;
  - the party was not a clear individual leader;
  - the party had not coerced anyone to join the cartel; and
  - the party fully cooperates with the ACCC in providing full and truthful information and attending court to give evidence as required.
- 2.2.3 Dealing with subsequent applicants for immunity under the existing *Prosecution Policy of the Commonwealth*.
- 2.2.4 Publishing the immunity policy to ensure a clear understanding of the immunity programme.

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## **2.3 MANAGING PARALLEL CIVIL AND CRIMINAL PROVISIONS**

### **Task of the working party**

The existence of civil and criminal provisions for substantially the same conduct requires a clear statement of the roles and responsibilities of investigators and prosecutors, and how to distinguish between civil and criminal cartel conduct. As the Prosecution Policy provides guidance on the prosecution of criminal cases, the working party considered how the ACCC would manage investigations and what guidance it should provide.

The Dawson Review raised several concerns in relation to the parallel provisions; principally, the ACCC could opt to litigate civilly or criminally at will, and would need to decide early whether it investigated civilly or criminally as the investigative path for each would be different.

Because this decision might not be clear cut, the Dawson Review identified other issues that might arise: the permissible method of investigating a breach would depend on whether eventual proceedings were civil or criminal; evidence the ACCC obtained from a person under section 155 of the Trade Practices Act would not be admissible in criminal proceedings against that individual; and evidence obtained by search warrant under section 3E of the Crimes Act would not be admissible in civil proceedings.

### **Working party's response**

#### **Managing investigations and prosecutions for offences under the Trade Practices Act — the current arrangements**

The Trade Practices Act already provides for parallel civil (Division I and IA of Part V) and criminal (Part VC) provisions in consumer protection matters. Therefore, the ACCC and DPP already cooperate on the investigation and prosecution of these offences.

For criminal breaches, in determining whether or not to investigate and/or refer a matter for prosecution, the ACCC takes into account whether the conduct shows a blatant disregard for the law or causes significant public detriment, whether the alleged contravenor has a history of engaging in similar conduct, and whether enforcing the Trade Practices Act would have an educative or deterrent effect.

In making these assessments, where the ACCC concludes the conduct is so serious it warrants criminal prosecution, it will liaise with the DPP about how the investigation

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is to be conducted, what evidence may be required and whether the matter is likely to be one that the DPP would pursue.

Where the ACCC refers a matter to the DPP, the Director determines whether or not to initiate criminal proceedings. The following are considered:

- whether there is sufficient evidence to establish a prima facie case and a reasonable prospect of conviction;
- whether in light of all of the circumstances the public interest requires a prosecution to be pursued. In considering that question the following will be relevant:
  - maintaining the confidence of the community in the criminal justice system;
  - fairness and consistency;
  - any mitigating or aggravating circumstances;
  - the staleness of the offence;
  - the availability of any alternatives to prosecution;
  - the likely outcome; and
  - the likely length and expense of a trial.

Hence, in consumer protection cases, the ACCC has discretion on whether or not to investigate. It also has discretion on how to pursue an alleged contravention, and in particular, whether the contravention warrants referral to the DPP.

### **Managing investigations and prosecutions in criminal cartel cases**

The working party considers it would be possible, in principle, to extend these sorts of existing arrangements to a cartel offence that is subject to both civil and criminal sanctions. There are a number of detailed arrangements which would need to be put in place to make such arrangements workable.

#### **Guidance for the ACCC and DPP**

While the ACCC and DPP already manage the investigation and prosecution of offences under the Trade Practices Act, and have criteria for deciding to pursue criminal or civil proceedings, these should be formalised for a criminal cartel investigation.

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The working party recommends that the DPP and ACCC publish an MOU outlining what their respective roles and responsibilities would be and how they would manage inter-agency liaison on matters, including investigations, referral to the DPP and operation of the immunity policy (Section 2.2). This would be consistent with the recommendations of the Australian Law Reform Commission (ALRC).<sup>30</sup>

The DPP and ACCC consider that, for operational reasons, some arrangements between the two organisations should not be publicly available. The ALRC has recognised this may be appropriate.<sup>31</sup>

The working party also recommends that the ACCC publish guidelines, developed in consultation with the DPP, which outline in general terms the factors relevant to determining whether to pursue a criminal or a civil investigation and under which circumstances it will refer matters to the DPP. These guidelines should also include criteria that set out the characteristics that warrant or militate against criminal prosecution.

### **Evidence**

In a criminal prosecution, the ACCC must obtain sufficient evidence to establish, beyond reasonable doubt, all the elements of a criminal offence.

Criminal proceedings have stricter rules of procedure and evidence than civil proceedings; therefore, the methods used to gather evidence and the procedures for handling that evidence differ between civil and criminal investigations.

This raises operational issues for investigators. Constraints on the use of evidence in multiple proceedings mean that at some point in the investigation, a regulator would take the decision to pursue civil or criminal proceedings. These problems are not unique to the ACCC.

In considering whether to introduce a criminal cartel offence the Dawson Review raised particular limitations on the use of evidence.

Firstly, evidence obtained by the ACCC using its powers under section 155 of the Trade Practices Act would not, in some circumstances, be admissible in criminal proceedings.

Under section 155(1) of the Trade Practices Act, the ACCC can demand the furnishing of information, the production of documents, or the appearance of a person before the ACCC to give such evidence or documents. Failure to comply may result in a fine or imprisonment. Evidence or documents gathered under section 155 can be used in civil

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30 Australian Law Reform Commission (2002), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Recommendation 9-1.

31 Note 30, paragraph 9.84.

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proceedings, however there are some limitations on the use of such evidence in criminal proceedings. This is because a person is not entitled to rely on the privilege against self-incrimination to excuse them from furnishing information or producing or permitting the inspection of a document.

The corresponding safeguard for individuals (that is, not bodies corporate) is that answers given by an individual, or a document made available by an individual, are not admissible in evidence against that individual in criminal proceedings. This does not prevent the ACCC from using the evidence given by an individual to form a chain of inquiry, and from using the evidence derived from that chain of inquiry against the individual in criminal proceedings.

The ACCC is currently able to use evidence gathered under its powers in s155(2) of the Trade Practices Act in criminal proceedings.

The Dawson Review recommended section 155(2) of the Trade Practices Act be amended to require the ACCC to seek a warrant from a Federal Court judge or magistrate, and this would provide the ACCC with the power to search for and seize information. At the reporting date, the Dawson amendments had not been implemented.

