

CRIMINALISATION OF CARTEL CONDUCT: COMPELLING COMPLIANCE WITH ANTI-COLLUSION LAWS

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Following the enactment of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) ('*Cartel Conduct Act*'), this article explains the key elements of the cartel provisions now found in Part IV Division 1 of the *Trade Practices Act 1974* (Cth) ('TPA') and the features of the supporting administrative arrangements agreed between the Australian Competition and Consumer Commission ('ACCC') and the Commonwealth Director of Public Prosecutions ('CDPP'). The article also reviews the contextual background to, and the arguments in favour of, a criminal enforcement regime for the regulation of cartel conduct as opposed to a civil regime underpinned by significant pecuniary penalties.

I. INTRODUCTION

Criminalisation of cartel conduct became a reality in Australia when the *Cartel Conduct Act* came into force on 24 July 2009. The enactment of this legislation has been widely applauded by those who support criminal penalties for 'serious cartel conduct', an umbrella term for anti-competitive arrangements between competing businesses involving price-fixing, market-sharing, output restrictions and bid-rigging.¹ Certainly, such behaviour undermines the rivalrous competition on which a free market depends and has been rightfully condemned as a 'cancer on the Australian economy'.²

Although no criminal cartel prosecutions have been instituted under the *Cartel Conduct Act* to date, it is timely to reflect on the place of this legislation in Australia's regulatory landscape. Accordingly, this article explains the key elements of the cartel provisions now found in Part IV Division 1 of the *TPA*³ and the administrative arrangements to support their implementation agreed between the ACCC and the CDPP. Operationally, the cartel conduct regime depends on four interrelated instruments — the *Memorandum of Understanding between the CDPP and the ACCC regarding Serious Cartel Conduct* (July 2009)⁴, the ACCC's *Approach to Cartel Investigations* (July 2009),⁵ the ACCC's *Immunity Policy for Cartel Conduct* (July 2009)⁶ and

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1 See, eg, whether written in anticipation or in the aftermath of the legislative amendments: Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 675, 677–8; Adrian Hoel, 'Crime Does Not Pay but Hard-Core Cartel Conduct May: Why it Should be Criminalised' (2008) 16 *Trade Practices Law Journal* 102, 108; Terry Calvani and Torello H Calvani, 'Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?' (2009) 17 *Competition & Consumer Law Journal* 119, 127–8; Ross McInnes and Mihkel Wilding, 'Bring It On! New Challenges and Opportunities in the Pursuit of Cartels in Australia' (2009) 17 *Trade Practices Law Journal* 167, 168.

2 'ACCC Chiefs Past and Present in Stand Against Price Fixing', *CCH News Headlines* (Sydney), 25 June 2007, quoting the Chair of the ACCC, Mr Graeme Samuel.

3 Courtesy of the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), the *TPA* will be renamed the *Competition and Consumer Act 2010* (Cth) as from 1 January 2011.

4 *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2009) (hereafter 'MOU').

5 ACCC, *ACCC Approach to Cartel Investigations* (2009) (hereafter 'Approach to Cartel Investigations').

6 ACCC, *ACCC Immunity Policy for Cartel Conduct* (2009) (hereafter 'Immunity Policy').

the CDPP's *Annexure to the Prosecution Policy of the Commonwealth* (November 2008)⁷ — the scope and effect of which are outlined in the article.

To begin with though, the article reviews the steps toward, and the arguments in support of, a criminal enforcement regime for the regulation of cartel conduct as opposed to a civil regime underpinned by significant pecuniary penalties.

