CLAYTON UTZ

Submission to the Committee of Inquiry into the competition provisions of the Trade Practices Act 1974 and their administration

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CLAYTON UTZ
Lawyers
Levels 22-35 No. 1 O'Connell Street Sydney NSW 2000 Australia
PO Box H3 Australia Square Sydney NSW 1215
www.claytonutz.com
Tel + 61 2 9353 4000 Fax + 61 2 8220 6700

1. Background

This submission is made by the Clayton Utz National Competition Law Group.

A large number of the submissions to the Inquiry have described aspects of the competition law provisions and their administration which warrant improvement to ensure that:

(a) specific provisions and their administration achieve their objective and that of Australian competition law generally; and

(b) these objectives are achieved in the most effective and efficient way.

Our submission supports the submissions made to the Inquiry which are focused largely on technical issues arising as a consequence of the current drafting of the Act and which would arise from the amendments proposed by the Commission. We do not address other issues (particularly policy issues) raised by the terms of reference.

Please contact Michael Corrigan, Linda Evans or Bruce Lloyd, Sydney partners of the Clayton Utz National Competition Law Group, if you would like to discuss any of the issues raised. Contact details are provided at the end of this submission.

We do not claim confidentiality for any part of this submission.

2. Merger Control Administration

2.1 Informal Clearances Work but can be improved

The informal clearance system should be retained. Two particular aspects of the informal merger review process that should be amended to introduce more certainty into the process and to provide businesses with the ability to readily exercise the rights and obligations under the Act.

(a) the Commission is not required to publish its reasons for decision in respect of informal merger applications; and

(b) a decision by the Commission to not grant an informal clearance in respect of, or to oppose, a particular merger is not subject to any form of practical review which can meet the requirements of commerce. Unreviewable administrative decisions lead to a lack of transparency and accountability.

2.2 Reasons should be given for ACCC decision

(a) The Commission's Mergers Branch staff currently prepare a report with a recommendation to the Mergers Panel of the Commission. The contents or details of this report are not released publicly. The Commission does not provide detailed reasons for its decisions in relation to informal merger clearance applications - it merely "logs" its decision (which provides scant details on its public register) and sometimes makes a brief media release of 2 or 3 paragraphs. These records are not generally sufficient to ascertain the Commission's detailed reasoning process, e.g. what market definitions were accepted or rejected; what weight was given to particular merger factors; what other considerations were relevant; what third party objections were about and what weight was accorded to third party market inquiries etc.

(b) In our experience, the provision by the Commission of detailed reasons for its

decision would significantly enhance the merger process. Reasons would:

(i) provide a clear guidance to the parties affected as to the relevant areas of the Commission concern. This is important as it will enable parties to consider whether to proceed with a merger or not, or to move to authorisation or how best to address the Commission's concerns;

(ii) give comfort to disappointed parties, that their submissions were considered in detail and were unsuccessful for reasons which have clearly articulated and can be understood by them.

(iii) enable the parties to better focus on the issues critical to the Commission's decision, which would provide the merging parties, and other interested persons, a better opportunity to provide information which may be relevant to the Commission's analysis;

(iv) provide precedent assistance to parties in the future in deciding whether the Commission will consider that a particular merger will raise competition issues. Broad guidance of this nature, although not determinative in future merger decisions, would be extremely helpful; and

(v) enhance understanding the rigour of the competition analysis undertaken by the Commission.

(c) Confidentiality concerns can be addressed by relevant data being omitted from the reasons.

(d) An example of fairly detailed reasons being provided is the Commission's decision in respect of the Westpac/Bank of Melbourne merger. These reasons have been of considerable utility in explaining the Commission's reasoning in that case, as well as providing very useful guidance for participants in the financial services sector.

(e) However, reasons have not been released for other important mergers which affect large numbers of consumers and a substantial part of the economy. Examples are Qantas-Impulse, Commonwealth Bank-Colonial, AAPT-Optus and other acquisitions in the energy and rail transport sector.

(f) Most overseas competition regulators provide more fulsome reasons than the Commission in respect of merger clearance decisions. Practitioners often call in aid of merger submissions examples from our major trading partners, when several mergers have been examined by the Commission in Australia in the same sector and no information is available about those analyses.

(g) In our submission, the Commission's reasons should address, in detail, the relevant market definition, the merger factors under section 50(3) and the arguments that the Commission rejected in its consideration of the merger. This could be done without disclosing confidential information or the identity of any party who made a submission on the merger.

(h) The reasons can be released to the parties during the informal clearance process and publicly some time after the matter becomes public; by this means there is no delay to the process or clearance timetable.

2.3 **Review of Commission's informal clearances**

(a) The Commission's analysis and decisions in respect of a proposed merger lacks an effective review option.

(b) The Commission is able to block a merger initially by obtaining an injunction in Court without an undertaking as to damages. The Commission needs only to show that there is an arguable case to be tried and that the balance of convenience favours the grant of the injunction.

(c) The balance of convenience generally favours the grant of an injunction to preserve the status quo because of the difficulty in divestment in unscrambling a business after final determination of section 50 proceedings. Once Court proceedings begin, very few mergers will survive the delays of a full scale Court timetable, a lengthy trial, reserved judgment and appeals process.

(d) The authorisation process, similarly, is not an attractive option, once the Commission has decided to oppose a particular merger. The reasons are not always obvious for this but may include a combination of:

(i) the outcome of authorisation applications is not readily predictable; the public benefit test is vague and it is not easy to prove the existence of quantifiable future benefits, which would not be available in the absence of the merger;

(ii) The authorisation process is public and is perceived (albeit wrongly) to allow a "free for all" by any third party or interest group on the "popularity" of the merger;

(iii) An authorisation application is seen to involve a concession by the merging parties that the merger is anti-competitive;

(iv) The time frames for authorisation, involving lengthy submissions, and possible appeal to the Tribunal, are too long for mergers, especially if the authorisation application comes after an informal clearance application is rejected by the Commission; and

(v) The authorisation process involves the Commission - the same body that has determined that the merger is anti-competitive - being asked to 'authorise' the merger that it has already criticised. This of itself provides a disincentive to apply for authorisation.

(e) For these reasons, the Commission's informal clearance in respect of a merger is generally the "final verdict" on whether a merger will or will not proceed and parties seek to use undertakings to address concerns, rather than authorisation.

The fact that such a decision is not subject to any form of practical review is a serious omission, and imbalance of power, in Australia's competition law regime.

(f) By contrast, a quick and efficient administrative review mechanism, by a Review Panel, would assist greatly the administration of section 50. We submit that the review mechanism be along the following lines:

(i) only available for an informal merger clearance decision by the Commission.

(ii) the Review Panel would have power only to:

- grant clearance including clearance conditional on undertakings; or

- require the Commission staff to undertake further investigation, or analysis; or

- confirm the Commission's decision.

(iii) The review mechanism would give parties an opportunity to argue their merger case before an independent body, provide a quick mechanism for review and act as a constraint to, effectively, the sole power of the Commission in decision making on mergers . (The Review Panel should not be the Australian Competition Tribunal, which is a judicial process and not appropriate for this review function).

(iv) The Review Panel may or may not be comprised of specially appointed Associate or Merger Review Panel Commissioners but would comprise say three to five eminent, experienced persons in this field appointed by the Treasurer; they would be independent of the full time Commissioners and involved only in merger review. Typical members could comprise experienced business persons; economists, lawyers and a consumers' representative. The Review Panel should publish reasons for its decisions to the parties if the matter is confidential and publicly when the matter becomes public, omitting any confidential information.

(v) The Review would essentially be conducted 'on the papers' before the Commission but the appellant would have the right, when seeking a review, to put a further submission directly to the Review Panel; the appellant would not have a right to review normally confidential Commission staff papers analysing the merger but perhaps should see a non-confidential version of the final staff recommendation and an edited summary of the Commission reasons (omitting any truly confidential third party information). Any right of appearance before the Panel should be at the Panel's discretion.

(vi) There would be no third party rights to seek a review of a clearance.

