

AUSTRALIAN CARTEL LAW:

BIOPSIES

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I Australian Cartel Law after the Harper Review and the 2017 Amendments

1. The *Competition Policy Review Final Report* (31 March 2015) (Harper Report)¹ made numerous recommendations for changes to the *Competition and Consumer Act 2010* ('CCA'). Many of these recommendations were adopted in amendments that came into effect on 6 November 2017.² Other recommendations may be adopted in future amendments.³
2. Some patients remain in the wards. This paper considers the following:
 - (a) "contract, arrangement or understanding" – stitching "arrangement" and "understanding" to a different model of agreement (Part II);
 - (b) "cartel provision" – ongoing issues of "purpose" in s 45AD (Part III);
 - (c) exemptions from cartel prohibitions – joint ventures, supply/acquisition agreements and class exemptions (Part IV); and
 - (d) liability and sanctions – dealing with offshore individuals and responding to limitations of monetary penalties against corporations (Part V).
3. Others are not visited on this round. They include:
 - big rigging as defined in s 45AD(3)(c);⁴

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¹ Available at <http://competitionpolicyreview.gov.au/>.

² In relation to cartel conduct see *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

³ See Government Response to Harper Report at: <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/CPR-response>.

⁴ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 4.7.

- the prohibition defined in term of a “concerted practice” and substantial lessening of competition (**SLC**);⁵
- international liner cargo shipping exemptions under Part X;⁶
- ACCC and CDPP immunity policies;⁷
- whether or not a BEAR-type scheme should be introduced for combatting cartel conduct;⁸
- non-inclusion of cartel offences in the proposed deferred prosecution scheme;⁹
- “intuitive synthesis” v structured assessment of fines and civil monetary penalties;¹⁰ and
- application of civil remedies to cartel conduct.¹¹

II “Contract, Arrangement or Understanding” – Element of “Commitment”

Issue and background

4. “Commitment” or “assumption of an obligation” has become an established element of an “arrangement” or “understanding” under the CCA prohibitions that are defined in terms of a “contract, arrangement or understanding” (**CAU**). The difficulty of proving commitment or assumption of an obligation has generated concern and debate for well over a decade. The response in the 2017 amendments to the CCA after the Harper

⁵ See the paper at this conference by The Hon L Foster J.

⁶ Repeal was recommended in *Competition Policy Review: Final Report* (March 2015), Recommendation 4.

⁷ Eg, application to concerted practices prohibitions; making a compliance program a condition of immunity. See C Beaton-Wells, ‘Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study’ (2014) 2 *Journal of Antitrust Enforcement* 126; C Beaton-Wells & C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015). The ACCC currently is reviewing its Immunity Policy.

⁸ Consider *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth).

⁹ Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, referred to Senate Legal and Constitutional Affairs Legislation Committee (07/12/2017), report 20/04/2018); Attorney-General’s Department, Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper, 2017, at: <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf>.

¹⁰ See OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (2018) at: <http://www.oecd.org/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>; C Beaton-Wells & J Clarke, “Corporate financial penalties for cartel conduct in Australia: A critique” (2018) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149143. One issue is whether or not ACCC guidelines would be sufficient to make structured assessment work. Another is whether or not fines or monetary penalties should be geared to revenue; see eg JE Harrington, Jr, *The Theory of Collusion and Competition Policy* (2017) 76 (welfare economics does not support current widely used fining structures that are based mainly on revenues – penalties based on overcharges are welfare superior).

¹¹ See eg, C Beaton-Wells, “Private Enforcement of Competition Law in Australia: Inching Forwards?” (2016) 39 *Melbourne University Law Review* 681.

Review has been to introduce a concerted practices prohibition that does not require a CAU.¹² However, the cause of the problem remains. Is it possible to repair the concepts of arrangement and understanding? As explained in the discussion to follow, one possibility may be to stitch them to a different model of agreement.

5. An “arrangement” or “understanding” in the definition of cartel prohibitions in the CCA requires that at least one party assume an obligation, or give an assurance or an undertaking, that they will act in a particular way.¹³ The requirement of assumption of an obligation is often referred to as the element of “commitment”. A mere expectation that a party will act in a certain way is not enough.¹⁴ A mutual obligation does not appear to be necessary although the question has yet to be settled.¹⁵ A proposal is not an arrangement or understanding but may give rise to an attempt to induce an arrangement or understanding.¹⁶
6. The element of commitment or assumption of an obligation has been relevant in a number of cases where proceedings for cartel conduct by the ACCC have not been successful.¹⁷ They include:

¹² CCA s 45(1)(c).

¹³ *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 (1999) 92 FCR 375, [141] (Lindgren J); *Rural Press Ltd v ACCC* [2002] FCAFC 213, [79]; 2005] FCAFC 161, *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794, [37] (Gray J) (“[w]hatever word may be chosen to represent the essential element of an understanding for the purposes of the relevant statutory provisions, it is clear that element involves the assumption of an obligation, unenforceable in any court of law, but merely morally binding or binding in honour”); *TPC v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446, [49]. See also *News Ltd v Australian Rugby League Ltd (No 2)* (1996) ATPR ¶41-521 at [654], [656] (mutual consent to carrying out a common purpose manifested by a common “undertaking”). Contrast *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444 (Gibbs and Mason JJ) (“arrangement” in “agreement or understanding in taxation legislation interpreted as requiring consensual conduct but not necessarily a commitment or an assumption of an obligation). Contrast also *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608, [16] (concepts of mutuality, obligation and duty not determinative but if a moral obligation is implied if consensus and expectation are established (that implication is dubious: two competitors may reach a consensus that they should increase the price they charge for a product and expect that each is likely to increase the price without necessarily also assuming an obligation to increase the price)); see further C Noonan, *Competition Law in New Zealand* (2017) 300-302.

¹⁴ *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 (1999) 92 FCR 375, [141] (Lindgren J); *Rural Press Ltd v ACCC* [2002] FCAFC 213, [79]. Some cases refer to the insufficiency of a mere expectation without also saying that commitment or assumption of an obligation is necessary; see eg *Stationers Supply Pty Ltd v Victorian Authorised Newsagents Ltd* (1993) 44 FCR 35, at 61 (Ryan J).

¹⁵ *ACCC v Australian Egg Corporation Limited* [2017] FCAFC 152, [95]-[96]. In this case the reference to mutual obligations by White J reflected the pleadings by the ACCC; id, at [102]-[103]. See also *ACCC v Colgate-Palmolive Pty Ltd (No 4)* [2017] FCA 1590 (Wigney J).

¹⁶ *ACCC v Pauls Ltd* [2003] ATPR ¶41-911 46 622 [105] (O’Loughlin J).

¹⁷ Compare *Prysmian Cavi E Sistemi SRL v ACCC* [2018] FCAFC 30 (lack of commitment by one party in relation to one instance of the application of an arrangement or understanding insufficient to preclude liability for being a party to the arrangement or understanding).

- *Apco Service Stations Pty Ltd v ACCC*¹⁸
- *ACCC v Leahy Petroleum Pty Ltd*¹⁹
- *ACCC v Olex Australia Pty Ltd*²⁰
- *ACCC v Colgate-Palmolive Pty Ltd (No 4)*.²¹

7. Discussions with competitors can be conducted in a way calculated to help counter possible later allegations by the ACCC or private litigants that the participants are parties to an understanding.²² This invites rort:²³

Liability can .. be avoided by the obvious tactic of discussing prices (or output, allocation of customers or bids) but studiously stopping short of making any commitment. This is a glaring loophole in the law. Consider the following possible instruction that would seek to exploit that loophole:

If discussing anything sensitive with a competitor, always express a reservation to the effect that you will be making up your own mind about what you will be doing. Make sure that you make a file note recording that you expressed that reservation.

8. The concerted practice prohibition introduced in 2017 does not require commitment or assumption of an obligation by a party to engage in cartel conduct.²⁴ However, the SLC test applies to the concerted practices prohibition and creates a significant hurdle.²⁵ By contrast, a per se test of liability applies to a concerted practice under Article 101(1) of the EU Treaty where the object limb of the prohibition applies.²⁶

¹⁸ [2005] FCAFC 161. The High Court did not grant special leave to appeal: *ACCC v Apco Service Stations Pty Ltd & Anor* [2006] HCA Trans 272.

¹⁹ [2007] FCA 794.

²⁰ [2017] FCA 222.

²¹ [2017] FCA 1590. See further Clifford Chance, "Not Enough Dirty Laundry: ACCC Fails Against Cussons", Client Briefing, February 2018.

²² Consider eg *ACCC v Colgate-Palmolive Pty Ltd (No 4)* [2017] FCA 1590, [152], [282], [436], [475].

²³ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 559, noting also that boundary riding could be taken to the extreme of this possible instruction:

If discussing anything sensitive with a competitor, always express a reservation to the effect that you will be making up your own mind about what you will be doing. (If you want to be cheeky, you can say that you expect to follow what the other competitor has proposed but always add that you have yet to make your own independent decision.) Make sure that there is a suitable file note and remember at all times that your telephone may be tapped. It is also best to make sure that your conduct after the discussion includes some random departures from parallel conduct.

²⁴ Competition and Consumer Amendment (Competition Policy Review) Bill 2017, EM, 3.22.

²⁵ See C Davies & L Wainscoat, "Not quite a cartel: Applying the new concerted practices prohibition" (2017) 25 *Competition & Consumer Law Journal* 173; R Nicholls & D Kayis "Concerted practices contested: Evidentiary thresholds" (2017) 25 *CCLJ* 125.

²⁶ J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3C(8). See also *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25; M Todino & N Colombo, "Case C-179/16; Hoffmann-La Roche: By Object Restrictions Still Bitter Pills to Swallow? A Close

Underlying models of agreement

9. The element of commitment or assumption of obligation required for an arrangement or understanding appears to stem from a promise-based model of agreement (**Promise Model**).²⁷ The Promise Model is apparent in many, although not all, theories of contract.²⁸ If that Model is reflected by the term “contract” in the phrase “contract, arrangement or understanding”, the terms “arrangement or understanding” have a similar connotation: *noscitur a sociis*.²⁹
10. The Promise Model is one of several different models of cartel agreement. Other models include:
 - the US model of inferring an agreement under s 1 of the Sherman Act from so-called plus factors (**Plus Factors Model**);³⁰
 - the EU model of “concurrence of wills” under Article 101 of the EU Treaty (**Concurrence of Wills Model**);³¹ and
 - the model of offer and acceptance developed by Oliver Black in *Agreements* (**Black’s Offer and Acceptance Model**).³²
11. The concepts of “contract, combination in the form of a trust or otherwise, or conspiracy” in s 1 of the Sherman Act (US) are all equated with an agreement. The Promise Model may underlie s 1 but there is no clear conceptual model of agreement. Some expressions of the element of agreement refer to “commitment” (for example, “conscious commitment to a common scheme”).³³ However, “commitment” under s 1 is a weak concept, not a necessary condition of an agreement. Instead, the focus is

Watch on the Pharmaceutical Sector” (2018) 9 Journal of European Competition Law & Practice (advance).

²⁷ O Black, *Agreements* (2012) ch 1.

²⁸ See eg J Paterson, A Robinson & A Duke, *Principles of Contract* (3rd ed 2009) ch 1; C Fried, *Contract as Promise* (1981); B Coote, *Contract as Assumption: Essays on a Theme* (2010).

²⁹ D Pearce & R Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 4.20.

³⁰ RC Marshall & L Marx, *The Economics of Collusion* (2012) ch 11; W Kovacic, R Marshall & L Marx, “Plus factors and Agreement in Antitrust Law” (2010) 110 Mich LR 393.

³¹ Black, *Agreements*, 8.1.

³² Black, *Agreements*.

³³ *Monsanto Co v Spray-Rite Service Corp*, 465 US 752, 768 (1984). Compare earlier Supreme Court decisions defining agreement in terms of “a unity of purpose or a common design and understanding, or a meeting of minds”; see eg *American Tobacco Co v US*, 328 US 781, 810 (1946).

on evidentiary factors – “plus factors”³⁴ – that are taken into account when deciding if there is an agreement:³⁵

Having recited the traditional definition of an agreement, courts appear largely to focus on whether an agreement can be inferred from evidence suggesting that D was not acting independently. In other words, the inquiry is directed at whether there was something other or more than conscious parallelism or oligopolistic interdependence at work. If so, then generally that ‘other’ is assumed to fall within the traditional concept of ‘agreement’.³⁶

Plus factors are essentially as described by Robert Marshall and Leslie Marx:³⁷

Plus factors are the body of economic circumstantial evidence of collusion, above and beyond the parallel movement of prices by firms in an industry. Plus factors are the economic criteria that can assist with the diagnosis of collusion. When a plus factor delivers a strong inference of collusion, we refer to that plus factor as a super-plus factor.

12. The Promise Model does not appear to apply to “agreement” under Article 101(1) of the EU Treaty, although reference is made occasionally to the concept of commitment.³⁸ The Concurrence of Wills Model is prevalent in the case law on Article 101(1). One example is *Bayer AG v Commission* where the Court of First Instance spoke in terms of “joint intention” and “concurrence of wills”:³⁹

[I]n order for there to be an agreement within the meaning of Article [10 I] (I) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way ...

It follows that the concept of an agreement within the meaning of Article 101(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention.

Consider also the formulation in terms of “joint intention” by the Court of First Instance in *SA Hercules Chemicals v Commission*:⁴⁰

.. it is sufficient [for an agreement to exist] if the undertakings in question should have expressed their joint intentions to conduct themselves in the market in a specific way.

³⁴ Marshall & Marx, *The Economics of Collusion*, ch 11; Kovacic, Marshall & Marx, “Plus factors and Agreement in Antitrust Law”.

