Comments of the American Bar Association Section of Antitrust Law and Section of International Law In Response to the Commonwealth Government of Australia's Request for Public Comment on the Draft Legislation Providing Criminal Penalties for Serious Cartel Conduct

February 2008

The Section of Antitrust Law and the Section of International Law of the American Bar Association ("the Sections") appreciate the opportunity to present their views concerning the Commonwealth Government of Australia's draft *Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008* (the "Draft Bill") and the draft Memorandum of Understanding (MOU) between the Commonwealth Director of Public Prosecutions (DPP) and the Australian Competition Consumer Commission (ACCC) regarding serious cartel conduct. The views expressed in these comments are those of the Sections and have been approved by the Sections' Council. They have not been approved by the ABA's House of Delegates or its Board of Governors and should not be construed as representing the policy of the ABA.

Executive Summary

The Sections welcome the introduction of criminal penalties for serious cartel conduct in Australia. The Sections believe that criminal sanctions are an appropriate and effective response to cartel conduct and will increase the level of deterrence considerably. This development will align Australia's sanctions for serious cartel activity with those of a number of other jurisdictions, including the United States, Canada and the United Kingdom.

The Sections have developed considerable experience with criminal sanctions for hard-core cartel conduct in several jurisdictions, particularly the United States. The Sections have relied on that experience in formulating these comments and hope that they may be of use in the evaluation of certain parts of the Draft Bill and the MOU.

The Sections respectfully submit comments on four particular issues:

1) The definition of the criminal offense;

2) The inclusion of "dishonesty" as an element of the criminal offense;

3) The issues related to the concurrent investigation and prosecution of cartel conduct as both a civil and a criminal offense; and

4) The treatment of leniency applications by the ACCC and the DPP.

The Sections respectfully note that the Draft Bill does far more than merely define a new criminal offense; it establishes. a new broadly defined civil cartel offense. The Sections also provide in this submission comments on the mechanism by which a civil offense is to be distinguished from a criminal offense. However, the proposed changes to the existing civil cartel prohibitions present important issues that should not be ignored. The Sections would appreciate an opportunity to provide comments based on their experience regarding those aspects of the Draft Bill as well.

The Sections believe that there should be a clear legal distinction between conduct that may be subject to criminal sanctions and that which may be subject only to civil liability. The Draft Bill attempts to draw that line by incorporating "dishonesty" as an additional element of the proposed criminal offense. The test for "dishonesty" proposed in the Draft Bill is used in other Australian statutes and for many criminal offenses in the United Kingdom. But experience shows that approach raises several concerns that warrant further consideration. In application, the proposed test for dishonesty may create significant challenges in jury trials by requiring jurors to assess whether the relevant conduct was (objectively) "dishonest" as judged by the standards of ordinary people and whether the conduct was (subjectively) known by the defendant to be dishonest. This very difficulty, in fact, has been acknowledged by the High Court of Australia.[1] The "dishonesty" test differs from the objective approach used in the United States, but prosecutorial discretion will play an important role in its implementation.

The Sections also have concerns about allowing the ACCC and the DPP to maintain parallel civil and criminal proceedings against the same defendant based on the same conduct, as contemplated by the Draft Bill and MOU. Parallel proceedings will necessarily subject the targets of those investigations to the increased costs and uncertainties inherent in parallel investigations, and expose them to the potential risk (acknowledged by the ACCC) that those agencies might unfairly use the threat of criminal sanctions to negotiate a civil remedy that would not otherwise be available. Parallel proceedings also will require the expenditure of scarce public resources without any obvious enhancement of cartel enforcement policy.

The Sections submit that if parallel proceedings are to go forward, then, at a minimum, there should be clarification in the MOU concerning (1) the time within which the ACCC should determine (and notify the subjects of its preliminary investigation) whether a criminal referral will be made, and (2) the way in which the ACCC and the DPP will thereafter coordinate their investigations. Any such clarifications will provide greater transparency into how those processes will operate in practice, and reduce the uncertainty for subjects, as well as the potential for abuses, created by parallel investigations.

Finally, the Sections believe it to be imperative that there be consistency between the leniency/immunity policies of the ACCC and the DPP not only in their terms but also in their application. The ACCC has an effective immunity policy that is consistent with international "best practices." Since its introduction in August 2005, it has proven to be an effective law enforcement tool aiding the ACCC in detecting and successfully prosecuting hard-core cartel conduct. The Sections recommend that the DPP develop a specific immunity policy for serious cartel conduct that is consistent and compatible with the ACCC's immunity policy.

Comments

The Sections applaud the Commonwealth Government of Australia for its action to criminalize hard-core cartel behavior and thus strengthen its competition law enforcement process. From the Sections' experience in the United States and in other jurisdictions, criminal

[1] *Peters v The Queen*, [1988] 192 CLR.

penalties are effective penalties for competition law offenses and provide a significant deterrent to cartel behavior.

The Sections will address four specific issues regarding the new criminal provision:

1. Defining A Criminal Offense.

The Draft Bill provides that a "person" (either an individual or a corporation) commits a criminal offense if the person makes or gives effect to a contract or arrangement, or arrives at an understanding (collectively, "Arrangement"), with the intention of dishonestly obtaining a benefit; and the contract, arrangement or understanding contains a "cartel provision."[2]

A "cartel provision" is defined as a provision of an Arrangement that satisfies the following two conditions: First, the provision must have the purpose, or have or be likely to have the effect, of directly or indirectly fixing prices; restricting outputs in the production and supply chain; allocating customers, supplies or territories; or bid/rigging (the "Purpose/Effect Condition"). Second, the parties to the Arrangement must be, or would have been but for the Arrangement, in competition with each other (the "Competition Condition").

