

SENATE ECONOMICS COMMITTEE

INQUIRY INTO THE TRADE PRACTICES AMENDMENT (CARTEL CONDUCT AND OTHER MEASURES)

BILL 2008

SUBMISSION

BRENT FISSE

20 January 2009

Brent Fisse

Lawyers

70 Paddington St

Paddington, NSW 2021

(02) 9331 6277

0411 528 122

brentfisse@ozemail.com.au

www.brentfisse.com

CONTENTS

1.	EXECUTIVE SUMMARY	1
2.	UNNECESSARY AND ILL-ADVISED INTRODUCTION OF NEW AND UNTESTED CONCEPTS OF CARTEL CONDUCT	7
2.1	There is no justification for introducing new and untested concepts of cartel conduct	7
2.2	A more straightforward and safer approach to the definition of cartel offences and civil penalty prohibitions based on the existing prohibitions against price fixing and exclusionary provisions	10
2.3	Conclusions as regards the new and untested definitions of a cartel provision in the Bill	11
3.	OVER-REACH OF THE PER SE CRIMINAL AND CIVIL PROHIBITIONS AGAINST CARTEL CONDUCT	12
3.1	Summary	12
3.2	Over-reach – restriction of output and allocation of customers	12
3.2.1	Examples of over-reach	12
3.2.2	Responsive amendments to the Bill	14
3.3	Over-reach – bid-rigging	17
3.4	Conclusion on over-reach of the per se prohibitions against cartel conduct	18
4.	UNJUSTIFIED PER SE CRIMINAL AND CIVIL LIABILITY FOR SUPPLY AGREEMENTS BETWEEN COMPETITORS	19
4.1	Summary	19
4.2	Examples of pro-competitive or harmless commercial supply agreements subject to per se liability under the TPA and the Bill	20
4.3	Addressing the fundamental issue and avoiding preoccupation with “anti-overlap” provisions	25
4.4	Solution for avoiding unjustified per se liability for supply agreements between competitors	27
4.5	Conclusion on supply agreements between competitors under the TPA and the Bill	28
5.	UNSATISFACTORY JOINT VENTURE PROVISIONS	29
5.1	Summary	29
5.2	Joint venture defences and exceptions under the TPA and the Bill	30
5.3	Criticisms of the joint venture provisions in the Bill	31
5.3.1	A rogue’s charter for evading the new criminal and civil prohibitions against price fixing and other cartel conduct?	31
5.3.2	Undue narrowness - the new joint venture exceptions are limited to a cartel provision contained in a contract	39
5.3.3	Arbitrary and economically unprincipled requirement that the joint venture be “for the production and/or supply of goods or services”	40
5.3.4	Unjustified differences between the joint venture exceptions under ss 44ZZRO and 44ZZRP and the s 76C defence that will continue to apply to the	

	civil penalty prohibition against exclusionary provisions	40
	5.3.5 Uncertainty – the obscurity of “for the purposes of a joint venture”	41
5.4	Conclusion as regards the joint venture provisions in the Bill	43
6.	CONCLUSION	45
	ATTACHMENT 1	46
	Brent Fisse – Relevant Experience	

1. EXECUTIVE SUMMARY

1.1 Purpose and scope of this submission

The purpose of this submission is to identify major problems with the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (**the Bill**) and to indicate how those problems can and should be resolved by amendments to the Bill. The Bill should not be passed until these problems are resolved.

This submission is limited to the worst problems that seem to arise from the Bill. It does not deal with numerous other issues.¹ The Exposure Draft Bill released on 11 January 2008 was egregiously flawed and attracted widespread criticism in public submissions.² The revised Exposure Draft Bill released on 27 October 2008 made some responsive changes, most notably removal of the element of dishonesty as a requirement for the cartel offences. However, the revised Exposure Draft Bill introduced problematic new joint venture provisions and failed to address many criticisms that had been made of the first Exposure Draft Bill. The Bill contains few changes, the most significant being the inclusion of “anti-overlap” provisions (eg ss 44ZZRP and 44ZZRS). The Bill is unresponsive to many further issues of concern, including the major issues addressed in this submission.

Nothing in this submission should be taken to imply that the author is opposed to the criminalisation of conduct. Quite the contrary. However, the provisions in the Bill go significantly beyond the criminalisation of serious cartel conduct and represent the most far-reaching reform of cartel regulation in Australia since the enactment of the *Trade Practices Act 1974 (TPA)*. The need to introduce cartel offences does not justify amendments to the TPA that are ill-designed and bound to produce unsatisfactory and counterproductive results.

¹ Other issues not discussed in this submission include: the meaning of “control” in the definition of price fixing; the lack of justification for a prohibition against maximum price fixing; the case for including authorisation of cartel conduct a basis of individual liability as a principal offender; the imposition of vicarious responsibility for the cartel offences; inconsistency in the basis for assessing monetary penalties between ss 44ZZRJ and 44ZZRK and s 76 of the TPA; the questionable protection of cartel information scheme; the unduly narrow scope of the prohibition against indemnification; and sentencing implications. See C Beaton Wells & B Fisse, “Criminalising Serious Cartel Conduct: Issues of Law and Policy” (2008) 36 ABLR 166; C Beaton-Wells & B Fisse, “Criminal Cartels: Individual Liability and Sentencing” (6th Annual University of South Australia Trade Practices Workshop, 18 October 2008, copy available on request).

² The submissions are available at:
<http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1350>.

1.2 Unnecessary and ill-advised introduction of new and untested concepts of cartel conduct

The definitions of a cartel provision in s 44ZZRD are new and untested. The cartel offences and per se civil prohibitions against cartel conduct should be based on the existing definitions of price fixing and exclusionary provisions, with amendments where necessary to address their various limitations and interpretational problems, having regard to case law, the Dawson Committee Report and relevant commentaries.

The framework of prohibitions proposed in this submission is as follows:

- cartel offences for price fixing and exclusionary provisions (based on ss 44ZZRF and 44XXRG and the current definitions of price fixing in s 45A and s 4D, but with some amendments);
- per se civil prohibitions for price fixing and exclusionary provisions (based on ss 44ZZRJ and 44ZZRK and the current definitions of price fixing in s 45A and s 4D, but with some amendments);
- a civil prohibition against provisions that have the purpose or likely effect of substantially lessening competition in a market following the current prohibitions under s 45(2)(a)(ii) and (2)(b)(ii).

The existing per se prohibitions against price fixing and exclusionary provisions would be repealed as they are under the Bill.

The Bill would need to be amended by:

- making minor amendments to the definition of price fixing in s44ZZRD(2);
- repealing the definitions of output restriction and allocation of customers in s 44ZZRD(3)(a) and (b) and replacing those definitions with a definition of an exclusionary provision based on s 4D but with some amendments; and
- repealing the definition of bid rigging in s 44ZZRD(3)(c).

Further amendments to the Bill would be needed to resolve the problems discussed in sections 3-5 below. For example, section 3.2 discusses the over-reach of the definitions of restriction of output and allocation of customers under s 44ZZRD(3)(a) and (b) of the Bill and proposes amendments designed to avoid such over-reach. Those amendments are also necessary if, as

proposed, s 44ZZRD(3)(a) and (b) are replaced by a definition of an exclusionary provision based on s 4D.

1.3 Over-reach of the per se criminal and civil prohibitions against cartel conduct

The criminal and civil per se prohibitions against cartel conduct under the Bill and the definition of an exclusionary provision in s 4D catch a wide range of conduct that is pro-competitive or in the public interest and where authorisation is an impractical solution. Examples are set out in sections 3.2-3.3 below together with proposed amendments to the Bill (Amendment A and Amendment B).