³⁵ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 48. See also PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2003) ¶1410.

³⁶ Marshall & Marx, *The Economics of Collusion*, 213.

³⁷ Marshall & Marx, *The Economics of Collusion*, 213.

³⁸ Black, *Agreements*, 261.

³⁹ [2000] 4 CMLR 176, [65], [67]. See also *Commission v Bayer AG* [2004] I-23, [97], [102] (ECJ).

⁴⁰ [1991] ECR II-1711, [2].

13. Black's Offer and Acceptance Model seeks to explain agreements in terms not of promise but of offer and acceptance in a broad sense.⁴¹ The explanation extends to contract law, competition law and the law of conspiracy. The analysis is detailed and micro-stitches the law into philosophical shape. Some main threads:
- Agreement is best understood in terms not of promises but of offer and acceptance.
 - Offer and acceptance are sufficient to constitute agreement.
 - Offer and acceptance are to be understood in the broad sense of "propose" and "assent".
 - Promises are insufficient to constitute agreement.⁴²
 - An offer and an acceptance are insufficient for a promise. Offer and acceptance do not imply commitment or assumption of an obligation.⁴³
 - Performance obligations are grounded in the fact of an agreement but are distinct conceptually.⁴⁴
14. The implications of Black's Offer and Acceptance Model in relation to Article 101(1) of the EU Treaty include the following:
- The Concurrence of Wills Model is unsatisfactory because it fails to capture the essence of agreement and dodges the question by focussing on common intention.⁴⁵
 - Competition authorities would do better to talk in terms of offer and acceptance in the broad sense of "propose" and "assent". Cases and commentaries occasionally mention offer and acceptance (sometimes with meanings different from the ones they bear in contract law).⁴⁶ More typically they use terms akin to offer and acceptance (for example, "instruct", "require", "exhort", "request" and "invite"; and "assent", "acquiesce", "consent", "endorse", "subscribe", "abide", "adhere", "conform", "comply", "co=operate" and "participate").⁴⁷

⁴¹ Black, *Agreements*, chs 1-2.

⁴² Black, *Agreements*, chs 1-2.

⁴³ Black, *Agreements*, ch 1, 74, 279.

⁴⁴ Black, *Agreements*, ch 3.

⁴⁵ Black, *Agreements*, 8.1.

⁴⁶ Black, *Agreements*, 276.

⁴⁷ Black, *Agreements*, 277-278.

- “Concerted practice” differs conceptually from “agreement”.⁴⁸ The concept of a concerted practice is not based on offer and acceptance but on joint action.⁴⁹
15. Conspiratorial agreements are accommodated by Black’s Offer and Acceptance Model. Black refutes Gerald Orchard’s suggestion that an offer and acceptance model does not apply to agreement in conspiracy.⁵⁰ It may be noted that the law of conspiracy in Australia does not seem to reflect the Promise Model and appears to be compatible with Black’s Offer and Acceptance Model. For instance, the offence of conspiracy under s 11.5 of the Commonwealth *Criminal Code* requires “entry” into “an agreement”. The element of agreement is not clearly defined in the Code, the case law or commentaries.⁵¹ The orthodox view is that there is no necessary element of commitment or assumption of obligation for conspiracy under the Code or at common law.

Remove the element of commitment from CCA civil prohibitions?

16. As discussed above, the element of commitment flows from a Promise Model of arrangement or understanding. By contrast, there is no corresponding definitive element of commitment under the US Plus Factors Model or the EU Concurrence of Wills Model. Nor is commitment necessary for an agreement under Black’s Offer and Acceptance Model. Why not reflect those Models by amending the arrangement and understanding limbs of the civil cartel prohibitions in ss 45AJ and 45AK to remove the element of commitment?
17. An amendment could provide that:
- (a) an arrangement or understanding does not necessarily require a commitment, undertaking or assumption of an obligation;

⁴⁸ Black, *Agreements*, 8.3.

⁴⁹ Under Black’s joint action model, most or at least many concerted practices involve communication. The model is developed by means of an analysis of degrees of communication based on the work of Grice; see eg, F Grice, “Meaning” [1957] *Philosophical Review* 67. On Grice’s analysis of speaker meaning, the speaker intends his utterance to produce an effect in the hearer by means of the hearer’s recognition of that intention. This account is seen as better than a thinner one which maintains that the reason for engaging in a concerted practice is to reduce uncertainty.

⁵⁰ G Orchard, “‘Agreement’ in Criminal Conspiracy” [1974] *Criminal LR* 297, 300; Black, *Agreements*, 340-341.

⁵¹ See G Williams, *Criminal Law: The General Part* (2nd ed, 1961) 666-669; S Odgers, *Principles of Federal Criminal Law* (3rd ed, 2015) 221-223; M Goode, *Criminal Conspiracy in Canada* (1975) 6-18, E Colvin, *Principles of Criminal Law* (1986) 292-294; G Orchard, “‘Agreement’ in Criminal Conspiracy” [1974] *Criminal LR* 297. *R v Orton* [1922] *VLR* 469 at 473 (“conscious understanding of a common design”) (Cussen J). For an argument that the Promise Model should apply to conspiracy, see L Sacharoff, “Conspiracy as Contract” (2016) 50 *Univ of California Davis LR* 405. The discussion in Orchard, “‘Agreement’ in Criminal Conspiracy” flirts with the Promise Model but is inconclusive.

(b) it is sufficient for an arrangement or understanding that:

- (i) A makes a representation, whether express or implied, as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way;
- (ii) such representation is communicated to B, who has knowledge that A so expected and intended;
- (iii) such representation or A's conduct in fulfilment of it, operates as an invitation or encouragement, whether among other invitations or encouragement or not, to B to act in that particular way; and
- (iv) B assents to that invitation or encouragement, whether explicitly or by behaving in such a way as to indicate to A or another party to the alleged arrangement or understanding that he assents to it or intends to act or does act in accordance with it.

18. The test in clause (b)(i) (ii) and (iii) is a modified version of that advanced by Diplock LJ in *Re British Basic Slag Agreements*.⁵² Clause (b)(iii) requires that A's representation "operates as an invitation or encouragement" to B. This requirement reflects the element of offer in Black's Offer and Acceptance Model in the broad sense of an offer under that Model.⁵³ Clause (b)(iv) is added to Diplock LJ's formulation to reflect the element of acceptance in Black's Offer and Acceptance Model.
19. The approach suggested would be a palliative, not a panacea. It might help by making it more difficult for miscreants to evade liability by studious commitment to non-commitment. However, the amendment suggested would raise new issues of interpretation and application. Some may be willing to face that prospect. Others may not. The element of commitment is not only an ulcer for enforcement but also a cheek enhancement for market coordination.
20. The approach of dispensing with the element of agreement has been proposed by some, including Richard Posner⁵⁴ and Louis Kaplow.⁵⁵ That approach requires direct economic analysis of coordinated conduct instead of reliance on legal rules such as the rule requiring an agreement and the rule that liability is per se. Such an approach

⁵² [1963] 2 All ER 807, 819. The modifications are: a "representation" may be express or implied; and "invitation or encouragement" is used instead of the narrower term "inducement".

⁵³ See I Tonking, "Belling the CAU: Finding a substitute for 'understandings' about Price" (2008) 16 Competition & Consumer LJ 46, 53. ('definition' notable for the fact that contains no reference to commitment, obligation or duty). Nor does it reflect the element of acceptance in Black's Offer and Acceptance Model. On the element of assent, compare *Taylor v Johnson* (1983) 151 CLR 422, 428.

⁵⁴ RA Posner, *Antitrust Law* (2nd ed, 2001) 51–100.

⁵⁵ *Competition Policy and Price Fixing* (2013).

has some theoretical attraction. However, the approach of direct economic analysis would require a fundamental change and raises practical concerns.⁵⁶ It does not appear on the operating list of Australian competition law reform.

III “Cartel Provision” – Element of “Purpose”

Issues and background

21. The element of “purpose” is central to the purpose/effect condition and the purpose condition of a “cartel provision” in ss 45AD(2) and (3). What does a stress test show?
22. “Purpose” in the term “purpose of a provision” means:
 - subjective intention, not objective intention, of a party to the CAU, determined by direct evidence or by inference from the surrounding circumstances, the conduct of the parties and the effects of that conduct;⁵⁷
 - an end that is pursued by the activity underlying the CAU as distinct from merely a means of achieving such an end;⁵⁸
 - not merely a motive;⁵⁹
 - recklessness, foresight of practical certainty or conditional intention is insufficient;⁶⁰
 - one of a number of purposes is a purpose if it is a “substantial” purpose⁶¹ (that is, “considerable or large”);⁶²
 - a purpose that need not be capable of achievement (ie factual impossibility is not a defence);⁶³

⁵⁶ See eg, W Page, “Objective and Subjective Theories of Concerted Action” (2013) 79 Antitrust LJ 215; M Coate, “Should Economic Theory Control Price Fixing Analysis?” (2014) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103359.

⁵⁷ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ), 581 [46] (McHugh J, but with reservations), 587 [65] (Gummow J), 638 [216] (Callinan J). Cf Kirby J, at 605 [127], 606 [130].

⁵⁸ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ), 581 [46] (McHugh J), 587 [65] (Gummow J), 638 [216] (Callinan J).

⁵⁹ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 627.

⁶⁰ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, by plain implication from the decision of the majority and explicitly at 638 [216] (Callinan J).

⁶¹ CCA, s 4F(1)(b).

⁶² *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, 139; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110, 136 [97] (Heerey J) (‘the question is whether the purpose loomed large among the objects the corporation sought to achieve by the conduct in question’).

⁶³ *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, [897] (Dowsett and Lander JJ).

- where the intention of the parties differs, the purpose of the provision is to be ascertained by reference to the subjective purpose of those who sought and caused the inclusion of the provision in the CAU (the including party rule).⁶⁴

23. Several spikes can be seen:

- the decision in *News Ltd v South Sydney* implies that an ultimate legitimate purpose can trump an immediate substantial purpose to fix prices, to limit production, capacity, supply or acquisition, to allocate customers, or to rig bids;
- the including party purpose rule is unsatisfactory and reflects questionable statutory design;
- there is some suggestion that a counterfactual analysis is required when applying the purpose/effect or the purpose condition of a cartel provision; and
- the prospect of algorithmic collusion raises the question of whether or not a corporate (that is, non-humanoid) purpose falls within the meaning of s 45AD(2) and (3).

Ultimate legitimate purpose

24. In *News Ltd v South Sydney*, a majority of the High Court held that the purpose of a term of an agreement to merge two rugby league competitions was not an exclusionary purpose because the end in view was to save the game of rugby league from financial ruin.⁶⁵

The overall purpose of the agreement was to save the game from financial ruin. The purpose of the term was to restrict the number of teams in a financially viable competition to 14. The question arose as to whether the '14 team term' was an exclusionary provision. Acknowledging that the effect of the provision was plainly exclusionary, the High Court made much of the nature of the relevant purpose, emphasising that it must be ascertained not from the terms of the provision in isolation but from the contract, arrangement or understanding as a whole and its surrounding circumstances. With the benefit of this context, the purpose of the provision could be construed from the perspective of the parties as 'the end they had in view'. In this case, the 'end they had in view' was the resurrection of the game of rugby league as distinct from the exclusion of the South Sydney team from the unified competition.

⁶⁴ *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, [859]–[887] (Dowsett and Lander JJ).

⁶⁵ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 104 (footnotes omitted). See also I Wylie, "What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond" (2007) 35 ABLR 33.

25. Although the decision in *News Ltd v South Sydney* avoided an “uncommercial” outcome,⁶⁶ the reasoning in law is problematic:⁶⁷

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

26. The “end in view” reasoning in *News Ltd v South Sydney* may be adopted under ss 45AD(2) and (3). Consider the following possible examples:

- (a) Two competing stevedoring companies agree to pool and share their resources at Port Hedland under an “efficient allocation of resources” scheme. They intend thereby to reduce logistic and transaction costs.
- (b) Three competing aviation companies provide helicopter services for medical emergencies in rural areas at cost. They arrange a roster system under which each agrees to provide a guaranteed level of emergency transport services for patients in different geographical areas at different times.
- (c) A cyclone strikes Cairns and causes extreme flooding and devastating damage to public and private buildings and other facilities. Building contractors, concerned about by the delay or insufficiency of governmental action, stop competing with each other and create a recovery program under which they agree to put all their resources into priority recovery projects managed by the government.
- (d) Two competing energy companies agree to reduce the amount of natural gas they export in order to increase supply on the eastern seaboard where there is

⁶⁶ However, as noted below, it is difficult to understand why News Limited did not apply for an authorisation.

⁶⁷ *Id.*, at 104-105 (footnotes omitted).

an immediate risk that manufacturers will be forced to reduce production unless more gas is available.

(e) Two competing coal fired power generators agree that they will both comply with an inducement by the PM to keep their generators going for another 10 years at existing capacity in order to provide sufficient base-load power to guard against energy blackouts and political irradiation in NSW.

27. On the basis of the reasoning in *News Ltd v South Sydney*, the purpose in cases (a) to (e) does not appear to be a s 45AD purpose. *News Ltd v South Sydney* might possibly be distinguished on casuistic grounds but why indulge casuistry? The better view is that in all the examples, and on the facts of *News Ltd v South Sydney* itself, there is a substantial immediate purpose⁶⁸ (for example, to limit production, capacity, supply or acquisition) and each substantial immediate purpose is sufficient to satisfy the purpose condition in s 45AD(3). On that view, the conduct in all cases will breach the cartel prohibitions unless it is authorised or otherwise exempted (for example, under a joint venture exemption). The problem that arose in *News Ltd v South Sydney* could have been addressed by applying for authorisation but News Limited did not take that route.⁶⁹
28. The former s 4D concept of an exclusionary provision has been repealed. However, s 45AD remains infected by the reasoning in *News Ltd v South Sydney*. The later decision of the High Court in *Rural Press Rural Press Ltd v ACCC*⁷⁰ is difficult to reconcile with the decision in *News Ltd v South Sydney*⁷¹ but did not overturn the end in view reasoning in *News Ltd v South Sydney*. An amendment to s 4F that the term “substantial purpose” includes an immediate substantial purpose is overdue. Any resulting potential overreach of s 45AD(3) is addressable by means of well-designed exemptions relating to joint exemptions, supply/acquisition agreements between competitors, and class exemptions (see Part IV below) as well as by authorisation.