Secondly, evidence obtained by search warrant under section 3E of the Crimes Act would not be admissible in civil proceedings.<sup>32</sup> Section 3E requires that the warrant state the offence to which the warrant relates. The search powers under a Crimes Act warrant only apply to Commonwealth criminal offences, not to civil contraventions.

As the ACCC's decision to launch a civil or criminal investigation of an alleged cartel will rest on whether the evidence points to a civil or criminal contravention, some preliminary investigative work will have occurred before the ACCC decides which type of investigation it will pursue.

Therefore, initial investigative work may have to be revisited to bring evidence up to criminal standard. To minimise the need to do this the ACCC would need to identify early that a matter would proceed as criminal.

The ACCC also would need to use sophisticated evidence handling procedures to meet the higher evidential standards in criminal trials.

In investigating criminal and civil cartel conduct the ACCC will have available its section 155(2) powers under the Trade Practices Act, or to investigate a criminal cartel offence, it can seek to have the Australian Federal Police (AFP) use a Crimes Act warrant. If the Dawson amendments are implemented, the working party assessed these powers as being available to the ACCC for investigating criminal and civil cartel

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<sup>32</sup> See *Williams v Keelty* (2001) 184 ALR 411, at 456-458.  
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conduct and noted that the ACCC may prefer to use its section 155(2) powers given the difficulty in using evidence gathered under a Crimes Act warrant in civil proceedings.

### **Coercive powers**

Certain coercive powers may be available to investigate a criminal offence that are not available in relation to a civil contravention. The power to enter and search premises and seize evidence, and arrest and detain a suspect would be available to investigate the criminal cartel offence, and other agencies would be involved in the investigation.

Entry and search powers are generally for investigating specific offences and monitoring compliance with legislative requirements. These powers may take different forms and rely on different procedures for their efficacy. The Australian Government's general policy position is that the requirement to enter and search should be handled through owner consent or a judicially-issued warrant.

Part 1AA of the Crimes Act contains search warrant provisions for police to seek search warrants, and defines the outer limits of the powers and minimum safeguards and obligations that should apply to federal search warrant regimes in other contexts. The AFP executes warrants with assistance as required from other investigative agencies.

Currently the entry and search powers of the ACCC under section 155(2) of the Trade Practices Act, and those conferred on the AFP under the Crimes Act differ significantly. In contrast to section 155(2) of the Trade Practices Act where entry to premises may only be authorised for the purpose of examining relevant documents in the possession or control of the person suspected of the contravention, the AFP may execute a Crimes Act search warrant to search for and seize evidential material in the possession or control of any person.

While the current section 155(2) power is limited to inspecting, copying or taking extracts from documents, the Crimes Act search warrant allows seizure of any type of evidential material specified in the warrant. A Crimes Act search warrant authorises forced entry, while section 155(2) of the Trade Practices Act does not. In addition, the exercise of the section 155(2) power is to be authorised by a member of the ACCC, while only a magistrate may issue a search warrant under the Crimes Act.

As previously noted, the section 155(2) powers are proposed to be changed to implement the Dawson Review recommendation that search and seizure powers be available to the ACCC where a warrant is issued.

Hence in investigating a criminal cartel offence the ACCC can use section 155(2) of the Trade Practices Act, or can seek to have the AFP use a Crimes Act warrant. If the Dawson amendments are implemented, as noted above, the ACCC may prefer to use these powers to avoid the difficulties in using evidence gathered under a Crimes Act

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warrant. In both cases an independent party must issue the warrant and this provides safeguards.

#### **Additional powers for criminal cartel investigations**

The working party considered what further investigatory powers should be made available in investigating a criminal cartel offence.

Specified law enforcement agencies, including the AFP, may obtain telecommunications interception warrants for the investigation of specified serious offences. These include a range of offences attracting a penalty of seven or more years imprisonment.

The thresholds set for the use of telecommunications interception warrants represent a balance between the protection of privacy and the interests of law enforcement agencies in the investigation of serious criminal offences. Given the proposed penalty for the criminal cartel offence (see Section 2.4), the working party does not recommend that telecommunications interception be made available in connection with the investigation of the criminal cartel offence.

#### **Jurisdiction**

At present, almost all the offences under the Trade Practices Act are summary offences (tried before a judge or magistrate without a jury) and those that are not summary offences are procedural offences with a maximum penalty of two years imprisonment.<sup>33</sup> Under sections 163(1) and (2) of the Trade Practices Act the Federal Court has jurisdiction for criminal matters in the Trade Practices Act.

Section 4G of the Crimes Act provides that an offence punishable by imprisonment for more than 12 months is an indictable offence (triable before a jury). The proposed penalty for a criminal cartel offence (see Section 2.4) means it would be an indictable offence.

Under section 80 of the Constitution, trials for Commonwealth offences are by jury in the state where the offence was committed. Pursuant to section 68 of the *Judiciary Act 1903* Commonwealth criminal offences are generally prosecuted in state or territory courts.

While the Federal Court could be given jurisdiction for an indictable cartel offence this would be inconsistent with the general Commonwealth legal policy to limit the criminal jurisdiction of the Federal Court to summary offences and less serious offences.

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<sup>33</sup> Obstructing authorised officers in the exercise of their duty (section 65Q) and unauthorised dealing with certain confidential or protected information (sections 95ZP, 95ZQ and 10.89).

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Therefore, it is recommended that the criminal cartel offence be prosecuted on indictment before the state or territory courts where the offence is alleged to have occurred.

### **Parallel proceedings**

The ALRC has raised the concern that regulators could use the existence of criminal and civil penalties for the same conduct to impose both on an offender, and this could offend against the principle of avoiding double jeopardy.<sup>34</sup> Parallel proceedings also raise practical issues, for example, the order in which matters are litigated and appeals are heard.

To address such concerns, most Commonwealth legislation containing both civil and criminal penalties for substantially the same conduct generally permits criminal proceedings to be undertaken after civil proceedings, but bars civil proceedings where a defendant is convicted of a criminal offence.

The former ensures that civil remedies do not preclude later criminal penalties being imposed, and it is usual to stay the civil proceedings until the criminal proceedings are completed, after which time, if the defendant is convicted of the criminal offence, the civil proceedings are terminated. For example, under the Corporations Act, civil proceedings are stayed until the criminal proceedings are completed, after which time, if the defendant is convicted, civil proceedings are terminated.

The fact that civil proceedings have commenced and run is one matter that the DPP will consider in accordance with its Prosecution Policy in deciding whether it would be appropriate to commence criminal proceedings for the same conduct.