The Draft Bill sets forth specific factual situations that can give rise to the Purpose/Effect Condition. In essence, the Purpose/Effect Condition attempts to identify the particular provisions of an Arrangement that have the purpose, effect or likely effect of directly or indirectly bringing about outcomes relating to price, production quantities, buyer allocations and bid outcomes. The Competition Condition is directed toward ascertaining whether at least two of the parties to the arrangement are actual or likely[3] competitors, or would have been but for the arrangement.

The Draft Bill creates civil liability for conduct similar to the criminal offenses, except for the absence of dishonesty. These civil offenses are, with one exception,[4] in addition to the current provisions of Part IV of the Trade Practices Act ("TPA"). Accordingly, there is effectively a three level hierarchy of potential contraventions for certain conduct: criminal offenses under the new Division 1 of Part IV of the TPA; civil offenses under the new Division 1 of Part IV of the TPA; and the existing provisions contained in what will become Division 2, which are the basis of both civil causes of action by third parties and enforcement proceedings leading to civil penalties. In that sense, the Draft Bill does far more than merely defining a new criminal offense; it establishes a new broadly defined civil cartel offense. There are important differences between the existing civil prohibitions and the proposed new civil cartel prohibition that should not be ignored, but are beyond the scope of these comments.[5]

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[2] @4477RF and 44ZZRG.

[3] *Id.*

[4] The exception is the removal of the provision that deemed provisions having the purpose, effect, or likely effect of fixing, controlling, or maintaining to have the purpose, effect, or likely effect of substantially lessening competition.

[5] An illustrative example is the proposed new 'effects' test in s44ZZRD(2). It means that exclusionary conduct which is likely to have the effect of restricting production, capacity or supply will be illegal irrespective of its purpose or whether it adversely affects competition. That is, on its face, quite different to the existing rules as to exclusionary provisions concerning supply or acquisition which will continue to apply in Division 2, thereby creating overlapping provisions, spawning further complexity in an already difficult area of law without any obvious or articulated

The Draft Bill distinguishes between conduct that will give rise to criminal liability and that which will give rise to civil liability by requiring, in the case of criminal liability, that the alleged conduct be shown to have been undertaken with the intention of dishonestly obtaining a benefit.

The Sections look to the experience in the United States where the exercise of prosecutorial discretion and the case law have shaped the determination of what is prosecuted criminally and what is prosecuted civilly by the enforcement agency.[6] The Sherman Act can be enforced as both a criminal statute and a civil statute. But, over time, the U.S. Department of Justice has concluded that, while permissible under the statute, the same conduct should not be subject to civil and criminal enforcement and that those potentially subject to a law should be able to determine, clearly and in advance, the rules and consequences that would be applied to their actions. In a world of ever-increasing regulatory complexity, the distinction between criminal and civil matters is not always as clear as it should be, and that lack of clarity creates unnecessary risks and can lead to potentially devastating costs.[7]

There was a time in the United States, during the 1960s and 1970s, when every criminal antitrust case filed by U.S. prosecutors was accompanied by companion civil charges based on the same conduct. That practice has long-since been abandoned, and, today, once a matter is designated for criminal prosecution, no parallel civil charges are pursued. The basis for this decision is that the criminal penalties are now so much more severe than the civil remedies that the civil remedies are not relevant.

The basis for designating certain conduct for criminal (as opposed to civil) prosecution has been achieved through the exercise of prosecutorial discretion. The DOJ has long prosecuted as criminal violations only that conduct (and, more specifically, those agreements) which the U.S. courts deemed to have no possible business or economic justification — price fixing, bid rigging and customer, territorial, and market share allocations. When the U.S. Congress amended (and substantially increased) the penalties for criminal antitrust violations in 2004, this precise issue was revisited and a great deal of discussion ensued over what constitutes criminal conduct. The enforcement community understood that such conduct had to be carefully defined so that all business persons and counsel advising them knew what the boundaries were. The relevant conduct was defined clearly and simply by the DOJ, as follows:

> [T]he cartels that . . . have [been] prosecuted criminally invariably involved hard core cartel activity — price-fixing, bid-rigging and market and customer-allocation agreements. The conspirators have discussed the criminal nature of their agreements; they have

justification. The Sections believe the creation of a new parallel, overlapping but different set of civil offences ought to be carefully considered and certainly consulted upon more fully.

[6] Although the U.S. Department of Justice does not bring both criminal and civil enforcement actions, it should be noted that civil damage actions are regularly brought by private parties and, on occasion, by the Federal government if it is a purchaser of the product.

[7] M. Gleeson, Chief Justice of Australia, *Civil or Criminal — What is the Difference?*, 2006 Law Summer School, Perth, at 15-16 (Feb. 24, 2006).

> discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover up their actions . . . . Moreover, the cartels typically involve senior executives at firms — executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs.[8]

Such conduct is prosecuted criminally and other allegedly anticompetitive behavior is challenged only by civil enforcement. While there is no similar long history in Australia of defining what is criminal conduct as there is in the United States, there is a quite well-defined listing of hard core criminal offenses that is universally recognized by the ICN, OECD and other international organizations. The inclusion of a "dishonesty" element, however, begins to address many of the characteristics identified in this definition, although it is not free from difficulties, as described below.

The DPP has acknowledged that the availability and application of both criminal and civil penalties to the same conduct poses a significant administrative problem. It has endorsed the establishment of separate fault elements for civil and criminal penalties.[9] The Sections support some type of definition or a separate fault element for criminal conduct. Indeed, the Sections submit that there must be some distinction, either by definition or by a specific element of the offense. While the inclusion of dishonesty in the statutory definition begins to address this issue, there will remain an important role for prosecutorial discretion.