⁶⁸ See *Barneys Blu-Crete Pty Ltd v Australian Workers Union* (1979) 43 FLR 463; *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367; *Leon Laidely Pty Ltd v Transport Workers' Union of Australia* (1980) 28 ALR 129; *Mudginberri Station v Australasian Meat Industry Employees Union* [1985] ATPR ¶40–598; *Hughes v Western Australian Cricket Association* (1986) 19 FCR 10.

⁶⁹ See C Davies, “News Ltd v ARL, South Sydney v News Ltd and the question of authorisation under s 88 of the Trade Practices Act” (2002) 10 Trade Practices Law Journal 215. (2003) 216 CLR 53.

⁷¹ See Wylie “What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond”, 42.

Including party rule for “purpose of a provision”

29. In many cases, all of the parties to a CAU will be aware of the purpose of a particular provision and have the purpose prescribed by a purpose condition in s 45AD.⁷² However, that will not always be the position. Sometimes the parties may have different substantial purposes. Some parties may have an innocent purpose. Some parties may have a cartel purpose but not be an including party. The rule that the purpose of an including party is sufficient to amount to the purpose of a provision can inculcate an innocent party. The obverse rule, namely that the purpose of a non-including party is insufficient to amount to the purpose of a provision, can exculpate a party with a cartel purpose.
30. Assume that E and F are competing airlines and enter into an agreement under which E will share F’s maintenance facilities. The agreement proposed by E and which F accepted includes a provision inserted by E that gives E priority in the event of a capacity restraint that prevents E from servicing F’s aircraft in addition to servicing E’s own aircraft (the prioritisation provision). E has inserted the prioritisation provision partly for the purpose of achieving an economy of scale but for the substantial purpose (unknown to F) of using the prioritisation provision from time to time as a means of hampering F’s ability to fly on schedule. F’s substantial purpose in acceding to the prioritisation provision is to do the deal in order to reduce costs. The prioritisation provision in the maintenance agreement will be a cartel provision if the purpose of the provision was to limit the supply of airline services (flights) by E (see s 45AD(3)(a)). What is the purpose of the provision? E had a s 45AD(3)(a) purpose but F did not. Under the including party rule, the prioritisation provision is taken to have a s 45AD(3)(a) purpose because the purpose of E, the including party, is sufficient. In consequence, both E and F are liable under s 45AJ for making a contract containing a cartel provision. F is liable despite lacking a s 45AD(3)(a) purpose and despite not having inserted the provision in the maintenance contract.
31. Contrast a slightly different scenario. F proposed the contract and inserted the prioritisation provision because F believed the inclusion of that provision was the only way to get E over the line. E agreed to enter into the contract with that provision because of the opportunity it would create for E to hamper F’s ability to fly on schedule. E did have a s 45AD(3)(a) purpose but F did not. Under the including party rule, the prioritisation provision does not have a s 45AD(3)(a) purpose because the purpose of F, the including party, is what counts. The s 45AD(3)(a) purpose of E does not count

⁷² *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, [876] (Dowsett and Lander JJ).

because E did not insert the prioritisation provision. In consequence, both F and E are not liable under s 45AJ for making a contract containing a cartel provision. E is not liable despite making a contract containing a provision that E agreed to with a s 45AD(3)(a) purpose.

32. The including party rule for “purpose of a provision” thus operates capriciously and lacks any apparent policy justification. The cause of pain is that puffy appendage, “purpose of a provision”.
33. A better approach would be to excise the concept of “purpose of a provision” and focus on the intention of each defendant. That approach is discussed and recommended elsewhere in the context of a proposed redefinition of the concept of a cartel provision.⁷³

Counterfactual analysis?

34. Is a counterfactual analysis required when applying the purpose/effect or the purpose condition of a cartel provision? This question is significant because counterfactual analysis potentially could paralyse the operation of the cartel prohibitions in some cases.
35. Differing views have arisen as to whether or not counterfactual analysis is necessary and appropriate where the purpose element of the SLC test applies. In *Stirling Harbour Services Pty Limited v Bunbury Port Authority*⁷⁴ Burchett and Hely JJ observed:

There was no dispute but that in determining whether the proposed conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in the relevant market, the Court has to:

- consider the likely state of future competition in the market “with and without” the impugned conduct; and
- on the basis of such consideration, conclude whether the conduct has the proscribed anti-competitive purpose or effect.

By contrast, in *ACCC v Liquorland (Australia) Pty Ltd*,⁷⁵ Allsop J expressed the view that counterfactual analysis was unnecessary and inappropriate:

It can be readily accepted that one must, to assess effect, analyse the world with the conduct and without the conduct. However, it is meaningless and distracting to discuss the

⁷³ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 133.

⁷⁴ [2000] FCA 1381, [12].

⁷⁵ [2006] FCA 826, [802]. See C Hodgekiss, “Refocussing on the Fundamental Concepts of Competition and Substantial Lessening of Competition,” *Commercial Law Association*, 31 July 2015, 26. Contrast Case C-56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 249 (STM), 250 (when determining the purpose of the agreement, the competition must be understood within the actual context in which it would occur in the absence of the agreement in dispute).

world with and without the purpose. To require a case based only on purpose to contain a real effect on competition is to insert into the statute an element not provided for by Parliament. I decline to do so.

36. In the context of the effect condition in s 45AD(2), the better view is that a counterfactual analysis is irrelevant, but some doubt lingers on:⁷⁶

- The law, as stated and applied in *ACCC v CC (NSW)* by Lindgren J,⁷⁷ appears to be that: “An arrangement or understanding has the effect of ‘controlling price’ if it restrains a freedom that would otherwise exist as to a price to be charged.” This is consistent with the approach taken by the US Supreme Court in *United States v Socony Vacuum Oil Co.*⁷⁸ where price fixing was defined in terms of interference with the free play of market forces.
- In *ACCC v Pauls Ltd*⁷⁹ O’Loughlin J seems to have taken the view that an agreement does not control a price if the price charged or offered pursuant to the agreement is a market price. That is not the position taken by Lindgren J. O’Loughlin J’s interpretation introduces a counterfactual analysis that, with respect, is inconsistent with the wording and purpose of the provisions defining price fixing.
- O’Loughlin J’s interpretation comes close to allowing competitors to deny liability for price fixing if the price is a “reasonable price”. That interpretation was rejected emphatically by US Supreme Court in *United States v Socony Vacuum Oil Co.*⁸⁰

Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale, and protects that vital part of our economy against any degree of interference.

⁷⁶ Contrast *ACCC v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 413 [168] (Lindgren J) with: *ACCC v Pauls Ltd* [2003] ATPR ¶41-911 46 624–46 626 [117]–[128] (O’Loughlin J); *ACCC v Australian Abalone Pty Ltd* (2007) ATPR 42-199 (where it was argued that the relevant prices were controlled by international market forces); N Hutley, “Challenging the Australian Competition and Consumer Commission’s Pleadings in Cartel Cases” in M Legg (ed), *Regulation, Litigation and Enforcement* (2011) ch 7.

⁷⁷ (1999) 92 FCR 375, 413 [168].

⁷⁸ 310 US 150, 220 (1940).

⁷⁹ [2003] ATPR ¶41-911 46 624–46 626 [117]–[128].

⁸⁰ 310 US 150, 220 (1940). See also *United States v Addyston Pipe & Steel Co*, 85 F. 271, 284 (6th Cir. 1898) (any court that presumed to accept the responsibility for deciding whether a given price was reasonable would “set sail on a sea of doubt”) (Taft J).

- O’Loughlin J’s interpretation would create loopholes and require potentially complex counterfactual assessment. The better view is that: (a) counterfactual analysis should not be substituted for the statutory wording;⁸¹ and (b) in any event, the intention of the effect condition in s 45AD(2) is partly to avoid the creation of loopholes and the need for difficult or protracted counterfactual analysis.
 - The correct application of s 45AD(2) in relation to the question of whether or not a provision controls a price seems relatively straightforward: have the competitors agreed to impose a restriction on their freedom to determine the price to be charged or offered by either or both of them? If the answer to that question is “yes”, the price is controlled or likely to be controlled. It is submitted that the answer to that question in *ACCC v Pauls Ltd* should have been “Yes”.
37. If a non-counterfactual approach is adopted in relation to the effect condition in s 45AD(2), it would be odd to adopt a counterfactual analysis when applying the purpose condition in s 45AD(2).
38. If a counterfactual analysis is unnecessary and inappropriate when applying the purpose/effect condition in s 45AD(2), there is no apparent reason why a counterfactual analysis should be necessary or appropriate in relation to the purpose condition in s 45AD(3).

Corporate purpose and algorithmic collusion⁸²

39. It is conceivable that prices, production, capacity, supply or acquisition, allocation of customers, or bids may be subject to coordination by the use of algorithms.⁸³ It is also conceivable that such coordination may arise from machine learning and conduct by autonomous software agents in which event it may be difficult or impossible to attribute the coordination to individual persons acting on behalf of the corporation that has released the algorithmic genie. For some, this is sci-fi. For others, including this author,

⁸¹ Compare *ACCC v Australian Competition Tribunal* [2017] FCAFC 150 at [56] (with or without test, while useful when applying public benefit test, not a substitute for the statutory wording (“would result, or be likely to result, in”)).

⁸² Thanks are due to Rob Nicholls for his assistance with this section; the usual disclaimers apply.

⁸³ See A Ezrachi & M Stucke, *Virtual Competition* (2016) Part II; J Harrington, “Developing Competition Law for Collusion by Autonomous Artificial Agents” (2018) at: <http://assets.wharton.upenn.edu/~harrij/pdf/Collusion%20and%20Autonomous%20Pricing%20Agents.pdf>; J Bambauer & T Zarsky, “The Algorithm Game” (2018) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135949; Ai Deng, “An Antitrust Lawyer’s Guide to Machine Learning” (2018) 32(2) *Antitrust* 82; M Gal, “Algorithms as Illegal Agreements” (2018) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171977. Joseph Harrington is the keynote speaker (on this topic) at the NZCLPI conference in Wellington 10-11 August 2018.

the possibility should be recognised and addressed; “let’s wait and see” is a less than compelling answer.⁸⁴ Can an algorithmic decision to restrict competition by fixing prices, limiting production, capacity, supply or acquisition, allocating customers or rigging bids manifest the “purpose” of a cartel provision? If so, can that algorithm-generated purpose be attributed to a corporation?⁸⁵

40. Algorithmic decision-making may exhibit purpose in the sense of a strategy or objective based on AI and machine learning. It may also exhibit action in the sense of execution or implementation of such a strategy or objective.⁸⁶ Examples of the strategy or objective would include using a competitor’s offered prices to adjust own offered prices. For example, an online retailer might use machine learning to gather price data from its competitors. The software might use unsupervised machine learning to determine when competitors’ prices change and then AI to acquire those prices and present them using data visualisation as a dashboard for the business. The execution or implementation phase would be to respond to these changes in a strategic fashion. The AI system could also learn how competitors react to price changes and modify the strategy in accordance with the “rules” set by the business.
41. Liability for breach of the cartel prohibitions⁸⁷ arises only if there is CAU. In the scenario above, there would be a CAU if the competitors agreed to share raw data with each other. The question would then arise whether the purpose of the provision in the CAU that raw data be shared was a s 45AD purpose. If the competitors agreed that the analysis of the raw data would be left to unsupervised machine learning, it is possible that no human representative of either competitor would have a s 45AD purpose. The human representatives who agreed on behalf of their corporations to share raw data may have done so with an intention only that raw data be shared and that the implications of that data would be left to unsupervised machine learning to work out and apply.

⁸⁴ Compare R Sims, “The ACCC’s approach to colluding robots”, 16 November 2017, at: <https://www.accc.gov.au/speech/the-accc%E2%80%99s-approach-to-colluding-robots>.

⁸⁵ It is unnecessary to go to the extent of treating algorithm-based systems or other machine-based systems as legal persons; compare G Hallevey, “The Criminal Liability of Artificial Intelligence Entities – From Science Fiction to Legal Social Control” (2016) 4 Akron Intellectual Property Journal 171.

⁸⁶ Consider eg NASDAQ, “Execution Algorithms”, October 2014, at: http://www.nasdaqomx.com/digitalAssets/95/95590_execution-algos-member-presentation-october-2014.pdf.

⁸⁷ The concerted practice prohibition does not require a CAU. On algorithmic collusion and the limit of the concerted practice prohibition see R Nicholls & B Fisse, “Concerted Practices and Algorithmic Coordination: Does the New Australian Law Compute?” (2018) 25 CCLJ (forthcoming).

42. In law it is often said that a corporation is a legal fiction and for that reason does not itself act with an intention. Instances include *Universal Music Australia Pty Ltd v ACCC*:⁸⁸

The purpose of a corporation is a legal fiction. A corporation has no mind and can have no purpose, in the usual sense of that word. Its activities will necessarily reflect the purposes of the individuals who make the decisions which control those activities. In the case of most corporations, this will be a group rather than a single individual. Their minds are the mind of the corporation: see *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 370 (Gibbs CJ) and 384 (Mason J). The members of the group will often have differing reasons for arriving at a decision, some spoken and some unspoken. Necessarily, therefore, a finding about the purpose of a corporation is a legal conclusion expressed as an attributed state of mind.