While Section 4C of the Crimes Act provides some protection against prosecution twice for an offence it does not extend to liability for civil penalties. The working party considers that there should be some protection for cartel offences in relation to being prosecuted for a criminal offence and also being liable to a civil penalty (double jeopardy).

The working party recommends the incorporation in the Trade Practices Act of statutory bars to provide protection in terms similar to those in the Corporations Act.

### **International cooperation**

The ACCC not only conducts domestic cartel investigations, but participates in the investigation of cross-border cartels. Therefore it could seek assistance from, or be requested to provide assistance to, other countries in the investigation of criminal cartels.

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<sup>34</sup> Note 30, 11.32.

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Some additional investigative tools would be available for the investigation of cross-border cartels if cartel conduct is criminalised, primarily the use of the provisions of the *Mutual Assistance in Criminal Matters Act 1987* and extradition.

Extradition arrangements and how the ACCC would manage mutual cooperation in the investigation of international criminal cartels are outlined below.

#### Mutual Assistance

Countries use mutual assistance to provide and obtain formal government-to-government assistance in criminal investigations and prosecutions, and to realise the proceeds of crime. Mutual assistance is a reciprocal process; countries assist on the understanding that they will receive assistance in return when the need arises.

It is required where, for example, Australia asks another country to:

- exercise coercive powers (for example, apply for and execute search warrants or take evidence from a witness before a court);
- obtain material in admissible form; or
- register foreign orders to prevent the dissipation of proceeds of crime.

The *Mutual Assistance in Criminal Matters Act 1987* governs requests, and under this Act, Australia could request or receive a request from any country for a proceeding or investigation for a criminal offence in any jurisdiction in Australia.

A number of bilateral treaties and multilateral conventions also form the basis of Australia's mutual assistance relationship with other countries or concern particular subjects. In competition law enforcement, the exchange of information in international investigations is made formally through bilateral treaties between the ACCC and overseas investigation bodies. The ACCC seeks to formalise its relationships with these bodies to allow the parties involved to cooperate more fully, for example, by setting up a formal mechanism for comity requests and the protected exchange of confidential information. For criminal breaches of Australia's competition law, Australia's existing mutual assistance in criminal matters regime may be used to obtain assistance from foreign countries for investigations or prosecutions.

Australia's only state-to-state agreement on competition law enforcement is its treaty with the US on mutual antitrust enforcement assistance. The treaty is binding, and the main difference between the treaty and other arrangements is that it specifies the circumstances in which, and conditions upon which, certain confidential information may be exchanged.

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## Extradition

Extradition is based on a mutual recognition by two countries that certain conduct is criminal, coupled with an agreement to surrender people accused or convicted of that conduct.

The conduct must attract a minimum threshold penalty of imprisonment and must be extraditable under the laws of both the country in which the person is located and the country which applies for that person's extradition.

### **Appropriate safeguards**

On the basis of the preceding discussion, the working party considers that there will be appropriate safeguards put in place to ensure that criminal investigations and prosecutions are pursued where clearly justified and in accordance with appropriate procedures.

While the ACCC can undertake a criminal investigation, it will need to present the evidence to the DPP which will make its own judgement as to whether the investigation can proceed to prosecution. The DPP is guided by the Commonwealth Prosecution Policy which sets out a range of matters to be considered before a decision is taken to prosecute.

In conducting investigations, the more invasive and coercive powers under the Crimes Act will only be available where it is demonstrated that there are sufficient grounds for a warrant to be issued. The AFP applies for and executes a Crimes Act warrant.

In using the search and seizure powers to be made available, flowing from the recommendation of the Dawson Review, the ACCC will also need to seek a warrant from a magistrate.

In addition, the higher standard of proof – beyond reasonable doubt – in criminal cases offers a further safeguard.

### **Recommendations**

The working party recommends:

2.3.1 Maintaining the distinction between the investigation and prosecution of a matter in criminal cartel cases. The ACCC will undertake investigations of, and the DPP will prosecute, criminal cases.

2.3.2 The ACCC and the DPP enter a Memorandum of Understanding that would:

- specify the responsibilities of each agency;

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- establish standards of cooperation between agencies in the investigation and litigation process;
- outline channels of communication to establish adequate liaison;
- indicate selection criteria for the referral of cases to the DPP; and
- specify processes for the consideration of immunity applications.

2.3.3 The ACCC publish guidelines, prepared in consultation with the DPP, which outline in general terms the criteria that will inform decisions as to whether to pursue a criminal or a civil investigation, and in which circumstances matters will be referred to the DPP.

2.3.4 The incorporation of statutory bars in the *Trade Practices Act 1974* to provide protection against double jeopardy in terms similar to those in the *Corporations Act 2001*.

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## 2.4 SETTING THE PENALTY

### Task of the working party

The Dawson Review recommended that the penalty for the criminal cartel offence include imprisonment and fines, as appropriate, for individuals, and fines for corporations, but did not make any concrete recommendations. The working party was required to determine what would be an appropriate maximum penalty for individuals and corporations. A penalty maximum allows judges to use their discretion to determine the penalty in the particular circumstances before the court, taking into account a range of sentencing considerations,<sup>35</sup> including whether there has been previous offending, the circumstances of the victim, whether the person has cooperated and the deterrent effect.

### Working party's response

Any penalty should be within the range prescribed in other countries, but be appropriate in the Australian context. Key factors in determining an appropriate penalty were penalties for similar offences in other countries, penalties for similar offences under Australian law, and pecuniary penalties for cartel breaches under the civil provisions in the Trade Practices Act. Other consequences of a criminal conviction also were taken into account.

### Penalising convicted cartels — imprisonment

Conviction for a criminal offence carries serious consequences beyond the penalty imposed. Criminal convictions attract a strong social stigma, especially where imprisonment is ordered, and may disqualify participation in certain activities. A convicted person may be ineligible to hold an office, unable to obtain a licence to undertake certain activities, ineligible to travel to a range of other countries and be deported from Australia if not an Australian citizen.

In Australia, maximum terms of imprisonment for fraud related offences range from five to ten years (Table 2.4.1).

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<sup>35</sup> These are detailed at section 16A of the *Crimes Act 1914*.