In the Sections' view, a clearer understanding of how the investigating and prosecuting agencies will undertake their functions will greatly advance the objectives of the TPA and, in particular, the proposed new Division of Part IV. The ACCC should therefore provide a clear statement indicating how (and when) it will exercise its discretion in deciding whether to refer a matter for criminal prosecution. This statement could be made in the MOU by reformulating the factors currently identified as "indicative considerations" that inform the ACCC's referral decision as minimum thresholds that must be satisfied before the ACCC will refer a matter to the DPP.

In the normal course of any investigation, it takes time for an enforcement authority to decide whether the alleged conduct warrants criminal prosecution. As a matter of sound enforcement policy, the ACCC should signal as early as possible whether it foresees that an investigation may develop into a criminal matter. The need for early notification has taken on an even greater urgency because of the possibility that the criteria for immunity for whistle-blowers

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[8] *See* Scott Hammond, Deputy Asst. Attorney General, U.S. Dept. of Justice, *Caught in the Act: Inside an International Cartel*, OECD Competition Committee Working Party No. 3: Public Prosecutors Program, at 2-3 (Oct. 18, 2005), www.usdoj.gov/atr/public/speeches/212266.htm; *see also* R. Hewitt Pate, Asst. Attorney General, U.S. Dept. of Justice, *Vigorous & Principled Antitrust Enforcement: Priorities & Goals*, ABA Antitrust Section Annual Meeting, at 6 (Aug. 12, 2003) ("The cases we criminally prosecute at the Division are not ambiguous."), www.usdoj.gov/atr/public/speeches/201241.htm.

[9] Australian Law Reform Comm'n, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, [2002] ALRC 95, at ¶ 9.13.

under the ACCC's Immunity Policy and the DPP's Prosecution Policy might not be consistent (or at least not applied consistently). (*See* Part 4.) These timing considerations also have consequences for the ACCC's choice of investigative tools. The ACCC, for example, may seek to compel prospective defendants to produce even self-incriminating evidence under § 155 of the TPA. This has no adverse consequences for the agency's enforcement efforts, so long as they prosecute the conduct civilly. The use of that investigative tool may compromise any subsequent criminal prosecution of that conduct, however, because none of the compelled evidence could be used against the defendant as evidence of the substantive offense in any criminal proceedings.[10]

2. The Inclusion of "Dishonesty" as an Element of the Criminal Offense.

The Draft bill proposes to create two new criminal offenses in Part IV of the TPA and also would establish equivalent offenses in the Competition Codes of each of the Australian States and Territories. Putting aside some technical drafting differences between the existing civil regime (which will continue to operate with some additional new cartel offenses) and the proposed new criminal regime, the main distinguishing feature between criminal and civil offenses will be that the criminal offenses will include only those Arrangements that are entered into with "the intention of dishonestly obtaining a benefit." The Draft Bill, as proposed, defines "dishonesty" as:

- Dishonest according to the standards of ordinary people; and
- Known by the defendant to be dishonest according to the standards of ordinary people.[11]

Incorporating "dishonesty" as an element in the criminal offenses raises two important questions: (1) whether there is a need for a "super-added" component to distinguish criminal and civil penalties; and, if so, (2) whether dishonesty, as defined in the proposed legislation, is the appropriate and useable standard.

Is there a need for a "super-added" component to distinguish criminal and civil penalties?

For the reasons discussed above, the Sections believe that it is imperative that the line between criminal and non-criminal liability be drawn as clearly as possible. Certainty and consistency in the application of the criminal law is important in facilitating compliance and enabling the law to be an effective deterrent.

The Sections recognize the difficulty in defining with precision the conduct constituting the offense (the *actus reus*). The formulation must capture only "hard core" cartel behavior involving criminality, leaving restrictive agreements that do not involve turpitude to the realm of civil enforcement. As discussed above, the United States does not rely on concepts such as

[10] Conversely, information obtained pursuant to a search warrant issued under s3E of the Commonwealth *Crimes Act 1914* would not be admissible in proceedings for a civil penalty.

[11] This definition adopts a modified version of the standard articulated in *R v Ghosh*, [1982] 2 All ER 689, for theft and conspiracy to defraud, which is already used in the Commonwealth Criminal Code Act 1995 and the Corporations Act 2001.

"dishonesty" to distinguish criminal from civil offenses under the Sherman Act. Instead, the Sherman Act requires evidence that the parties actually agreed to engage in hard-core cartel conduct.[12] In addition, the United States has the benefit of being able to rely on a long history of prosecutorial discretion. Over time, those decisions have developed into principles on which firms, individuals, and their counsel now rely to predict with reasonable confidence when certain conduct may create the risk of criminal exposure. Those principles have proven to be extraordinarily important to (and useful in) the efficient administration of justice in the United States, but, at least for now, they have no Australian equivalent. Nonetheless, the characteristics noted above that are frequently involved in cases of criminal enforcement in the United States (such as avoidance of detection, secrecy and subterfuge) do have an element of dishonesty to them, so the inclusion of this "super-added" component in the proposed statutory definition is understandable.

Even with such a statutory provision, the line between criminal and civil cartel conduct in Australia will be defined by the ACCC's exercise of prosecutorial discretion in deciding whether to refer a matter to the DPP, as well as that of the DPP in deciding whether to initiate criminal proceedings. But until a body of precedent developed, the MOU would provide the only public guidance regarding how the enforcement agencies might exercise that discretion in any particular case.

The MOU identifies certain factors that are deemed to exemplify "serious" cartel behavior. Those factors include:

- Whether the conduct was longstanding or had (or could have) a significant impact on the market in which the conduct occurred; or

- Whether the conduct caused (or could cause) significant detriment to the public, or a class thereof, or caused (or could cause) significant loss or damage to one or more customers of the alleged participants; or

- Whether one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil; and

- Whether the value of the affected commerce would exceed $1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed $1 million within a 12 month period); or

- Whether in the case of bid rigging, the value of the bid or series of bids exceeded $1 million within a 12-month period.