43. The conception of a corporation as a legal fiction is at odds with sociological perspectives on corporate behaviour and some philosophical theories of corporate intentionality.⁸⁹ Corporate action and corporate intentionality relate distinctively to corporations and it is a mistake (the mistake of methodological individualism) to try to explain them simply or merely in terms of individual action or individual intentionality. The adage of Baron Thurlow that “corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like”⁹⁰ is a Georgian leg-pull.
44. Where a strategy is developed algorithmically on behalf of a corporation, in theory it can be attributed to the corporation as a “purpose”. Where a strategy is executed on behalf of a corporation, in theory it can also be attributed to the corporation as conduct. From this theoretical perspective, it is possible for a corporation to enter into a CAU containing a cartel provision where the entry into the CAU⁹¹ and the purpose/effect and purpose conditions of s 45AD are met algorithmically.
45. The courts might develop the law accordingly. A faster approach would be to amend s 84 so as to:

(a) recognise the concept of corporate purpose explicitly;⁹²

⁸⁸ [2003] FCAFC 193, [252].

⁸⁹ See B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993) ch 2; C List & P Pettit, *Group Agency* (2011); P Pettit, “Responsibility Incorporated” (2007) 117 *Ethics* 171; PA French, *Collective and Corporate Responsibility*, (1984); PA French, “The Corporation as a Moral Person” (1979) 16 *American Philosophical Quarterly* 207.

⁹⁰ J Poynder, *Literary Extracts* (1844) Vol 1, 268.

⁹¹ See further L Scholz, “Algorithmic Contracts” (2017) 20 *Stan Tech LR* 128; T Allen & R Widdison, “Can Computers Make Contracts?” (1996) 9 *Harvard Journal of Law & Technology* 25.

⁹² Contrast the references to “state of mind” in CCA s 84.

- (b) enable the attribution of a corporate purpose to a corporate defendant;
 - (c) define corporate purpose to include a strategy or objective developed by a software-based decision-making tool on behalf of a corporation; and
 - (d) extend s 84(2) to include a new s 84(2)(b) worded along the lines of “using software at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body; or”.
46. This approach will assist in relation to the cartel prohibitions only if there is a CAU.⁹³ In situations where autonomous agents are used to match prices or otherwise coordinate market conduct there may not be a CAU. When more comes to be known about the nature and extent of algorithmic coordination in practice, it may turn out that typically there will be no CAU.⁹⁴ Although the prohibition against concerted practices does not require a CAU, the use of autonomous agents may not necessarily entail a concerted practice.⁹⁵ Looking ahead, it may be necessary to introduce a prohibition against the unilateral use of market-coordinating autonomous agents.⁹⁶

IV Exemptions from Cartel Prohibitions

Issues and background

47. Liability for cartel conduct often depends on whether or not an exemption under the CCA applies. It is often essential in practice to scan for exemptions that will save the day without the need to apply for authorisation. Authorisation is costly, bureaucratic, and missing a limb (the no-SLC limb of the test that applies to anti-competitive agreements under s 45 does not apply in relation to the per se cartel prohibitions).⁹⁷
48. Where are things up to after the 2017 amendments? The discussion to follow looks at:
- the joint venture exemptions, which have been improved in some respects by the 2017 amendments but not in others;
 - the proposed supply/acquisition exemption that disappeared from the 2017 amendments; and
 - the potential of class exemptions under s 95AA.

⁹³ See para 41 above.

⁹⁴ See Harrington, “Developing Competition Law for Collusion by Autonomous Artificial Agents” (2018).

⁹⁵ See Nicholls & Fisse, “Concerted Practices and Algorithmic Coordination: Does the New Australian Law Compute?”.

⁹⁶ See Harrington, “Developing Competition Law for Collusion by Autonomous Artificial Agents”.

⁹⁷ CCA s 90(8)(a). See further *Competition Policy Review: Final Report*, 398-399.

Joint ventures and other collaborative activities between competitors

49. The joint venture exemption under s 45AP for civil cartel prohibitions provides:

45AP Joint ventures—civil penalty proceedings

(1) Sections 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision if the defendant proves that:

- (a) the cartel provision is:
 - (i) for the purposes of a joint venture; and
 - (ii) reasonably necessary for undertaking the joint venture; and
- (b) the joint venture is for any one or more of the following:
 - (i) production of goods;
 - (ii) supply of goods or services;
 - (iii) acquisition of goods or services; and
- (c) the joint venture is not carried on for the purpose of substantially lessening competition; and
- (d) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and
- (e) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; and
 of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

(2) A defendant who wishes to rely on subsection (1) must prove that matter on the balance of probabilities.

50. The amended joint venture exemptions, unlike their predecessors from 2009, apply where a cartel provision is contained in an arrangement or understanding as well as where it is contained in a contract. The exemptions, unlike their predecessors, are not excluded where a joint venture is for the acquisition of goods or services. These changes are welcome.

51. Questions arise about:

- the retention of the concept of “joint venture”;
- the meaning of “purposes of a joint venture”;
- the meaning of “reasonably necessary for undertaking a joint venture”; and

- the wisdom or otherwise of the requirement that the joint venture not for carried for the purpose of substantially lessening competition.

“Joint venture”

52. The term “joint venture” is retained. The term is not elucidated in case law or ACCC guidelines. Contrast the concept of a collaborative venture that applies in the US, EU, NZ and Canada.⁹⁸ A collaborative venture encompasses consortia, partnerships, strategic alliances, syndicated lending arrangements, lender workout arrangements for insolvent borrowers, collective litigation settlement agreements, and franchisors and franchisees under a franchise agreement.
53. The concept of jointly carrying on in the definition of “joint venture” in s 4J and in s 45AP(1)(d) and (e) is less than clear and may be narrower than the concept of a collaborative activity. For example, a franchise network or a credit card network is a collaborative venture but they may not constitute a “joint venture”.⁹⁹ Furthermore, the exceptions under the former s 44ZZZ(3A) and s 44ZZZ(5) for certain kinds of legitimate cooperation by competitors were enacted in the 2011 amendments on price signalling because that conduct was not necessarily of a kind that would entail the joint carrying on of an activity as required for the joint venture exception under the former s 44ZZZ(3).
54. The concept of a “collaborative activity” has been adopted in s 31 of the *Commerce Act 1986* (NZ). That approach is consistent with US, EU and Canadian competition law:
- Under s 1 of the *Sherman Act* (US) efficiency enhancing collaborations between competitors are exempted. Joint ventures are treated as one among many relevant kinds of competitor collaborations.¹⁰⁰
 - Horizontal co-operation agreements are regulated under Art 101(1) and (3) of the European Treaty. The concept of a horizontal co-operation agreement is broad and includes joint ventures and a wide range of other competitor

⁹⁸ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 271-272.

⁹⁹ In the credit card surcharge price fixing case in Australia in 2000 (ACCC v National Australia Bank Ltd, Statement of Claim, FCA No N948 of 2000) the possibility of relying on a joint venture exemption was entertained but no one appears to have taken it seriously.

¹⁰⁰ See US Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

collaborations.¹⁰¹

- In Canada, competitor collaborations are subject to a defence of ancillary restraint under s 45(4) of the *Competition Act 1985*. The defence of ancillary restraint applies to any kind of collaboration between competitors and is not limited to joint ventures.¹⁰²

55. It is difficult to understand why Australian cartel law has not followed suit.

“For the purposes of a joint venture”

56. The requirement that the cartel provision be “for the purposes” of a joint venture echoes the current law but remains unclear.¹⁰³ Does the wording “for the purposes” mean solely for the purposes of a joint venture? Predominantly for the purposes of a joint venture? Substantially for the purposes of a joint venture? Partly for the purpose of materially facilitating a more efficient operation of the joint venture? Partly for the purpose of facilitating a joint venture? Are the relevant “purposes” determined objectively or do they depend on the subjective intention of all or some of the parties to the joint venture? These questions remain at large after all these years. They are not answered by the Explanatory Memorandum.

“Reasonably necessary for undertaking a joint venture”

57. This is an important requirement. Yet the Explanatory Memorandum says very little about what it means.
58. The requirement does not necessarily require an efficiency-enhancing integration of business functions.¹⁰⁴ By contrast, under US antitrust law relating to collaborative ventures reference is often made to the need for “efficiency-enhancing integration of economic activity”.¹⁰⁵

¹⁰¹ See European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (January 2011), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

¹⁰² See Canada Bureau of Competition, *Competitor Collaboration Guidelines* (2009), available at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

¹⁰³ See Beaton-Wells & Fisse, *Australian Cartel Regulation*, 8.3.4.

¹⁰⁴ See J Land, “Joint Ventures and the collaborative activity exemption” [2014] *New Zealand Law Journal* 190.

¹⁰⁵ See eg US Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, 4.

59. ACCC Guidelines would assist. The collaborative activity exemption in NZ is the subject of instructive guidelines by the NZ Commerce Commission.¹⁰⁶ Similar guidelines exist in the US and Canada.¹⁰⁷ These guidelines make it clear that the test of reasonable necessity is to be interpreted and applied in a commercially realistic way. For instance, the NZ guidelines indicate that the cartel provision in issue need not necessarily be the one and only way of pursuing the collaborative activity.¹⁰⁸
60. The NZ guidelines usefully spell out how the Commerce Commission will assess whether a cartel provision is reasonably necessary for the purposes of a collaborative activity:

128 In assessing whether a cartel provision is reasonably necessary for the purposes of the collaborative activity, we will first look to understand what interest or interests the parties are trying to protect or promote by using the cartel provision. That is, what are the parties trying to achieve with the cartel provision? For example, is the cartel provision designed to:

128.1 significantly reduce the parties' risk in achieving the collaborative activity's purpose(s) (eg, it deters free-riding or ensures an equitable sharing of profits derived from the collaboration);

128.2 significantly reduce the cost of achieving that purpose;

128.3 significantly shorten the timeframe for parties to achieve that purpose; or

128.4 align the parties' incentives?

129 Second, it will be important for us to understand how important or significant that interest(s) is in assisting the parties to achieve the collaboration's purpose(s).

130 In essence, these two questions ask: why have the parties included the cartel provision?

131 Third, in assessing whether the cartel provision is reasonably necessary we will then consider the following types of factors.

131.1 The scope of the cartel provision itself, including its duration, its geographic scope, relationship to the parties' businesses, and the products and markets to which the provision applies. A cartel provision may not be reasonably necessary when it applies for a significantly longer period of time, or has a significantly greater geographic scope than is required for the parties to achieve the purpose(s) of the collaborative activity.

¹⁰⁶ *Competitor Collaboration Guidelines*, January 2018, at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/> See further J Land, "Joint Ventures and the collaborative activity exemption" [2014] *New Zealand Law Journal* 190; J Land and A Schiff, "Analysing Collaborative Activities" [2014] *New Zealand Law Journal* 230; J Land, "The Case for Pro-Competitive Collaborations", *NZ Productive Markets Forum - Developments in Competition Law, Policy and Regulation*, Nov 2014.

¹⁰⁷ US Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000;

¹⁰⁸ Canada Bureau of Competition, *Competitor Collaboration Guidelines* (2009).

131.2 The available alternatives that would enable the parties to pursue their collaboration/protect the relevant interest. Parties should be able to explain why they have chosen the cartel provision as opposed to other alternatives. It is not enough for a party to simply say that they would not enter into the collaboration in the absence of the cartel provision.

132 Evidence of alternative options the parties considered at the time the agreement was negotiated may be relevant. Similarly, evidence showing that other comparable collaborations have failed or succeeded (in New Zealand or overseas) without such a provision would be relevant.

133 If there is more than one cartel provision in an agreement, each cartel provision must be reasonably necessary for the purpose of the collaborative activity.

61. The “reasonably necessary” requirement in s 45AO and s 45AP does not differentiate between civil and criminal liability. Criminal liability should require subjective blameworthiness on the part of the offender in relation to the elements of offences and the elements of exceptions or defences. Thus, a collaborative activity exemption from cartel offences should be subject to a defence of genuine belief that the cartel provision is reasonably necessary for the collaborative activity (with an evidential burden of proof on the accused).¹⁰⁹

“Not carried on for the purpose of substantially lessening competition”

62. This requirement in s 45AO and s 45AP does not follow US law or NZ law, which exclude exemption where the dominant purpose of the party relying on the exemption is to lessen competition between any 2 or more parties.¹¹⁰ Incorporating a SLC test in an exemption to per se prohibitions, albeit a purpose test, is highly questionable. Apart from the complexity of market definition and the SLC test, there may be cases where a sham joint venture is used in order to eliminate competition between two competitors but no further and not to the extent of substantially lessening competition in a market.
63. The Explanatory Memorandum says that “[t]his amendment confines the exceptions to joint ventures established for genuine commercial purposes” and refers to the former s 76C as a precedent.¹¹¹ This does not explain why the US and NZ approach has not been followed. Nor does it recognise that s 76C was ill-designed. One criticism of s

¹⁰⁹ See Beaton-Wells & Fisse, *Australian Cartel Regulation*, 290; Commerce (Criminalisation of Cartels) Amendment Bill 2018 (NZ), proposed s 82C(1)(b).

¹¹⁰ *Commerce Act 1986* (NZ) s 31(2)(b)); *Timken Roller Bearing Co v United States*, 341 US 593, 597–8 (1951). See further Beaton-Wells & Fisse, *Australian Cartel Regulation*, 8.4.3.2.

¹¹¹ EM, 2.25, 2.26.