II. PATH TO CRIMINALISATION

In June 2001, the then Chairman of the ACCC, Professor Allan Fels, began championing the introduction of criminal penalties for 'hard core breaches' of Part IV of the *TPA*.⁸ Within a year, during which the Howard Government constituted the Trade Practices Act Review Committee ('the Dawson Committee')⁹ and charged it with reviewing Australia's competition laws,¹⁰ the ACCC was formally calling for criminal sanctions to operate in conjunction with the prevailing civil penalty regime.¹¹ The ACCC's reasoning was simple and direct: civil penalties are not strong enough and other countries have already taken this step.¹²

The Dawson Committee was persuaded. A critical recommendation in its report, *Review of the Competition Provisions of the Trade Practices Act* ('Dawson Report'), released in April 2003, was that criminal penalties, including imprisonment, should be introduced into the *TPA* for 'serious' cartel behaviour.¹³ Other significant recommendations contained in the report were that the *TPA* should be amended by increasing the amount of existing civil pecuniary penalties, by preventing corporations from indemnifying their officers for payment of pecuniary penalties, and by granting courts the power to disqualify individuals found to have contravened the *TPA* from managing a corporation.¹⁴

The immediate reaction of the Commonwealth Government was to accept 'in principle' that criminal penalties could provide more effective deterrence of cartel conduct than civil penalties.¹⁵ Yet it was February 2005 before the then Treasurer, the Honourable Peter Costello MP, announced planned amendments to the *TPA* which would introduce criminal sanctions for serious cartel conduct.¹⁶

A further two and a half years drifted by without any amendments materialising. Then, suddenly and quite independently, circumstances evolved to create a real impetus for change. By late 2007, the ACCC's action for price-fixing in the corrugated fibreboard packaging industry against the Visy corporation and its billionaire owner, Mr Richard Pratt,¹⁷ had become a media sensation, with much of the attention focused on government inaction since the release of the Dawson Report more than four and a half years previously.¹⁸ No doubt sensing the opportunity, new ACCC Chairman, Mr Graeme Samuel, continued to reiterate his agency's earlier calls for criminal sanctions.¹⁹

⁷ CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process — Annexure B: Immunity from Prosecution in Serious Cartel Offences* (2008) (hereafter 'Annexure to Prosecution Policy').

⁸ Allan Fels, 'Regulating in a High-Tech Market Place' (Paper presented at the Conference on Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001).

⁹ Named for its chair, former High Court Justice Sir Daryl Dawson.

¹⁰ See Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, Canberra, report dated 31 January 2003, released 16 April 2003) (hereafter 'Dawson Report').

¹¹ ACCC, 'Submission to the Trade Practices Act Review' (Public Submission No 50, 2002) 35.

¹² Louise Castle and Simon Writer, 'More than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia' (2002) 10 *Competition & Consumer Law Journal* 1, 2.

¹³ Dawson Report, above n 10, recommendation 10.1.

¹⁴ Ibid recommendation 10.2.

¹⁵ Commonwealth Treasury, *Government Response to the Review of the Competition Provisions of the Trade Practices Act* (2003) 10.

¹⁶ Commonwealth Treasury, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release No 4, 2 February 2005).

¹⁷ *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617.

¹⁸ See, eg, 'PM Back Pedals on Cartel Penalties', *The Australian Financial Review* (Sydney), 10 October 2007, 1.

¹⁹ See, eg, 'ACCC Boss Wants Jail for Tycoons', *The Courier-Mail* (Brisbane), 3 November 2007, 1.

In this environment, the political momentum shifted too. During the October–November 2007 Federal election campaign, the Opposition promised the introduction of criminal cartel penalties within the first twelve months of a Labor Government.²⁰ In January 2008, the newly elected Rudd Government released the exposure draft of the proposed *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth). Some eighteen months later, the Bill was passed into law.

In contrast, the other important recommendations of the Dawson Committee noted above were acted on with a greater sense of urgency. The *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth) increased the civil pecuniary penalties for corporations from a maximum of \$10 million to the greater of \$10 million, three times the benefit gained from the contravention, or if that cannot be determined, 10% of the annual turnover of the corporation during the period of 12 months ending at the end of the month in which the contravention occurred.²¹ The maximum pecuniary penalty for individuals remained unchanged at \$500,000.²²

The 2006 amendments also gave the courts the power to disqualify individuals in breach of the *TPA* from managing a corporation.²³ Since 1 January 2007, these measures have supplemented other remedies the ACCC can seek for contraventions of Part IV, such as declarations of unlawfulness,²⁴ injunctions banning repeat conduct,²⁵ damages for those who have suffered loss,²⁶ orders for community service²⁷ and adverse publicity orders.²⁸