[12] This evidence also satisfies the proof of mens rea required before criminal liability may be imposed under U.S. constitutional law. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 (1978).

The MOU does not identify these factors as minimum thresholds that must be satisfied before the ACCC may refer a matter to the DPP, but only as examples of the types of "considerations" that might inform the ACCC's decision to refer in any given case.[13]

The Sections believe that elevating these factors from mere considerations to formal requirements that must be satisfied before the ACCC may make a criminal referral may improve the public's ability to discern between criminal and civil offenses.

Given the need for a distinguishing element, is dishonesty the appropriate standard?

Like all other jurisdictions that prosecute cartel conduct criminally, the proposed criminal offense only applies to "hard core" or "serious" cartel offenses. Different jurisdictions have sought to draw that distinction in different ways but all have recognized the importance of the distinction. The Draft Bill seeks to draw the line between criminal and non-criminal conduct by relying on the statutory element of dishonesty and the guiding factors set out in the MOU between the ACCC and the DPP. There are some challenges presented by that approach.

The concept of dishonesty plays no explicit statutory role in criminal antitrust enforcement in the United States, although there are elements of dishonesty, secrecy and/or subterfuge that appear to play a role in the exercise of prosecutorial discretion. (See quote on p.4) Nor does it have any parallel in Canadian law, which also imposes criminal sanctions for participating in hard-core cartel activities.[14] Rather, in Canada, section 45 of the Competition Act makes it an indictable criminal offense to conspire or otherwise enter into an agreement with another present or to prevent or lessen competition "unduly" in the provision of a good or service in Canada. Whether the effect of an agreement is "undue" is assessed based on the severity of its impact on competition in the relevant market(s), coupled with the degree of market power that the parties have.[15] The Supreme Court of Canada has described this analysis as a "partial rule of reason" approach,[16] distinguishing it from the "per se" and the "rule of reason" approaches employed in the United States.[17]

By contrast, the United Kingdom has incorporated the element of "dishonesty" into its criminal cartel offense under the *Enterprise Act* 2002 (UK). A key element of the U.K. offense is that the participants in the cartel must have acted "dishonestly." In this context, "dishonesty" is determined by two-part test (as construed by a UK court in *R v. Ghosh*[18]):

- Whether the alleged conduct is dishonest according to the standards of ordinary people (the objective test); and

[13] MOU § 4.3.

[14] The dishonesty concept also has no parallel in the statutes condemning hard-core cartel conduct in France, Germany, Ireland, Japan, or Korea.

[15] C. Goldman, et al., *Recent Developments in Canadian Criminal and Civil Cartel Enforcement and Joint Defence in Canada*, at 2, ABA/IBA 2008 International Cartel Workshop, San Francisco ("Goldman").

[16] *R v. Nova Scotia Pharmaceutical Soc'y*, [1992] 2 SCR 606 (SCC).

[17] Goldman, note 14, *supra*.

[18] [1982] 2 All ER 689.

- Whether the alleged conduct was known by the defendant to be dishonest according to those standards (the subjective test).

Unlike the Australian proposal, however, the Enterprise Act makes no attempt to define the term, although the court defined approach is identical to the Australian proposed definition. Moreover, the term ("dishonestly") is used to qualify the "agreement" between the individuals to make or implement the alleged cartel arrangements, not their intent to obtain a benefit (which has to be the subject of an intention). Indeed, under the Enterprise Act, there is no statutory requirement that any benefit or loss accrue, other than what might be inherent in the meaning of "dishonesty."

The dishonesty standard proposed in the Draft Bill is also consistent with the existing statutory definitions of dishonesty in the Commonwealth *Criminal Code Act 1995* and the *Corporations Act 2001*, which themselves were based on the *Ghosh* standard. This formulation of the standard, however, has not been without its critics.[19]

Perhaps the most significant criticism of the *Ghosh* standard is that it invites a complex social judgment on which different juries might give different answers, and thus may make hard-core criminal activity unnecessarily difficult to prosecute, while discouraging appropriate tough business practices.[20] The use of dishonesty as a distinction between criminal and non-criminal conduct, therefore, creates a risk of inconsistent prosecutorial outcomes.[21] Many have argued that the standard is ambiguous. While the *Ghosh* test (for all its deficiencies) assists juries in reaching a common-sense result in relatively straightforward fraud or theft charges, it may well make it more difficult for a jury to capture the nuance and effect of hard-core cartel conduct. For example, it could be difficult for a jury to draw the line between tough business practice and criminality. Some jurors might be swayed by defendants' arguments that they agreed to fix prices to avoid having to close their factories and lay off their workers.[22] The U.K.'s Hammond-Penrose report discounted this risk:

> The possible disadvantage is that some might argue that an offence that depends on an approach of 'dishonesty' may be difficult for juries to understand. However, given the context in which hard core cartels take place, we believe that, in most cases, the facts will demonstrate that the parties realized what they were doing was dishonest and was contrary to the law.[23]

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[19] *See, e.g., Elliot, Dishonesty; A Dispensable Concept?*, Chin. L.R. 395 (1982); Griew, *Dishonesty: The Objections to Feely and Ghosh*, Crim. L.R. 431 (1985); Halpin, *The Test for Dishonesty*, Crim. L.R. 283 (1986). The objections are not confined to academic commentaries. Perhaps the most incisive criticism of all was articulated in *Peters v. R.* by Toohey, Gaudron, McHugh, and Kirby, JJ., though for different reasons.