Amendment A: A provision should be inserted in s 44ZZRD and in s 4D to the effect that a cartel provision or an exclusionary provision does not include a provision the purpose or likely effect of which is not to substantially lessen competition *between two or more of the competitors* (or likely competitors) who are parties to the contract, arrangement or understanding containing the alleged cartel provision. The rationale for Amendment A is simple and directly reflects orthodox economic principle: there is no justification for imposing per se liability for price fixing or other cartel conduct unless the competitors agree that at least one of them will not compete against another competitor.

Amendment B: The definition of a cartel provision in s 44ZZRD of the Bill and the definition of an exclusionary provision in s 4D should be amended to exclude a provision the “dominant purpose” of which is to:

- (a) to increase the quantity of goods or services to be produced, supplied or acquired by one or more of the parties, to reduce their cost, or to improve their quality, design or functionality;
- (b) to prevent a serious risk to a person's life or the health or safety of the public or a section of the public or to remedy serious physical harm occasioned to a person or serious damage to property; or
- (c) to prevent a serious risk to the environment, or to remedy serious harm occasioned to the environment.

Amendment B avoids over-reach partly by excluding per se liability for cartel conduct where a cartel provision or exclusionary provision is ancillary to co-operative efficiency-enhancing conduct. Amendment B also avoids over-reach by enabling per se liability for cartel conduct to be denied where a cartel provision is ancillary to forms of cooperative activity that are so

plainly in the public interest that it would be unreasonable to require the cooperating parties to apply for an authorisation.

The bid-rigging provisions in s 44ZZRD(3)(c) of the Bill are unnecessary as well as new and untested and prone to over-reach. They should be deleted. Bid rigging is covered by the existing definitions of price fixing and exclusionary provisions in the TPA. Those definitions should be followed in the definition of a cartel provision in s 44ZZRD; see section 2 of this submission.

1.4 Unjustified per se criminal and civil liability for supply agreements between competitors

Under the TPA and the Bill pro-competitive or harmless supply agreements between competitors may often involve a breach of the per se prohibitions against price fixing and other cartel conduct. The introduction of criminal liability for price fixing and other cartel conduct under the Bill accentuates the significance of this flaw in the legislation. Exposure to the risk of criminal liability for pro-competitive or harmless commercial conduct is doubly absurd and repugnant.

It is difficult to explain the aberrational treatment of supply agreements between competitors in Australia. Provisions such as s 45(6) of the TPA and s 44ZZRS of the Bill often have been referred to as “anti-overlap” provisions, a term also used in the Explanatory Memorandum accompanying the Bill (para 4.4). As explained in section 4.3 below, the focus on overlap seems to have diverted attention away from the fundamental policy issue that needs to be addressed. The fundamental policy issue is not whether s 45 should overlap with s 47, or whether ss 44ZZRG and 44ZZRH or ss 44ZZRJ and 44ZZRK should overlap with s 47. The issue is whether vertical supply agreements between competitors should be subject to per se liability for price fixing or other cartel conduct. Section 45(6) and s 44ZZRS deal only with situations where there is exclusive dealing conduct. The Explanatory Memorandum does not address the issue squarely and, in the context of price fixing, fiddles with some half-baked ideas (see section 4.2, Example A). There is a significant gap in the law.

The straight-forward solution recommended in section 4.4 below is to insert an additional exception in Part IV that excludes per liability for price fixing or other cartel conduct where the relevant provision in a supply agreement between competitors does not have the purpose or likely effect of substantially lessening competition *between those competitors*. This exception would not be required if Amendment A to the cartel offences and civil prohibitions were adopted (see section 1.3 above and section 3.2 below).

1.5 Unsatisfactory joint venture provisions

The joint venture provisions in the Bill are unsatisfactory in five main respects.

First, there is the problem of “Mickey Mouse” or “JV Ultra-Light” joint venture arrangements the dominant but not sole purpose of which is to evade per se liability for cartel conduct; see section 5.3 below. The solutions proposed (see section 5.3.1.5) are as follows:

- An obvious solution to the problem of JV Ultra-Lights in the context of the civil penalty prohibitions under s 44ZZRJ and 44ZZRK is to amend s 44ZZRP to include a competition test parallel to that under s 76C. It is difficult to understand why s 44ZZRP does not include a competition test based on the s 76C model. Although a competition test would be unworkable in the context of jury trials for the cartel offences (a policy position reflected by s 44ZZRO), a competition test is workable in civil cases under Part IV where there is no trial by jury.
- Another solution is to clarify the meaning of the requirement under ss 44ZZRO and 44ZZRP and s 76C that a provision be “for the purposes of a joint venture”. One possibility would be to provide that a provision is “for the purposes of a joint venture” if and only if the “dominant purpose” of the provision is to further a “pro-competitive activity of a joint venture”. The “dominant purpose” test is meant specifically to exclude JV Ultra-Lights from the application of the joint venture exceptions in ss 44ZZRO and 44ZZRP. A “pro-competitive activity of a joint venture” is an activity that is:
 - (a) undertaken jointly by the parties to the joint venture; and
 - (b) directed towards :
 - (i) reducing the cost or improving the quality, design or functionality of goods or services to be produced, supplied or acquired by the joint venture; or
 - (ii) increasing the quantity of the goods or services to be produced, supplied or acquired by the joint venture.

Secondly, ss 44ZZRO and 44ZZRP should be amended by extending the wording to cover cartel provisions in arrangements or understandings as well as those in contracts; see section 5.3.2 below.

Thirdly, ss 44ZZRO and 44ZZRP should be amended by revising the wording “for the production and/or supply of goods or services” to read: “for the production, supply and/or acquisition of goods or services”; see section 5.3.3 below.

Fourthly, ss 44ZZRJ and 44ZZRK should be amended to include a competition test parallel to that under s 76C; see section 5.3.1.5 of this submission. Section 44ZZRD(3) should be amended to incorporate the definition of an exclusionary provision under s 4D and s 4D and s 76C should be repealed (see section 5.3.4 of this submission).

Fifthly, the wording “for the purposes of a joint venture” is obscure and the uncertainties need to be resolved. The proposal in section 5.3.5 below is that ss 44ZZRO and 44ZZRP and s 76C be amended to provide that:

- “for the purposes” means in furtherance of the objective purposes of the joint venture;
- a provision is “for the purposes of a joint venture” if and only if the “dominant purpose” of the provision is to further a “pro-competitive activity of a joint venture” – see also section 5.3.1.5 of this submission; and
- the dominant purpose of a provision is to be determined on the basis of the purpose of the defendant who seeks to rely on the joint venture exception under s 44ZZRO or s 44ZZRP or the joint venture defence under s 76C.

1.6 Conclusion

The Bill should not be passed until the problems discussed in this submission have been resolved by amendments of the kind proposed in sections 2-5 below and as summarised in sections 1.2-1.5 above.

If enacted in their present form, the provisions of the Bill discussed in this submission will impose unjustified restraints on legitimate business by large and small companies. They will cause unnecessary uncertainty. They will frustrate enforcement by the ACCC and action for civil remedies by plaintiffs. They will also erode support for the legislation. Amendments can readily be made to improve the Bill and to avoid those unwanted outcomes.

