

~~PROTECTED~~

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

~~PROTECTED~~

~~PROTECTED~~

© Commonwealth of Australia 2004

ISBN 0 642 74233 2

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth available from the Department of Communications, Information Technology and the Art. Requests and inquiries concerning reproduction and rights should be addressed to:

The Commonwealth Copyright Administration
Intellectual Property Branch
Department of Communications, Information Technology and the Arts
GPO Box 2154
CANBERRA ACT 2601

Or posted at:

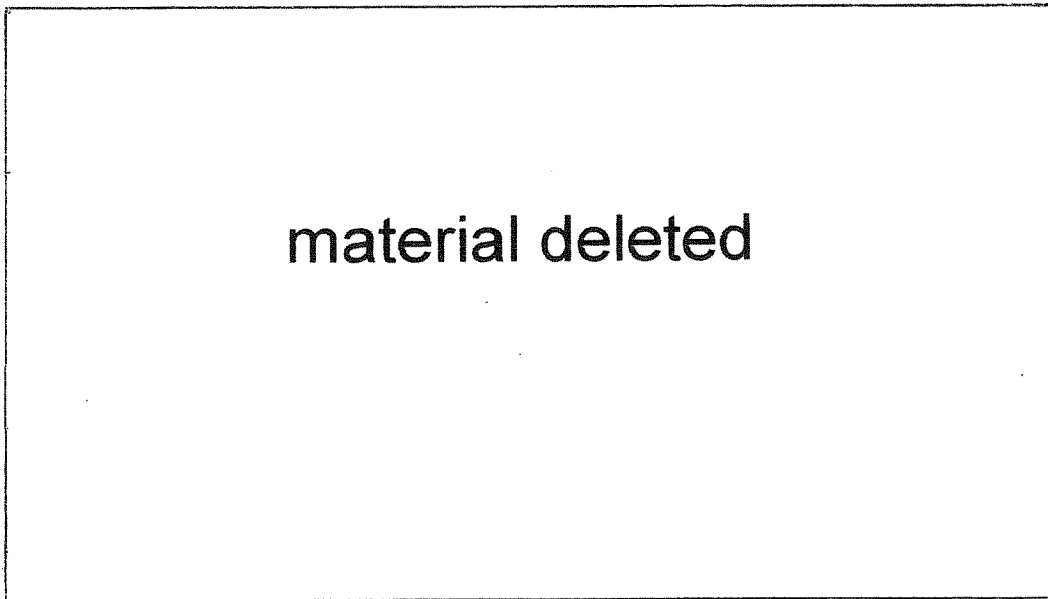
<http://www.dcita.gov.au/cca>.

Printed by

~~PROTECTED~~

CONTENTS

EXECUTIVE SUMMARY	1
PART 1: OUTLINING THE ISSUES	9
The task of the working party.....	9
Cartel behaviour.....	9



APPENDIX B: TERMS OF REFERENCE — WORKING PARTY ON PENALTIES FOR CARTEL BEHAVIOUR.....	66
--	----

EXECUTIVE SUMMARY

———— material deleted ————

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

Principally, the problems identified in the Dawson Review centred on appropriately defining a criminal offence and implementing a leniency or immunity policy.

material deleted

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

material deleted

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

Part 1: OUTLINING THE ISSUES

THE TASK OF THE WORKING PARTY

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

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

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

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

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

CARTEL BEHAVIOUR

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

~~PROTECTED~~

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

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

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

International and Australian evidence

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

An OECD survey of member countries found that the total commerce affected³ by cartels in 16 cases exceeded US\$55 billion.⁴ The survey also showed that there are significant variations in a cartel's impact on the price mark-up, and in some cases it is as much as 50 per cent or more.⁵ The OECD is of the view that these cases represent a fraction of cartel activity.

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

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

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

4 Note 2, p9.

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

~~PROTECTED~~

~~PROTECTED~~

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

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

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

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

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

6 Note 1.

7 Note 2, p.10.

~~PROTECTED~~

Table 1.1: Cartel cases prosecuted in Australia

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

Source: Australian Competition and Consumer Commission.