**Table 2.4.1: Penalties for other relevant offences in Australian law**

Offence	Max years in prison	Max fine for a person (\$)	Max fine for a corporation (\$)	Reference
Theft	10	13,200	66,000	s131.1 Criminal Code
Obtaining a financial advantage by deception	10	13,200	66,000	s134.2 Criminal Code
Conspiracy to defraud	10	13,200	66,000	s135.4 Criminal Code
Corruption	10	13,200	66,000	s135 Criminal Code
Insider trading	5	220,000	1,100,000	s1043A Corporations Act
Market manipulation	5	22,000	110,000	s1041A Corporations Act
Market rigging	5	22,000	110,000	s1041B Corporations Act
False or misleading statements to induce dealing	5	22,000	110,000	s1041E Corporations Act

Nine OECD countries prescribe maximum terms of imprisonment, ranging from two to six years for competition offences, and Table 2.4.2 shows the penalties for some comparable offences in other jurisdictions.

**Table 2.4.2: Penalties for comparable offences in other jurisdictions**

Jurisdiction	Max years in prison	Max fine for a person	Max fine for a corporation	Reference
United States	3	US\$0.4m (\$0.5m) or twice the gross gain or loss	US\$10m (\$13m) or twice the gross gain or loss	s1 and s2 of the Sherman Act and the Criminal Fines Improvements Act
Canada	5	Can\$10m (\$10m)	Can\$10m (\$10m)	s45 of the Competition Act
United Kingdom	5	Unlimited	Not applicable	s190 of the Enterprise Act
Ireland	5	€4m (\$7m) or 10 per cent of the turnover	€4m (\$7m) or 10 per cent of the turnover	s8 of the Competition Act

An appropriate maximum term of imprisonment for the cartel offence should lie within the international range, but also should reflect the seriousness of the cartel offence relative to other corporate criminal offences in Australia. On this basis, a term of imprisonment of five years could be justified.

The working party therefore recommends a maximum term of imprisonment of five years for the criminal cartel offence.

### **Fines for individuals**

Legislation establishing an offence usually sets a maximum fine, expressed in penalty units, as well as a maximum term of imprisonment. Section 4AA of the Crimes Act provides that a penalty unit is \$110 and sections 4AB and 4B set out general penalty ratios between levels of imprisonment and fines for individuals and corporations.

The working party reviewed the maximum fines for individuals in other offences and under the Trade Practices Act, comparable offences in federal legislation and comparable offences internationally.

Part VC of the Trade Practices Act contains criminal offences relating to consumer protection. A person convicted of making a false or misleading representation about goods or services faces a maximum fine of 2,000 penalty units, or \$220,000. Other similar crimes in Commonwealth law often have maximum fines for individuals ranging from \$13,200 to \$220,000 (Table 2.4.1).

Equivalent offences in comparable jurisdictions have considerably higher maximum fines. In the US, individuals are liable to maximum fines of US\$350,000 for a breach of section 1 of the Sherman Act. However, the Criminal Fines Improvements Act provides for additional fines to be imposed. In Canada, the maximum fine for individuals is \$10 million. The UK does not limit the fine on individuals if the conviction is on indictment.

It is therefore recommended the appropriate maximum fine for an individual be \$220,000, or 2,000 penalty units.

### **Pecuniary penalties for corporations**

In Australia, the Crimes Act default maximum pecuniary penalty for corporations is five times that for an individual.

If the maximum pecuniary penalty for an individual for the cartel offence is \$220,000, the default maximum pecuniary penalty for a corporation would therefore be \$1.1 million.

The Dawson Review recommended that the penalty regime for civil cartel breaches under Part IV of the Trade Practices Act set a maximum fine for corporations as the greater of \$10 million or three times the gain from the contravention, or where the gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all its interconnected bodies corporate (if any).

If the maximum pecuniary penalty for the criminal cartel offence were the default \$1.1 million, a corporation convicted of a criminal cartel offence would face a lower maximum pecuniary penalty than if convicted of a civil breach.

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Such a disparity is not uncommon in Commonwealth law and takes account of the strong social stigma attached to a criminal conviction, and its consequences. It could be argued that lower pecuniary penalties for a corporation convicted of a criminal cartel offence may be balanced by other outcomes from a criminal conviction.

Negative publicity could damage goodwill towards or public confidence in a company. Publicity could be generated by an order to publish an advertisement under paragraph 86C(1)(d) of the Trade Practices Act.

A criminal conviction also may constrain a firm's business activities where it prevents the granting of a licence or permit for a particular activity under a statutory scheme. Corporations convicted of offences may become ineligible to obtain certain licences or accreditation; for example, a convicted corporation would be ineligible to provide employment services under the Employment Services Act.

The Proceeds of Crime Act also applies. Its principal aim is to prevent criminals profiting from their crimes by depriving them of the proceeds and benefits of criminal activity.

Recovery action under the Proceeds of Crime Act can be either conviction or civil based.

For example, under section 49 of the Proceeds of Crime Act, if a court is satisfied on the balance of probabilities that some or all of the property or assets of a person is, or is suspected to be, proceeds<sup>36</sup> of one or more Commonwealth indictable offences (such as a criminal cartel offence), and the property has been restrained for at least six months, the court can order the property be forfeited to the Commonwealth, upon application by the DPP. It is not necessary for the court making the order to find the person committed a specific offence – rather, the order can be based on a finding that an indictable offence (not specified) has been committed.

Alternatively, under section 47 of the Proceeds of Crime Act, if a court is satisfied on the balance of probabilities that a person has engaged in conduct constituting a serious offence under the Act (criminal cartel conduct may fall within that definition), then the court may order forfeiture of any property owned by or under the control of the person where it has been restrained for at least six months. The court does not need to consider whether the property was the proceeds of the offence. A defendant can prevent forfeiture by showing the relevant property is not the proceeds of unlawful activity.

The Proceeds of Crime Act also enables civil based pecuniary penalty orders to be made against a person. Where a court is satisfied that a person has committed a serious

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<sup>36</sup> Property is proceeds of an offence if it is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence (section 329 of the *Proceeds of Crime Act 2002*).

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offence<sup>37</sup> it must, on application by the DPP, order the person pay a pecuniary penalty order equivalent to the benefit derived from committing the offence. The Act provides presumptions to assist the court in calculating the benefit. For example, where an offender's net property increased in value during the period of the offending, the amount of the increase is presumed to be a benefit derived from the commission of the offence.

Proceeds of crime proceedings could result in the confiscation of millions of dollars and there is no upper limit.

Under the default penalty maximum of \$1.1 million, the maximum fine would be only one tenth of the fine that would apply under the civil regime. This disparity is particularly marked. Treasury and the ACCC consider the financial disincentives for corporations to engage in cartel conduct should be at least as strong in the criminal regime as in the civil regime. While the Proceeds of Crime Act applies to this conduct with a lower (civil) standard of proof, the DPP is only likely to make an application under the Proceeds of Crime Act where a benefit to the corporation from the cartel activity can be identified. It may be difficult to quantify such a gain to the cartel participants. While it may be relevant for a number of reasons it is not necessary for a successful prosecution to prove that the cartel participant made a gain.