2. UNNECESSARY AND ILL-ADVISED INTRODUCTION OF NEW AND UNTESTED CONCEPTS OF CARTEL CONDUCT

2.1 There is no justification for introducing new and untested concepts of cartel conduct

The criminal and civil prohibitions against cartel conduct under the Bill rely on new and untested statutory concepts of restriction of output, allocation of customers and bid-rigging (see s 44ZZRD(3)). Also, some changes are made by s 44ZZRD(2) to the definition of price fixing under s 45A(1).

The Bill repeals the current civil penalty prohibition against price fixing but not that against exclusionary provisions.

The approach taken in the Bill was not recommended by the Dawson Committee. Nor has it been explained or justified in any public document, including the Explanatory Memorandum.

A simpler and safer approach would be to base the definition of cartel offences and civil penalty prohibitions directly on the existing prohibitions against price fixing and exclusionary provisions. See section 2.2 below.

There is no need for introducing new definitions of cartel conduct in the provisions of the Bill that define a cartel provision:

- As the Explanatory Memorandum says (para 1.7), the existing definitions of price fixing and exclusionary provisions cover the kinds of cartel provisions subject to the new cartel offences and new civil penalty prohibitions under the Bill. Price fixing is covered by the definition of price fixing under s 45A(1). Bid-rigging is covered by the definition of price fixing under s 45A(1). Allocation of customers is covered by the definition of an exclusionary provision under s 4D. Restriction of output is likely to involve an exclusionary provision. If there is any need to extend per se liability for cartel conduct beyond the scope of the existing definitions of price fixing and exclusionary provisions³ than those definitions should be amended rather than introducing a new set of definitions.

³ For example, the particularity requirements under s 4D serve little purpose and arguably should be brought into line with the approach taken in s 44ZZRD(7) of the Bill.

- The OECD recommendation on the deterrence of “hard-core” cartel conduct (*Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (25 March 1998 — C(98)35/FINAL)) does not require prohibitions defined specifically in terms of restriction of output, allocation of customers or bid-rigging.⁴ What matters is that the types of “hard-core” cartel conduct mentioned in the Recommendation be subject to prohibition, not that exactly the same high-level concepts be used to define the elements of a cartel offence or a per se civil penalty prohibition. Given the importance of defining cartel prohibitions in a way that is consistent with existing local competition laws and legislative practice, many OECD members (including the USA, Canada, New Zealand, Korea and Japan) do not define cartel prohibitions in terms of the foursome of price fixing, restriction of output, allocation of customers and bid-rigging. The cartel offence under the Enterprise Act 2002 (UK) is the most notable exception. However, the definition of that offence under ss 188-189 of the Enterprise Act is a dense maze,⁵ and no model for other jurisdictions to follow.

The approach taken in the Bill of creating a new set of definitions of cartel conduct has significant disadvantages:

- The definitions of a cartel provision in s 44ZZRD are new and untested in any jurisdiction. The process of settling the meaning of the new provisions, especially the provisions on restriction of output, allocation of customers and bid-rigging, will require test cases and occasion commercial uncertainty. By contrast, the existing per se civil penalty prohibitions against price fixing and exclusionary provisions have been applied and tested over 30 years in numerous Federal Court decisions and, in the case of exclusionary provisions, several decisions of the High Court.
- The new definitions in s 44ZZRD are prone to creating unexpected or arbitrary results and loopholes.⁶ For example, the definition of restriction of output does not cover cases where two or more competitors agree to restrict the *acquisition*

⁴ The same applies to the approach recommended in ICN, Working Group on Cartels, Report, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties* (2005).

⁵ The run-down in M Furse & S Nash, *The Cartel Offence* (2005) 29-34 is useful but ss 188-189 defy succinct restatement.

⁶ Cartel conduct takes many different forms and cannot sensibly be reduced to four categories of conduct without creating gaps. For example, the OECD four-fold categorisation does not cover rule fixing: see RH Lande & HP Marvel, "Rule Fixing: An Overlooked but General Category of Collusion" in A Cucinotta, R Pardolesi & R Van den Burgh (eds), *Post-Chicago Developments in Antitrust Law* (Edward Elgar, 2002) ch 9.

of goods or services from a supplier.⁷ It is arbitrary and economically unprincipled to exclude such conduct in a definition of cartel conduct that supposedly is meant to cover serious cartel conduct. It is true that such conduct will be caught by the civil penalty prohibition against an exclusionary provision. However, that does not explain why the conduct should not be covered by the new cartel offences.

There is no worthwhile advantage in introducing a new set of definitions of cartel conduct based on the high-level concepts used in the OECD recommendation. For example, those concepts are general and undefined and do not go anywhere near limiting liability to serious cartel conduct. The Explanatory Memorandum seems to suggest (see paras 1.4-1.7) that following the OECD concepts of price fixing, restriction of output, allocation of customers and bid-rigging offers the advantage of explicitly labelling and signalling the types of cartel conduct that are prohibited. However, if effective labelling and signalling is the relevant objective,⁸ the Bill is an inadequate way of trying to achieve that objective:

- The definition of a cartel provision in s 44ZZRD(3) of the Bill is complicated and technical.
- The essence of prohibitions against cartel conduct is relatively straightforward – it is a serious breach of the law for competitors to agree that one or more of them will not compete against another competitor. However, neither the title of the cartel offences (“cartel offence”) nor the language used in the definitions of cartel conduct in the Bill sends that message in plain terms.
- The concept of allocation of customers (see s 44ZZRD(3)(b) of the Bill) is much less meaningful than the concept of market-sharing that is now part of the general commercial understanding of what is meant by an exclusionary provision.
- The effect of anti-cartel provisions can and should be communicated to businesses and other stakeholders by means of guides of the kind illustrated by several ACCC publications (eg *What is a cartel and what penalties apply to them?* at <http://www.accc.gov.au/content/index.phtml/itemId/694995>) and by the US Department of Justice’s *An Antitrust Primer for Federal Law Enforcement Personnel* (2005).

⁷ It should also be noted that the civil prohibitions against anti-competitive agreements under s 2 of the Competition Act 1998 (UK) have not been amended to reflect either the OECD concepts of hard-core cartel conduct or the cartel offence definition under ss 188-189 of the Enterprise Act 2002 (UK).

⁸ See further A Ashworth, *Principles of Criminal Law* (5th ed, 2006) 88-89.

- If the term “exclusionary” as used in s 4D for decades is now suddenly considered to be insufficiently graphic it could be replaced by another term more akin to that of “price fixing” (eg “competition avoidance”).

2.2 A more straightforward and safer approach to the definition of cartel offences and civil penalty prohibitions based on the existing prohibitions against price fixing and exclusionary provisions

A more straightforward and safer approach is to base the definition of cartel offences and civil penalty prohibitions against cartel conduct directly on the existing definitions of price fixing and exclusionary provisions.

The framework of prohibitions proposed is as follows:

- cartel offences for price fixing and exclusionary provisions (based on ss 44ZZRF and 44XXRG and the current definitions of price fixing in s 45A and s 4D, but with some amendments);
- per se civil prohibitions for price fixing and exclusionary provisions (based on ss 44ZZRJ and 44ZZRK and the current definitions of price fixing in s 45A and s 4D, but with some amendments);
- a civil prohibition against provisions that have the purpose or likely effect of substantially lessening competition in a market following the current prohibitions under s 45(2)(a)(ii) and (2)(b)(ii).

The existing per se prohibitions against price fixing and exclusionary provisions would be repealed, as they are under the Bill.