[20] J. Joshua, *The UK's New Cartel Offence and its Implications for EC Competition Law: A Tangled Webb*, 28 E.L. REV. OCT. 620, 626 (2003) ("Tangled Web").

[21] U.K. Law Comm'n Consultation Paper No. 155, *Legislating the Criminal Code: Fraud & Deception*, ¶ 5.15 (1999).

[22] *Tangled Web*, at 626, note 19, *supra*, at 8.

[23] *See* Hammond-Penrose Report ¶ 2.5.

But while this may be true for the most egregious and clandestine of cartels, it is not clear how these difficulties would be managed in more subtle cases of serious cartel conduct.[24] Both the U.K. report and U.S. prosecutorial practice, however, appear to reflect that the cases appropriate for criminal proceedings (and jury determination) are those of "unambiguous" cartel conduct. (See note 8.)

The concept of dishonesty has no present role in Australian antitrust enforcement. Offenses under Part V of the TPA do not require dishonesty. The Australian Law Reform Commission, in fact, rejected a proposal to incorporate dishonesty as an element of these offenses in Report No 68, *Compliance with the Trade Practices Act (*1994).[25] It is also well recognized that while the High Court of Australia could not agree on the appropriate instructions to provide juries considering the element of dishonesty in *Peters v. The Queen*, 192 CLR 493 (1988), the justices were unanimous in their rejection of *Ghosh*. The Dawson Review referenced the High Court's decision in this regard:

> Misgivings have been expressed about using the test of dishonesty in Australia to identify serious cartel behaviour. It is thought that its application in the context of cartel behaviour is likely to cause difficulty to a jury, particularly where the proscribed activities are merely referred to by name — for example, price fixing or bid rigging — and not by description.[26]

The current framework for assessing cartel behavior instead focuses on whether: (a) the parties are competitors; (b) the parties have entered into or given effect to an agreement, arrangement, or understanding between the competitors; (c) the agreement, arrangement, or understanding relates to price fixing, bid rigging, market sharing, or restricting output or setting quotas; and (d) the parties have acted with the type of fault required by the mental element of the per se prohibition.[27] The dishonesty element, on the other hand, will require analysis of the standards of ordinary people and inquiry into whether the defendant knew that its conduct was dishonest according to those standards. The incongruity between the current analytical framework and the dishonesty standard has the potential to create confusion, particularly in the minds of juries who will be asked to make the relevant determinations.

The Draft Bill addresses part of the misgivings identified in the Dawson Review by defining the elements of a cartel provision (e.g., price fixing or bid-rigging), rather than just simply referring to those concepts by name. The fundamental concern remains that a jury might have difficulty with those concepts.

The Sections believe that the offensive nature of serious cartel conduct lies principally in the fact that the conduct has no legitimate purpose or effect, but there is always an important role

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[24] Fisse, B, The *Proposed Australian Cartel Offence: The Element of Dishonesty*, Centre for Regulation & Market Analysis, University of South Australia, 4th Annual Trade Practices Workshop, at 27 (Oct. 20-21, 2006) ("Fisse").

[25] *See id.* at 23 (citing Ch. 9).

[26] Kurt Rendell, Jillian Segal and Sir Darryl Dawson, *Review of the Competition Provisions of the Trade Practices Act*, 1974, at 155 ("Dawson Review").

[27] *See* Fisse, note 23, *supra*, at 37.

for prosecutorial discretion in giving effect to the proposed statutory standard of dishonesty. Through such discretion, the cases prosecuted should involve the secrecy, cover-up, destruction of documents, and other features referenced by Mr. Hammond, the U.S. Deputy Assistant Attorney General for Criminal Enforcement (*see supra*, at 4), as these features almost always accompany such conduct and provide important evidence in establishing a criminal violation. To the extent that the dishonesty standard requires such evidence to establish the offense, we appreciate that aspect of the Draft Bill. However, to the extent that the Draft Bill adopts the *Ghosh* standard of dishonesty, it may focus the dishonesty on the idea of making an illicit profit, causing an illicit loss, or otherwise jeopardizing the economic interests of others.[28] It is true that in the Draft Bill, the proposed element of dishonesty qualifies the making of a benefit, and is thus more closely aligned with the economic aspect of the *Ghosh* standard for dishonesty. This is not a factor considered in determining criminal liability in U.S. cases and may prove a difficult element to establish in many cartel cases, making the prosecution of hard-core cartel offenses unnecessarily difficult. The Sections therefore respectfully submit that the definition of the dishonesty standard to establish criminality should focus on objective criteria rather than the subjective criteria contained in the current dishonesty definition. At the very least, the two prongs of the standard should be made alternatives, so that proof of either objective or subjective dishonesty should suffice to establish a criminal offense. The factors laid out in Mr. Hammond's remarks could usefully be incorporated into the MOU as a demonstration of the conditions that could satisfy the dishonesty standard. That would avert the issues outlined above.

3. Issues Related to the Concurrent Investigation and Prosecution of Cartel Conduct as Both a Civil and a Criminal Offense.

The Sections are concerned by the provisions in the Draft Bill and the MOU that contemplate concurrent civil and criminal cartel investigations by the ACCC and the DPP and the imposition of dual sanctions on the same corporate and individual defendants based on the same conduct. The Sections appreciate that there are concurrent civil and criminal regimes operating in other fields of Australian regulation such as tax, customs, and corporate law, as well as in the competition laws of other jurisdictions. The Sections also are aware that the Australian Law Reform Commission (ALRC) endorsed concurrent liability in its 2002 report.[29] But that report also identified a number of concerns that are raised by a concurrent liability regime and the Sections share those concerns:

- The potential for double jeopardy and multiple penalties;
- The potential for multiple proceedings to be unfair and oppressive, to delay finality, and to impose additional costs on the regulated, the regulator, the legal system, and the public;

[28] C. Harding, et al., Breaking *Up the Hard Core: The Prospects of the Proposed Cartel Offence*, Crim. L.R. 933, 938 (2002); *Tangled Web*, at 626, note 19, *supra*, at 8.