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

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

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

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

Source: Australian Competition and Consumer Commission

~~PROTECTED~~

Box 1.2: Case study — animal vitamins (international)

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

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

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

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

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

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

Source: Australian Competition and Consumer Commission

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

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

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

material deleted

~~PROTECTED~~

material deleted

Defining serious cartel conduct

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

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

material deleted

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

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

material deleted

⁸ Note 1, p106.

⁹ Note 2, pp11-12.

~~PROTECTED~~

material deleted

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

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

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

material deleted

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

~~PROTECTED~~

material deleted

Box 2.1.1: Cartels in Australian law

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

Western Australia Panel Beaters: The Federal Court found four panel beating and spray painting businesses in the Pilbara had colluded on the prices they charged motor vehicle insurance companies for repair work. In August 2000, the four businesses sent a letter to 18 insurance companies specifying their agreed charges for repair work; _____ material deleted _____ The businesses cooperated with the ACCC and the matter was settled without imposing a penalty and with consent orders and injunctions, among other things, to prevent the four from engaging in similar conduct.

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

~~PROTECTED~~

material deleted

Fire protection cartel: A 10-year price fixing agreement between 56 companies and individuals – almost the entire fire alarm and fire sprinkler installation industry in Brisbane – involved participants meeting as the 'Coffee Club'.

material deleted

Transformer cartel: Domestic distribution transformer companies (in the 1990s) and domestic power transfer companies, manufacturers and suppliers (as early as the 1980s) in the power and distribution transformer industry agreed to fix prices and rig bids.

material deleted

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

effect be anticompetitive before a breach can be proved. Bid rigging is a separate, per se offence.

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

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

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

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

material deleted

— evidence from the OECD indicates cartels are harmful to consumers and stifle innovation and efficiency by protecting firms from market forces.¹⁶ —

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

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

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

~~PROTECTED~~

material deleted

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

material deleted

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

18 Note 17, p13.

19 Note 17, p14.

~~PROTECTED~~

material deleted

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

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

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

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

~~PROTECTED~~

~~PROTECTED~~

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

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

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

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

material deleted

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

~~PROTECTED~~

material deleted

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

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

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

²⁰ Note 1.

~~PROTECTED~~

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

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

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

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

material deleted

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

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

Recommendation 9.1 of the Dawson Review proposes replacing section 45A(2) of the Trade Practices Act with a provision stating that the prohibition on price fixing does not extend to price fixing provisions for the purpose of a joint venture (as defined in s4J of the Trade Practices Act) and the joint venture does not substantially lessen competition.

material deleted

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

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

The Dawson Review noted protection of whistleblowers is important in uncovering cartel activity.

material deleted

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

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

material deleted

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

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

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

~~PROTECTED~~

~~PROTECTED~~

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

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

material deleted

In Australia, the express freight cartel ran for 20 years, the pre-mixed concrete cartel for seven years and the fire-protection cartel for ten.

material deleted a 1990s sample of US Department of Justice and EC prosecutions found that cartels operated, on average, for six years.²⁴

material deleted

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

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

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

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

²⁴ Note 23, p1226.

~~PROTECTED~~

~~PROTECTED~~

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

material deleted

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

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

In Australia, immunity, charge-bargaining²⁵ and leniency in sentencing are all used in certain circumstances. The DPP, which prosecutes criminal cases under Commonwealth law, does not plea bargain.²⁶