(vii) There should be time limits so that a party must seek a review within, say, 14 days of Commission declining clearance, and lodge its submission in a further 7 days, with the Panel to give its decision say within a month after that. The Panel could not extend time without the appellant's consent.

(viii) This model may mean legislating to recognise the informal clearance but perhaps this could be done by Regulations which make it clear that the Review Panel can substitute its views for those of the Commission, on the limited question of whether or not to oppose a merger and institute section 50 proceedings.

SUBMISSION 1

The Commission should be required to publish detailed reasons for deciding to oppose, or not oppose, informal clearance applications.

SUBMISSION 2

A decision by the Commission decision to not grant an informal clearance should be subject to review by a Review Panel.

3. Exclusionary Provisions - s.4D - *Souths* case and Joint Ventures

3.1 Summary

From our experience, the current prohibition on exclusionary provisions:

(a) catches a very broad number of legitimate joint venture arrangements, that should be assessed on a substantial lessening of competition test;

(b) precludes arrangements that are motivated by legitimate commercial purposes;

(c) is unclear in its operation; and

(d) represents a significant obstacle to many legitimate collaborative arrangements between competitors.

3.2 **Background**

(a) Section 45(2) of the Act provides, relevantly, that:

> *"A corporation shall not:*
>
> *(a) make a contract or arrangement, or arrive at an understanding, if:*
>
> *(i) the proposed contract, arrangement or understanding contains an exclusionary provision…"*

(b) Section 4D of the Act defines the elements of an exclusionary provision, relevantly, as a contract, arrangement or understanding:

(i) made between persons any two or more of whom are competitive with each other;

(ii) which has the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from;

(iii) particular persons or classes of persons (or particular persons or classes of persons in particular circumstances or on particular conditions);

(iv) by all or any of the parties to the contract arrangement or understanding.

(c) The law on exclusionary provisions is complicated and has resulted in a number of anomalous, decisions, most notably the decision of the majority of the Full Court in *Souths*[1].

(d) In our experience, it is often difficult for co-venturers to proceed with any certainty about whether a particular provision of a joint venture agreement will breach section 45(2).

(e) Further, the prohibition hinders legitimate joint venture activity and pro-competitive arrangements between competitors.

3.3 **Scope of 4D is too broad**

(a) Unlike the United States or (recently amended) New Zealand[2] statutes, the Act provides that an exclusionary provision is illegal per se, even if the target of the

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[1] *South Sydney District Rugby League Football Club v News Ltd* (2001) ATPR 41-824 ("*Souths*")

[2] *Commerce Act 1996*: Section 29(1)(c)

provision is not a competitor or potential competitor of the parties who make the relevant exclusionary provision. This is because the provision prohibits arrangements directed against "persons", a term that is defined widely under the Act.

(b) This expanded definition of "person" for the purposes of section 4D (to include more than competitors) gives the prohibition an extremely wide ambit, as any agreement between competitors which affect dealings with any third party can give rise to issues under section 45(2)(a).

(c) Trade association rules, non-compete clauses in partnership agreements, quality control standards and other types of pan-industry regulation are all potentially caught by the section as it is currently drafted. This decision also potentially endangers admission and selection criteria by trade and professional organizations.

(d) An example of how this definition of "person" can give rise to anomalous results is referred to in the dissenting judgment of Heerey J in *Souths* as follows:

> *If Souths' argument is correct (note: the Full Federal Court found it to be correct), competitors who enter into a partnership and agree to provide a lesser range of goods or services (or deal with a narrower range of customers) will have contravened s 45(2). Nothing in the stated object of the Act ("to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection": s 2) would suggest such a startling result."*[3]

3.4 **Arrangements with a legitimate purpose are caught**

(a) An exclusionary provision has the purpose of restricting limiting or preventing the supply of goods or services to or from a particular person or class of persons. However, Courts have interpreted this section to catch arrangements where the *immediate* purpose is to limit supply, even where the *broader* purpose is much wider and is not exclusionary.

(b) An example of this is the *Souths* case (on appeal to the High Court), in which a majority of the Full Federal Court held that even though an agreement had a broader purpose of benefiting Rugby League by ensuring a competition of viable size, its immediate purpose was to exclude a club. The provision was therefore illegal per se.

3.5 **It is unclear what constitutes a "class of persons"**

(a) Exclusionary provisions, by definition, need to target, or operate on, a "particular person or class of persons". Until the recent decision in *Rural Press*[4], other recent decisions on s.4D were of little assistance in identifying what is meant by a "class of persons".

(b) It has been held that a 'class of persons' can be distinguished and made "particular" if its members are objects of a purpose of any provision with which section 4D is concerned - *ASX Operations v Pont Data*[5]. In *Rural Press*, the Full Court noted that the High Court will be undertaking a comprehensive review of s.4D when it hears

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[3] *Souths*, at 43, 126

[4] *Rural Press Ltd v Australian Competition and Consumer Commission* [2002] FCAFC 213

[5] *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) ATPR 41-109

the appeal in *Souths* and that it was therefore inappropriate for the Full Court to do so, including a reconsideration of the decision by the Full Court in *ASX Operations v Pont Data*.

(c) The result from *ASX Operations v Pont Data* is that the world at large may be a class if the parties intend to restrict dealings with the world at large. In *Rural Press*, the Full Court considered this approach incorrect. We agree with the approach adopted by the Full Court in *Rural Press*.

SUBMISSION 3

If, in the Souths . Australian Rugby League appeal, the High Court upholds the approach to "class of persons" referred to in ASX Operations v Pont Data, the Act should be amended to better clarify what is meant by a "class of persons" and to narrow the scope of section 4D.

3.6 Joint Venture Exception

(a) Joint venture activities are granted an exemption to section 45A, which prohibits price fixing[6]. However, there is no equivalent exemption in the prohibition on exclusionary provisions. As a result, joint venture activity is significantly impacted by the prohibition on exclusionary provisions. For example, a joint venture between two competitive parties to develop a new product will potentially be caught by section 45(2)(a), regardless of joint venture's effect on competition. This can result in the potential joint venturers having to reconsider whether to continue with the product development.

(b) Because of these problems, co-venturers who use non-compete clauses in joint venture agreements unwittingly may infringe the Act in many instances, or through failing to draft their agreement in a manner which properly records the vertical nature of the exclusivity covenants by the co-venturers in favour of the joint venture company, the section 45(6) non-overlap provision does not operate to shield the conduct from section 45/4D.

SUBMISSION 4

There should be a general exception to the per se prohibition on exclusionary provisions in joint ventures. Such an exception would provide that an exclusionary provision is only illegal if it has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

4. Overlap between sections 45 and 47

4.1 Background

Section 45(6) of the Act is intended to ensure that conduct which falls within both section 45 and section 47 of the Act is examined under section 47. However, because section 47 is not exhaustive, certain vertical conduct is treated more harshly under the per se provisions of section 45 than other vertical conduct, even though the conduct has no more severe anti-competitive purpose or effect. One example is the acquisition of goods subject to a condition

[6] *Trade Practices Act*: section 45A(2)

that the person from whom the goods are acquired not supply goods to a competitor of the acquirer[7].

4.2 **Regulation of vertical conduct**

It is generally submitted that exclusive dealing conduct should be regulated by section 47 of the Act not section 45. This is supported by the policy basis for section 45(6) and the Full Federal Court's decision in *Visy*[8]. In *Visy*, the majority referred to the statement by Justice Hely in *South Sydney District Rugby League Football Club Ltd v. News Ltd*[9] in which he said:

> "The expression "by reason that" [in section 45(6)] has a meaning equivalent to "if and in so far as". If the expression is read in that way, there is harmony between the two parts of the section, and the legislative intention of subjecting exclusive dealing to s 47 regulation, rather than regulation under s 45, is effectuated."

and the majority in *Visy* said:

> "For the reasons indicated we are of the view that the tentative construction suggested by Hely J was correct .."[10]

4.3 **Problem highlighted by *Visy***

Although the decision in *Visy* is no doubt correct on the current law, it raises the unintended consequence that because of the drafting of section 47 some vertical conduct is treated more harshly than other vertical conduct with no apparent basis for doing so. There is no economic or legal reason why supply on condition that a person does not acquire goods or services from a non-competitor should be treated more harshly than supply on condition that a person does not acquire goods or services from a competitor.