[29] *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, [2002] ALRC 95 (ALRC Report).

- The risk that evidence produced in one proceeding could be used, either directly or derivatively, in parallel proceedings in which that evidence ordinarily would not be available or admissible;

- The nature, timing, and transparency of the agencies' processes for deciding between criminal or civil proceedings, and how those processes affect potential subjects.

The Sections understand that the Draft Bill has addressed some of these concerns by extending the protections currently available under § 76B of the Act to the new cartel offenses. The Sections support those extensions.

The Sections remain concerned, however, by the absence of any detailed explanation in the Draft Bill or the MOU regarding how the enforcement agencies will handle the investigation and prosecution of the proposed concurrent liability offenses in practice. The MOU provides that the ACCC will be responsible for investigating all cartel conduct, and that it will refer serious cartel conduct to the DPP for criminal prosecution.[30] The MOU also provides:

- The ACCC will consult with the DPP when it is considering making a referral, and the DPP will provide preliminary advice concerning whether the matter should be pursued as a criminal matter.[31]

- The ACCC will formally refer matters to the DPP "as soon as reasonably possible for determination as to whether prosecution is warranted."[32]

- Upon formal referral, the DPP will "as soon as reasonably possible" advise whether a prosecution should be commenced.[33]

Beyond these statements, however, the MOU provides almost no guidance regarding how the agencies will actually handle the investigation and prosecution of concurrent liability offenses. The MOU states only that the agencies "acknowledge that some matters may warrant both criminal and civil proceedings," and that the agencies "will ensure that such matters are managed in an integrated fashion, including so that civil investigations or proceedings conducted by the ACCC do not adversely affect criminal investigation or prosecution."

The success or failure of this program will depend largely on the ways in which the agencies conduct their investigations and select cases for criminal prosecution. Transparency is, therefore, critical. The Sections endorse the ALRC Report's recommendation that the agencies

[30] This approach bears some similarity to the way in which the Canadian competition authorities handle concurrent liability offenses. The Competition Bureau investigates all cartel conduct and refers cases to the Public Prosecution Service of Canada (PPSC) for criminal prosecution. The PPSC then has formal responsibility to bring criminal charges and to make sentencing submissions to the courts, but the PPSC routinely consults with the Competition Bureau on those matters. As a matter of practice, the PPSC and the Bureau also jointly conduct plea negotiations. This, in effect, has allowed the Bureau to participate in the disposition of the vast majority of criminal cases prosecuted since the early 1990s, as most were resolved by guilty pleas, rather than contested prosecutions.

[31] MOU ¶ 4.1.

[32] MOU ¶ 4.4.

[33] MOU ¶ 5.1.

develop and publish guidelines for cases involving concurrent liability. Those guidelines should address:

- How the agencies will decide which penalties (civil and/or criminal) to pursue;
- What factors will guide the decision to seek double punishment; and
- What limits (if any) will be imposed on the (direct and/or derivative) use of evidence in parallel proceedings.

In addition, the Sections believe that the agencies should consider and address a number of other issues that fall into the following categories and are discussed below: (i) the potential for unfairness in concurrent investigations and prosecutions; (ii) the creation of disincentives for subjects to cooperate in the agencies' investigations; and (iii) the increased costs of concurrent investigations and prosecutions.

Potential for unfairness in concurrent investigations and proceedings

The proposed division of labor between the ACCC and the DPP raises fairness questions related to the timing of the referral decision. As things currently stand, a corporation or individual contacted by the ACCC can quickly grasp the likely (civil) consequences of any cartel conduct in which it (or he/she) might have participated; however, under the proposed system of concurrent civil and criminal liability, the same corporation or individual must make difficult judgments regarding the response that should be offered to informal or formal inquiries by the ACCC. This concern is made more acute by the risk that information obtained by the ACCC in its preliminary investigation, though perhaps not formally admissible in any criminal proceedings, might still be used indirectly or derivatively in a criminal prosecution.

The MOU implicitly recognizes this potential unfairness in paragraph 4.4, which states: "the ACCC will formally refer matters to the DPP as soon as *reasonably* possible for determination as to whether prosecution is warranted."[34] The Sections submit that the ACCC should have a more concrete obligation to refer matters to the DPP as soon as they can determine whether criminal prosecution may be appropriate. The current formulation in the MOU does not adequately ensure that such decisions will be made as promptly as possible, particularly given the magnitude of the liabilities to which the subjects of those investigations may be exposed.

The possibility of concurrent civil and criminal liability also creates a risk that the threat of criminal prosecution might be used unfairly to leverage an enforcement outcome that might not otherwise be available if only one proceeding, criminal or civil, was available. The Canadian experience may lend credence to this concern. In Canada, enforcement action against certain deceptive marketing practices may be taken by way of concurrent criminal prosecution and proceedings for the imposition of an administrative monetary penalty (AMP) under §§ 52 and 74.01 of the *Competition Act*. In *Canada (Commissioner of Competition) v. Sears Canada Inc.*,[35]

[34] MOU ¶ 4.4 (emphasis added).

[35] [2005] 37 C.P.R. (4th) 65.

the Competition Tribunal imposed an AMP of C$100,000, essentially confirming the maximum AMP that can he levied under s74.01(1)(c) of the Act. In numerous other proceedings under s.74.01, however, AMPs well in excess of that "maximum" have been imposed, on consent, after settlement discussions.[36] It is widely suspected among Canadian practitioners that the inexplicably high AMPs in those settlements may well have been accepted as the result of the enforcement authorities' direct or tacit threat to pursue the alleged conduct criminally under s52 of the Act, with its adverse reputational consequences, exposure to civil claims under s36 of the Act, and unlimited fines that could be imposed upon a criminal conviction.