Accordingly, the Treasury and the ACCC recommend that the maximum fine for a corporation mirror the civil fines that will be introduced on the basis recommended by the Dawson Review. In such a case, the Proceeds of Crime Act would still apply and the DPP would consider whether such action was appropriate on a case by case basis.

The Attorney-General's Department considers that the civil penalty recommendations by the Dawson review would be an excessive penalty for the cartel offence given the other consequences of criminal convictions, including proceeds of crime proceedings, which are now much easier to establish than in the past. Given the additional consequences of criminal convictions, it is not unusual for civil penalties to be considerably higher than criminal fines. The Attorney-General's Department is also concerned that a \$10 million threshold penalty would greatly exceed the maximum penalties currently prescribed for other comparable offences, and would therefore compromise the internal consistency of Commonwealth criminal law. Given that existing offences in Part VC of the Trade Practices Act carry a maximum corporate penalty of \$1.1 million, and the cartel offence would be generally considered to be more serious than those offences, the Attorney-General's Department agrees that a higher penalty could be appropriate for the cartel offence. However, it considers that a more appropriate maximum corporate penalty would be \$2.2 million.

Therefore, the working party recommends that the Government consider whether:

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<sup>37</sup> This will be where a conviction has been recorded, or the court has established this on the balance of probabilities.

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- the maximum pecuniary penalty for a corporation should mirror the civil pecuniary penalty that will be introduced based on Dawson Review recommendation 10.2.1; or
- the maximum pecuniary penalty for a corporation should be \$2.2 million, given the other consequences of a criminal conviction.

### **Other remedies**

Under subsection 79(4) of the Trade Practices Act, a court can order a range of civil remedies in proceedings against a person for breaching consumer protection offences in Part VC, including injunctions and adverse publicity orders.

Under section 87, the court can make a range of other orders, for example, that a corporation or individual convicted of a consumer protection offence pay compensation. Section 87A empowers the court to prohibit the payment of a debt or the transfer of property.

The working party considers it appropriate that similar orders also should be available to a court dealing with the criminal cartel offence. As all these orders are civil, the jury would not have any role in making them. The DPP should be able to seek such orders from the court.

As a consequence of Dawson Review recommendation 10.2.2 the Government intends to empower courts to ban people from being involved in managing a corporation if they have contravened the civil pecuniary penalty provisions of the Trade Practices Act.

The working party considers it appropriate that a similar power should be available to a court if a person has been convicted of a cartel offence. The DPP should be able to seek such an order from the court following conviction.

### **Recommendations**

The working party recommends:

2.4.1 The maximum term of imprisonment for a person be a five-year term.

2.4.2 The maximum fine for an individual be \$220,000 or 2,000 penalty units.

2.4.3 The Government consider whether:

- the maximum pecuniary penalty for a corporation should mirror the civil penalty that will be introduced based on Dawson Review recommendation 10.2.1; or

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- the maximum pecuniary penalty for a corporation should be \$2.2 million, given the other consequences of a criminal conviction.
- 2.4.4 Other remedies apply under sections 80, 86C, 86D, 87 and 87A of the *Trade Practices Act 1974* where a person or corporation is convicted of the criminal cartel offence.
- 2.4.5 Consistent with Dawson Review recommendation 10.2.2, a person may be banned from being involved in managing a corporation if that person is convicted of the criminal cartel offence.

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## 2.5 OVERALL WORKING PARTY FINDINGS

### Task of the working party

The Dawson Review was of the view that despite the problems it identified with the introduction of criminal sanctions, it was persuaded by submissions and overseas experience that criminal sanctions deter serious cartel behaviour and should be introduced in Australia. It noted, however, that a number of practical problems needed to be solved before criminal sanctions could be introduced, and that this should be the task of a working party.

### Working party's response

#### Why criminalise the cartel offence? (Part 1)

The rationale for criminalising the cartel offence can be summarised as:

- cartel behaviour has significant detrimental consequences for the economy and consumers in terms of higher prices and lower choice, and should be seen as a form of theft or fraud against consumers.
- the threat of imprisonment can be an effective deterrent to cartel behaviour (but is more effective if coupled with an effective immunity policy); and
- Australia is not immune from cartel behaviour as reflected in a range of prosecutions of international and domestic cartels.

#### The issues identified by Dawson to be resolved by the working party

The Dawson Review raised several practical problems that needed to be resolved before there could be an assurance that a criminal cartel offence would be workable in Australia.

##### A workable definition of the offence (Section 2.1)

The most significant issue that needed to be dealt with was how to identify serious cartel conduct which should be subject to criminal sanctions.

Proving beyond reasonable doubt before a jury that a party to a cartel was dishonest (as in the UK) or the cartel was anti-competitive (as in Canada) posed difficulties. These concepts require the jury to make a subjective assessment of motive or make a judgement on the basis of complex economic evidence.

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The working party came to the view that establishing the conduct was secret captures the central element of serious cartel conduct. Cartels are able to perpetuate a fraud on consumers because their arrangements are covert.

To establish secrecy requires proving beyond reasonable doubt that the parties to the agreement to fix prices, rig bids, share or divide markets or restrict output did not make the agreement known publicly, before entering into the arrangement.

This is a more certain argument to put to a jury because it does not require them to make a subjective judgement about the agreement or its economic effect on markets. This also provides certainty to business as secrecy is a simpler concept than dishonesty for them to take account of when they make commercial agreements. As a defence to avoid criminal liability, for legitimate collaborative arrangements, the working party's recommendations provide for notification in writing to the ACCC before entering an agreement.

#### **Can an effective immunity policy be developed? (Section 2.2)**

An effective immunity policy must provide adequate protection from prosecution to whistleblowers to encourage disclosure of a cartel. This means offering immunity at an early stage so as to encourage participants to come forward. However, the DPP has statutory discretion to grant immunity, not the competition enforcement agency, and the DPP's current Prosecution Policy means that it can provide an indemnity only at the conclusion of an investigation, and as a last resort.

The working party recommended amendments to the DPP's Prosecution Policy to enable the DPP to grant immunity, where the ACCC recommends immunity and where the applicant meets certain conditions. These conditions are:

- the ACCC was not aware of the conduct;
- the party was the first to come forward;
- the party was not a clear individual leader;
- the party had not coerced anyone to join the cartel; and
- the party fully cooperates with the ACCC in providing full and truthful information and attending court to give evidence as required.