76C is that it was inconsistent with and undermined the per se nature of the prohibitions to which it applied:¹¹²

The [s 76C SLC] test is based on the assumption that a case-by-case assessment of competition effects is an appropriate way to define a joint venture exception. The opposing view is that joint venture exceptions should be defined on a per se basis that avoids the need to assess competition effects. A 'per se legality' approach to the definition of joint venture exceptions avoids the indeterminacy of a competition test and promotes commercial certainty, expediency and cost saving.

Supply/Acquisition Agreements between Competitors – Lack of Specific Exemption from Cartel Prohibitions

64. There is still no specific exemption for supply/acquisition agreements between competitors. The proposed s 44ZZRS in the Exposure Draft Bill did not appear in the Competition and Consumer Amendment (Competition Policy Review) Bill 2017. The Explanatory Memorandum to that Bill says that “the vertical trading restriction cartel exception was removed from this Bill, to be given further consideration and progressed in a future legislative package together with amendments to section 47”.¹¹³
65. There are many examples where pro-competitive supply or acquisition agreements between competitors are caught by the cartel prohibitions unless they are authorised.¹¹⁴ For instance:

Assume that XCO, an Australian manufacturer, agrees to supply Product D to YCO on condition that YCO agrees to supply Product E to XCO. YCO agrees to supply Product E to XCO on condition that XCO agrees to supply Product D to YCO. XCO and YCO compete against each other in the market for Product D, Product E and competing products. The reciprocal supply provisions are pro-competitive because they increase the ability of XCO and YCO to compete against major competitors in the market. Neither XCO nor YCO are prevented from deciding to acquire Product D or Product E from alternative sources at any time.

Each reciprocal supply provision is a cartel provision, as defined by ss 45AD(3)(a)(iii) and (4). XCO and YCO compete with each other in relation to the relevant competing products. A substantial purpose of each provision is to restrict or limit the supply or likely supply of goods or services to a person (YCO or XCO) by a party to the contract (XCO or YCO) (s 45AD(3)(a)(iii)). It is irrelevant that the purpose is conditional: the purpose required to satisfy the purpose condition under s 45AD(3) may be conditional or unconditional. Nor can

¹¹² Beaton-Wells & Fisse, *Australian Cartel Regulation*, 291. See further P Areeda & H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2003) ¶2100g.

¹¹³ Para 15.57.

¹¹⁴ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 8.6.

it be maintained that the 'real' or 'ultimate' purpose of each reciprocal supply provision is not a s 45AD(3) purpose but a purpose to 'act in the best interests of the market' or to 'improve competition': if the substantial purpose of a provision is to restrict the supply or acquisition of goods or services in the way prescribed by s 45AD(3)(a), it is irrelevant whether or not D believes that the restriction is in the best interests of the market or a way of improving competition.

66. The Harper Report recommended that the CCA be amended to exempt supply/acquisition agreements between competitors (including intellectual property licensing) from the cartel prohibitions:

An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by s 45 of the CCA (or s 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition. ...¹¹⁵

[A]s is the case with other vertical supply arrangements, IP licences should be exempt from the per se cartel provisions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP. Such IP licences should only contravene the competition law if they have the purpose, effect or likely effect of substantially lessening competition.¹¹⁶

67. The Model Legislative Provisions appended to the Harper Report included an exemption for restrictions on supply or acquisition by competitors (s 45J). The Exposure Draft Bill in October 2016 included a similar exemption; the following section would replace the then s 44ZZRS:

44ZZRS Restrictions on supplies and acquisitions

(1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision to the extent that the cartel provision:

(a) imposes, on a party to the contract, arrangement or understanding (the acquirer) acquiring goods or services from another party to the contract, arrangement or understanding, an obligation that relates to:

(i) the acquisition by the acquirer of the goods or services;

(ii) the acquisition by the acquirer, from any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services;

or

¹¹⁵ Recommendation 27.

¹¹⁶ *Competition Policy Review: Final Report*, 110.

(iii) the supply by the acquirer of the goods or services or of other goods or services that are substitutable for, or otherwise competitive with, the goods or services;
or

(b) imposes, on a party to the contract, arrangement or understanding (the supplier) supplying goods or services to another party to the contract, arrangement or understanding, an obligation that relates to:

(i) the supply by the supplier of the goods or services; or

(ii) the supply by the supplier, to any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the Criminal Code and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.

(3) This section does not affect the operation of section 45 or 47.

68. One concern is that the proposed s 44ZZRS exemption would not cover some vertical restrictions that would be exempt under the exclusive dealing exemption in the current law.¹¹⁷ That could be overcome by deleting the words after “goods or services” in the words “goods or services that are substitutable for, or otherwise competitive with”.¹¹⁸ Nor would the proposed s 44ZZRS exemption cover situations where an obligation is imposed on a supplier that relates to the acquisition by the supplier, from any person, of goods or services.¹¹⁹ The wording could and should be amended accordingly.

69. The delay in introducing a supply/acquisition exemption from per se cartel prohibitions under the CCA is unfortunate in a number of respects:

- It is unclear when a supply/acquisition exemption will be included in a later Bill, or what form such an exemption will take.
- The uncertainty and overreach occasioned by the decision of High Court in *ACCC v Flight Centre*¹²⁰ makes the introduction of a supply/acquisition exemption from per se cartel liability important, especially in the context of dual distribution arrangements.¹²¹

¹¹⁷ Law Council of Australia, Competition & Consumer Committee Business Law Section, Submission on Competition Law Amendments: Exposure Draft Consultation, 28 Oct 2016, 10-11.

¹¹⁸ *Id.*, at 11.

¹¹⁹ *Ibid.*

¹²⁰ *ACCC v Flight Centre Ltd* [2016] HCA 49.

¹²¹ See B Fisse, “The High Court decision in *ACCC v Flight Centre*: Crash Landings Ahead?” (2017) 45 ABLR 61, at 65-67.

- A supply/acquisition exemption from per se cartel liability is long overdue in Australia in relation to supply/acquisition agreements between competitors generally.¹²² The exemption for exclusive dealing conduct is limited in scope and does not apply in many situations where supply or acquisition agreements between competitors are not anti-competitive.
 - The delay may have held up the repeal of s 47. The Harper Report recommended that s 47 be repealed.¹²³ It is difficult to see how s 47 could be repealed until the exclusive dealing exemption is replaced a supply/acquisition exemption from per se cartel liability.
 - It is difficult to see how the proposed repeal of s 51(3) could or should proceed until a supply/acquisition exemption from per se cartel liability is assured.¹²⁴
70. Part of the background to the excision of the proposed s 44ZZRS from the Competition and Consumer Amendment (Competition Policy Review) Act 2017 is a submission made by the ACCC to Treasury about it.¹²⁵
71. The ACCC submitted that the proposed provision “has the potential to introduce inappropriately complex assessments into the application of the anti-overlap provision.” The words “goods or services that are substitutable for, or otherwise competitive with, the goods or services” would introduce a product market test that is unsuitable for jury determination in criminal cartel prosecutions. That concern could easily be met by deleting the words in question, as the Law Council of Australia recommended for a different reason.¹²⁶
72. The ACCC also submitted that the former s 44ZZRS (now s 45AR) is tied to s 47, which sets out “some distinct boundaries to the operation of the ‘anti-overlap’¹²⁷ provision” and is limited to the giving of effect to a cartel provision that amounts to exclusive dealing conduct as defined by s 47. In contrast, the proposed s 44ZZRS would be

¹²² See Beaton-Wells & Fisse, *Australian Cartel Regulation*, 8.6.

¹²³ Recommendation 33.

¹²⁴ Recommendation 27, 110.

¹²⁵ ACCC, Supplementary letter re: ACCC Submission to Exposure Draft Consultation on Competition Law Amendments, 5 October 2016, at:

<https://www.accc.gov.au/system/files/ACCC%20Letter%20to%20Treasury%20-%20Submission%20on%20Harper%20Exposure%20Draft%20legis....pdf>.

¹²⁶ Law Council of Australia, Competition & Consumer Committee Business Law Section, Submission on Competition Law Amendments: Exposure Draft Consultation, 28 Oct 2016, 10-11.

¹²⁷ The notion of “anti-overlap” provisions is inapposite. The main purpose of a provision like s 45AR is not to avoid overlap but to exempt conduct that, in the general run of cases, is insufficiently anti-competitive to justify per se liability: B Fisse, “Competition, fairness and the courts” (2014) 30 *Australian Bar Review* 101 at 107.

broader and less clear because it would apply to the extent that a provision in a supply or acquisition relationship “imposes ...obligations that relate to” that supply or acquisition.

73. Consider in that light the exemption for “vertical supply contracts” under the *Commerce Act 1986* (NZ):

32 Exemption for vertical supply contracts

(1) Nothing in section 30 applies to a person who enters into a contract that contains a cartel provision, or who gives effect in relation to a cartel provision in a contract, if—

- (a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and
- (b) the cartel provision—
 - (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, or to the maximum price at which the customer or likely customer may resupply the goods or services; and
 - (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.

74. The proposed NZ vertical supply contract exemption is subject to the requirement that the cartel provision in issue “not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.” The proposed s 44ZZRS under the Exposure Draft Bill did not include such a requirement. By contrast, the joint venture exemptions under the Competition and Consumer Amendment (Competition Policy Review) Act 2017 require that “the joint venture is not carried on for the purpose of substantially lessening competition”. Some safeguard is necessary, as is evident from *H Lundbeck A/S and Lundbeck Ltd v European Commission*.¹²⁸ The NZ safeguard is commendable but could be improved by making the dominant purpose referable to the purpose of the accused or defendant.¹²⁹ It would be misguided to adopt a SLC purpose test of the kind that has emerged in the joint venture exemptions in s 45AO and s 45AP.¹³⁰
75. The ACCC submission on the Exposure Draft Bill sought, as a last resort, to postpone further consideration of the proposed s 44ZZRS until the Government had developed a proposal to further simplify the competition law, including whether to simplify s 47.

¹²⁸ Case T-472/13 8 September 2016 (ECLI:EU:T:2016:449). See further R Subiotta & JF Diaz, “*Lundbeck v Commission*: Reverse Payment settlements as Restrictions of Competition by Object” (2017) 8 *Journal of European Competition Law & Practice* 27; B Fisse, “The Productivity Commission’s Recommendations on the Intellectual Property Exemption under the Competition and Consumer Act” (2017) 45 *ABLR* 260, 264-265.

¹²⁹ See para 33 above.

¹³⁰ See paras 62-63 above.

Two responses may be made to this plea for postponement. First, simplification is a secondary concern to that of ensuring that substantive competition rules avoid overreach. The proposed s 44ZZRS sought to resolve a significant problem of overreach that has now been exacerbated by the decision of the High Court in *ACCC v Flight Centre*.¹³¹ Secondly, although simplification was proposed in the Harper Report¹³² and the Government Response to that Report,¹³³ it does not appear to be front-of-mind for the Government. The generally prescriptive CCA drafting style of the Exposure Draft Bill and the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* suggests that simplification beyond tidy-up amendment is unlikely to happen in the short- to mid-term.

76. Unless the exemption applies retrospectively, it will not exempt cartel provisions or exclusionary provisions in CAUs, or giving effect to a cartel provision or exclusionary provision, where the CAU or conduct occurred prior to the commencement of the proposed s 44ZZRS or a similar supply/acquisition exemption. On one view, this exemption (and other exemptions or amended exemptions under the Harper reforms) should operate retrospectively, at least from the time of commencement of the cartel prohibitions under the CCA.¹³⁴

Class exemptions

77. Class exemptions were recommended by the Harper Report¹³⁵ and are now possible under s 95AA of the CCA. The ACCC has issued guidance notes.¹³⁶ ACCC class exemptions have yet to be published.
78. Class exemptions potentially are important:
- class exemptions can provide an expedient safe harbour in addition to joint venture and other exemptions;

¹³¹ [2016] HCA 49.

¹³² See especially Recommendations 23 and 27. See further The Hon S Rares J, “Competition, Fairness and the Courts” (2014) 39 Australian Bar Rev 79.

¹³³ At: <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/CPR-response>: “[t]he Government will develop a proposal to further simplify the remaining provisions of the CCA, following stakeholder consultation by the Treasury including with the ACCC, business groups and legal advisers”.

¹³⁴ Retrospective application is problematic where a legislative provision *inculcates* a defendant (see eg Beaton-Wells & Fisse, *Australian Cartel Regulation*, 275-276), but the position is different where the provision *exculpates* from criminal or civil penal liability.

¹³⁵ *Competition Policy Review: Final Report*, 22.3, Recommendation 39.

¹³⁶ “Class Exemptions”, November 2017, at: <https://www.accc.gov.au/business/exemptions/class-exemptions>

- class exemptions can carve out conduct that is likely to be pro-competitive or benign yet is caught by the broad definition of a “cartel provision” (or, under s 45(1), the nebulous SLC test);
- a class exemption will be needed if, as recommended by the Harper Review, the intellectual property exemptions under s 51(3) are repealed;
- class exemptions facilitate an economic approach to providing exemptions through the use of market share thresholds as a proxy for market power and through black-listing restrictions that are the most likely to pose competition concerns;
- they can help to relieve pressure on the authorisation process;
- a class exemption provides binding liability rules whereas guidelines offer only non-binding guidance; and
- ACCC guidelines may constrain ACCC enforcement discretion but have little or no impact on private litigants.