The Bill would need to be amended by:

- making minor amendments to the definition of price fixing in s44ZZRD(2);
- repealing the definitions of output restriction and allocation of customers in s 44ZZRD(3)(a) and (b) and replacing those definitions with a definition of an exclusionary provision based on s 4D but with some amendments; and
- repealing the definition of bid rigging in s 44ZZRD(3)(c).

Further amendments to the Bill would be needed to resolve the problems discussed in sections 3-5 below. For example, section 3.2 discusses the over-reach of the definitions of restriction of output and allocation of customers under s 44ZZRD(3)(a) and (b) of the Bill and proposes amendments designed to avoid such over-reach. Those amendments are also necessary if, as proposed, s 44ZZRD(3)(a) and (b) are replaced by a definition of an exclusionary provision based on s 4D.

2.3 Conclusion as regards the new and untested definitions of a cartel provision in the Bill

The Bill should not be passed with the new and untested definitions of a cartel provision in s 44ZZRD. There is no reason to depart from the tried and tested existing definitions of price fixing and exclusionary provisions and s 44ZZRD(2) and (3) should be amended accordingly.

The definition of price fixing in s 44ZZRD(2) should follow the existing definition of price fixing in s 45A(1). The definitions of restriction of output and allocation of customers in s 44ZZRD(3) should be deleted and replaced by wording based on the definition of an exclusionary provision in s 4D. The definition of bid-rigging in s 44ZZRD(3)(c) should be deleted; bid-rigging is covered by the definitions of price fixing and exclusionary provisions.

3. OVER-REACH OF THE PER SE CRIMINAL AND CIVIL PROHIBITIONS AGAINST CARTEL CONDUCT

3.1 Introduction

It is axiomatic that per se liability for cartel conduct should be defined in such a way as to catch only conduct that is clearly anti-competitive.⁹

It is also axiomatic that offences should be defined no more broadly than is necessary to cover the conduct that warrants criminal prohibition.¹⁰

The criminal and civil per se prohibitions against cartel conduct under the Bill catch a wide range of conduct that is pro-competitive or in the public interest and where authorisation is an impractical solution. Examples are set out in sections 3.2-3.3 below together with proposed amendments to the Bill.

Another important area of over-reach is supply agreements between competitors. See section 4 of this submission.

The joint venture provisions in the Bill do not exclude per se liability for cartel conduct in some situations where liability is unjustified. They may also exclude liability in cases where per se liability should be imposed. See section 5 of this submission.

3.2 Over-reach - restriction of output and allocation of customers

3.2.1 Examples of over-reach

The definitions of restriction of output and allocation of customers in s 44ZZRD(3) and the definition of an exclusionary provision under s 4D do not exclude liability in cases where the conduct is not anti-competitive or is positive in terms of consumer welfare. Examples proliferate:

⁹ RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 267-269; OECD, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (25 March 1998 — C(98)35/FINAL, A2(b) (the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies ...).

¹⁰ A Ashworth, *Principles of Criminal Law* (5th ed, 2006) 30-35.

- Assume that competing suppliers of plastic explosive agree to refuse supply to a terrorist organisation. A substantial purpose is to restrict supply and falls within the over-reach of s 44ZZRD(3)(a)(iii) and s 4D.
- Assume that a hurricane strikes Cairns and is causing extreme flooding and devastating damage to public and private buildings and other facilities. Building contractors, concerned about by the delay or insufficiency of governmental action, stop competing with each other and create a recovery plan under which they agree to deploy all their resources on agreed priority recovery projects. The hurricane is on the radar, not the highly theoretical possibility of applying to the ACCC for an authorisation. Valuable as this private sector initiative is, one substantial purpose is to restrict supply and is caught by s 44ZZRD(3)(a)(iii) and s 4D.
- Assume that a local television blackout of a sporting event is imposed in order to attract the crowds necessary to make the event commercially feasible. Such conduct involves an exclusionary provision.¹¹

Suppose a group of horse racing clubs agree to allow closed-circuit telecasting of races to social clubs, hotels, motels, racetracks and other institutions but a term of the agreement is that local races are not to be telecast in the local area. The reason for this restriction is that the local horse racing clubs wish to retain racetrack crowds. Without such crowds, local race meetings would be less successful and it is not inconceivable that the subject matter of the telecast itself (that is, races) could cease to exist.

All of the above reasons in favour of home town 'blackouts' have led to the conclusion in the US that such jointly agreed TV 'blackouts' are not anticompetitive. Indeed, the home town blackout restriction 'promotes competition more than it restrains it'. In Australia, a *per se* ban on such jointly agreed arrangements may, however, be the result. There is no doubt that the immediate purpose is to deny services to certain identifiable persons or institutions. There appears to be little doubt that the various horse racing clubs are competitive with each other (they compete for sponsorships, entries and prize money offered and, highly relevant in the present context, for TV coverage and payments for such coverage). While the blackout certainly does not substantially lessen

¹¹ W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) 104-105.

competition between the horse racing clubs in those matters in respect of which they compete, this is not the relevant test for infringement of the Australian exclusionary provision legislation.

The conduct described in this example would also be caught by s 44ZZRD(3)(a)(iii) of the Bill – a substantial purpose is to restrict the supply of a service (the right to broadcast the sporting event locally) to local television stations.

- Assume that competing aviation companies provide helicopter services for medical emergencies in rural areas at cost or on a subsidised basis. They arrange a system under which each agrees to provide a minimum guaranteed level of emergency transport services for patients in different geographical areas. All of the parties are free to provide additional services whenever they wish to do so, whether on a subsidised or full price basis. This customer allocation scheme is caught by s 44ZZRD(3)(b)(iii): one substantial purpose is to allocate the geographical areas in which services are supplied, or likely to be supplied.¹² The customer allocation scheme is also caught by s 4D: one substantial purpose is to restrict the supply of services to a particular class of persons (patients requiring air transport to hospital) in particular circumstances (where the competitor is not rostered to supply the service required in a particular area).

3.2.2 Responsive amendments to the Bill

The examples above show how the Bill and the existing definition of an exclusionary provision impose per se criminal and civil liability for cartel conduct in situations where the conduct is pro-competitive or plainly in the public interest. The examples are not unusual or contrived.

It may be argued that, in all of the examples above, the “real” purpose is only to serve the public interest and is not a cartellous purpose under s 44ZZRD(3). However, such an argument is inconsistent with s 4F of the TPA and it is doubtful that the reasoning of the majority of the High Court in *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563 can be stretched to that extreme. To qualify the meaning of “purpose” to that extent would be to rewrite the wording of s 4D and s 4F. In any event, corporations and

¹² The wording of s 44ZZRD(3)(a) and (b) is unqualified in any way that exempts roster schemes. Note 1 to s 44ZZRD states that “subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.” However, an immediate and substantial purpose of roster schemes is to restrict the supply of services.

their advisers should not have to engage in oracular feats of interpretation to work out what is meant by the purpose requirement in s 44ZZRD and s 4D.

It may also be argued that parties can and should apply for an authorisation in such cases. However, that argument is unrealistic given the cost and delay of the authorisation process and the absence of any reason to question the legitimacy of the conduct concerned.

Over-reach of the kind illustrated therefore needs to be avoided by amending the definition of a cartel provision under the Bill and the definition of an exclusionary provision.

Amendment A

A provision should be inserted in s 44ZZRD to the effect that a cartel provision does not include a provision the purpose or likely effect of which is not to substantially lessen competition *between two or more of the competitors* (or likely competitors) who are parties to the contract, arrangement or understanding containing the alleged cartel provision. A parallel provision should be inserted in the definition of an exclusionary provision.