III. WHY CRIMINALISATION?

The principal justification for the introduction of criminal penalties for cartel conduct is that this will provide more effective general deterrence than civil penalties for first time offenders. As a general rule, effective deterrence will be achieved if the penalties for contravening a law exceed the gains from its violation. In legislating against cartel conduct, the concern has always been that civil pecuniary penalties, when combined with the small risk of detection of cartel activities, do not meet this requirement, so that alternative sanctions need to be considered.²⁹

Although some researchers have found that the seriousness of the penalty does little to increase deterrence of many kinds of crime,³⁰ white-collar crime appears to be an exception.³¹ This is because white-collar crime offenders are more inclined to undertake a rational cost-benefit analysis of their actions, carefully factoring in the severity of potential punishments.³²

This analysis has even greater force when the possibility of criminal sanctions, particularly imprisonment, is introduced into the equation.³³ A criminal conviction severely damages the defendant's image and reputation, and the associated stigma and negative publicity far outweigh the inconvenience and embarrassment of an adverse decision in a civil proceeding.³⁴ For senior executives, the thought of imprisonment is especially 'abhorrent' and too great a risk to run.³⁵

20 See, eg, 'Rudd Backs Criminal Penalties for Cartel Behaviour', *Australian Associated Press* (Brisbane), 18 October 2007.

21 *TPA* s 76(1A)(aa).

22 *TPA* s 76(1B).

23 *TPA* s 86E.

24 *TPA* s 163A.

25 *TPA* s 80.

26 *TPA* s 82.

27 *TPA* s 86C.

28 *TPA* s 86D.

29 Julie Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) *Deakin Law Review* 141, 148; Vicky Comino, 'Civil or Criminal Penalties for Corporate Misconduct: Which Way Ahead?' (2006) 34 *Australian Business Law Review* 428, 438.

30 Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 19, 35.

31 Clarke, above n 29, 148.

32 *Ibid* 149; Hoel, above n 1, 109.

33 Clarke, above n 29, 151; Graeme Samuel, 'The ACCC Enforcement Perspective on Serious Cartel Conduct' (2009) 17 *Trade Practices Law Journal* 244, 244.

34 Comino, above n 29, 438.

35 Calvani and Calvani, above n 1, 132.

In short, the argument here is that the threat of criminal sanctions, particularly incarceration, is more likely to provide effective deterrence against cartel conduct than any amount of pecuniary penalties.

Another important justification for criminalising cartel conduct is that this will promote fairness and consistency with other forms of white-collar crime.³⁶ The question has to be asked: why should cartel conduct be exempt from criminal sanctions while other white-collar crimes in Australia attract criminal penalties?³⁷ It is challenging to think of any reason at all, when ‘hard core collusion ... is a form of theft and little different from other white-collar crimes (including insider trading and obtaining a benefit by deception) that already attract criminal sentences.’³⁸

The analogy of cartel conduct with common theft is a powerful one. Indeed, it has been pointed out although a common thief may cost an individual victim a few thousand dollars, cartel conduct often costs multiple victims combined losses running into millions of dollars.³⁹ From this perspective, it is difficult to see why the thief is subject to criminal law, while the business executive who participates in cartel conduct remains immune from criminal sanctions.⁴⁰ The criminalisation of cartels goes some way towards redressing this inequality.