The ACCC has acknowledged this risk and agreed that such an approach would be "highly improper," stating that it "would develop internal guidelines aimed at preventing this."[37] Yet there is nothing in the proposed MOU that addresses the concern. Guarding against this potential for abuse is important not only to ensure that actual abuses do not occur, but also to promote public confidence in the ACCC's and the DPP's prosecutorial decisions.

Lastly, it is possible for multiple participants in the same cartel to be subject to different proceedings, some criminal and some civil. If a multi-player cartel gives rise to multiple criminal and civil proceedings, it is unclear whether all civil proceedings would be stayed pending a resolution of all criminal proceedings arising out of the same cartel, or whether the stay would only operate against those defendants that are also being prosecuted criminally. Given that the statutory safeguards against double jeopardy and use immunity are quite narrow, it is important that the agencies offer some guidance on these issues, too.

Disincentives to cooperate based on threat of concurrent prosecution

Under the current regime, cartel participants have a significant incentive to cooperate with the ACCC, even where full immunity is not available. It is well established that by cooperating in ACCC investigations and subsequent proceedings, a party can earn a significant discount off any penalty to which it ultimately may be subject. Under the new legislation, defendants that face the risk of criminal prosecution by the DPP will need to consider how any cooperation with the ACCC might affect their risk of criminal exposure.

The agencies may need to provide additional guidance, and potentially additional protection, to ensure that these risks do not compromise early-stage investigations. In particular, the subjects of ACCC investigations in the past have often provided information to the ACCC on a voluntary basis, rather than requiring the ACCC to compel production of the information. The new provisions concerning "protected cartel information" seek to provide some protection against the disclosure of such information, but they do not protect against the use of that information against the producing party.

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[36] *See, e.g., Forzani Group* (C$1.7 million AMP), www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00254e.html; *Grafton-Fraser* (C$1.2 million AMP), www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02147e.html; *Suzy Shier* (C$1 million AMP), www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00305e.html; *Toyota* (C$2.3 million "voluntary payment") www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00300e.html.

[37] *Id.*

Increased costs of concurrent prosecution

The new cartel offenses represent a departure from current agency practices. As a result, at least in the beginning, the agencies should be expected to pursue all investigations (except those involving low level conduct) in a way that will later support the heavier burdens of proof required to establish criminal liability. From the agencies' perspective, this approach is prudent insofar as it ensures that no criminal prosecution will be compromised by a failure to have taken appropriate steps from the outset. But this approach will also impose more costs and complexity on the agencies, as well as the subjects of their investigations. The agencies should be mindful of these costs, not only to avoid unnecessarily burdening in a duplicative way the companies and particularly the individuals who may be subject to these processes, but also to preserve their scarce enforcement resources.

4. Treatment of Leniency Applications By the ACCC and the DPP.

In the Sections' experience, an effective leniency program is instrumental to successful efforts to detect, prosecute, and deter cartels. An effective leniency program will often lead cartel members to disclose their conduct to authorities before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon their cartel activities and to provide evidence against other cartel members.[38]

In the United States, the vast majority of international cartel investigations and prosecutions conducted by the DOJ have been built on the cooperation of a corporate leniency applicant. Since 1986, more than 90 percent corporate defendants charged with criminal antitrust offenses negotiated plea agreements with the DOJ under the terms of which they admitted their participation in the alleged cartels and cooperated in ongoing investigations.

The ACCC's Immunity Policy has been in place for considerably less time than that of the DOJ, but nonetheless has produced compelling results in a number of high-profile civil competition matters — in particular, the ACCC's proceedings against Visy Pty Limited. The Chairman of the ACCC has described the role of the Immunity Policy in that case as "crucial in bringing one cartel participant — Amcor — over the line to confess."[39] The Sections completely agree with the ACCC's view that "an effective leniency policy is the key element" in detecting cartels, "especially when underpinned by criminal sanctions, specifically imprisonment."[40]

The proposed MOU between the DPP and the ACCC regarding Serious Cartel Conduct identifies the roles and responsibilities of the DPP and ACCC and addresses the availability of immunity from cartel proceedings. Both the DPP and the ACCC expressly recognize that maximization of certainty and minimization of discretion, as far as reasonably possible, are crucial to the effective operation of immunity policies for cartel conduct.[41] The Sections endorse

[38] Scott Hammond, Director of Criminal Enforcement, U.S. Dept. of Justice, *Cornerstones of an Effective Leniency Program*, ICN Workshop on Leniency Programs, (Nov. 22, 2004) ("Cornerstones"), www.usdoj.gov/atr/public/speeches/206611.htm.

[39] Visy News Conference, Opening Statement, Graeme Samuel, Nov. 2, 2007.

[40] Mark Pearson, Criminalization of Cartels, 2008 International Cartel Workshop (Jan. 2008).

[41] MOU § 7.1.

those elements as critical to an effective leniency program. The Sections, however, are concerned that some key differences between the immunity policies of the ACCC and the DPP may create uncertainty and lead prospective applicants to be reluctant to participate in those processes.

In particular, Clause 7.2 of the MOU provides that the ACCC will publish from time to time its immunity policy relating to Cartel Conduct so that the availability and conditions of civil immunity from proceedings by the ACCC for Cartel Conduct may be clearly ascertained. The ACCC has a well developed and active immunity policy that is contained in the ACCC Immunity Policy for Cartel Conduct dated 26 August 2005. That policy is broadly consistent with the immunity policy administered in the United States by the U.S. DOJ.[42]

Key components of an effective immunity program are transparency, predictability, and the provision of necessary incentives and inducements to self-report and cooperate.[43] The ACCC's current Immunity Policy actively works to ensure that these key goals are met.