79. Much work needs to be done if exemptions comparable to the European Commission block exemptions are to be developed in Australia. Those exemptions include:

- Technology Transfer Block Exemption Regulation (TTBER);¹³⁷ and
- Vertical Agreements Block Exemption Regulation (VBER).¹³⁸

80. Who will do all the work necessary to prepare good and useful class exemptions? Section 95AA envisages that the ACCC will develop class exemptions. That raises questions of priority, resources and interest. Those in the private sector who are concerned about the need for class exemptions may choose to act proactively by developing draft class exemptions as a starting point rather than to leave development solely to the initiative of the ACCC.¹³⁹

¹³⁷ European Commission, Licensing agreements for the transfer of technology, Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements. See also: Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/C 89/03); J Faull and A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 10C.

¹³⁸ Commission Regulation 230/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices [2010] OJ L102/1 (VBER), Article 4(a) See further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 9B.

¹³⁹ See ACCC “Class Exemptions”, November 2017, at:

[https://www.accc.gov.au/business/exemptions/class-exemptions:](https://www.accc.gov.au/business/exemptions/class-exemptions)

The ACCC will identify types of conduct for class exemptions. While businesses do not apply for a class exemption they may wish to suggest options to the ACCC. The ACCC will consider such requests taking account of other organisational priorities. The ACCC will consult with a wide range of interested parties as it develops a particular class

V Liability and Sanctions

Issues and background

81. Liability rules and sanctions against individuals and corporations for cartel conduct raise many issues.
82. An initial concern is that, for all the hype since 2009, there have been three cartel offence prosecutions to date and two of those were solely against corporate accused.¹⁴⁰ The expectation that fuelled the introduction of cartel offences in Australia was that the threat of individual criminal liability and imprisonment was necessary to deter cartel conduct effectively.¹⁴¹ That expectation has often been voiced subsequently, including by the Chairman of the ACCC in 2017.¹⁴²
83. A second main concern is that monetary penalties against corporations may be too low to achieve effective deterrence. This is reflected by the OECD report, *Pecuniary Penalties for Competition Law Infringements in Australia (OECD Report)*¹⁴³ commissioned by the ACCC. The Australian corporate civil penalty regime is also the subject of a detailed critique by Caron Beaton-Wells and Julie Clarke.¹⁴⁴
84. The discussion to follow focusses on two issues that relate to the concerns outlined above:

exemption. Interested parties will have an opportunity to make submissions during that process.

- ¹⁴⁰ See: “Criminal cartel charges laid against K-Line”, 15 November 2016, at: <http://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-k-line>; “Australia’s first criminal cartel charge laid against NYK”, 18 July 2016, at: <http://www.accc.gov.au/media-release/australia%E2%80%99s-first-criminal-cartel-charge-laid-against-nyk>; “Criminal cartel proceedings commenced against Country Care and its managers”, 18 February 2018, at: <https://www.accc.gov.au/media-release/criminal-cartel-proceedings-commenced-against-country-care-and-its-managers>. There are many possible explanations. One is the challenge of joint trial of a corporation and the employees alleged to have participated in cartel conduct, partly because evidence obtained by reliance on s 155 may be admissible against the corporation but not individuals. For some of the other issues that arise see Gordon J, “Criminalisation of Cartel Conduct” (2011) 34 Australian Bar Review 177. For a critique of prosecution of a corporation where no individuals can be, see B Fisse, “The First Cartel Offence Prosecution in Australia: Implications and Non-Implications’ (2017) 45 ABLR 482.
- ¹⁴¹ See Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Second Reading Speech, Hansard, House of Representatives, 3 December 2008, 12309. See also G Samuel, ‘Delivering for Australian consumers: making a good Act better’, 25 June 2008, National Press Club, Canberra, 5-6. See further C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011).
- ¹⁴² R Sims, “CCA compliance in interesting times”, 24 February 2017, at: <http://www.accc.gov.au/speech/cca-compliance-in-interesting-times> (“I fear that only jail sentences for individuals in prominent companies will send the appropriate deterrence messages”).
- ¹⁴³ At: <http://www.oecd.org/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>
- ¹⁴⁴ “Corporate financial penalties for cartel conduct in Australia: A critique”.

- the inability to impose individual liability for cartel offences or breaches of civil penalty prohibitions where an individual assisted or encouraged the unlawful conduct from overseas or skipped the jurisdiction after participating in it onshore;
- the limitations of monetary sanctions against corporations and whether those limitations can be overcome or reduced.

Inability to impose individual liability for cartel offences or breaches of civil penalty prohibitions¹⁴⁵

85. Cases often arise of cartel conduct in Australia where the conduct has been induced or assisted by an individual located overseas where that person is not subject to territorial jurisdiction under the CCA. This is a significant practical issue given the prevalence of multi-national cartels and the fact that cartels often are run from bases outside Australia.
86. The problem, the **NYK-Type Jurisdictional Problem**, is illustrated by *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha (CDPP v NYK)*.¹⁴⁶ This was the first prosecution in Australia for a cartel offence. No individual persons were charged. A number of senior managers employed by NYK in Japan and elsewhere overseas were closely implicated in the conduct. They escaped the territorial reach of s 5 of the CCA because none were Australian citizens or residents.¹⁴⁷ Several were subject to imprisonment in Japan and one in the US for participation in cartel conduct under Japanese and US competition law respectively.¹⁴⁸
87. The contravention was serious:
- The cartel provisions to which NYK was a party related to the supply of shipping services supplied to ten major vehicle manufacturers over six shipping routes. The cartel provisions related to the fixing of freight rates in respect of the shipping routes to Australia, the rigging of bids in response to requests for bids by the motor vehicle manufacturers, and the allocation of the customers, the motor vehicle manufacturers, between the members of the cartel. The shipping contracts affected by NYK's offending conduct over the three years from 2010 to 2012 involved the shipping of 69,348 new vehicles to Australia. NYK derived

¹⁴⁵ On the importance of individual responsibility see Fisse & Braithwaite, *Corporations, Crime and Accountability*; Beaton-Wells & Fisse, *Australian Cartel Regulation*, 6.6; C Beaton-Wells & B Fisse, "US Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique" (2011) 56 *Antitrust Bulletin* 277; G Werden, "Individual Accountability Under the Sherman Act: The Early Years" (2017) 31(2) *Antitrust* 100.

¹⁴⁶ [2017] FCA 876.

¹⁴⁷ Id at [188].

¹⁴⁸ See "NYK Manager Sentenced to Prison Over Price Fixing Conspiracy" gCaptain, 13 March 2015, at: <http://gcaptain.com/nyk-manager-sentenced-prison-price-fixing-conspiracy/>

revenue of AU\$54.9 million and profit of AU\$15.4 million from the commerce affected by the conduct. The anti-competitive effect of the offending conduct probably resulted in higher freight rates on the subject shipping routes to Australia. Those higher freight rates were most likely to have been passed through to Australian consumers in the form of higher prices for the imported cars and trucks.

88. Cases also arise where an individual has participated in cartel conduct in Australia but leaves the jurisdiction before criminal or civil proceedings have been initiated or completed. This is the **Fugitive Problem**.
89. The Fugitive Problem arises in relation to cartel offences where extradition is not possible because extradition arrangements are not in place. Australia does not have extradition arrangements with many countries. For instance, there is no extradition treaty with Japan or China. The Fugitive Problem may also arise where a corporation subject to civil penalty proceedings adopts the expedient of transferring executives implicated in the contravention to a posting overseas, or where an individual subject or potentially subject to civil enforcement action decides to move out of the sunlight to a destination offshore.
90. What can be done about the NYK-Type Jurisdictional Problem? Two possible steps are:
- (a) bring s 5 of the CCA into line with the territorial jurisdiction provisions in the Commonwealth Criminal Code; and
 - (b) take inability to prosecute individuals into account as an aggravating factor in sentencing and determination of penalty.
91. In *CDPP v NYK*, NYK's conduct occurred outside Australia but was caught by section 5(1) of the CCA because it was an agreed fact that NYK carried on business in Australia. However, the managers of NYK implicated in the cartel conduct were not Australian citizens or residents as required by section 5(1). It has been suggested that s 5(1) would apply to those managers, on the basis that NYK was carrying on business in Australia and that the executives were knowingly concerned in that conduct. That view is very difficult to reconcile with the decision of the NZ Court of Appeal in *Poynter v Commerce Commission* on s 4 of the *Commerce Act 1986* (NZ).¹⁴⁹ On the *Poynter*

¹⁴⁹ [2010] NZSC 38. Note also the further issue of whether the extension under s 5(1) applies to liability for complicity under s 75B, s 76 or s 79. It has been held that the extension under s 5(1) does not apply where s 75B(1) operates: *Bray v F Hoffmann-La Roche Ltd* (2002) 118 FCR 1, [53]–[56] (Merkel J). However, the position in relation to s 79 is different: s 5(1) applies to s 79(1) by reason of s 5(1)(f) and the relevant wording of s 79(1) (“is taken to have contravened that provision ..”) differs from the wording in s 75B (“involved in a contravention”).

interpretation, the failure of s 5(1) to reach the conduct of non-citizens or non-residents who are knowingly concerned in breaches of the CCA is an obvious and significant loophole in the section.¹⁵⁰ However, it is possible that the managers in NYK would be subject to the application of the Competition Code under s 8(1)(d) of the *Competition Policy Reform Act* in each State and Territory.¹⁵¹ Under s 8(1)(d), the Competition Code of the jurisdiction applies to and in relation to “persons otherwise connected with the jurisdiction”. It has yet to be tested whether or not a foreign executive whose connection with Australia is limited to assisting or encouraging conduct that is a cartel offence in Australia is a person “otherwise connected with the jurisdiction”.¹⁵² It should be noted that the test in s 8(1)(d) stipulates the need for the connection to be between the person and the jurisdiction. That is materially different from a test requiring a real connection between the *conduct* of a person and the jurisdiction. It seems remarkable that these loose ends have not been addressed and fixed by the 2009 cartel reforms or the Harper Review. The key question should be whether the conduct affects or relates to economic activity in Australia, not whether the persons accused or subject to enforcement action are Australian citizens, residents or persons “otherwise connected with” the jurisdiction.

92. Contrast the nature and scope of territorial jurisdiction under s 14.1 of the *Criminal Code* (Standard geographical jurisdiction). Under s 14.1 of the *Criminal Code*, unless a contrary intention appears, geographical jurisdiction extends to an “ancillary offence” that occurs wholly outside Australia if the primary offence occurs or is intended to occur in Australia (see s 14.1(1)(b) and (2)(c)). There is no requirement that the accused be an Australian citizen, resident or otherwise connected with the jurisdiction. However, the s 14.1 territorial test does not apply to ancillary liability under s 79 of the CCA for a cartel offence. The term “ancillary offence” is defined by the Criminal Code Dictionary to mean: (a) an offence against s 11.1, 11.4 or 11.5; or (b) an offence against a law of the Commonwealth, to the extent to which the offence arises out of the operation of s 11.2, 11.2A or 11.3. Liability for aiding, abetting, counselling or procuring a cartel offence does not arise by operation of s 11.2, 11.2A or 11.3 of the *Criminal Code* but

¹⁵⁰ As flagged in Beaton-Wells & B Fisse, *Australian Cartel Regulation*, 16. See further C Noonan, “Bad Poynter: International Cartels and territorial Jurisdiction” (2013) 19 NZ Business LQ 138.

¹⁵¹ As discussed in *ACCC v Yazaki Corporation (No 2)* [2015] FCA 1304.

¹⁵² *ACCC v Yazaki Corporation (No 2)* [2015] FCA 1304 does not resolve this question: (a) it was held that Yasuki’s various business connections with Australia amounted to carrying on business in Australia and were also sufficient for Yasuki to be a person otherwise connected with Victoria; (b) the possible liability of Yasuki employees located abroad was not in issue; and (c) the connection between off-shore Yasuki employees and the State of Victoria is unknown and possibly insufficient to make them persons “otherwise connected with” Victoria.

by operation of s 79(5) of the CCA and hence s 14.1(2)(c) does not apply to that type of ancillary liability.

93. Ancillary liability for cartel offences and breaches of the civil cartel prohibitions under the CCA should be subject to the same extraterritorial test as that under s 14.1 of the *Criminal Code*. Section 5 of the CCA should be amended accordingly.
94. Where individual persons implicated in a cartel offence or civil cartel contravention cannot be prosecuted or joined in a penalty enforcement action, arguably that should be taken into account as a factor when determining the sentence or penalty to be imposed on a corporation. A deterrence deficit that arises from inability to prosecute individual persons should be offset by an increase in the punishment or penalty imposed on the corporation. By hypothesis, the deterrent impact of prosecution or enforcement action will be too low unless the write-off of individual liability is offset on the corporate side of the deterrence ledger. Although corporate and individual liability are conceptually and legally distinct, deterrence is likely to be undermined unless the total deterrent impact of corporate and individual liability is taken into account. The flip side is that corporate penalties should be reduced where all or most of the individuals implicated in an offence or contravention have been subject to prosecution or enforcement action and punished or penalised. Where a corporation has materially assisted an investigation into offences or contraventions by employees but prosecution or enforcement action has not ensued, that cooperation can be taken into account in mitigation of penalty.
95. Section 16A(2) of the *Crimes Act* sets out a non-exhaustive list of factors that a court must take into account in sentencing an offender, to the extent they are relevant and known to the court. The inability to prosecute individuals known to have been implicated in an offence may be taken into account under s 16A(2)(i) (“the deterrent effect that any sentence or order under consideration may have on the person”) and/or (k) (“the need to ensure that the person is adequately punished for the offence”). However, the balance between individual and corporate liability is fundamentally important to deterrence and should be reflected specifically.¹⁵³
96. The ALRC recommended that there be a statutory list of factors specific to sentencing of corporations.¹⁵⁴ The factors are:
 - (a) the type, size, financial circumstances and internal culture of the corporation

¹⁵³ The central argument in Fisse and Braithwaite, *Corporations. Crime and Accountability*.