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

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

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

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

~~PROTECTED~~

~~PROTECTED~~

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

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

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

material deleted

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

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

material deleted

Canada's criminal prosecutions are the

~~PROTECTED~~

~~PROTECTED~~

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

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

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

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

material deleted

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

While the UK does not restrict its 'no action' letters to one per cartel investigation, Ireland grants only one immunity to preserve the incentive.²⁹

material deleted

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

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

material deleted

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

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

material deleted

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

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

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

~~PROTECTED~~

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

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

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

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

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

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

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

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

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

material deleted

Page 39

~~PROTECTED~~

~~PROTECTED~~

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

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

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

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

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

material deleted

³² See *Williams v Keelty* (2001) 184 ALR 411, at 456-458.
Page 40

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

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

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

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

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

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

~~PROTECTED~~

~~PROTECTED~~

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

material deleted

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

Section 4G of the Crimes Act provides that an offence punishable by imprisonment for more than 12 months is an indictable offence (triable before a jury).

material deleted

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

material deleted

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

~~PROTECTED~~

~~PROTECTED~~

material deleted

under the Corporations Act, civil proceedings are stayed until the criminal proceedings are completed, after which time, if the defendant is convicted, civil proceedings are terminated.

material deleted

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

~~PROTECTED~~

material deleted

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

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

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

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

A number of bilateral treaties and multilateral conventions also form the basis of Australia's mutual assistance relationship with other countries or concern particular subjects. In competition law enforcement, the exchange of information in international investigations is made formally through bilateral treaties between the ACCC and overseas investigation bodies.

material deleted

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

~~PROTECTED~~

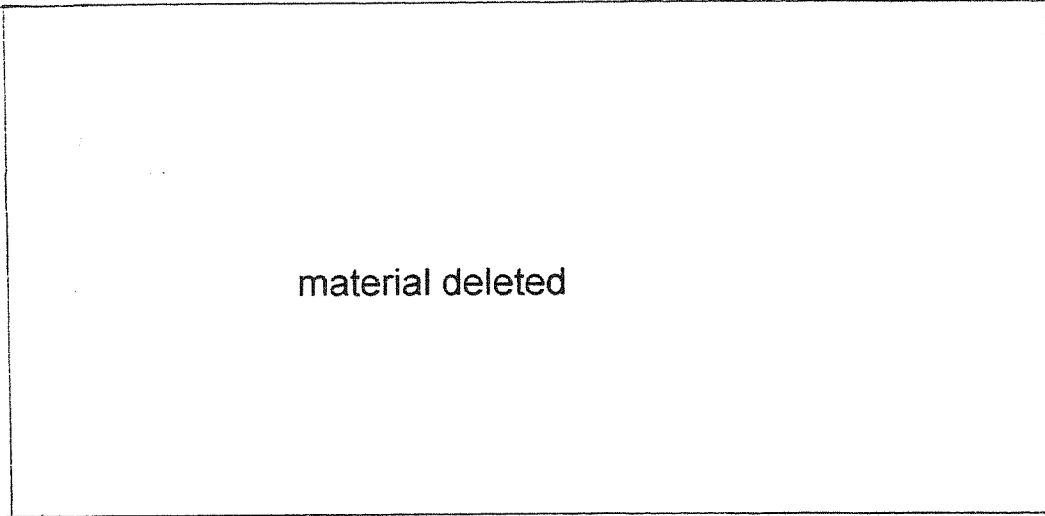
Extradition is based on a mutual recognition by two countries that certain conduct is criminal, coupled with an agreement to surrender people accused or convicted of that conduct.

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

material deleted

~~PROTECTED~~

~~PROTECTED~~



~~PROTECTED~~

~~PROTECTED~~

material deleted

The Dawson Review recommended that the penalty for the criminal cartel offence include imprisonment and fines, as appropriate, for individuals, and fines for corporations, but did not make any concrete recommendations.

material deleted

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

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

~~PROTECTED~~

~~PROTECTED~~

Table 2.4.1: Penalties for other relevant offences in Australian law

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

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

Table 2.4.2: Penalties for comparable offences in other jurisdictions

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

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

material deleted

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

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

material deleted

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

material deleted

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

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

For example, under section 49 of the Proceeds of Crime Act, if a court is satisfied on the balance of probabilities that some or all of the property or assets of a person is, or is suspected to be, proceeds³⁶ of one or more Commonwealth indictable offences (such as a criminal cartel offence), and the property has been restrained for at least six months, the court can order the property be forfeited to the Commonwealth, upon application by the DPP. It is not necessary for the court making the order to find the person committed a specific offence – rather, the order can be based on a finding that an indictable offence (not specified) has been committed.