This enables immunity to be provided early in the investigation which overcomes the difficulties identified by the Dawson Review.

The responsibility for granting immunity is dependent on the ACCC and DPP both concluding that the applicant has met the conditions of immunity. Therefore, both agencies must cooperate closely when deciding whether to grant immunity.

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The working party believes this arrangement will work effectively in practice. Canada has a similar arrangement under its immunity policy, and early and close cooperation between the Competition Bureau and Department of Justice when a party approaches the Competition Bureau for immunity means that the Canadian Attorney General usually follows any Bureau recommendation to grant immunity.

**What procedures are required to conduct criminal and civil proceedings?  
(Section 2.3)**

The working party recognises that there are different procedures required to conduct civil and criminal proceedings. Bars to the use of evidence in multiple proceedings means the ACCC will need to give careful consideration in the course of an investigation as to the type of proceedings the evidence will be used for. It also will need to have sophisticated handling methods for evidence to be used in criminal investigations to meet the higher standards in criminal cases.

For these reasons it is desirable that the ACCC decide early in its investigation whether it will proceed along a civil or criminal path. The ACCC will need to work cooperatively with the DPP in order to obtain a successful criminal prosecution, and the working party has recommended the development of guidelines and an MOU to provide appropriate guidance to the operations of both organisations.

**What is an appropriate penalty? (Section 2.4)**

The Dawson Review raised the question of the size of the penalty for the criminal offence.

The working party recommends that the Government consider whether:

- the maximum pecuniary penalty for a corporation should mirror the civil penalty that will be introduced based on Dawson Review recommendation 10.2.1, or
- the maximum pecuniary penalty for a corporation should be \$2.2 million, given the other consequences of a criminal conviction.

Individuals convicted of the cartel offence would face imprisonment, and the working party recommends a five year maximum jail term.

**Extending the criminal law to cover cartel activity**

The Dawson Review observed that there were concerns raised in some of the submissions it received about extending the criminal law into the area of economic regulation. This stems from the view that economic regulation/competition law tends to be aspirational rather than prescriptive. This is reflected in the object of the Trade Practices Act which is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection'. Thus the difficulty

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in defining the requisite degree of criminality to justify the imposition of criminal sanctions was a matter of real concern raised in submissions to the Dawson Review.

Consequently the working party considered appropriate safeguards for the concerns that are likely to be raised by stakeholders regarding the scope of the offence. A summary is presented below.

### **Providing certainty and safeguards for business**

The working party was conscious of the need to ensure prohibitions on anti-competitive conduct do not rule out legitimate business activities that benefit the economy or are in the public interest. The working party considers that targeting covert arrangements, through the use of secrecy to define criminality, would be consistent with that need. This means that cartels that are not covert, that do not attempt to deceive the public and the market as to their existence could not be prosecuted.

A general defence will be available to business. Where a business notifies the ACCC in writing of a proposed contract, arrangement or understanding that business would not commit the criminal cartel offence. The working party recommends that the criminal cartel offence should not apply to activities which are currently, or proposed to be, lawful under the Trade Practices Act.

Appropriate protection for individuals and businesses that come forward to uncover cartel conduct also would be provided through a clear and certain immunity policy. As an aid to public awareness, the working party recommends the ACCC and DPP develop and publish guidelines covering the conditions for immunity. The roles and responsibilities of the ACCC and the DPP also should be defined in an MOU.

There are also safeguards in the area of enforcement and prosecution.

- The ACCC will pursue criminal matters only where they can be clearly justified. This will be where the ACCC considers the scale, duration and impact of the conduct sufficiently serious to warrant referral to the DPP. In addition, the ACCC would not look to refer for prosecution cases where there is evidence that the cartel participants were not aware of or did not appreciate the consequences of their conduct. For these reasons, the ACCC will not pursue minor or trivial breaches. Civil proceedings can be settled and offer a great deal more flexibility to the ACCC in the conduct of litigation arising from breaches of the Trade Practices Act than would criminal prosecutions. Hence the decision to commence a criminal investigation will not be made lightly.
- For a criminal investigation, only the AFP can execute a Crimes Act warrant. Hence, for the ACCC to initiate the use of this type of warrant it would be required to convince an independent party that there are sufficient grounds for a warrant to be issued. There will be similar requirements for the issuing of a

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section 155(2) warrant if the Dawson Review recommendations relating to investigations are implemented.

- In addition, while the ACCC can undertake a criminal investigation, it will need to present the evidence to the DPP which will make its own judgement as to whether the investigation can proceed to prosecution.
- Only the DPP can decide whether to institute criminal proceedings. The DPP will be guided by the Prosecution Policy, which includes considerations such as whether there is sufficient evidence to establish a prima facie case, reasonable prospect of conviction, and whether the public interest requires a prosecution. In considering the public interest, the likely length and expense of a trial, the likely outcome and the availability of any alternatives to prosecution are relevant.
- There is a higher standard of proof – proof beyond reasonable doubt – for a criminal conviction. Under section 80 of the Constitution, the unanimous verdict of a jury would be necessary. The need to prove beyond reasonable doubt that an individual or corporation engaged in cartel activity would ultimately rest with the DPP based upon evidence provided by the ACCC.

The working party is of the view that the number of cases subject to criminal prosecution in any given year is not likely to be large.

However, the working party considers it is appropriate to proceed with the criminalisation of cartel behaviour given the possible significant negative consequences when such behaviour remains undetected, the probable strong deterrent effect of a criminal sanction and the identification of a set of solutions to the practical difficulties in introducing criminal sanctions in the Australian context.

### **Recommendation**

The working party recommends:

- 2.5 That criminal sanctions should be introduced for serious cartel behaviour, on the basis of the arrangements set out in this report.

## APPENDIX A

In formulating its recommendations, the working party developed draft outlines of the cartel offence, the ACCC immunity policy and an MOU between the ACCC and the DPP, so as to give a clearer indication of their possible shape. These are set out below.

### DRAFT OF THE CARTEL OFFENCE

Box A.1 sets out a draft of the cartel offence.

This draft is intended as a guide to legislative drafters, and it should be noted that the working party recommends that the criminal cartel offence should capture the activities of price fixing, output restrictions, bid rigging, and market sharing. Hence the draft offence as set out in Box A.1, which only proscribes price fixing, would need to be appropriately extended.