¹⁵⁴ *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006, Recommendation 30-2).

- (b) the existence or absence of an effective compliance program designed to prevent and detect criminal conduct
- (c) whether the corporation ceased the unlawful conduct voluntarily and promptly upon discovery of the offence
- (d) the extent to which the offence or its consequences could be foreseen and
- (e) the effect of the sentence on third parties.

These factors do not adequately capture inability to prosecute individuals implicated in an offence. An additional factor should be added, along the lines of “whether jurisdictional or other legal or practical obstacles prevent or are likely to prevent individual persons who participated in the offence on behalf of the corporation from being prosecuted”.

97. In the context of civil monetary penalties, the “French Factors”¹⁵⁵ and *NW Frozen Foods*¹⁵⁶ factors do not nail the relevance of non-liability of individuals implicated in a contravention or lack of internal accountability for a contravention.¹⁵⁷ It may be necessary or desirable to amend s 76 to require that, when determining penalty, consideration be given to “whether jurisdictional or other legal or practical obstacles prevent or are likely to prevent individual persons who participated in the contravention on behalf of the corporation from being the subject of enforcement action”.¹⁵⁸
98. The Fugitive Problem could be reduced to some extent in the context of cartel offences by extending the web of extradition treaties with countries that also have cartel offences.¹⁵⁹ However, that is a slow process and gaps are inevitable. Nor would extradition treaties help assist where the fugitive is evading civil enforcement action. One possible approach, in criminal and civil proceedings, would be to impose an internal discipline order on the corporate accused or defendant.¹⁶⁰ Such an order would require the corporation to take internal disciplinary action against individuals, including fugitives within corporate grasp,¹⁶¹ and report back to the court on the action taken. Where the corporation has been unable or unwilling to take internal discipline action

¹⁵⁵ *TPC v CSR Ltd* [1991] ATPR 41-076 at 52,152

¹⁵⁶ *ACCC v NW Frozen Foods Pty Ltd* [1996] ATPR 41-515.

¹⁵⁷ The OECD Report recognises the problem (at 63) but does nothing to try to resolve it.

¹⁵⁸ Following the recommendation in Beaton-Wells and Fisse, *Australian Cartel Regulation*, 194-195.

¹⁵⁹ See generally J Wilson, *Extradition Law in Australia: Time for a Rational Approach* (2010).

¹⁶⁰ See ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 30.15, 30.16; Beaton-Wells & Fisse, *Australian Cartel Regulation*, 6.6.3, 6.6.4; Fisse & Braithwaite, *Corporations, Crime and Accountability*, ch 5; JC Coffee, Jr, “No Soul to Damn No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 *Michigan Law Review* 387.

¹⁶¹ Some fugitives may have fled the corporation and have no ongoing entitlements that can be subjected to internal disciplinary sanction.

against a fugitive or other individual implicated in the offence or contravention, that should be taken into account when determining sentence or penalty against the corporation.

Limitations of monetary sanctions against corporations and what may be done about them

99. The limitations of fines and monetary penalties are generally known. They have been recognised by the ALRC in several reports.¹⁶² Three major limitations are:¹⁶³

(1) Monetary sanctions are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour. However, they may have little impact on those in a position of control.¹⁶⁴ Instead, they may inflict substantial loss on shareholders.¹⁶⁵ Alternatively or additionally, they may have adverse spillover effects on employees, consumers, and other innocent bystanders.¹⁶⁶ The worst case scenario for spillover effects on consumers is where all members of an oligopoly are fined for their participation in a cartel, have sufficient market power to be able to pass the fines on to their customers and are able to rely on some form of tacit collusion to coordinate future prices.¹⁶⁷ In

¹⁶² ALRC, *Compliance with the Trade Practices Act 1974* (Report No 68, 1994) ch 10; ALRC, *Principled Regulation*, Report 95, 2002, ch 28; ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, ch 30.

¹⁶³ For these and other limitations see B Fisse, "Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations", in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, Oxford, 2011) ch 14; C Hodges & R Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-based Approach to Compliance and Enforcement* (2017), ch 3.

¹⁶⁴ See B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1983) 56 *Southern California Law Review* 1141, 1216–7.

¹⁶⁵ See JW Adams, "Trustbusting and the "Innocent" Shareholder: "Compensation" If Stock Prices Fall?" (1978) *Antitrust Law & Economics Review* 51. But see Fisse and Braithwaite, *Corporations, Crime and Accountability*, 49–50. For the view that shareholders should bear the cost of fines, see C Kennedy, "Criminal Sentences for Corporations: Alternative Fining Mechanisms" (1985) 73 *Calif LR* 443.

¹⁶⁶ See Fisse, "Reconstructing Corporate Criminal Law", 1219–20. Whether or not such spillover effects will occur in any given case is an empirical question. See A Dershowitz, "Increasing Community Control over Corporate Crime. A Problem in the Law of Sanctions" (1961) 71 *Yale LJ* 280, 286, n 17. For the view that fines are unlikely to be passed on to consumers as higher prices see M Motta, "On Cartel Deterrence and Fines in the European Union" (2008) 29 *European Competition Law Review* 209, 217–9. The passing on of a fine is a factor to be considered in sentencing under US federal criminal law: 18 USC §3572(a)(7). The factor is not specified in the French Factors or the NW Frozen Foods factors. Nor is it listed in *Crimes Act 1901* (Cth) s 16A(2). For criticism of the neglect of this factor in *CDPP v NYK* see Fisse, "The First Cartel Offence prosecution in Australia", 486.

¹⁶⁷ However, there are many reasons why corporations may not pass on fines, including the risk of losing market share and the "stickiness" of prices; on the latter see generally AS Blinder, ERD Canetti, DE Lebow and JB Rudd, *Asking about Prices: A New Approach to Understanding Price Stickiness* (1998).

theory, a fine is a sunk cost and will not be passed on to consumers: rational economic actors look to what they should do in future and do not try to recover sunk costs. However, whether or not or when corporations treat fines as sunk costs is an empirical question.¹⁶⁸ Moreover, if fines are treated as sunk costs, they emerge as a relatively weak form of deterrent punishment.

- (2) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending conduct.¹⁶⁹ The cheapest and least embarrassing response may be simply to write a cheque in payment of the fine and continue with business as usual. Corporations have incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in civil litigation against the company or its officers.
- (3) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures in such a way as adequately to guard against re-offending.¹⁷⁰ The response may be to treat the offence as an isolated incident and simply to write a cheque in payment of the fine, hoping or expecting that the incident will not be repeated.

100. The limitations of monetary sanctions are not always heeded. They are not discussed in the OECD Report, which stems from a narrow brief by the ACCC to compare the application of monetary penalties in Australia with that in 6 overseas jurisdictions. The discussion accentuates the positives of monetary penalties but does not articulate their negatives. The OECD Report makes no mention of the ALRC Reports. Unless and until the limitations of monetary sanctions are recognised, attempts to improve the design and application of monetary penalties are unlikely to be made or will suffer from lack of direction.
101. By reason of its narrow brief, the OECD Report does not explore all the deterrent impacts that monetary penalties against corporations have or could impel. The Report assumes that imposing a large enough monetary penalty on a corporation will achieve deterrence by giving the corporation a sufficient incentive to refrain from similar

¹⁶⁸ How sunk costs are treated in the real world as distinct from neoclassical economic theory is one of many items on the agenda of behavioural economics; see, eg C Jolls, CR Sunstein & R Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 *Stanford Law Review* 1471, 1482–3.

¹⁶⁹ Fisse and Braithwaite, *Corporations, Crime and Accountability*, 8–12; JC Coffee, Jr, "Corporate Crime and Punishment: A Non-Chicago View of the Economies of Criminal Sanctions" (1980) 17 *American Crim LR* 419, 458–9.

¹⁷⁰ See CD Stone, *Where the Law Ends* (1975) ch 6.

contravening conduct in the future. This **Incentive Theory** is consistent with optimal (or suboptimal) economic theories of deterrence.¹⁷¹ The Incentive Theory has much to commend it. Financial profit and loss is an essential means of propulsion in commerce, and monetary sanctions are geared to that engine. And monetary incentives can be deployed without intervention in the internal affairs of corporations. However, the Incentive Theory is not the only theory of monetary penalties that is relevant and significant. Consider also the **Deterrent Impacts Theory**.¹⁷²

Improving the application of fines and monetary penalties under the Deterrent Impacts Theory

102. The Deterrent Impacts Theory first specifies the main intended deterrent impacts of monetary penalties:

- (a) a monetary penalty on a corporation is to be felt by management with limited pass-through to shareholders or consumers;
- (b) to the extent possible, those implicated in a contravention are to be held accountable; and
- (c) internal operating procedures (including compliance programs)¹⁷³ are to be reviewed and revised to guard against similar contravention in future.

Secondly, the Deterrent Impacts Theory requires that:

- (d) monetary penalties be used in ways calculated to reinforce and achieve the intended impacts specified above; and
- (e) intervention in the internal affairs of corporations be avoided except to the extent of enforced self-regulation.¹⁷⁴

¹⁷¹ See eg G Elzinga & W Breit, *The Antitrust Penalties: A Study in Law and Economics* (1976) ch. 7; G Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy* 169.

¹⁷² B Fisse, "Taking the Deterrent Impacts of Fines and Monetary Penalties against Corporations: Seriously: A Functional Reconstruction" (forthcoming).

¹⁷³ Compliance programs are important but may not necessarily work. See eg, WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (2006) chs 4–5; C Parker and VL Nielsen, "Corporate Compliance Systems: Could They Make Any Difference?" (2009) 41 *Administration & Society* 3.

¹⁷⁴ J Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 *Michigan Law Review* 1466. Enforced self-regulation is the strategy of allowing corporations to regulate their own conduct but insisting that self-regulation does in fact occur. Compliance is more likely to ensue if nurtured in a spirit of cooperation (enforcement policies should avert organised business cultures of resistance). Efficiency considerations are also important and require that intervention in the internal affairs of corporations be kept to a minimum. Another precept of enforced self-regulation is the utilitarian principle of least drastic means; more drastic means are available but are used primarily as a contingent threat.

103. The Deterrent Impacts Theory is not based on neo-classical economic theory¹⁷⁵ nor on principal-agent theory.¹⁷⁶ It does not assume a rational human actor or rational unitary actor model of corporate behaviour.¹⁷⁷ Consistently with theories of organisational behaviour, the Deterrent Impacts Theory recognises that threats or incentives directed to corporations do not operate in the same way as threats or incentives directed to individuals.¹⁷⁸ Deterrent signals or incentives are received and processed by a corporate system for receiving and managing external information. Managers and employees participate in that management process but the output is not merely self-restraint or self-activation — the input of deterrent signals or incentives is fed into the internal controls of the organisation. Those internal controls include policies, procedures and processes. If the external threat or incentive is to be heeded, those policies, procedures or processes need to be applied and, if necessary, revised.
104. It is not possible here to give a full account of the implications of the Deterrent Impacts Theory for the design and application of monetary sanctions against corporations.¹⁷⁹ However, these are some basic points:
- The Deterrent Impacts Theory complements the Incentive Theory – pluralism is called for, not one-eyed preoccupation with economic incentive.¹⁸⁰
 - Enforced self-regulation could be used to induce a corporate defendant to come up with ways of making management feel the impact of a monetary penalty and limiting the pass-through of monetary penalties to shareholders or consumers. The extent and quality of the corporation’s proposal would be taken into account when determining the amount of the penalty. A null or anaemic response should be treated as an aggravating factor. There is no need to go to the extent of imposing legislative requirements that corporations recover a minimum specified percentage of a monetary penalty from management by

¹⁷⁵ See further the references in Beaton-Wells & Fisse, *Australian Cartel Regulation*, 425, n 14.

¹⁷⁶ See eg J-J Laffont & D Martimort, *The Theory of Incentives: The Principal-Agent Model* (2002).

¹⁷⁷ See Fisse and Braithwaite, *Corporations, Crime and Accountability*, 73–74; TF Malloy, “Regulating by Incentives: Myths, Models, and Micromarkets” (2002) 80 *Texas Law Review* 531.

¹⁷⁸ See B Fisse, “Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions” (1983) 56 *Southern California Law Review* 1141, 1159–66.

¹⁷⁹ Fisse, “Taking the Deterrent Impacts of Fines and Monetary Penalties against Corporations: Seriously: A Functional Reconstruction” (forthcoming).

¹⁸⁰ See further J Braithwaite, “The Limits of Economism in Controlling Harmful Corporate Conduct” (1982) 16 *Law and Society Review* 481.

means of levy or denial of bonus, or that they absorb a penalty and not pass it on to consumers.¹⁸¹

- Enforced self-regulation could be used in much the same way to induce a corporate defendant to prepare a self-investigative report detailing the internal disciplinary steps that have been taken to impose individual accountability on those who were concerned in the contravention or who were in a position to have done more to prevent it.¹⁸² This approach is set out in detail elsewhere, with safeguards against scapegoating and corporate cheating.¹⁸³
- The same applies in relation to other internal controls including compliance programs, whistleblowing procedures, and incident reporting procedures.¹⁸⁴

Relying on individual liability and non-monetary sanctions against corporations to a greater extent

105. It is also possible to reduce the significance of the limitations of fines or monetary penalties by relying on individual liability and non-monetary sanctions against corporations to a greater extent than at present. These enforcement avenues are complements to fines or monetary penalties against corporations, not supplements: monetary sanctions against corporations play a major role and will continue to do so.
106. The case for relying more on individual liability has been put elsewhere, where these recommendations are made:¹⁸⁵

First, the ACCC *Compliance and Enforcement Policy*, the *Prosecution Policy of the Commonwealth* and the ACCC–CDPP MOU should be revised to include guidance specifically on the roles of individual liability and corporate liability, the importance of both forms of liability and the type of circumstances where pursuit of corporate liability alone is appropriate.