(a) Secondly, because of the broad definition of "services" in section 4, conduct frequently may have a dual character: because every transaction gives rise to rights and obligations on both parties, every transaction may be characterised as supply or acquisition of services, which cannot have been Parliaments intention.

SUBMISSION 5

To clarify the issue and ensure that the aim of sections 45 and 47 are fulfilled, we submit that:

(b) *all vertical conduct that might otherwise fall within section 4D/45 of the Act be examined under section 47; and*

(c) *the primary character of the conduct determine if the conduct is vertical or horizontal in natur*e.

5. **Third Line Forcing - ss.47(6) and (7)**

5.1 **Background**

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[7] as occurred in Visy (2001) ATPR ¶41-835

[8] (2001) ATPR ¶41-835 at page 43,319.

[9] (1999) ATPR ¶41-728 at page 43,452.

[10] [insert citation for Full Court's decision in Visy]

(a) There appears to be little justification for common business practices with no competition implication such as many 'bundling' and joint promotions to be prohibited per se by the Act.

(b) In a statute which aims to maximise benefits to consumers, sub-sections 47(6) and (7) are outdated and of little benefit. It is difficult to see why section 47(6) and (7) conduct is uniquely singled out as being illegal per se, whereas other types of vertical restraints are illegal only if they substantially lessen competition.

(c) Sub-Sections 47(6) and (7) have been the subject of much criticism[11]. The Hilmer Committee, as well as a recent Treasury discussion paper[12] recommended that section 47(6) be made subject to a competition test, as for the balance of section 47.

5.2 **Examples of conduct caught by sub-sections 47(6) and (7)**

(a) Examples of conduct that may be caught by section 47(6) **and (7)** include cash register ribbon and other forms of 'shopper dockets', joint marketing promotions and membership discounts at third party outlets which many organisations offer to their members. Under the current law, these arrangements could be argued to contravene section 47(6) **and (7)**.

(b) Many of these arrangements are notified to the Commission, with the Commission virtually never objecting to any such third line forcing arrangements. Many more arrangements are not notified.

(c) Clayton Utz submits that section 47(6) its corollary, section 47(7), should be amended to bring it in line with the rest of section 47. If this is done, parties to third line forcing arrangements must still have to ensure that their conduct does not have the purpose or effect of substantially lessening competition. Of course they must also have to ensure, relevantly, that they are not breaching section 46 and that their marketing material does not offend section 52.

SUBMISSION 6

Section 47 should be amended to provide that third line forcing conduct will only be illegal if it has the purpose, effect or likely effect of substantially lessening competition in a relevant market in Australia.

6. **Commission Investigations - Legal Privilege should be preserved**

6.1 **Compliance**

(a) Section 155 of the Act empowers the Commission to investigate suspected contraventions of the Act by requiring production of documents or provision of information from persons who the Chairman has reason to believe can provide such documents or information. Recently, the Commission has used that power to require production of documents to which legal professional privilege attaches. We are aware of cases where, despite the doubt over the Commission's power to do so (raised in the *Daniels Corporation* Appeal to the High Court), some recipients have produced privileged material to the Commission rather than incur the cost of a legal

[11] See, for example Pengilley, W, "*Third-line forcing: What is the policy?*" (1998) 14 Australian & New Zealand Trade Practices Law Bulletin; Thomas, B "*Third line forcing in action*" 1998 (59) Australian Construction Law Newsletter 59; Lipton, J "*Third line forcing in Australia: current problems and future directions*" 4 TPLJ 77; McEwin, R "*Third line forcing in Australia*" 22 Australian Business Law Review 114.

[12] Department of Treasury, Discussion Paper, Possible Amendments to the Trade Practices Act, July 2001.

challenge.

(b) A culture of compliance is assisted by an ability to offer frank, confidential advice. If legally privileged documents are required to be produced to the Commission in its investigations, one predictable effect is that fewer corporations would seek legal advice on the legality of their conduct. This is inimicable to the proper administration of the Act. The preservation of privilege is therefore important to encourage continuing compliance with the Act.

(c) It is well settled that legal professional privilege is a substantive and fundamental common law right.[13]

(d) Whether or not the current form of section 155 overrides legal professional privilege is to be finally determined by the High Court in the *Daniels* appeal. If the High Court determines that privilege is overruled by the current form of section 155, this will have significant implications for corporations in seeking legal advice on whether their conduct is potentially in breach of the Act.

(e) The preservation of legal professional privilege does not prevent the Commission from achieving the purpose of section 155. Privilege has a narrow scope and does not apply to documents that evidence a transaction or to commercial dealings or negotiation. There has been no special reason advanced in the case of investigations into trade practices breaches sufficient to warrant the abrogation of legal professional privilege.

R*ECOMMENDATION 7*

If the High Court in the Daniels appeal determines that the current form of section 155 does abrogate the common law right of legal professional privilege, section 155 should be amended to expressly preserve legal professional privilege.

7. Criminal Sanctions

7.1 Procedural Issues

We do not express an opinion on whether or not criminal penalties for any Part IV offences are warranted. Our comments are intended to highlight some of the legal and procedural issues that should be addressed if the Committee recommends and Parliament decides that such criminal penalties are warranted. In Australia there are a range of issues to consider if a criminal regime is introduced for Part IV offences[14].

7.2 Strict Liability

(a) Is the element of *mens rea* to be added to the existing provisions in Part IV to make the conduct a criminal offence? Presumably if such an element is added, following the proposed UK example, this implies that "innocent" price fixing would not attract criminal sanctions because there is no intention to commit an economic crime, but that "dishonest" price fixing would be so punishable because there is such an intention. This would require a radical change to the strict liability regime

[13] *Baker v Campbell* (1983) 153 CLR 52; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490; *Goldberg v Ng* (1995) 185 CLR 83 at 93, 121; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 131, 161; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 505, 564-565.

[14] A paper given to the 2002 Trade Practices & Consumer Law Conference by Michael Corrigan, which canvasses these issues in more detail, is attached.

presently contemplated by Part IV.

(b) The proposed UK reforms, in the *Enterprise Bill 2002*, introduces the requirement of *dishonesty* into its proposed cartel criminal provision. Those provisions are very complex and seem likely to cause problems in jury trials.

(c) Given the difficulty and uncertainty of ascertaining whether particular conduct is caught by the current price fixing or market sharing provisions, it may be that an Australian criminal regime is better suited to introducing a mental element to the criminal offence. Without such a requirement, it is possible that a large number of individuals could inadvertently or involuntarily commit criminal offences. Alternatively, wary of the risk of criminal prosecution, individuals may decide to not proceed with a particular arrangement, even if the risk of breach is remote.

(d) This approach is consistent with the requirement that an individual be at least "*knowingly involved in a contravention*" - section 75B(1) - to be prosecuted under the existing provisions of the Act.

(e) Further, no additional element is required under Part V for criminal liability for false representations.

7.3 **Complexity of Part IV offences**

(a) It is commonplace for Part IV hearings to run for a considerable period with complex lay and expert evidence being presented. Trials of 3 or 4 weeks are common and some Part IV cases have gone for months at trial. It is also commonplace for expert evidence to be heard in an inquisitorial style discussion of experts with questions from the Bench as well as counsel, rather than by way of adversarial cross examination, with experts bound by the Federal Court Practice Note to assist the Court to reach a conclusion about complex matters of market dynamics over a relevant timeframe, substitutability and market definition at various levels of the market; the effect of the conduct on competition in that market and on actual and potential competitors; the effects of a significant non-transitory increase in price of goods and services and the like. Even if criminal sanctions were reserved for "hard core" (i.e. per se) offences, proof to the relevant standard that parties were relevantly in competition, that a collective boycott was intended or that a price fixing contract arrangement or understanding was reached with the requisite level of certainty will present grave difficulties for the prosecutor.