This limitation on per se liability for cartel conduct focuses on whether or not the competitors have agreed not to compete that at least one of them will not compete against another competitor and does not require an evaluation of competition in a market as a whole, nor of whether the restriction of supply or acquisition had the purpose, effect or likely effect of substantially lessening competition in a market.

The rationale for the solution recommended above is simple and directly reflects orthodox economic principle: there is no justification for imposing per se liability for price fixing or other cartel conduct unless the competitors agree that at least one of them will not compete against another competitor.

Amendment B

The definition of a cartel provision in s 44ZZRD of the Bill and an exclusionary provision under s 4D should be amended to exclude a provision the “dominant purpose” of which is to:

- (a) to increase the quantity of goods or services to be produced, supplied or acquired by one or more of the parties, to reduce their cost, or to improve their quality, design or functionality;

- (b) to prevent a serious risk to a person's life or the health or safety of the public or a section of the public or to remedy serious physical harm occasioned to a person or serious damage to property;¹³ or
- (c) to prevent a serious risk to the environment, or to remedy serious harm occasioned to the environment.¹⁴

Amendment B avoids over-reach partly by excluding per se liability for cartel conduct where a cartel provision is ancillary to co-operative efficiency-enhancing conduct. The concept of "dominant purpose" is comparable to the dominant purpose test in s 45DD(2) and (3) (as recently applied in *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2008] FCAFC 156). It also reflects Taft J's seminal formulation of the principle of an ancillary restraint in *US v Addyston Pipe & Steel Co*:¹⁵ a restraint is ancillary and not naked where the "main purpose" of the restraint is to make a separate legitimate transaction more effective.

Amendment B also avoids over-reach by enabling per se liability for cartel conduct to be denied where a cartel provision or exclusionary provision is ancillary to forms of cooperative activity that are so plainly in the public interest that it would be bureaucratic overkill to require the cooperating parties to apply for an authorisation.¹⁶

Application of Amendment A and Amendment B

This approach would avoid over-reach in the examples given in section 3.2.1 above:

- In the case of the refusal by competing manufacturers of plastic explosive to supply their explosives to a terrorist organisation, the dominant purpose of the parties is to prevent a serious risk to human life or public safety. Under Amendment B, there would not be a cartel provision or exclusionary provision. Also, under Amendment A, the purpose or likely effect is not to substantially lessen competition between the parties.
- Building contractors in a hurricane-struck city who stop competing and collectively plan and implement work on recovery projects would be acting for

¹³ Compare *Criminal Code* (Cth) s 100.1.

¹⁴ Compare *Criminal Code* (Cth) s 100.1.

¹⁵ 85 Fed 271 at 282-283 (1898). See further RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 26-30, 135-136, ch 13.

¹⁶ To similar effect, see the principle of public interest ancillarity under EC competition law: see J Faull & A Nikpay, *The EC Law of Competition* (2nd ed, 2007) 237-239. In some cases the rule of reason in US antitrust law has been extended to take account of social justifications; see American Bar Association, *Antitrust Developments* (6th ed, 2006) vol 1, ch 1(3).

the dominant purpose of preventing a serious risk to a person's life or the health or safety of the public or a section of the public and/or for the dominant purpose of remedying serious physical harm occasioned to a person or serious damage to property. Under Amendment B above the restrictions on competition would not be cartel provisions or exclusionary provisions.

- In the sporting blackout example, the dominant legitimate purpose of the restriction is to increase the output of goods or services or to improve their quality. Under Amendment B, there is no cartel provision or exclusionary provision.
- In the example of scheduled minimum helicopter services for medical emergencies there would be no cartel provision or exclusionary provision. Under Amendment A, the purpose or likely effect of the roster restrictions is not to substantially lessen competition between the parties. The parties intend to provide a minimum guaranteed level of emergency service in specified geographical areas. All of the competing helicopter companies are free to provide additional services whenever they wish to do so, whether on a subsidised or full price basis. Alternatively, under Amendment B, the parties could deny liability on the basis that the dominant legitimate purpose of the roster restrictions is to prevent a serious risk to human life or to remedy serious physical harm occasioned to a person.

3.3 Over-reach - bid-rigging

The definition of bid rigging under s 44ZZRD(3)(c) of the Bill proscribes various types of conduct in response to a request for bids without also requiring that the intended effect or likely effect be to control a price or to foreclose a competitive conduct.

For example, consider the scope of s 44ZZRD(3)(c)(v). The purpose condition is satisfied if the provision has the purpose of ensuring that, in the event of a request for bids in relation to the supply or acquisition of goods or services:

2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

Assume that A and B, two of 5 competing suppliers and installers of desalination plants in Australia, are requested by the NSW government to bid for several new plants. A manufactures

distillation units. B manufactures pumps. A wants to use B's technology for the bid and B wants to use A's technology. They discuss supply arrangements for the bid and agree to supply each other at a mutual discounted rate in order to improve each other's chance of winning the tender. The input cost of A's technology is a material component of B's bid. The input cost of B's technology is a material component of A's bid. Since the discounted rate applicable to A's technology and B's technology has been worked out in accordance with an arrangement between A and B, and the purpose is to implement that deal, the mutual discount provision is caught by s 44ZZRD(3)(c)(v). There is no joint venture between A and B and hence the joint venture exceptions under ss 44ZZRO and 44ZZRP do not apply.

The bid-rigging provisions in s 44ZZRD(3)(c) of the Bill are unnecessary as well as new and untested and prone to over-reach. They should be deleted. Bid rigging is covered by the existing definitions of price fixing and exclusionary provisions in the TPA. Those definitions should be followed in the definition of a cartel provision in s 44ZZRD; see section 2 of this submission.

3.4 Conclusion on over-reach of the per se prohibitions against cartel conduct

The new criminal and civil per se prohibitions against cartel conduct under the Bill and the existing prohibition against exclusionary provisions catch a wide range of conduct that is pro-competitive or in the public interest. Examples are set out in sections 3.2-3.3 above.

The Bill should not be passed until the problem of over-reach is resolved. Specific amendments are proposed in sections 3.2 and 3.3 above.

4. UNJUSTIFIED PER SE CRIMINAL AND CIVIL LIABILITY FOR SUPPLY AGREEMENTS BETWEEN COMPETITORS

4.1 Summary

Supply agreements between competitors are part of the life-blood of commerce. The competition laws in most countries do not subject such agreements to per se liability for price fixing or other cartel conduct except for some rare and controversial exceptions.¹⁷ That is not the position in Australia. Under the TPA and the Bill pro-competitive or harmless supply agreements between competitors may often involve a breach of the per se prohibitions against price fixing and other cartel conduct. The introduction of criminal liability for price fixing and other cartel conduct under the Bill accentuates the significance of this flaw in the legislation. Exposure to the risk of criminal liability for pro-competitive or harmless commercial conduct is doubly absurd and repugnant.

The exposure of supply agreements between competitors to per se liability for price fixing or other cartel conduct is reduced to some extent by the exception for exclusive dealing conduct under s 45(6) of the TPA and s 44ZZRS of the Bill. However, as illustrated in section 4.2 below, some everyday kinds of pro-competitive or harmless supply agreements between competitors are not excepted from per se liability by s 45(6) or s 44ZZRS of the Bill. Nor are they excepted by any other provision. Authorisation by the ACCC could be sought but in most situations authorisation is impractical given the cost, delay, publicity and uncertainty of the authorisation process and the limited scope or period of immunity where authorisation is granted.