Under the arrangements contemplated by the MOU, the ACCC will continue to receive and manage requests for immunity, for both criminal and civil proceedings, and to make recommendations to the DPP based on its assessment of whether the applicant meets the criteria set out in the ACCC's immunity policy in relation to cartel conduct.[44] But the DPP must decide whether to grant immunity from criminal proceedings in accordance with the *Prosecution Policy of the Commonwealth* and upon the recommendation of the ACCC.

The power of the DPP to grant immunity is governed by the *Director of Public Prosecutions Act, 1983* (DPP Act) and the Prosecution Policy of the Commonwealth. Section 9(6)(D) of the DPP Act provides that, if the DPP considers it appropriate to do so, the DPP may give to a person an undertaking that the person will not be prosecuted (on indictment or similarly) for a specified offense against the law of the Commonwealth or in respect of specified acts or omissions which constitute, or may constitute, an offense against the law of the Commonwealth. Where the Director gives such an undertaking, no criminal proceedings may be instituted in a Federal Court or in a Court of the State or Territory against the person in respect of such an offense or in respect of such act or omissions.[45]

The MOU expressly contemplates that the DPP will continue to decide whether to grant immunity from criminal proceedings based on the Prosecution Policy of the Commonwealth. That policy, however, has been developed in a different context and is not always easily applied to cartel-related offenses. In particular, no reference is made in the policy to corporate offenders, making it unclear how some operational aspects may work when applied to corporations. Leaving aside those technical or operational issues, the Sections are concerned that the Prosecution Policy of the Commonwealth may not operate in a way that will encourage

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[42] Scott Hammond, Deputy Asst. Attorney General, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All*, OECD Competition Committee Working Party No. 3 (Oct. 17, 2006), www.usdoj.gov/atr/public/speeches/219332.htm. Each policy has some unique features but they are generally consistent and enable effective inter-jurisdictional cooperation in cartel matters.

[43] *Cornerstones*, *supra*, note 37 at 14.

[44] MOU § 7.4.

[45] Subsection 9(6)(E) of the DPP Act.

immunity applicants to come forward and promote the purposes of the Draft Bill, namely, the early detection and prosecution of cartels.

As presently structured, the Prosecution Policy of the Commonwealth advocates granting immunity only as a matter of last resort.[46] Under that policy, the DPP will enter into statutory undertakings only under the following conditions:

- The evidence that the accomplice can give is necessary to secure the conviction of the defendant, and that evidence is not available from other sources; and

- The accomplice can reasonably be regarded as significantly less culpable than the defendant.

In deciding whether to give an undertaking immunity, the key issue for the DPP is whether it is in the "overall interests of justice"[47] that the opportunity to prosecute a person should be foregone to secure that person's evidence in the prosecution of another. The factors the DPP weighs are: (a) the degree of involvement by the person in the crime in comparison to the defendant; (b) the strength of the prosecution's evidence against the defendant without the person's evidence and if the charge(s) could be established against the defendant without it; (c) the extent to which the prosecution's evidence is likely to be strengthened if the person testifies; (d) the likelihood of weaknesses in the prosecution case being strengthened other than relying on the person's evidence; (e) whether there is (or is likely to be) sufficient admissible evidence to substantiate charges against the person, and if it would be in the public interest that the person be prosecuted but for their preparedness to give evidence if given an undertaking; and (f) if the person was prosecuted and then testified, there is a real basis for believing that their personal safety would be at risk whilst serving any jail time.

Based on the nature of the process contained in the Prosecution Policy of the Commonwealth, moreover, the grant of an undertaking is generally considered only at the end of the DPP's evaluation of its case. In contrast, the essence of the ACCC's leniency program is that it is the upfront grant of immunity that serves as an inducement to self-report.

The Sections are concerned that if the Prosecution Policy of the Commonwealth continues to be the policy that determines whether immunity will be granted, it will jeopardize Australia's ability to promote a successful leniency program and undermine its cartel enforcement objectives. The Sections respectfully submit that the experience of other jurisdictions, and in particular the United States, as well as Australia's own experience under the ACCC's Immunity Policy since 2005, show that in cartel matters, the Immunity Policies of the DPP and the ACCC must parallel one another. Otherwise, the objectives of early detection and increased enforcement of cartel activity will not be met.

The Prosecution Policy of the Commonwealth, moreover, does not address aspects of the ACCC's Immunity Policy that are integral to its continued success, such as restrictions on the

[46] Prosecution Policy ¶ 5.4.

[47] Prosecution Policy ¶ 5.6.

use of information received as part of the Immunity Policy; the express provision for oral applications and for the matter to be dealt with orally; the provision requiring that disclosure to other jurisdictions not be made without the consent of the applicant; the extension of the application for immunity by a corporation to current or former directors, officers, and employees who satisfy requirements for derivates immunity; a commitment on the part of the DPP to use best endeavors to protect any confidential information provided in immunity applications; and a requirement that immunity is conditional on full, frank, and truthful disclosure.

The Sections believes that an effective leniency program is required to achieve the full policy benefits of criminalizing serious cartel offenses. Unless the Prosecution Policy of the Commonwealth is modified to correspond with that of the ACCC in respect of serious cartel conduct, it is unclear whether the goals of the legislation can in fact be achieved.

The Sections believe that the ACCC and DPP will work together to establish procedures that are transparent and fair. When it does, Australia will have one of the strongest enforcement regimes in the world and will join the United States, Canada, and the United Kingdom in providing more effective deterrence to cartel behavior.

Respectfully submitted,

Section of Antitrust Law
Section of International Law
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