(b) The complexity of such cases will only be increased by adding the exigencies of the criminal process. This will require extra investigative care, new rules of procedure and a need to prove all allegations beyond reasonable doubt. This will, without a doubt, add to the complexity, length and cost of this litigation. The experience in anti-trust cases in the US where the number of directed verdicts notwithstanding the jury result is highly instructive.

(c) The stigma which attaches to a criminal conviction, along with the possibility of jail terms and the disabilities which come with a criminal record (in terms of immigration etc) could result in more cases being contested. Executives will be less likely to settle a matter if the result is a criminal sanction of any kind.

(d) The need to contest more and more complex and lengthy cases could put a serious strain on Commission resources, and on defence costs. It would be inappropriate if the cost of defence at trial was so high that defendants could not afford a fair trial (indemnity and insurance being unavailable - see Corporations Act s. 199A).

7.4 **Jury Trials**

"In a jury trial brevity and simplicity are the hand maidens of justice. Length and complexity its enemies…"[15]

(a) In Australia, the introduction of criminal sanctions, and therefore jury trials[16], will raise some major challenges for prosecuting authorities as well as the courts.

(b) The existing terminology of the main cartel offences presently in Part IV would be challenging for most juries. This may mean that a new offence would have to be created, as in the UK, rather than using the existing provisions in Part IV.

(c) This is particularly the case in proceedings for contravention of section 45A and section 4D - price fixing and market sharing.

(d) Those sections are highly complex, as seen from the decisions of the Federal Court in matters such as *South Sydney Rugby League v News* (currently on appeal to the High Court); and the complexity of the pleaded allegations in the Commission's abandoned s.45A case against National Australia Bank over credit card interchange fees.[17]

(e) In other contexts, there have been a number of well documented instances of major cases of civil corporate fraud which proved so complex that serious concerns were raised about whether the defendants received a fair trial.[18]

(f) An offence that is more simply drafted than the present Part IV offences is therefore required if cartel cases are to be determined by a jury.

7.5 Self-incrimination

Section 155(7) currently abrogates the privilege against self incrimination for the purposes of answering section 155 notices issued by the Commission. If cartel behaviour is to be criminalised, the section needs to be reviewed and amended because the privilege should, as a matter of fairness, apply in a criminal prosecution of individuals for breach of the TPA.

7.6 Sentencing guidelines

(a) The Commission's new amnesty and leniency policy for cartel conduct is to be welcomed.

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[15] *Novac* (1976) 65 Cr. App. R107, 119.

[16] See section 80 of the Constitution.

[17] The NAB case involved allegations of price fixing between the major banks in relation to bank interchange fees, and an extended application of the provisions of section 45A when applied to an arrangement which is said to fix the price of an *"input"* which by its very nature dictates the price of an *"output"* - see the judgment of Justice Lindgren in *Commission v CC (NSW)* 1999 92 FCR 375. See also *"Dare to Deem - does section 45A Trade Practices Act prohibit "pro-competitive" price fixing?"*, A Nicotra and J O'Regan, Law Council Trade Practices Workshop, 19 August 2001, Canberra.

[18] See, for example the case of *R v Wilson and Grimwade* [1995] 1 VR 163 which involved 19 counts of fraudulently inducing the investment of money, the trial exceeded 22 months and occupied 294 sitting days. A jury convicted the applicants and an appeal against the verdict was made on the basis that the jury would not have been able to give a true verdict on the evidence because of the nature of the trial. The Victorian Court of Criminal Appeal allowed the appeal, not on the basis that the trial was too long and complex, but because of the disjointed presentation of the evidence by Counsel on both sides. At 176 the Court commented, "*[t]he length and complexity of the proceeding were two factors with which the jury might be supposed to have coped had the presentation to them been otherwise.*"

(b) If criminal sanctions are to be introduced, there is a need for the Commission to release detailed sentencing guidelines. This will be essential for the administration of the regime. Without some degree of certainty as to the reduction of jail sentences for informants and whistleblowers, the likelihood of co-operation by co-conspirators would seem to be remote.

SUBMISSION 8

If Parliament decides to amend the Act by introducing criminal sanctions then the issues which have been the subject of continuous legislative and judicial review under criminal law over many years must be considered, the operation of the Commission's leniency policy, the need for guidelines on penalties, an individual's privilege against self incrimination, the operation of strict liability offences in a criminal setting and indemnity issues that arise for company officers.

Criminal sanctions should not be implemented until a number of important issues have been considered and addressed and should not be implemented by attempting a "quick fix" add on to the Act.

8. **Summary**

We support the submission made in respect of the competition provisions of the Act, and their administration in the following main areas:

(a) **Merger Control Administration**

(i) the informal clearance system should be retained. To improve its operation, the Commission should be required to publish its reasons for deciding to oppose or not oppose informal clearance applications:

A. to the parties during a confidential consultation phase; and

B. publicly, once the matter becomes public.

(ii) a decision by the Commission to oppose a merger should be subject to "informal" review by an appeal board or specialist appointed Associate Commissioners upon formal request by a prospective merger party, based on the staff papers of the ACCC, the parties' submissions and such other information as that appeal body may require from the ACCC or the parties;

(b) **Section 4D - Exclusionary Provisions**

(i) If the High Court upholds[19] *ASX Operations v Pont Data*, the Act should be amended to better clarify what is meant by a "class of persons"

(ii) The formation and business activities of joint ventures are being unnecessarily hampered by the per se s4D prohibition. A more general exemption should apply so that exclusionary provisions in a joint venture context will only be unlawful where they have the purpose, effect or likely effect of substantially lessening competition.

(c) **Distribution and other Vertical Arrangements - Overlap between sections 45 and 47**

[19] *Souths* on appeal to the High Court.

All exclusive vertical conduct should be considered for compliance under section 47, not section 45. Vertical conduct which technically falls outside of the section 47 can fall within section 4D of the Act resulting in a per se breach which is not consistent with the objectives of the Act.

(d) **Third Line Forcing - s.47(6) & (7)**

Section 47(6) and (7) should be amended to provide that third line forcing conduct should only be unlawful if the conduct has the purpose, effect or likely effect of substantially lessening competition in a market.

(e) **Legal professional privilege should be preserved**

If the High Court decides[20] that legal professional privilege is abrogated by section 155 of the Act, section 155 should be amended to expressly preserve legal professional privilege.

(f) **Criminal Sanctions for Part IV breach**

We do not make any submission on whether it is appropriate or necessary for criminal sanctions to apply to a breach of Part IV.

However, if Parliament decides to amend the Act by introducing criminal sanctions, a number of complex issues should be addressed. These include management of jury trials in the Federal Court, committals, the operation of the Commission's leniency policy, the need for guidelines on penalties/sentencing, an individual's privilege against self incrimination and role of the DPP.

Criminal sanctions require a new substantive Part based on the accumulated jurisprudence which has shaped the criminal law which is embodied in legislation such as the Crimes Act (Cth) and should not be implemented by attempting a "quick fix" add-on to the Act such as by way of addition to section 45.

9. Contact Details

Michael Corrigan
Partner
Clayton Utz, Sydney
Tel: 02 9353 4187
Fax: 02 8220 6700
Eml: mcorrigan@claytonutz.com

Linda Evans
Partner
Clayton Utz, Sydney
Tel: 02 9353 4217
Fax: 02 8220 6700
Eml: levans@claytonutz.com

Bruce Lloyd
Partner

[20] *Daniels Corporation v Australian Competition and Consumer Commission* - judgment reserved 18 June 2002

Clayton Utz, Sydney
Tel: 02 9353 4219
Fax: 02 8220 6700
Eml: blloyd@claytonutz.com

2002 Trade Practices & Consumer Law Conference

Criminal Sanctions for Part IV?

and ACCC Leniency Policy

Michael Corrigan, Clayton Utz Sydney*

10. *Overview*

- The ACCC has called for criminal sanctions to apply to Part IV conduct involving 'hard core' or serious cases of collusion.
- In these discussion notes, I propose to:
  - note the reasons the ACCC has given for the changes;
  - outline the recent UK Bill dealing with the application of criminal sanctions to serious cases of collusion;
  - note the current reforms in Canada; and
  - consider some implications of applying criminal sanctions to Part IV conduct in Australia, including the need for a clear and certain leniency policy, and sentencing guidelines.