It is difficult to explain the aberrational treatment of supply agreements between competitors in Australia. Provisions such as s 45(6) of the TPA and s 44ZZRS of the Bill often have been referred to as “anti-overlap” provisions, a term also used in the Explanatory Memorandum accompanying the Bill (para 4.4). As explained in section 4.3 below, the focus on overlap seems to have diverted attention away from the fundamental policy issue that needs to be addressed. The fundamental policy issue is not whether s 45 should overlap with s 47, or whether ss 44ZZRG and 44ZZRH or ss 44ZZRJ and 44ZZRK should overlap with s 47. The issue is whether vertical supply agreements between competitors should be subject to per se liability for price fixing or other cartel conduct. Section 45(6) and s 44ZZRS do not address that issue squarely. Nor does any other provision in the TPA. There is a significant gap in the law.

¹⁷ See R Bork, *The Antitrust Paradox* (1978) 274-278; J Faull & A Nikpay, *The EC Law of Competition* (2nd ed 2007) 3.116.

The straight-forward solution recommended in section 4.4 below is to insert an additional exception in Part IV that excludes per se liability for price fixing or other cartel conduct where the relevant provision in a supply agreement between competitors does not have the purpose or likely effect of substantially lessening competition *between those competitors*. This exception is based directly on Amendment A in section 3.2 and would be unnecessary if Amendment A were to be made to the Bill.

The Bill should not be passed until the unsatisfactory treatment of supply agreements between competitors under the TPA and under the Bill is rectified by means of an amendment to Part IV of the kind indicated in section 4.4 below.

4.2 Examples of pro-competitive or harmless commercial supply agreements subject to per se liability under the TPA and the Bill

Example A

ACO, an Australian manufacturer of Product A, supplies Product A on reasonable commercial terms and conditions to BCO, CCO and numerous other companies with which ACO competes downstream in the Australian wholesale market for Product A and competing products. These supply arrangements are pro-competitive given that: (a) BCO, CCO and other companies are able to compete as wholesalers against ACO in relation to ACO's Australian-made Product A; (b) BCO, CCO and other companies are able to compete against each other in relation to ACO's Australian-made Product A and to compete more effectively against companies supplying imported similar products; and (c) the agreements do not include an exclusive dealing condition, a resale price maintenance restriction or any other condition on the freedom of BCO, CCO and the other companies to sell ACO's Product A however and wherever they wish.

The price charged by ACO for Product A obviously is a major input cost of the wholesale price to be charged for Product A by BCO, CCO and the other companies in competition with ACO. The supply price provision therefore "controls" that wholesale price; see *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 at [164]-[202]. Accordingly, the supply price provision is a price fixing provision, as defined in s 45A(1) of the TPA. It is possible that the provision may not control the price to be charged for Product X by ACO. However, that is irrelevant: the provision does control the price to be charged for Product X by BCO, CCO and other

customers and it is sufficient that the competitors agree that the price to be charged by one of them will be controlled.¹⁸

The supply price provision is also a cartel provision, as defined by s 44ZZRD(2)(a) and (c) and (4) of the Bill. The reasoning parallels that set out above for price fixing under s 45(2) and s 45A(1) of the TPA.

The Explanatory Memorandum states (at p 13) that s 44ZZRD(2) is not intended to apply where a price is only “incidentally affected” and “where the price is otherwise established independently” and gives this example:

“Company A, having a shortage of inputs for its manufacture of a good, seeks to source the inputs from Company B, a competitor in the market for the good. B agrees to produce the additional inputs and to provide them to A, at an agreed price.

Provided there is no agreement between A and B regarding the price at which A sells the good concerned, the purpose/effect condition would not be met merely because of the reflection of the input price in the price of the good.”

Example A does not involve the supply of an input for use in the manufacture of a product but the supply of a product that is to be re-supplied by a competitor. The price charged by ACO has an indirect effect on the price to be charged by BCO, CCO and other customers but it is difficult or impossible to say that the effect is merely “incidental”. The definition of a cartel provision in s 44ZZRD(2) explicitly covers situations where a provision has the purpose or likely effect of controlling the price for “goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding” (s 44ZZRD(2)(e)).

¹⁸ This is consistent with the wording of s 45A(1) or s 44ZZRD(2)(a) and the apparent legislative intention to avoid creating a loophole in situations where eg a price fixing agreement between two competitors relates only to the price to be charged by one competitor or where it may be difficult to prove that the price fixing provision controls the price to be charged by both parties. Assume that GCO competes with HCO in relation to Type G products. GCO threatens to expand its production of Type G products if HCO discounts the price it charges for Type G products. HCO agrees not to discount its price for Type G products and GCO agrees not to expand production of Type G products. In such a case it may be difficult or impossible to prove that the agreement is likely to control the price to be charged for Type G products by GCO. Such proof is unnecessary under the s 45A(1) definition of price fixing. The contrary has been suggested in I Tonking, “Competition at Risk? New Forms of Business Cooperation” (2002) CCLJ LEXIS 17 at [54]-[55] on the basis that the words “in competition with each other” that succeed the wording “by any of them” in s 45A(1) indicate that the earlier words should be read as if they said “or by any *two or more* of them”, since there must be at least two competitors for there to be competition. However, it is difficult to reconcile that interpretation with the wording of s 45A(1) and the requirement that there be two or more competitors requires only that there be two or more competitors, not that the price fixing agreement must control the price to be charged by two or more competitors.

Apart from the limited scope of the exception stated and the example given in the Explanatory Memorandum, the extent to which supply agreements between competitors are subject to per se liability should not depend on the vague notion of an “incidental effect”, the obscure distinction between indirect and incidental effects, or the opaque qualification “where the price is otherwise established independently”. The position should be governed by a clearly drafted statutory provision, not a makeshift rescue attempt in an explanatory memorandum.

The anti-overlap provisions do not exclude Example A from per se liability. The supply price provision in ACO’s supply agreements is not excepted by s 45(6) from per se liability for price fixing under s 45(2)(a)(ii): it is not an exclusive dealing condition. Nor is the supply price provision excepted by s 44ZZRS from per se liability for a cartel offence under s 44ZZRG or s 44ZZRH or for breach of the civil penalty prohibitions under s 44ZZRJ or s 44ZZRK: there is no exclusive dealing condition in the supply agreements.

Nor is there any other escape route short of the unrealistic possibility of applying for an authorisation. For example, the resale price maintenance exception under s 45(5)(c) of the TPA and s 44ZZRR of the Bill does not apply: the supply price provision is not a resale price maintenance provision. Nor is there a way out under the joint venture provisions in ss 44ZZRO(1) and 44ZZRP(1): there is no joint venture between ACO and BCO or any of the other companies to which ACO supplies Product A.

Example B

XCO, an Australian manufacturer, agrees to supply Product D to YCO on condition that YCO agrees to supply Product E to XCO. YCO agrees to supply Product E to XCO on condition that XCO agrees to supply Product D to YCO. XCO and YCO compete against each other in the market for Product D, Product E and competing products. The reciprocal supply provisions are pro-competitive because they increase the ability of XCO and YCO to compete against major competitors in the market.