Bringing Australia into line with international best practice is the third line of argument typically advanced in support of the criminalisation of cartel conduct.⁴¹ Cartel activity is unlawful in over 100 jurisdictions around the world, with sanctions ranging from quasi-criminal and financial penalties levied on businesses and individuals, to criminal fines and imprisonment.⁴² A number of advanced economies, including the United States, Canada, United Kingdom, Ireland, France, Germany, Norway, Japan and South Korea, provide for criminal fines and gaol terms for the contravention of their cartel provisions, while also permitting concurrent civil remedies.⁴³

IV. CARTEL CONDUCT PROVISIONS

A. *Criminal/Civil Regime*

The new Part IV Division 1 of the *TPA*, as introduced by the *Cartel Conduct Act*, attempts to define cartel conduct with specificity. Pursuant to s 44ZZRD, a ‘cartel provision’ is a provision of a contract, arrangement or understanding between parties that are, or are likely to be, in competition with each other which has, or is likely to have, the purpose or effect of:

- fixing prices for the supply, re-supply or purchase of goods or services; preventing, restricting or limiting production of goods or capacity to supply goods or services;
- allocating customers, suppliers and geographical areas in connection with the supply or purchase of goods or services; or
- bid-rigging.

Section 44ZZRF of the *Cartel Conduct Act* then criminalises *making* a contract or arrangement, or arriving at an understanding, that contains a cartel provision; and s 44ZZRG criminalises *giving effect* to a contract, arrangement or understanding that contains a cartel provision. The equivalent civil penalty provisions are found in ss 44ZZRJ and 44ZZRK, which, respectively, render it a contravention of the *TPA* to *make* a contract or arrangement, or arrive at an understanding, that contains a cartel provision or *give effect* to a contract, arrangement

³⁶ Clarke, above n 29, 152.

³⁷ See *TPA* Part VC for examples of deceptive practices that lead to criminal sanctions under the *TPA*.

³⁸ ACCC, ‘Submission to the Trade Practices Act Review’, above n 11, 24.

³⁹ Clarke, above n 29, 152.

⁴⁰ Comino, above n 29, 429.

⁴¹ Clarke, above n 29, 154.

⁴² Bill Reid and Elizabeth Henderson, ‘Cartels — Criminal Sanctions and Immunity Policy’ (2006) 14 *Trade Practices Legal Journal* 199, 202.

⁴³ The Organisation for Economic Cooperation and Development recommendations currently stipulate that member nations should implement laws imposing criminal sanctions on cartel participants: Organisation for Economic Cooperation and Development, ‘Recommendation of the Council Concerning Effective Action against Hard Core Cartels’, 25 March 1998.

or understanding that contains a cartel provision. This arrangement is intended to permit a ‘proportionate’ response, with criminal prosecution targeted at serious cartel conduct, while minor conduct is pursued civilly.⁴⁴

The distinguishing feature between the criminal and civil penalty provisions is the so-called ‘fault’ element inherent in ss 44ZZRF and 44ZZRG of the *Cartel Conduct Act*. Drawing on principles of criminal responsibility under the *Criminal Code Act 1995* (Cth), these sections require that the corporation intended to make or give effect to a contract, arrangement or understanding containing a cartel provision and knew or believed that the contract, arrangement or understanding contained a cartel provision.⁴⁵ It is also necessary to prove the offences beyond reasonable doubt and obtain a unanimous verdict of the jury.⁴⁶ The lesser civil provisions do not involve any element of knowledge or belief, and the corresponding standard of proof is on the balance of probabilities.

Clearly, ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the *Cartel Conduct Act* have been drafted with the longstanding civil provision in s 45(2) of the *TPA* in mind. This will permit guidance from existing precedents and provide businesses with a general sense of the conduct to be avoided.

Section 45(2)(a)(ii) of the *TPA* prohibits *making* a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, effect or likely effect of substantially lessening competition; and s 45(2)(b)(ii) of the *TPA* prohibits *giving effect* to a provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition.⁴⁷ In contrast to the cartel conduct provisions, these are not *per se* prohibitions, but are linked to certain requirements in respect of a substantial lessening of competition.