The overseas experience suggests that what will be more effective than merely introducing criminal sanctions, in achieving results in enforcement, is a clear and definite leniency program, combined with fairly prescriptive sentencing guidelines for cartel conduct.

Secondly, the complexity of the UK reforms raises real issues of practical application when jury trials are proposed.

11. *Criminal Sanctions for Part IV Conduct*

11.1 *ACCC's Position*

The ACCC has called for criminal sanctions to apply to Part IV conduct, including imprisonment, as a penalty for 'hard core' cases of collusion.

* Thanks to Lyndall Stoyles and Simone Warwick who greatly assisted in the preparation of this paper.

The ALRC is due to report to the Attorney-General on 30 November 2002 on its review of the use of civil and administrative penalties - the ACCC submitted to this review that criminal sanctions should apply to Part IV.

Federal Cabinet is about to approve a new inquiry into Australian trade practices law and its administration by the ACCC and this may involve a consideration of whether criminal sanctions should apply to so called 'hard core' breaches of Part IV.

11.2 *Reasons why ACCC considers a change is required*

According to recent public statements of the Chairman[21], the ACCC believes:

- There is a real question about whether civil penalties are an effective deterrent against serious acts of collusion and other anti-competitive behaviour.
- The Australian civil penalty regime is looking a 'little weak' in comparison to other countries, including important trading partners such as the US, Canada, Japan, South Korea, Ireland and the UK (once the ***Enterprise Bill 2002*** has been passed). These jurisdictions impose on individuals criminal sanctions, including imprisonment, as a penalty for 'hard core' cases of collusion.
- Because Australian markets are relatively small and highly concentrated by international standards, they are particularly vulnerable to the detrimental effects of 'hard core' cartel activity.
- Globalisation has raised the stakes for cartels by escalating the potential gains from collusion.
- Technological innovation makes it easier for cartels to operate and harder for regulators to detect them.
- Collusion (such as price fixing, market sharing and bid rigging) is in a separate class of its own and is a deliberate and secret act of dishonesty, which directly affects the operation of free markets.

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[21] See the presentation given by Professor Fels at the Policy, Principles and Practice in Government Regulation Conference held by the ALRC in June 2001.

- Collusion is a form of 'fraud' against consumers or customers.

An example of the use of criminal sanctions was the recent decision in the U.S., in which Alfred Taubman, the multimillionaire owner of Sotheby's was jailed for one year and fined $US7.4 million. The price fixing had occurred over a 6 year period.

The chief prosecution witness, Diana Brooks, received 3 years probation, six months home detention, 1000 hours community service and a $US350,000 fine.

12. *Proposed Changes in the United Kingdom*

12.1 *The Enterprise Bill 2002*

- A Bill to criminalise cartel behaviour was recently introduced in the United Kingdom and was read for a second time on 10 April 2002. (A copy of the relevant Part is included in Appendix 1).
- The Bill introduces a new criminal offence of *"dishonestly entering into cartels"*.
- Sanctions include imprisonment for up to 5 years and/or fines.
- An individual is guilty of the new offence under section 179 of the Enterprise Bill if he or she:
    - dishonestly agrees with one or more other persons to make or implement (or to cause to be made or implemented);
    - an arrangement which relates to at least 2 undertakings (A and B), and involves any of the following:
        - ***Dividing Supply:*** dividing the supply of a product or service between A and B - where A and B are "at the same level in the supply chain", ie they are competitors;
        - ***Dividing Customers:*** dividing the customers for a product or service between A and B;
        - ***Bid-rigging:*** arrangements under which A and B, in response to a request to bid for the supply or production of a product or service, provide that only

one of them may make a bid, or that one or both must bid in accordance with the arrangement;

- ***Price Fixing:*** fixing the price for the supply by A (otherwise than to B) of a product or service and the price for the supply by B (otherwise than to A) of a product or service - where A and B are competitors;

- ***Limiting Supply:*** limiting or preventing the supply by A of a product or service and limiting or preventing the supply by B of a product or service - where A and B are competitors or where A's supply of the product or service is "at the same level in the supply chain at which B's supply would be limited or prevented"; and

- ***Limiting Production:*** limiting or preventing the production by A of a product or service and limiting or preventing the production by B or a product or service - where A and B are competitors or where A's production of the product or service is "at the same level in the production chain at which B's production would be limited or prevented".

12.2 ***Three key differences between the Bill and the Competition Act 1998***

- The offences covered by the Bill are what are generally considered to be serious cases of collusion such as price fixing or market sharing.

- Only individuals can be guilty of an offence under the Bill.

- To prove an offence has been committed, the OFT or Serious Fraud Office must prove that the agreement between the individuals was dishonest thereby incorporating a ***mens rea*** element.

12.3 ***UK Responsibilities and Powers***

- In the UK, the OFT will continue to be responsible for investigating cartel activities and will be given additional powers to do so under the Bill, including the power to enter premises under a warrant.

- The OFT will also be given additional powers of investigation, including the power to enter premises under a warrant.

- Prosecutions will be the responsibility of the Serious Fraud Office.

- Note, relevant to the ***Daniels*** case currently before the Australian High Court, that the UK Bill contains an express provision[22] that a person cannot be required to disclose any information or produce any document which he or she would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court.

13. *Implications for Australia*

In Australia there are a range of issues to consider:-

13.1 *Defining the Offence*

How would a criminal Part IV offence be defined?

The UK has introduced the element of 'dishonestly' into the offence under s 179 of the Enterprise Bill as the sole means of 'screening out' conduct that is said to be neutral or beneficial. This is how legitimate joint ventures and other legitimate conduct will evidently be excluded from the law. This is a fairly novel experiment, and it remains to be seen if it will work.

The Canadian Competition Act currently requires proof beyond reasonable doubt of both the existence of a conspiracy and its economic effects, ie that the agreement results in an "undue prevention or lessening of competition".

The 'undueness' test means that not all agreements between competitors are illegal. Only those agreements that have economic significance will be criminal. While this raises evidentiary difficulties, it ensures that the prosecutor may permit legitimate forms of business by exercising discretion.

Moves are on foot to make the Canadian offence a per se offence (as in the US) but with a notification and exemption process for pro-competitive agreements.

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[22] See section 187.

This is because the authorities sees the requirement of 'undueness' as being to blame for the low success rate of contested prosecutions (3 convictions from 22 prosecutions since 1980).

Australian reform

Should there be an element of ***mens rea*** added to the existing provisions in Part IV to make the conduct a criminal offence? For example, no additional element is required under Part VC for criminal liability for false representations.

Any new provision in Australia would have to recognise the exemptions that currently apply to s.45A - e.g. joint ventures, collective buying schemes and deal with vertical arrangements in the way currently recognised by sub-section 45(6).

There is a major challenge for the draftsman in attempting to create a simple offence which can be the subject of efficient proceedings before a jury to prosecute such cases.

Other jurisdictions may have avoided these problems in the sense that their primary prohibitions do not involve the same level of 'black letter' detail as we currently find in Part IV of the Act.

However, the UK approach takes 'black letter law' to a new level of complexity! As a result, to formulate a "simple" offence catching hard core cartel behaviour, whilst at the same time preserving the integrity of the existing provisions of Part IV, needs considerable thought.

13.2 ***Conducting Investigations and Prosecutions***

Who would be responsible for investigating cartel activities - the ACCC?

Who would be responsible for prosecutions - the Commonwealth DPP?