The draft draws on the provisions of the Criminal Code and the Crimes Act. These Acts are central to federal criminal law as they have general application, and affect the framing and operation of federal offences.

Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility. Division 3 of Chapter 2 provides that an offence consists of physical and fault elements.

Under section 4.1, the physical element of an offence may be 'conduct; or a result of conduct; or a circumstance in which conduct, or a result of conduct occurs'. Subsection 4.1(2) states that 'conduct means an act, an omission to perform an act or a state of affairs' while subsection 4.2(1) states that this can only be a physical element if the conduct is voluntary.

Division 5 of Chapter 2 of the Criminal Code provides the fault elements for the physical elements of conduct, circumstance and result. Where the physical element is conduct, the fault element (if no other is specified) is 'intention', and where the physical element is a circumstance or result, the fault element (if no other is specified) is recklessness.

Unless otherwise provided, the prosecution must prove intent in relation to the physical element of conduct, and recklessness as to the circumstance in which conduct occurs or the result of the conduct.

Part 2.5 of the Criminal Code translates the fault elements of individual responsibility to corporate liability. It is expected that corporate responsibility, as defined in the Criminal Code, would apply to a new cartel offence.

**Box A.1: Draft of the cartel offence**

1. A person is guilty of an offence if, in trade and commerce:
  - 1.a. that person makes, or enters into a contract, arrangement or understanding between two or more parties; and
  - 1.b. that person intends to make, or cause to be made or implemented, that contract, arrangement or understanding; and
  - 1.c. that contract, arrangement or understanding contains a provision to fix, control or maintain prices in relation to goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding; and
  - 1.d. that person is reckless as to whether that contract, arrangement or understanding contains that provision; and
  - 1.e. the contract, arrangement or understanding is between two or more parties, who are in competition with each other, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision relates; and
  - 1.f. that person is reckless as to that fact; and
  - 1.g. the relevant provision was not generally known to persons who either acquired or supplied or were likely to acquire or supply the goods or services to which the relevant provision relates; and
  - 1.h. that person is reckless as to whether the relevant provision is generally known to such persons.
2. It is a defence against the offence if the person notified the ACCC in writing of the proposed contract, arrangement or understanding before the contract, arrangement or understanding was made or implemented, or the person knew that the ACCC had been so notified by another person.

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## **DRAFT OF THE ACCC'S IMMUNITY POLICY FOR CARTEL WHISTLEBLOWERS**

Section 2.2 set out the working party's considerations in relation to the immunity policy, and recommendation 2.2.1 proposes introducing an immunity policy.

Box A.2 sets out a draft immunity policy developed by the ACCC. Should the working party's recommendations be accepted, the ACCC will finalise its immunity policy in consultation with the DPP.

### **Box A.2: Draft of the ACCC's immunity policy for cartel whistleblowers**

Subject to the following requirements, and consistent with fair and impartial administration of the law, the ACCC will recommend to the DPP that immunity be granted to a party.

A party may be a person or a corporation.

Subject to the requirements stated, if a corporation qualifies for immunity, all directors, officers and employees of the corporation, who admit their involvement in the cartel as part of the corporation's admission, will receive immunity in the same form as the corporation. This will require that they cooperate with the ACCC's investigation and in any proceedings.

A corporation may also seek immunity for its past directors, officers and employees. Where they cooperate with the ACCC's investigation such persons may also qualify for immunity through the corporation.

The requirements for immunity are:

- The applicant must be the first to approach the ACCC and the ACCC must have no knowledge of the cartel.
- The applicant must give full and frank disclosure of information and documents relating to the suspected cartel in the form requested by the ACCC and cooperate fully, on a continuous basis and expeditiously throughout the ACCC's investigation and any ensuing proceedings. It is not necessary for the party to have assembled a complete record of the information required at the first contact with the ACCC.
- The applicant's involvement in the suspected cartel must cease.
- The applicant must not have been involved in the coercion of other persons to participate in the cartel and must not have been the clear individual leader in the cartel.
- The applicant must not be the sole beneficiary of the activity in Australia.

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## **DRAFT OUTLINE OF PROPOSED MEMORANDUM OF UNDERSTANDING BETWEEN THE ACCC AND DPP**

Section 2.3 sets out the working party's considerations in managing parallel civil and criminal provisions. Recommendation 2.3.2 requires the ACCC and DPP enter an MOU.

Box A.3 sets out a draft outline for an MOU as developed by the ACCC and the DPP. Should the recommendations of the working party be accepted, the ACCC and the DPP will finalise and publish an MOU.

### **Box A.3: Draft outline of a proposed MOU between the DPP and the ACCC**

#### **Part 1: Introduction**

The introduction will state:

- that cartel conduct has traditionally been dealt with by the imposition of civil pecuniary penalties;
- the legislative intention that criminal penalties are part of the full spectrum of remedies available for contravention of the anti-competitive provisions of the Trade Practices Act;
- the background and rationale for the introduction of criminal sanctions. The Parliamentary intention being that criminal sanctions, including the possibility of imprisonment, is appropriate in serious cases of price fixing, bid rigging or market sharing, which is recognised as being akin to fraud.

#### **Part 2: Responsibilities**

The MOU will state the DPP is responsible for:

- prosecuting offences against Commonwealth law in accordance with the *Prosecution Policy of the Commonwealth*.

The MOU will state the ACCC is responsible for:

- enforcing the Trade Practices Act;
- investigating complaints regarding possible contraventions of the Trade Practices Act; and
- referring appropriate matters to the DPP for criminal prosecution.

**Box A.3: Draft outline of a proposed MOU between the DPP and the ACCC (continued)**

**Part 3: Decision to investigate**

The MOU will acknowledge that the ACCC receives a significant number of complaints and that it is not practical to investigate all such complaints.

The ACCC will decide what matters should be investigated in accordance with its internal guidelines.

The ACCC will refer matters to the DPP that have been investigated where criminal prosecution may be appropriate. In deciding whether a matter should be referred to the DPP the ACCC will act in accordance with internal ACCC selection criteria that have been agreed with the DPP. The selection criteria will set out those matters to be considered in deciding whether a matter should be referred to the DPP for consideration for prosecution as a criminal matter.

The ACCC and DPP will have regular operational meetings involving national and regional staff that will, amongst other things:

- examine matters under investigation to ensure that cases worthy of criminal prosecution are being dealt with appropriately;
- review current matters that have been referred to the DPP;
- ensure that the ACCC and DPP have nominated case officers for every matter that is referred;
- review the effectiveness of operational issues such as DPP provision of advice during an investigation and the adequacy of ACCC briefs of evidence.