B. Sanctions

Strengthened civil sanctions have applied to parties in breach of s 45(2) of the *TPA* since 1 January 2007. Corporations are principally liable and face pecuniary penalties capped at \$10 million, or three times their gain from the illegal conduct, or, where the gain cannot be readily ascertained, 10% of their annual turnover during the 12 month period ending at the end of the month in which the conduct occurred — whichever is greatest.⁴⁸ Individuals may be liable as accessories ‘involved in’ a contravention of the *TPA*,⁴⁹ incurring pecuniary penalties of up to \$500,000.⁵⁰

These penalties apply equally to all parties in breach of the new civil cartel conduct provisions in ss 44ZZRJ and 44ZZRK of the *Cartel Conduct Act*,⁵¹ and also to corporations found criminally liable under ss 44ZZRF and 44ZZRG, although the language in the latter provisions changes to ‘fine’.⁵² Individuals convicted of involvement in the criminal cartel

44 MOU, above n 4, [1.2].

45 Pursuant to the *Criminal Code Act 1995* (Cth) ch 2, a person has ‘knowledge’ of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events. The term ‘belief’ is not defined, but presumably refers to a level of awareness less than knowledge.

46 Approach to Cartel Investigations, above n 5, [6].

47 The composite expression ‘contract, arrangement or understanding’ is thus a familiar one. These three concepts have been held to represent ‘a spectrum of consensual dealings’, with the term ‘contract’ apt to describe a more formal agreement, consistent with its general law meaning, while ‘arrangement’ suggests something looser than ‘contract’, and ‘understanding’ implies something even looser than ‘arrangement’: *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794, [24]–[27] (Gray J). Interestingly, however, the case law to date reveals no material distinction between the two latter terms. In fact, the balance of authority is that both ‘arrangement’ and ‘understanding’ involve a ‘meeting of minds’, requiring communication between the parties and commitment to a course of action, rather than a mere hope or even an expectation that a course of action will be followed: *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161, [45] (Heerey, Hely and Gyles JJ).

48 *TPA* s 76(1A)(aa).

49 *TPA* s 75B(1).

50 *TPA* s 76(1B).

51 *TPA* ss 76(1A) and 76(1B).

52 *TPA* ss 44ZZRF(3) and 44ZZRG(3).

offences in ss 44ZZRF and 44ZZRG face maximum penalties of imprisonment for 10 years and/or a fine of \$220,000.⁵³

In so far as the monetary penalty for individuals has been set higher for a civil cartel provision contravention than for the contravention of a criminal provision, this discrepancy reflects the likelihood that a period of incarceration will be imposed in the latter instance and recognises the broader ramifications of a criminal conviction for an individual.⁵⁴

C. Exceptions

Authorisation of a cartel provision is available under s 44ZZRM of the *Cartel Conduct Act*. Additionally, the new regime provides a limited number of statutory exceptions to a charge of either criminal or civil cartel conduct.

Under s 44ZZRL of the *Cartel Conduct Act*, an exception to a criminal or civil charge of cartel conduct arises where notification of collective bargaining is provided to the ACCC. In these circumstances, a corporation may not be considered to have committed prohibited conduct while the notice is in force.⁵⁵ The provision stipulates that for the purposes of obtaining such notification, a corporation must supply the ACCC with the particulars of the relevant contract, arrangement or understanding.⁵⁶ The defendant bears the evidential burden when relying on this exception.⁵⁷

Pursuant to s 44ZZRN of the *Cartel Conduct Act*, it is an exception to a criminal or civil cartel provision charge to show the contract, arrangement or understanding is exclusively between related bodies corporate. If it can be shown that the only parties to the contract, arrangement or understanding are bodies corporate that are all related to each other, the contract, arrangement or understanding will not be regarded as anti-competitive for the purposes of the *TPA*.⁵⁸ Again, the evidential burden lies with the defendant.⁵⁹

Section 44ZZRO of the *Cartel Conduct Act* creates an exception to a criminal cartel charge if the cartel provision is for the purposes of a joint venture established for the production and/or supply of goods or services. Section 44ZZRP does likewise in respect of a civil cartel charge. Once more, the defendant bears the evidential burden under these provisions.⁶⁰

V. ADMINISTRATIVE FRAMEWORK

A. Investigation and Prosecution of Cartel Conduct

The *Memorandum of Understanding* between the ACCC and CDPP outlines the respective roles of these agencies in dealing with cartel conduct. Much of the content of the *Memorandum of Understanding* is repeated in the ACCC's *Approach to Cartel Investigations*.