Second, the courts should take a tougher approach when asked to approve a proposed settlement under which a penalty is specified for a corporate defendant but not for the individuals implicated in the relevant conduct. Deals of the kind approved for Richard Pratt in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No. 3]* should not be allowed.

Third, the courts should focus more sharply on the factor of presence or absence of enforcement action against culpable individuals when assessing penalty or determining

¹⁸¹ Compare JB McAdams, 'The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative' (1977) 46 *University of Cincinnati Law Review* 989, 992, n 28.

¹⁸² See references n 160 above.

¹⁸³ Fisse and Braithwaite, *Corporations, Crime and Accountability*, chs 5-6.

¹⁸⁴ See further Beaton-Wells & Fisse, *Australian Cartel Regulation*, ch 12.

¹⁸⁵ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 194-195 (footnotes omitted).

sentence against a corporate defendant. Submissions on penalties or sentence should be required to provide relevant details of the enforcement action taken or not taken and the account provided should be the subject of judicial comment.

Fourth, the supervisory role of the courts when asked to approve proposed penalty settlements or to accept submissions on sentence would be enhanced if they had the power to make an internal disciplinary order against corporate defendants. By using that sanction to require a detailed report about the individuals implicated in the contravening conduct and the action taken against them by the corporation, it would be possible to demonstrate and affirm that individual accountability matters and that it is not something that can be put on the negotiation table and bargained away.

107. The ACCC *2018 Compliance and Enforcement Policy and Priorities*¹⁸⁶ does not refer to the importance of individual liability or the balance to be struck between individual and corporate liability. The same is true of the *Prosecution Policy of the Commonwealth*, which remains unchanged. A sharper focus would be desirable. Consider in particular the Yates Memorandum “Individual Accountability for Corporate Wrongdoing” (2015) that applies to US federal enforcement discretion.¹⁸⁷
108. Non-monetary sanctions against corporations¹⁸⁸ are available under the CCA. Punitive adverse publicity orders may be made under s 86D. Non-punitive non-monetary orders may be made under s 86C:
- information disclosure orders;
 - advertisement publication orders;
 - community service orders; and
 - probation orders.
109. Punitive injunctions have been proposed elsewhere.¹⁸⁹ The punitive injunction is a punitive variant of the mandatory civil injunction or a corporate probationary order. It is intended to serve as a sanction against corporations for serious offences and serious civil contraventions without going to the extremes of disqualification from conducting

¹⁸⁶ February 2018, at: <https://www.accc.gov.au/system/files/D18-20423%20Enf%20-%20Admin%20Other%20-%20CLEAN%20VERSION%20final%20draft%20Combined%20Complia...%20%5Bfinal.%5D.pdf>.

¹⁸⁷ At: <https://www.justice.gov/archives/dag/file/769036/download>.

¹⁸⁸ See ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68, ch 10; ALRC, *Principled Regulation*, Report 95, ch 28; ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, ch 30; New South Wales Law Reform Commission, *Sentencing Corporate Offenders*, Report 102 (2003) chs 7–12; Beaton-Wells and Fisse, *Australian Cartel Regulation*, ch 11, 11.3.5, 11.4.6.6; R Gruner, *Corporate Criminal Liability and Prevention* (2008) ch 12.

¹⁸⁹ Fisse, “Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations”.

business or dissolution. The punitive element is to require a corporate offender to act in a demanding way that may go beyond the limits of remedial action. The demanding response required is non-financial in terms of its direct impact within a corporation. The punitive effect sought to be achieved is to produce a positive regulatory outcome. The main kinds of positive regulatory outcome sought to be achieved in the context of cartel conduct are: (a) the imposition of internal accountability for the cartel offence or contravention; (b) the revision of organisational precautions against future possible cartel offences or contraventions; and (c) the facilitation of civil redress to the victims of a cartel offence or contravention.

110. Much could be done to make the law more effective by amending s 86C. In its current form, s 86C has a number of limitations:¹⁹⁰

- The orders that may be made under s 86C(2) are explicitly non-punitive and hence cannot be used as a punitive sanction. That limit is highly questionable given the limitations of monetary sanctions and the deterrent value of non-monetary sanctions.¹⁹¹ It is also difficult to reconcile with the introduction of cartel offences in 2009.¹⁹² For example, a punitive community service order would be an appropriate and superior alternative to imposing a monetary penalty or a fine for cartel conduct in some situations.¹⁹³
- A court is most unlikely to impose a punitive community service order unless given the power expressly to do so. Section 86C should be amended accordingly, with additional examples.
- A weakness of s 86C is that the power to make an order under the section depends on application by the ACCC or, in the context of cartel offences, the CDPP. There is no good reason why the discretion of the courts when sentencing corporations or making orders in relation to civil contraventions should be fettered in such a way.
- The examples of probation orders in s 86C do not include an order requiring a corporate defendant to prepare and provide an internal discipline report

¹⁹⁰ Beaton-Wells and Fisse, *Australian Cartel Regulation*, 11.3.5.

¹⁹¹ See Fisse, "Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations", 315-317. Note also ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68, [10.14], [10.17] (recommending that community service orders be introduced as a penalty, not merely as a remedy).

¹⁹² The question does not appear to have been on the drawing board of the architects of the cartel offences; see Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Explanatory Memorandum, [6.14] - [6.15].

¹⁹³ Beaton-Wells & Fisse, *Australian Cartel Regulation*, 458-459. See further B Fisse, "Community Service as a Sanction Against Corporations" [1981] Wisconsin LR 970.

detailing who was implicated in the corporate contravening conduct and what internal disciplinary measures have been taken against them in order to prevent similar conduct in future.¹⁹⁴ Individual accountability is a fundamental pillar of social control but is imposed in enforcement actions by the ACCC to a limited and selective extent. Internal discipline orders are a means of making individual accountability count in cases where, as is common, few of the individuals implicated in contravening conduct can be proceeded against and held liable under s 76 or s 79 of the CCA. Section 86C should provide expressly for internal discipline orders.

- The concept of redress facilitation is reflected obliquely and inadequately by s 86C in its current form. Information disclosure orders and advertisement publication orders may be used to facilitate redress but these represent only two possible forms of redress facilitation. The potential of redress facilitation as a sanction is unachievable unless a wider range of redress facilitation orders are covered and authorised by the section. They include orders to:
 - (a) disclose information about the circumstances of the contravention, the nature of the loss likely to have been caused and the persons or classes of persons likely to have incurred the loss;
 - (b) give notice to persons who may have suffered or may suffer loss as a result of corporate wrongdoing;
 - (c) cooperate with someone acting on behalf of victims by making employees available for interview, waiving confidentiality obligations, and providing documents and data and explanations of them; and
 - (d) establish a collective redress scheme.
- It has been held in several cases that there is no power under s 86C to require that a compliance program be independently audited.¹⁹⁵ This is cramped and unsatisfactory. Independent auditing is often required in undertakings under s 87B as a safeguard against corporate cheating or laxity. Section 86C should be amended to include the power to require independent auditing as part of an order or consequential order under the section.

¹⁹⁴ See ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 30.15, 30.16; Beaton-Wells & Fisse, *Australian Cartel Regulation*, 6.6.3, 6.6.4; Fisse & Braithwaite, *Corporations, Crime and Accountability*, ch 5; Coffee, "No Soul to Damn No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment".

¹⁹⁵ *BMW Australia Ltd v ACCC* (2004) 207 ALR 452; *ACCC v Visy Paper Pty Ltd [No. 2]* (2004) 212 ALR 564; *ACCC* (2004) 207 ALR 329.

- Section 86C leaves courts in the dark about the factual basis of sentencing, assessment of penalty or design of remedy. They should have the power to require a corporate defendant to provide a detailed pre-sentence or pre-penalty or pre-remedy report setting out what steps have been taken by the corporation since the contravention:

(a) to improve its internal controls and to discipline the persons implicated in the contravention; and

(b) to compensate victims or to facilitate the compensation of victims.

111. Proposed amendments to s 86C to overcome the limitations indicated above are advanced in another paper.¹⁹⁶

VII Conclusion

112. Is Australian cartel law in robust good health? The Harper Review has resulted in some cures but not others.¹⁹⁷

113. The tests in Parts II-VI above suggest:

“Contract, Arrangement or Understanding” – Element of “Commitment”

- The commitment element in an “arrangement” or “understanding” in the cartel prohibitions survives as a rogue’s charter.¹⁹⁸ The terms could be defined so as to make commitment a sufficient but not necessary condition and to reflect Black’s Offer and Acceptance Model of agreement. This could make it more difficult for rogues to use the tactic of studious commitment to non-commitment but is no panacea.
- Using direct economic analysis instead of rules of agreement and per se liability would require a fundamental change and raise practical concerns. It does not appear on the screen of Australian competition law reform.

“Cartel Provision” – Element of “Purpose”

- The purpose condition in s 45AD remains infected by the “end in view” reasoning in *News Ltd v South Sydney*. An amendment to s 4F that the term “substantial purpose” includes an immediate substantial purpose is overdue.

¹⁹⁶ B Fisse, “Redress Facilitation Orders as a Sanction against Corporations” (2018) 35 UQLJ (forthcoming).

¹⁹⁷ An unvarnished history has yet to be written. Compare L Fitzharris, *The Butchering Art: Joseph Lister’s Quest to Transform the Grisly World of Victorian Medicine* (2017).

¹⁹⁸ The charter is now subject to the concerted practice prohibition under CCA s 45(1)(c) but the SLC test softens that attempted fix.

- The including party rule for “purpose of a provision” in s 45AD operates capriciously and lacks any apparent policy justification. The cause of pain is the puffy appendage, “purpose of a provision”. The appendage should be excised and “cartel provision” redefined in terms of the intention of the party to a CAU against whom contravention of a cartel prohibition is alleged.
- A counterfactual analysis is unnecessary and inappropriate when applying the purpose/effect condition in s 45AD(2) or the purpose condition in s 45AD(3).
- In theory, an algorithmic decision to restrict competition by fixing prices, limiting production, capacity, supply or acquisition, allocating customers or rigging bids can manifest the “purpose” of a cartel provision. The fastest way to adopt that approach would be to amend s 84 accordingly. However, when more comes to be known about the nature and extent of algorithmic coordination in practice, it may turn out that typically there will be no CAU. The prohibition against concerted practices does not require a CAU but the use of autonomous agents may not necessarily entail a concerted practice. Looking ahead, it may be necessary to introduce a prohibition against the unilateral use of market-coordinating autonomous agents.

Exemptions from Cartel Prohibitions

- The concept of “joint venture” in the joint venture exemptions under s 45AO and s 45AP should be replaced by the concept of a “collaborative venture” or “collaborative activity”.
- The wording “for the purposes of a joint venture” in the joint venture exemptions is unclear and warrants clarification.
- ACCC guidelines on the meaning of “reasonably necessary for undertaking a joint venture” would assist. The NZ Commerce Commission’s *Competitor Collaboration Guidelines* are one useful starting point.
- The wording “not carried on for the purpose of substantially lessening competition” imports a SLC purpose test. This seems misguided.
- The delay in adopting a supply/acquisition exemption from per se cartel prohibitions under the CCA is unfortunate in a number of respects. An exemption should be introduced without further delay. The proposed s 44ZZRS exemption in the Exposure Draft Bill is not entirely satisfactory. Some untoward wording needs to be extracted. A safeguard should be implanted, namely that

the dominant purpose of the accused or the defendant not be to lessen competition between two or more parties to the CAU.

- Class exemptions under s 95AA potentially are important but much work needs to be done if exemptions comparable to the European Commission block exemptions are to be developed. It seems unrealistic to expect the ACCC to do all that work. The private sector could take the initiative by preparing draft class exemptions for consideration.

Liability and Sanctions

- The NYK-Type Jurisdictional Problem should be addressed by:
 - (a) bringing s 5 of the CCA into line with the territorial jurisdiction provisions in the Commonwealth Criminal Code; and
 - (b) taking inability to prosecute individuals into account as an aggravating factor in sentencing and determination of penalty.
- The Fugitive Problem could be reduced to some extent in the context of cartel offences by extending the web of extradition treaties with countries that also have cartel offences. An additional and more helpful step, in civil as well as criminal proceedings, would be to uphold individual accountability by imposing an internal discipline order on the corporate accused or defendant.
- The limitations of monetary sanctions should be recognised. If the limitations are recognised, more can be done to improve the deterrent impacts of monetary sanctions. More is required than increasing the level of monetary penalties. The Incentive Theory treats corporations as a black box. The Deterrent Impacts Theory looks inside the black box and spells out what main deterrent impacts are intended to happen in the black box. The Deterrent Impacts Theory then impels consideration of how those impacts might be prompted and induced when assessing and imposing a monetary sanction on a corporation.
- It is also possible to reduce the significance of the limitations of fines or monetary penalties by relying on individual liability and non-monetary sanctions against corporations to a greater extent than at present.
- Individual liability and the balance to be struck between individual and corporate liability should be addressed specifically in the *ACCC Compliance and Enforcement Policy and Priorities* and the *Prosecution Policy of the Commonwealth*.

- Section 86C should be amended to beef up non-monetary sanctions against corporations. A number of limitations in s 86C need to be addressed. The sanctions under s 86C should be available as punitive or non-punitive sanctions. The section should provide expressly for internal discipline orders and redress facilitation orders. A court should be free to impose an order under s 86C whether or not the ACCC or the CDPP has applied for it. Provision should be made for pre-order reports and post-order reports.
114. Biopsies are tests, not treatment plans. To the extent that the discussion in this paper suggests the need for treatment, detailed treatment plans may be called for.