The reciprocal supply provisions are exclusionary provisions as defined by s 4D of the TPA. XCO and YCO compete with each other in relation to the relevant competing products. A substantial purpose of each reciprocal supply provision is to restrict the supply of a relevant competing product unless the condition of reciprocity is satisfied. It is irrelevant that the exclusionary purpose is conditional: an exclusionary purpose under s 4D may be conditional or unconditional. Nor can it be maintained that the “real purpose” of each reciprocal supply provision is an exclusionary purpose but a purpose to “act in the best interests of the market” or to “improve competition”: if the purpose of a provision is to restrict the supply or acquisition of goods or services in the way prescribed by s 4D it is irrelevant whether or not the defendant

believes that the restriction is in the best interests of the market or a way of improving competition. The dictum of Lockhart J in *Re: Radio 2UE Sydney and Stereo FM Pty Limited and 2 Day-FM Limited* (1982) 62 FLR 437 that conduct that “improves competition” is not price fixing under s 45A(1) of the TPA is obiter, was not endorsed by the Full Federal Court, does not extend to competitively neutral as well as competitively positive conduct, and does not provide any legal or commercial certainty about the meaning and scope of s 4D.

Each reciprocal supply provision is also a cartel provision, as defined by s 44ZZRD(3)(a)(iii) and (4) of the Bill. A substantial purpose of the provision is to restrict or limit the supply or likely supply of goods or services to a person (YCO or XCO) by a party to the contract (XCO or YCO) – s 44ZZRD(3)(a)(iii).

The reciprocal supply provisions are not excepted by s 45(6) from per se liability for making a contract containing an exclusionary provision under s 45(2)(a)(i): they are not exclusive dealing conditions. Nor are the reciprocal supply provisions excepted by s 44ZZRS from per se liability for a cartel offence under s 44ZZRG or s 44ZZRH or for breach of the civil penalty prohibitions under s 44ZZRJ or s 44ZZRK: they are not exclusive dealing conditions.

Nor is there any other escape route short of the unrealistic possibility of applying for an authorisation. For example, the resale price maintenance exception under s 45(5)(c) and s 44ZZRR does not apply: the reciprocal supply provisions are not resale price maintenance provisions. Nor is there a way out under the joint venture provisions in ss 44ZZRO(1) and 44ZZRP(1): there is no joint venture between XCO and YCO but merely a reciprocal supply agreement.

The implications of Example A and Example B

These examples of supply agreements between competitors are hardly atypical or contrived. The examples relate to many possible kinds of products. The price fixing provision in Example A is a feature of many supply agreements between competitors. The exclusionary provision in Example B is far from unusual – supply agreements between competitors often contain restrictions on supply or acquisition that do not amount to exclusive dealing conditions. Yet, as explained above, conduct of the kind illustrated by Example A and Example B is subject to per se civil liability under the current provisions of the TPA and to per se criminal and civil liability under the amendments proposed in the Bill.

Exposing competitors to per se civil liability in pro-competitive or harmless commercial supply situations of the kind illustrated by Example A and Example B is absurd. The exposure to criminal as well as civil liability under the Bill is doubly absurd.

Example A and Example B are impossible to reconcile with the following statement of legislative intention in the Explanatory Memorandum:

“Exceptions are included in the Bill to ensure that the prohibitions do not prohibit legitimate business activities that are beneficial to the economy or in the public interest.” (para 4.8)

Some possible kinds of restriction in supply agreements between competitors will raise the vexed question of whether or not there is an exclusionary purpose given the “real” commercial purpose facilitated by the restriction.

Consider the following example. RCO, an Australian manufacturer of Product R, supplies Product R to SCO, TCO and numerous other companies with which RCO competes downstream in the Australian wholesale market for Product R and competing products. RCO is concerned about the economic downturn and the increasing risk of non-payment. Accordingly, RCO’s supply agreement includes a *Romalpa* clause that title to the products supplied will not pass to the customer unless and until payment is received. Is the *Romalpa* clause in this example an exclusionary provision as defined by s 4D of the TPA? RCO competes in the wholesale market for Product R and similar products with SCO, TCO and the other companies to whom it supplies Product R. The predominant and immediate purpose of the *Romalpa* clause is to restrict the supply of a service (the transfer of title in Product R) to SCO, TCO and other customers unless and until payment is made for the relevant supply of Product R. On one possible view, that purpose is an exclusionary purpose as defined by s 4D:

- the economically rational purpose to help ensure payment does not negate or override the immediate exclusionary purpose: where a provision has multiple purposes it is sufficient that one substantial purpose is an exclusionary purpose (TPA, s 4F(1));
- it is irrelevant that the exclusionary purpose is conditional on non-payment: an exclusionary purpose under s 4D may be conditional or unconditional;
- the purpose is a substantial purpose within the meaning of s 4D and s 4F(1): it is considerable and looms large in the objectives being pursued by RCO.

On another possible view, however, the situation is on all fours with that in *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563 where a majority of the High Court decided that the 14 team term of the rugby league arrangements proposed was not an exclusionary provision. On that view, there is no exclusionary purpose in

the *Romalpa* clause example because, looking at the supply agreement as a whole and not the *Romalpa* clause alone, the “real” purpose is not to restrict supply but to help ensure payment for supply.

In cases such as that where *Romalpa* clauses are used in supply agreements between competitors, it is unfortunate that companies and their advisers are forced to go beyond the wording of s 4D and to try to devine guidance from the sophistical reasoning of the majority of the High Court in *News Limited v South Sydney District Rugby League Football Club Limited* (2003).¹⁹ This uncertainty can and should be avoided by means of a straight forward amendment to Part IV, as discussed in section 4.4 below.

4.3 Addressing the fundamental issue and avoiding preoccupation with “anti-overlap” provisions

The fundamental issue that needs to be addressed is whether or not, or when, supply agreements between competitors warrant per se liability under prohibitions against price fixing and other forms of cartel conduct.

Whether or not s 45 or ss 44ZZRF-44ZZRG or ss 44ZZRJ-44ZZRK should overlap with s 47 is a different and secondary issue. Yet the discussion of supply agreements between competitors in Australia to date appears to have been preoccupied with “anti-overlap”. That preoccupation lives on in the Explanatory Memorandum (see paras 4.4, 4.8). The Explanatory Memorandum does not address problems of the kind illustrated by Example A and Example B in section 4.2 above but seems to assume, wrongly, that s 45(6) of the TPA and ss 44ZZRS of the Bill deal adequately with the scope of per se liability for price fixing and other forms of cartel conduct in such situations.

Orthodox competition policy opposes the imposition of per liability for price fixing or other forms of cartel conduct where the agreement between competitors is a vertical supply agreement and where there is no underlying horizontal agreement not to compete against each other. A leading statement of that orthodoxy is provided in P Areeda and H Hovenkamp, *Antitrust Law*, ¶1437a:

“We saw in ¶1402 (2d) two overlapping policy reasons for being concerned with horizontal “agreements.” Neither reason applies in the same way to vertical agreements. *First*, agreements concern us because cooperative action creates a restraint that is not otherwise possible. In the horizontal context, one competitive firm alone cannot fix

¹⁹ See further I Wylie, “What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond” (2007) 35 ABLR 33 at 42.

prices or exclude rivals from the market without rival participation in that exercise. In one sense, the same is true in the vertical area, where a manufacturer obviously cannot fix a dealer's resale price or force a tied product upon the dealer without the dealer's cooperation (although a manufacturer retailing its product can lawfully charge any retail price it wishes). Nevertheless, a purely vertical agreement does not fix marketwide prices unless the parties control the market.