According to these documents, the ACCC must investigate each instance of alleged cartel conduct to determine whether or not it is 'serious'.⁶¹ In making this determination, the ACCC examines the following factors:⁶²

- Duration — was the conduct longstanding?
- Detriment — did the conduct cause a substantial detriment to consumers?
- Past history — do the alleged participants have a history of participating in cartel conduct?

⁵³ *TPA* s 79(1). Note, also, the effect of s 6(2)(b) of the *TPA* and the Schedule version of Part IV of the *Cartel Conduct Act* in extending principal liability under ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the *TPA* to persons who are not corporations.

⁵⁴ *Explanatory Memorandum to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth) [2.45]–[2.49].

⁵⁵ *TPA* s 44ZZRL(1)(c).

⁵⁶ *TPA* s 44ZZRL(1)(b).

⁵⁷ *TPA* s 44ZZRL(2).

⁵⁸ *TPA* s 44ZZRN(1).

⁵⁹ *TPA* s 44ZZRN(2).

⁶⁰ *TPA* ss 44ZZRO(1)–(1B) and 44ZZRP(2).

⁶¹ MOU, above n 4, [2.3]; *Approach to Cartel Investigations*, above n 5, [8], [10].

⁶² MOU, above n 4, [4.4]; *Approach to Cartel Investigations*, above n 5, [14].

- Value of affected commerce or bids — did it exceed \$1 million within a 12-month period?

If the conduct is not considered to be serious, the ACCC will pursue the matter itself under the civil cartel provisions of the *TPA*.⁶³ If the conduct is found to be serious, the matter will be referred to the CDPP, who must then decide whether to prosecute under the *TPA*'s criminal cartel provisions.⁶⁴ Where conduct leads to both civil and criminal actions, the ACCC and CDPP have agreed to manage this 'in an integrated fashion'.⁶⁵

The CDPP's decision to prosecute is guided by the two 'pillars' of its *Prosecution Policy*:⁶⁶ (i) whether there is sufficient evidence to prosecute the case with reasonable prospects of conviction;⁶⁷ and (ii) whether the public interest requires a prosecution.⁶⁸ Of course, it is always open to the ACCC to pursue a civil case if the CDPP decides not to commence a criminal prosecution.⁶⁹

Both the ACCC and the CDPP regard criminal cartel prosecutions as 'non-negotiable'. The ACCC takes the view that a party will not be permitted to seek to 'trade-off' a possible criminal prosecution with civil settlement.⁷⁰ Similarly, the CDPP's *Prosecution Policy* stipulates that charges should not be laid with the intention of providing scope for subsequent charge negotiation.⁷¹

B. Immunity Policy

Given the secretive and deceptive nature of cartels, the ACCC relies on its *Immunity Policy for Cartel Conduct*⁷² to assist in the detection of cartel conduct. In other words, the prevailing justification for letting culpable participants of cartels 'off the hook' is that the illegal conduct would otherwise go undetected. While some might argue that the benefits afforded to an immunity applicant are too great, the prosecution of cartel participants provides prospective plaintiffs with an opportunity to recover their loss. If the cartel remained a secret, this opportunity would not exist and losses would continue to flow.⁷³

As agreed between the ACCC and the CDPP, all requests for immunity from civil and criminal proceedings are received by the ACCC and assessed in accordance with its *Immunity Policy for Cartel Conduct*.⁷⁴ The ACCC decides on civil immunity and makes a recommendation to the CDPP if the application relates to criminal immunity.⁷⁵ Although the CDPP exercises an independent discretion on this question,⁷⁶ Annexure B ('Immunity from Prosecution in Serious Cartel Offences') to the *Prosecution Policy of the Commonwealth* stipulates that the CDPP must apply the same criteria set out in the ACCC's *Immunity Policy for Cartel Conduct*.⁷⁷

Accordingly, with the exception of the cartel ringleader, a party involved in a cartel, who did not coerce others to participate in the cartel, will be eligible for immunity where that party is the first 'whistleblower' to approach the ACCC, admit its conduct, cease its involvement in the cartel, and agree to disclose all information and fully cooperate with investigations.⁷⁸