**Part 4: Referral to the DPP**

If an ACCC investigation discloses prima facie evidence of price fixing, bid-rigging or market sharing that is worthy of criminal prosecution (in accordance with the selection criteria), the ACCC will consult with the DPP to obtain a preliminary view as to whether a matter would be appropriate for criminal prosecution and as necessary on evidentiary issues and will formally refer appropriate matters to the DPP as soon as possible for a decision on whether charges should be laid.

If an ACCC investigation discloses such serious conduct, and the ACCC is uncertain whether it would be appropriate to deal with the matter as a criminal prosecution, the ACCC will seek advice from the DPP.

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**Box A.3: Draft outline of a proposed MOU between the DPP and the ACCC (continued)**

The ACCC will as far as possible refer to the DPP a completed brief of evidence in a form agreed between the ACCC and the DPP.

Where the DPP requests the ACCC to undertake further investigations the ACCC will as far as practicable undertake those further investigations. In the event of disagreement as to the further investigations the ACCC will consult with the DPP.

**Part 5: Criteria for referral/ selection criteria**

All serious cases of cartel conduct are appropriate for referral to the DPP. In considering whether to refer a matter to the DPP the ACCC will have regard to the following factors:

**Are there circumstances surrounding the conduct that warrant or militate against criminal prosecution?**

- Is the alleged contravention a blatant disregard of the law?
- What was the scale of the conduct? Has it continued for a long time? Do the participants represent a significant part of the market?
- What was the impact of the conduct? Has it had a significant economic impact assessed by reference to the volume of commerce affected or the extent of the price rise?
- Did the participants attempt to keep the conduct secret or to enforce participation?
- The prevalence of the conduct and the need for deterrence either personal or general.

**Are there characteristics of the participants that warrant or militate against criminal prosecution?**

- Is there evidence that those involved thought the conduct was likely to adversely affect consumers?
- Do the participants have a history of involvement in cartels?
- Is there clear evidence that the defendants were not aware of, or did not appreciate, the consequences of their conduct?
- Is there evidence that the participants knew that their conduct was illegal but decided to proceed to engage in that conduct?
- Is there any evidence of coercion?

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**Box A.3: Draft outline of a proposed MOU between the DPP and the ACCC (continued)**

**Part 6: The decision to prosecute**

Once a case has been referred to the DPP the decision whether to prosecute will be made by the DPP independently of the ACCC.

The DPP will make the decision on all evidence available, on the basis of the guidelines set out in the *Prosecution Policy of the Commonwealth*.

If a matter has, or is likely to be, referred to the DPP, the ACCC and the DPP will consult in relation to any civil proceedings contemplated by the ACCC to ensure that such proceedings do not impinge upon the investigation or prosecution of criminal proceedings against individuals.

If there is a dispute at a national operational level as to whether a particular matter should be pursued as a prosecution the matter will be resolved by the Chairperson of the ACCC and the Director.

**Part 7: Immunity Policy**

The ACCC will acknowledge that the decision to grant immunity in criminal proceedings (including under the Trade Practices Act) is a matter for the DPP. The DPP will exercise its discretion in accordance with the *Prosecution Policy of the Commonwealth* (as amended).

The DPP will acknowledge the existence of the ACCC's immunity policies (applying to both civil and criminal matters). The DPP will acknowledge that where an applicant satisfies the immunity policy it proposes to exercise its discretion under the Director of Public Prosecutions Act accordingly.

## APPENDIX B: TERMS OF REFERENCE — WORKING PARTY ON PENALTIES FOR CARTEL BEHAVIOUR

### Background

The Review of the Competition Provisions of the *Trade Practices Act 1974* contained the following recommendation regarding penalties for cartel behaviour:

#### Recommendation 10.1

The Committee is of the view that solutions must be found to the problems identified by it before criminal sanctions are introduced for serious cartel behaviour. The problems are, importantly, the development (preferably by a joint body representing the Director of Public Prosecutions (DPP), the Attorney-General's Department, the ACCC and the Treasury) of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime. Subject to this proviso, the Committee recommends the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.'

The Commonwealth Government response in relation to this recommendation was:

- 'The Government accepts, in principle, that criminal penalties may be more effective than civil penalties in deterring people from engaging in serious cartel behaviour.
- The Government will further consider the introduction of criminal penalties for serious cartel behaviour. Appropriate solutions must be found to the problems identified by the Committee. In addition, to enhance the welfare of Australians, any new criminal penalty must be applied broadly and must not impose significant additional uncertainty and complexity for business. Any new offence must also work well in the context of the Australian legal system, because it will only deter if the risk of conviction and substantial penalty are real.'

## Working party membership and operation

The working party will be chaired by a Treasury official, and will comprise officials from Treasury, the Attorney-General's Department, the DPP and the ACCC. Treasury will provide secretariat support for the working party.

## Working party terms of reference

Having regard to Recommendation 10.1 of the Review of the Competition Provisions of the *Trade Practices Act 1974* and the Commonwealth Government Response, the working party is to consider and report on whether an appropriately defined criminal offence or offences can be introduced into Commonwealth law proscribing some or all of the activities that comprise cartel behaviour.

More specifically, the working party's consideration of this matter is to include a consideration of:

- the activities that comprise cartel behaviour and the provision of a workable definition of such behaviour, having regard to the definitions used in other jurisdictions and by the OECD;
- feasible options for criminalising cartel behaviour, including recommendations as to the elements of any offence;
- whether, and to what extent, any proposed offence might overlap with existing civil prohibitions and whether any measures (legislative or otherwise) are required to manage this overlap;
- the appropriate maximum penalties for any proposed offence;
- any appropriate defence against, or exemptions from, a proposed offence;
- the development of a clear and certain leniency policy, having regard to the operation of leniency policies in other jurisdictions; and
- how investigative, prosecutorial and other relevant legal processes might be used or might need to be modified to ensure the effectiveness of any proposed offence.

In undertaking this task, the working party is to examine relevant factors including, but not limited to, the following:

- the role of criminal penalties as an effective deterrent to cartel behaviour;
- the economic effects of cartels and penalising cartel behaviour;

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- the impact of any proposed penalties on business;
- the detection of cartel behaviour;
- similar offences in other jurisdictions and the implications for Australia of other jurisdictions' experiences;
- the transparency and accountability of investigative and prosecutorial agencies;
- the compatibility of any proposal with existing Australian approaches to law enforcement; and
- issues raised in the Review of the Competition Provisions of the *Trade Practices Act 1974*.

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