When the Australian Securities Commission first began briefing the DPP when serious criminal offences were introduced for breaches of the Corporations Law, considerable difficulties were experienced and prosecutions were very slow. Mr A.G. Hartnell, the then Chairman of the ASC commented:

> ***"The only way I know to speed up the process is to integrate the officers of the DPP more closely with the officers of the ASC from the start of a serious (ie perceived as significantly criminal) investigation."***[23]

In Canada, there are reports of significant difficulties being experienced between the Crown prosecutors and the Competition Bureau and there used to be considerable inter-agency suspicion and even acrimony. This was primarily because the Bureau investigators would put together a case which the Crown may find wanting on matters of fact, law, admissibility or the investigative process and so refuse to proceed with the case.[24]

These difficulties have been partially addressed by co-locating lawyers from the Canadian Attorney-General's Department with the Competition Bureau. One of the downsides in doing so has been a suggestion that this damages the independent exercise of prosecutorial discretion and may result in abuse of process. This has not yet been tested in a Court.

Would it be possible to operate a criminal investigation at the same time? Should the criminal investigations take place first?

Would it be possible to use evidence from a civil investigation in a subsequent criminal investigation? Difficulties would arise in relation to the use of evidence from a criminal investigation in a subsequent civil investigation (or vice versa) if the ACCC had different investigation powers for criminal investigations.

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[23] A.G. Hartnell, Chairman of the ASC, Address to the Australian Institute of Criminology Conference *"The Future of Regulatory Enforcement in Australia"*, Sydney 3 March 1992.

[24] Martin Low QC, McMillan Binch, Toronto. See also Harry Chandler, Deputy Director of Investigation and Research (Criminal Matters), Competition Bureau, The Canadian Bar Association Competition Law Annual Fall Conference *"Criminal Investigations: Process and Procedure"*, Ottawa, Ontario 24 September 1998. D. Martin Low, Q.C. The ABA Advanced International Cartel Workshop *"Cartel Exposure in Canada: What Will Your Client Be Facing?"*, New York, 15-16 February 2001.

The UK Bill provides that statements made pursuant to investigations conducted under sections 26 and 28 of the Competition Act (ie. civil investigations) cannot be used for purposes of a prosecution under section 179 (price fixing, bid rigging etc) of the UK Bill.

13.3 ***A Challenge for the Australian Courts in the administration of Justice***

Complexity of Part IV

In Australia there have been, over the years, some very long running trials of matters under Part IV. Certainly not all cases have taken a long time to be heard, but trials of 3 or 4 weeks are not uncommon and some Part IV cases have gone for months at trial.

The complexity of such cases will only be increased by adding the exigencies of the criminal process. This will require extra investigative care, new rules of procedure and a need to prove any allegation beyond reasonable doubt. This will, without a doubt, add to the complexity, length and cost of this litigation.

Obviously, as has been Canada's experience, while few cases go to trial, this type of legislation may result in more convictions achieved through guilty pleas, especially if introduced in conjunction with a clear and certain immunity policy.

It should be noted, however, that the stigma which attaches to a criminal conviction, along with the possibility of jail terms and the disabilities which come with a criminal record (in terms of immigration etc) are likely to result in more cases being contested. Executives will be less likely to settle a matter if the result is a criminal sanction of any kind. The need to contest more and more complex and lengthy cases could put a serious strain on ACCC resources.

Jury Trials

"In a jury trial brevity and simplicity are the hand maidens of justice. Length and complexity its enemies..."[25]

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[25] *Novac* (1976) 65 Cr. App. R107, 119.

[6] See section 80 of the Constitution.

In Australia, the introduction of criminal sanctions, and therefore jury trials[26], will raise some major challenges for prosecuting authorities as well as the courts.

Most likely, a new offence is needed, as in the UK, rather than using the existing Part IV.

This is particularly the case in proceedings for contravention of section 45A and section 4D - price fixing and market sharing.

Those sections are highly complex, as seen from the decisions of the Federal Court in matters such as ***South Sydney Rugby League v News*** (currently on appeal to the High Court); and the complexity of the pleaded allegations in the ACCC's abandoned s.45A case against National Australia Bank over credit card interchange fees.[27]

In other contexts, there have been a number of well documented instances of major cases of civil corporate fraud which proved so complex that serious concerns were raised about whether the defendants received a fair trial.[28]

Blue Arrow Case

In 1992, the UK Court of Appeal made some telling comments about a serious fraud trial which went "off the rails".[29] The prosecution had alleged a conspiracy over a share market rigging scheme intended to disguise a failed rights issue on the London market in 1987.

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[27] The NAB case involved allegations of price fixing between the major banks in relation to bank interchange fees, and an extended application of the provisions of section 45A when applied to an arrangement which is said to fix the price of an *"input"* which by its very nature dictates the price of an *"output"* - see the judgment of Justice Lindgren in *ACCC v CC (NSW)* 1999 92 FCR 375. See also *"Dare to Deem - does section 45A Trade Practices Act prohibit "pro-competitive" price fixing?"*, A Nicotra and J O'Regan, Law Council Trade Practices Workshop, 19 August 2001, Canberra.

[28] See, for example the case of *R v Wilson and Grimwade* [1995] 1 VR 163 which involved 19 counts of fraudulently inducing the investment of money, the trial exceeded 22 months and occupied 294 sitting days. A jury convicted the applicants and an appeal against the verdict was made on the basis that the jury would not have been able to give a true verdict on the evidence because of the nature of the trial. The Victorian Court of Criminal Appeal allowed the appeal, not on the basis that the trial was too long and complex, but because of the disjointed presentation of the evidence by Counsel on both sides. At 176 the Court commented, "*[t]he length and complexity of the proceeding were two factors with which the jury might be supposed to have coped had the presentation to them been otherwise.*"

[29] *Cohen and ors v The Queen* (1992), unreported UK Court of Appeal 28 July 1992, the Blue Arrow case.

After a trial extending over 184 days and apparently the second longest criminal trial in English history, the trial judge in summing up stated:

> ***"No jury should be asked to cope with what this jury have had to endure. No defendant or his family should have to suffer through month after month after month all of these defendants have had to suffer. There must be some other way".***

The Judge said to the jury:

> ***"This trial has taken a very long time indeed. You do not need me to tell you that. The obvious effect of so much time passing is that you cannot be expected to remember all of the evidence or even, in a case of this kind, substantial parts of the evidence".***

The Court of Appeal attributed the length and complexity of that trial to the complexity of the indictment, and concluded that the defendants could have been tried manageably and fairly, if the central issue had been appropriately formulated and simply put. This was not done.

The Court of Appeal stated:

> ***"This trial will rightly be regarded by the public as having been a costly disaster. The jury, we suspect, may have found the trial to have been an ordeal. The defendants must have regarded their daily experience of the trial as having been in itself a punishment"***,
>
> and:
>
> ***"The prosecution has a heavy responsibility not to overload the indictment. We recognise that the discharge of that responsibility is not easy in a case of complex fraud, especially where there has previously been a wide ranging departmental enquiry…the authority must always and anxiously consider whether the proposed particulars do, despite their inter-relationships, threaten a trial of greater length and complexity than is a "ineluctable necessity".***[30]

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[30] See *Novac* Op. cit. at p118, Bridge LJ

> ***"Likewise…restraint must be exercised by the prosecution in the adduction of evidence in regard to a necessary particular so that only essential evidence is produced and inessential but relevant evidence is not. A lack of restraint can be corrected by the trial judge expressing his view that evidence albeit relevant, is inessential and has a volume and complexity which would threaten to prejudice the achievement of a manageable and fair trial".***

The Court also noted that in the UK there is provision for a preliminary hearing in a serious fraud trial to enable issues to be identified which are likely to be material for the verdict of the jury and to assist their comprehension; to expedite jury proceedings and to assist the judge's management of the trial.[31]

14. ***Leniency and immunity from prosecution***

Would the ACCC's current guidelines for leniency be appropriate to operate under a criminal regime?

Compare the existing vague and discretionary guidelines in Australia with the US, Canadian and UK guidelines:

- The ACCC's current leniency policy is non committal and represents a general offer to consider reducing penalties by an unspecified amount in exchange for information.