63 MOU, above n 4, [4.3]; Approach to Cartel Investigations, above n 5, [21].

64 MOU, above n 4, [2.2]; Approach to Cartel Investigations, above n 5, [12].

65 MOU, above n 4, [6.2]; Approach to Cartel Investigations, above n 5, [32].

66 CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2008) [2.5]–[2.6] (hereafter 'Prosecution Policy').

67 Ibid [2.7] — itemises twelve factors relevant to this issue.

68 Ibid [2.10] — itemises twenty-four factors relevant to this issue.

69 Approach to Cartel Investigations, above n 5, [21].

70 Ibid [38].

71 Prosecution Policy, above n 66, [2.21].

72 Immunity Policy, above n 6.

73 Reid and Henderson, above n 42, 202.

74 MOU, above n 4, [7.2]; Immunity Policy, above n 6, [3].

75 MOU, above n 4, [7.2].

76 Ibid; Immunity Policy, above n 6, [4].

77 Annexure to Prosecution Policy, above n 7, [1.3].

78 Immunity Policy, above n 6, [8], [17].

VI. CONCLUSION

Criminal cartel provisions are now in force in Australia under the *TPA*. In the main, their introduction has been justified by the apparent failure of the *TPA*'s civil enforcement regime to provide sufficient deterrence of cartel behaviour.

Of course, it is interesting, if speculative, to ponder whether the potential of the civil provisions was ever fully exploited. Although the pecuniary penalties available under the *TPA* were strengthened on 1 January 2007, the mean of corporate penalty levels have remained low.⁷⁹ With courts reticent to penalise at maximum levels, it is difficult to refute claims that the civil penalty regime has failed to provide an effective deterrence of cartel conduct.⁸⁰

Even the record pecuniary penalties incurred in the *Visy* case have been criticised as insufficient.⁸¹ The total sum of \$36 million imposed on the Visy corporation for 37 breaches of the *TPA* translates into just under \$1 million for each of the contraventions, a mere 10% of the statutory maximum applicable at the time.⁸² One might have thought that 'the most serious cartel case to come before the courts in 30 years'⁸³ would have warranted pecuniary penalties that pushed the upper limits of those allowed.⁸⁴

At the individual level, the very factors that render business executives vulnerable to cartel-busting regimes — concerns about their career, wealth, social standing and good name — are, ironically, often the same reasons why courts are lenient towards them when collusion is known.⁸⁵ To advocate criminal sanctions as the solution is to assume that the same judges who are reluctant to impose corporate penalties close to the legislated maximum will be willing to send corporate executives to gaol.⁸⁶ Only test cases will reveal whether this assumption is naïve. At present, with the first criminal cartel prosecution yet to be instigated, it is impossible to know whether the theory behind the introduction of criminal sanctions will be matched in practice by any regularity and/or severity in their application.⁸⁷

Moreover, the debate is not just about criminal sanctions versus pecuniary penalties. This is too narrow a perspective, when a range of other remedies exists under the *TPA*, including orders for community service and disqualification from participation in the management of a corporation. Arguably, these options have not been sufficiently utilised to date.⁸⁸ Effective deterrence of cartel conduct depends on the regulatory authorities and the courts taking full advantage of the cache of penalties available to combat cartels.

79 'Campaign against Cartels Denounced as all Talk', *The Sydney Morning Herald* (Sydney), 22 February 2008, 3.

80 Caron Beaton-Wells and Neil Brydges, 'The Cardboard Box Cartel Case: Was All the Fuss Warranted?' (2008) 36 *Australian Business Law Review* 6, 22.

81 *Ibid* 15.

82 *Ibid*.

83 *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617, [320] (Heerey J).

84 Beaton-Wells and Brydges, above n 80, 15.

85 Castle and Writer, above n 12, 24.

86 Beaton-Wells and Brydges, above n 80, 22.

87 Castle and Writer, above n 12, 25.

88 *Ibid*.