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

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

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

~~PROTECTED~~

~~PROTECTED~~

offence³⁷ it must, on application by the DPP, order the person pay a pecuniary penalty order equivalent to the benefit derived from committing the offence. The Act provides presumptions to assist the court in calculating the benefit. For example, where an offender's net property increased in value during the period of the offending, the amount of the increase is presumed to be a benefit derived from the commission of the offence.

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

material deleted

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

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

material deleted

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

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

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

material deleted

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

~~PROTECTED~~

~~PROTECTED~~

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

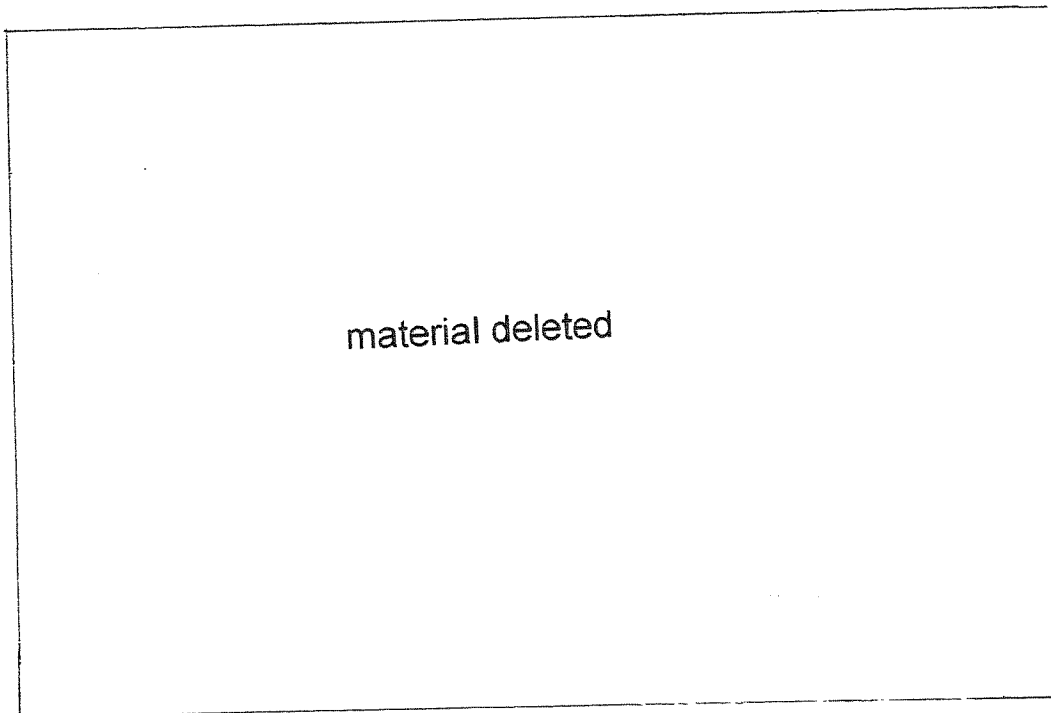
material deleted

~~PROTECTED~~

material deleted

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

material deleted



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

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

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

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

~~PROTECTED~~

Part 2.5 of the Criminal Code translates the fault elements of individual responsibility to corporate liability.]

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

Page 61

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

~~PROTECTED~~

material deleted

~~PROTECTED~~

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

Background

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

Recommendation 10.1

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

The Commonwealth Government response in relation to this recommendation was:

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

~~PROTECTED~~

Working party membership and operation

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

Working party terms of reference

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

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

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

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

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

~~PROTECTED~~

~~PROTECTED~~

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

~~PROTECTED~~