- The US leniency policy prior to amendment in 1993 did not generate many applications. This was primarily attributed to the relatively vague offer to grant leniency. The critical amendment was to offer automatic amnesty to the first applicant provided they met certain criteria, which was clearly set out in the readily available policy. Rigid sentencing guidelines has encouraged plea bargaining in the US because all interested parties know what to expect.[32]

The UK White Paper - ***A World Class Competition Regime*** - states that the government believes that encouraging whistle blowing will be a critical success factor in securing convictions under the new criminal offence. The White Paper

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[31] See the Criminal Justice Act 1987, section (1)(UK).

[32] See the author's paper, "*Cartel Immunity Policies - The Impact of Certainty*" Law Council Workshop, 19 August 2001.

acknowledges that there is a risk that introducing a criminal offence could act as a disincentive to those considering whistle blowing because individuals may fear incriminating themselves. It recognised that the key to the success in prosecuting cartels in the US is the competition authorities' ability to selectively plea bargain on behalf of executives who cooperate with investigations.

The UK does not have a formal plea bargaining mechanism. However, under the code for Crown prosecutors, cases against individuals must only be brought in the public interest and the OFT has the discretion not to bring a case against a particular individual.

The Canadian Competition Bureau has stated that its immunity program is "a key to enforcement against international cartels" and that criminal enforcement would not be effective without it.

How can the ACCC encourage whistleblowers to disclose cartel activity if criminal sanctions apply? Proof is more difficult in a criminal case but US experience shows leniency policy can produce results in a criminal environment.

Increased leniency is appropriate when the offence would otherwise be difficult to prove. Members of cartels are more likely to approach regulators and disclose conduct if they can make an informed assessment as to how the regulator will assess their application.

To be effective, the ACCC would have to adopt a leniency policy that positively encourages disclosure of illegality - to do so the ACCC would have to offer something that would be difficult for corporations and individuals to refuse, ie. a guarantee of leniency.

This can be done by ensuring that criteria for leniency (including for immunity) not be subject to the discretion of the regulator and that the criteria be set out in publicly available policy in clear and certain terms.

Can the ACCC offer immunity from criminal prosecution or leniency? If the DPP is to be responsible for prosecutions, the ACCC would have to reach agreement with the DPP as to whether leniency and particularly, immunity from prosecution, could be offered - this is likely to require the development of a joint policy on leniency and sentencing guidelines.

In Canada, criminal prosecutions under the ***Competition Act*** are conducted by the Attorney-General. Only the Attorney-General can grant immunity from prosecution but past experience indicates that the Attorney-General will give serious and careful consideration to recommendations received from the Competition Bureau.

15. *Concluding Comments*

If the government is to seriously entertain Professor Fels' suggestions, these issues need very detailed consideration. Certainly, some kind of detailed white paper and draft legislation needs to be prepared and widely circulated before one could evaluate the merits of any such proposals.

Appendix 1 - UK Enterprise Bill 2002

PART 6
CARTEL OFFENCE

179 Cartel offence

(1) An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).

(2) The arrangements must be ones which, if operating as the parties to the agreement intend, would

(a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,

(b) limit or prevent supply by A in the United Kingdom of a product or service,

(c) limit or prevent production by A in the United Kingdom of a product,

(d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,

(e) divide between A and B customers for the supply in the United Kingdom of a product or service, or

(f) be bid-rigging arrangements.

(3) Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would -

(a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service,

(b) limit or prevent supply by B in the United Kingdom of a product or service, or

(c) limit or prevent production by B in the United Kingdom of a product.

(4) In subsections (2)(a) to (d) and (3), references to supply or production are to supply or production in the appropriate circumstances (for which see section 180).

(5) Bid-rigging arrangements are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom -

(a) A but not B may make a bid, or

(b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.

(6) But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.

(7) "Undertaking" has the same meaning as in Part 1 of the 1998 Act.

180 Cartel offence: supplementary

(1) For section 179(2)(a), the appropriate circumstances are that A's supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by B in the United Kingdom.

(2) For section 179(2)(b), the appropriate circumstances are that A's supply of the product or service would be at a level in the supply chain -

(a) at which the product or service would at the same time be supplied by B in the United Kingdom, or

(b) at which supply by B in the United Kingdom of the product or service would be limited or prevented by the arrangements.

(3) For section 179(2)(c), the appropriate circumstances are that A's production of the product would be at a level in the production chain -

(a) at which the product would at the same time be produced by B in the United Kingdom, or

(b) at which production by B in the United Kingdom of the product would be limited or prevented by the arrangements.

(4) For section 179(2)(d), the appropriate circumstances are that A's supply of the product or service would be at the same level in the supply chain as B's.

(5) For section 179(3)(a), the appropriate circumstances are that B's supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by A in the United Kingdom.

(6) For section 179(3)(b), the appropriate circumstances are that B's supply of the product or service would be at a level in the supply chain -

(a) at which the product or service would at the same time be supplied by A in the United Kingdom, or

(b) at which supply by A in the United Kingdom of the product or service would be limited or prevented by the arrangements.

(7) For section 179(3)(c), the appropriate circumstances are that B's production of the product would be at a level in the production chain -

(a) at which the product would at the same time be produced by A in the United Kingdom, or

(b) at which production by A in the United Kingdom of the product would be limited or prevented by the arrangements.

181 Cartel offence: penalty and prosecution

(1) A person guilty of an offence under section 179 is liable -

(a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

(2) In England and Wales and Northern Ireland, proceedings for an offence under section 179 may be instituted only -

(a) by the Director of the Serious Fraud Office, or

(b) by or with the consent of the OFT.

(3) No proceedings may be brought for an offence under section 179 in respect of an agreement outside the United Kingdom, unless it has been implemented in whole or in part in the United Kingdom.

(4) Where, for the purpose of the investigation or prosecution of offences under section 179, the OFT gives a person written notice under this subsection, no proceedings for an offence under section 179 that falls within a description specified in the notice may be brought against that person in England and Wales or Northern Ireland except in circumstances specified in the notice.

182 Extradition

The offences to which an Order in Council under section 2 of the Extradition Act 1870 (c. 52) (arrangements with foreign states) can apply include -

(a) an offence under section 179,

(b) conspiracy to commit such an offence, and

(c) attempt to commit such an offence.

Criminal investigations by OFT

183 Investigation of offences under section 179

(1) The OFT may conduct an investigation if there are reasonable grounds for suspecting that an offence under section 179 has been committed.

(2) The powers of the OFT under sections 184 and 185 are exercisable, but only for the purposes of an investigation under subsection (1), in any case where it appears to the OFT that there is good reason to exercise them for the purpose of investigating the affairs, or any aspect of the affairs, of any person ("the person under investigation").

184 Powers when conducting an investigation

(1) The OFT may by notice in writing require the person under investigation, or any other person who it has reason to believe has relevant information, to answer questions, or otherwise provide information, with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.

(2) The OFT may by notice in writing require the person under investigation, or any other person, to produce, at a specified place and either at a specified time or forthwith, specified documents, or documents of a specified description, which appear to the OFT to relate to any matter relevant to the investigation.

(3) If any such documents are produced, the OFT may -

(a) take copies or extracts from them;

(b) require the person producing them to provide an explanation of any of them.

(4) If any such documents are not produced, the OFT may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

185 Power to enter premises under a warrant

(1) On an application made by the OFT to the court in accordance with rules of court, a judge may issue a warrant if he is satisfied that there are reasonable grounds for believing -

(a) that there are on any premises documents which the OFT has power under section 184 to require to be produced for the purposes of an investigation; and

(b) that -

(i) a person has failed to comply with a requirement under that section to produce the documents;

(ii) it is not practicable to serve a notice under that section in relation to them; or

(iii) the service of such a notice in relation to them might seriously prejudice the investigation.

(2) A warrant under this section shall authorise a named officer of the OFT, and any other officers of the OFT whom the OFT has authorised in writing to accompany the named officer -

(a) to enter the premises, using such force as is reasonably necessary for the purpose;

(b) to search the premises and -

(i) take possession of any documents appearing to be of the relevant kind, or

(ii) take, in relation to any documents appearing to be of the relevant kind, any other steps which may appear to be necessary for preserving them or preventing interference with them;

(c) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;

(d) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form -

(i) in which it can be taken away, and

(ii) in which it is visible and legible or from which it can readily be produced in a visible and legible form.

(3) Documents are of the relevant kind if they are of a kind in respect of which the application under subsection (1) was granted.

(4) A warrant under this section may authorise persons specified in the warrant to accompany the named officer who is executing it.

(5) "Court" means -

(a) in England and Wales, the High Court,

(b) in Scotland, the High Court of Justiciary, and

(c) in Northern Ireland, the High Court.

(6) In Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001 (c. 16) (powers of seizure to which section 50 of that Act applies), after paragraph 73 there is inserted -

"Enterprise Act 2002

73A. The power of seizure conferred by section 185(2) of the Enterprise Act 2002 (seizure of documents for the purposes of an investigation under section 183(1) of that Act)."

186 Exercise of powers by authorised person

(1) The OFT may authorise any competent person who is not an officer of the OFT to exercise on its behalf all or any of the powers conferred by section 184 or 185.

(2) No such authority may be granted except for the purpose of investigating the affairs, or any aspect of the affairs, of a person specified in the authority.

(3) No person is bound to comply with any requirement imposed by a person exercising powers by virtue of any authority granted under this section unless he has, if required to do so, produced evidence of his authority.

187 Privileged information etc.

(1) A person may not under section 184 or 185 be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court, except that a lawyer may be required to provide the name and address of his client.

(2) A person may not under section 184 or 185 be required to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless -

(a) the person to whom the obligation of confidence is owed consents to the disclosure or production; or

(b) the OFT has authorised the making of the requirement.

(3) In the application of this section to Scotland -

(a) the reference to the High Court is to be read as a reference to the High Court of Justiciary; and

(b) the reference to legal professional privilege is to be read as a reference to confidentiality of communications.

188 Restriction on use of statements in court

(1) A statement by a person in response to a requirement imposed by virtue of section 184 or 185 may only be used in evidence against him -

(a) on a prosecution for an offence under section 192(2); or

(b) on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it.

(2) However, the statement may not be used against that person by virtue of paragraph (b) of subsection (1) unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person in the proceedings arising out of the prosecution.

189 Use of statements obtained under Competition Act 1998

In the 1998 Act, after section 30 there is inserted -

"30A Use of statements in prosecution

A statement made by a person in response to a requirement imposed by virtue of any of sections 26 to 28 may not be used in evidence against him on a prosecution for an offence under section 179 of the Enterprise Act 2002 unless, in the proceedings -

(a) in giving evidence, he makes a statement inconsistent with it, and

(b) evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf."

190 Surveillance powers

(1) The Regulation of Investigatory Powers Act 2000 (c. 23) is amended as follows.

(2) In section 32 (authorisation of intrusive surveillance) -

(a) after subsection (3) there is inserted -
"(3A) In the case of an authorisation granted by the chairman of the OFT, the authorisation is necessary on grounds falling within subsection (3) only if it is necessary for the purpose of preventing or detecting an offence under section 179 of the Enterprise Act 2002 (cartel offence).";

(b) in subsection (6) after paragraph (m) there is inserted "and
(n) the chairman of the OFT."

(3) In section 33 (rules for grant of authorisations) after subsection (4) there is inserted -
"(4A) The chairman of the OFT shall not grant an authorisation for the carrying out of intrusive surveillance except on an application made by an officer of the OFT."

(4) In subsection (5)(a) of that section, after "officer" there is inserted "or the chairman or an officer of the OFT".

(5) In section 34 (grant of authorisation in the senior officer's absence) -

(a) in subsection (1)(a), after "or by" there is inserted "an officer of the OFT or";

(b) in subsection (2)(a), after "may be" there is inserted "as chairman of the OFT" or;

(c) in subsection (4), after paragraph (l) there is inserted -
"(m) a person is entitled to act for the chairman of the OFT if he is an officer of the OFT designated by it for the purposes of this paragraph as a person entitled so to act in an urgent case."

(6) In section 35 (notification of authorisations for intrusive surveillance) -

(a) in subsections (1) and (10), for "or customs" there is substituted ", customs or OFT";

(b) in subsection (10), after paragraph (b) there is inserted -
"(ba) the chairman of the OFT; or";

(c) in paragraph (c) of that subsection, at the end there is inserted "or for a person falling within paragraph (ba)."

(7) In section 36 (approval required for authorisations to take effect) -

(a) in subsection (1), after paragraph (d) there is inserted "or
(e) an officer of the OFT.";

(b) in subsection (6), after paragraph (g) there is inserted "; and
(h) where the authorisation was granted by the chairman of the OFT or a person entitled to act for him by virtue of section 34(4)(m), that chairman."

(8) In section 37 (quashing of police and customs authorisations etc.) in subsection (1), after paragraph (d) there is inserted "; or (e) an officer of the OFT."

(9) In section 40 (information to be provided to Surveillance Commissioners) after paragraph (d) there is inserted ", and
(e) every officer of the OFT,".

(10) In section 46 (restrictions on authorisations extending to Scotland), in subsection (3), after paragraph (d) there is inserted - "(da) the OFT;".

(11) In section 48 (interpretation of Part 2), in subsection (1), after the entry relating to "directed" and "intrusive" there is inserted - ""OFT" means the Office of Fair Trading;".

191 Authorisation of action in respect of property

(1) Part 3 of the Police Act 1997 (c. 50) (authorisation of action in respect of property) is amended as follows.

(2) In section 93 (authorisation to interfere with property etc.) -

(a) in subsection (1B), after "customs officer" there is inserted "or an officer of the Office of Fair Trading";

(b) after subsection (2A) there is inserted -
"(2AA) Where the authorising officer is the chairman of the Office of Fair Trading, the only purpose falling within subsection (2)(a) is the purpose of preventing or detecting an offence under section 179 of the Enterprise Act 2002.";

(c) in subsection (3), after paragraph (d) there is inserted ", or (e) if the authorising officer is within subsection (5)(i), by an officer of the Office of Fair Trading.";

(d) in subsection (5), after paragraph (h) there is inserted ", or (i) the chairman of the Office of Fair Trading."

(3) In section 94 (authorisation given in absence of authorising officer) in subsection (2), after paragraph (f) there is inserted - "(g) where the authorising officer is within paragraph (i) of that subsection, by an officer of the Office of Fair Trading designated by it for the purposes of this section."

192 Offences

(1) Any person who without reasonable excuse fails to comply with a requirement imposed on him under section 184 or 185 is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.

(2) A person who, in purported compliance with a requirement under section 184 or 185 -

(a) makes a statement which he knows to be false or misleading in a material particular; or

(b) recklessly makes a statement which is false or misleading in a material particular,

is guilty of an offence.

(3) A person guilty of an offence under subsection (2) is liable -

(a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both; and

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

(4) Where any person -

(a) knows or suspects that an investigation by the Serious Fraud Office or the OFT into an offence under section 179 is being or is likely to be carried out; and

(b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents which he knows or suspects are or would be relevant to such an investigation, he is guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the documents from the persons carrying out such an investigation.

(5) A person guilty of an offence under subsection (4) is liable -

(a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine or to both; and

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

(6) A person who intentionally obstructs a person in the exercise of his powers under a warrant issued under section 185 is guilty of an offence and liable -

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both; and

(b) on summary conviction, to a fine not exceeding the statutory maximum.

193 Interpretation of sections 183 to 192

In sections 183 to 192 -

"documents"	includes information recorded in any form and, in relation to information recorded otherwise than in a form in which it is visible and legible, references to its production include references to producing it in a form in which it is visible and legible or from which it can readily be produced in a visible and legible form;
"person under investigation"	has the meaning given in section 183(2).