Second, horizontal agreements concern us because they may create market power that did not previously exist. The ordinary cartel agreement creates market power by consolidating the price-output choices of firms that otherwise lack power over output or price. Of course, not every agreement between two or more rivals creates significant or even measurable power—such as, for example, in the case of two farmers agreeing to share an expensive piece of equipment or two solo practicing lawyers who agree to share an office.

As a general matter, a purely vertical agreement does not increase anyone's market power, although it may reflect the preexisting power of one party. Indeed, most litigated vertical agreements involve not so much consent or coordination but are a response to the manufacturer's unilateral power to substitute another dealer. ...”

The same policy explains the exclusion of vertical supply agreements from the application of the cartel offence under ss 188-189 of the Enterprise Act 2002 (UK). Sections 188-189 reflect the policy position set out in Office of Fair Trading Report, *Proposed Criminalisation of Cartels in the UK* (OFT 365, November 2001) para 1.12:

“We understand that the view of those who are experts in the field of competition law is that the criminal offence should only be applicable to **horizontal** agreements between individuals representing ‘competing’ undertakings operating at the same level of the supply-chain for the purposes of the agreement in question. It should not apply to vertical agreements, many of which are considered to have pro-competitive or other beneficial effects and consequently are currently excluded from the application of Chapter I of the Competition Act 1998 or alternatively benefit from exemptions under European competition law.”

The policy position that a cartel offence should not apply to vertical agreements between competitors was expressed by the ACCC in its submission to the Dawson Committee in 2002. The *Submission to the Review Committee* (June 2002) para 2.4.4.3 states that.

“Market sharing may also be vertical. Market sharing between manufacturers and distributors or franchisors and franchisees may be in the best interests of consumers. It may increase rather than decrease output. In the US these arrangements are treated in accordance with the rule of reason. They are not characterised as unlawful per se. The Commission has indicated that it does not seek to criminalise vertical agreements. They are not currently covered by s. 4D of the Act.”

The assertion in the ACCC submission that vertical agreements are “not currently covered by s 4D of the Act” is not explained and, as shown by Example B in section 4.2 above, does not appear to be correct. Moreover, the majority of the High Court in *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1 at [23]-[27] pronounced that the application of s 4D depends on the application of the wording of the provision, not the categorisation of an agreement as being horizontal rather than vertical.

4.4 Solution for avoiding unjustified per se liability for supply agreements between competitors

Sensible limits on the scope of per se liability could be imposed if the courts were to read down the statutory prohibitions against price fixing and other forms of cartel conduct and to confine them to horizontal agreements between competitors. However, that solution is most unlikely to occur, especially given the approach to the interpretation of s 45(6) taken by the High Court in *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1. In any event, a solution is needed now and the cost and uncertain outcome of test cases should be avoided.

Sections 188-189 of the Enterprise Act 2002 (UK) provide one possible statutory model. These provisions limit liability for cartel conduct to cases where the cartel conduct is reciprocal (eg competitor A agrees to fix the price it is to charge and competitor B agrees to fix the price it is to charge). However, the requirement of reciprocal cartel conduct goes beyond excluding vertical agreements from the scope of the cartel offence and is highly questionable given that a serious interference with the competitive process may exist where a cartel agreement fixes the

price to be charged by one competitor.²⁰ Moreover, ss 188-189 are very complex provisions that defy ready communication to jurors.²¹

A straight-forward solution is to insert in Part IV of the TPA an additional exception that excludes per se liability for cartel provisions and exclusionary provisions in supply agreements between competitors if the provision does not have the purpose or likely effect of substantially lessening competition *between those competitors*.²² This solution is based directly on Amendment A in section 3.2 above and would be unnecessary if Amendment A were made to the Bill. The focus of this solution is on whether or not competitors agree that one or more of them will not compete against another competitor; it does not require an evaluation of competition in a market as a whole, nor of whether the restriction of supply or acquisition had the purpose, effect or likely effect of substantially lessening competition in a market.

As explained in section 3.2, the rationale is simple and directly reflects orthodox economic principle: there is no justification for imposing per se liability for price fixing or other cartel conduct unless the competitors agree that at least one of them will not compete against another competitor.

This approach would exclude per se liability in Example A and Example B in section 4.2 above. By contrast, it would not exclude liability for an exclusionary provision on the facts in *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1 (where competitor A agreed not to compete for competitor B's customers).

4.5 Conclusion on supply agreements between competitors under the TPA and the Bill

The Bill should not be passed until the unsatisfactory treatment of supply agreements between competitors under the TPA and under the Bill is rectified by means of an amendment to Part IV of the kind indicated in section 4.4 above or by Amendment A as discussed in section 3.2 above.

²⁰ Assume that GCO competes with HCO in relation to Type G products. GCO threatens to expand its production of Type G products if HCO discounts the price it charges for Type G products. HCO agrees not to discount its price for Type G products and GCO agrees not to expand production of Type G products. In such a case it may be difficult or impossible to prove that the agreement is likely to control the price to be charged for Type G products by GCO. Yet there is an obvious and serious interference with the competitive process. There is no compelling policy justification for excluding liability for price fixing in such a case, which does involve price fixing as defined under s 45A(1) of the TPA.

²¹ As criticised in J Joshua, "Norris v United States: A Stalking Horse for the Cartel Offence", *Competition Law Insight*, 12 February 2008 11 at 13 ("[the cartel offences] are drafted with all the user-friendliness of a schedule to VAT regulations").

²² As is apparent from the examples set out in section 3.2, the problem of over-reach addressed by Amendment A arises in a much wider range of situations than that of supply agreements between competitors.

5. UNSATISFACTORY JOINT VENTURE PROVISIONS

5.1 Summary

Five main problems are apparent in the joint venture provisions in the Bill:

- the joint venture exceptions under ss 44ZZRO and 44ZZRP of the Bill do not clearly preclude the possibility of competitors getting around the new criminal and civil per se prohibitions against price fixing and other types of serious cartel conduct by adopting quick and easy forms of joint venture arrangements (**JV Ultra-Lights**) (see section 5.3.1 below);
- the joint venture exceptions under ss 44ZZRO and 44ZZRP of the Bill do not apply to a cartel provision contained in an arrangement or understanding – legitimate joint venture arrangements may be arrived at without a contract, as in the situation where an understanding short of a binding contractual agreement is arrived at as a preliminary step before drawing up and executing a contract (see section 5.3.2 below);
- the joint venture exceptions under ss 44ZZRO and 44ZZRP require the joint venture to be “for the production and/or supply of goods or services”, a hangover from the old s 45A(2) that is arbitrary and economically unprincipled (see section 5.3.3 below);
- the joint venture exception under s 44ZZRP is inconsistent with the joint venture defence under s 76C that applies to the prohibition against exclusionary provisions – for example, a competition test applies under s 76C but not under s 44ZZRP (see section 5.3.4 below); and
- the wording “for the purposes of a joint venture” in s 76C and ss 44ZZRO and 44ZZRP is obscure (see section 5.3.5 below).

Proposals for resolving these problems are set out in sections 5.3.1-5.3.5 below.

5.2 Joint venture defences and exceptions under the TPA and the Bill

Under the TPA and the Bill there are three joint venture defences or exceptions²³ to the per se prohibitions against cartel conduct:

1. the existing joint venture defence under s 76C, which applies to the s 45(2) prohibition against exclusionary provisions;
2. a new joint venture exception under s 44ZZRO, which applies to the new cartel offences under ss 44ZZRF and 44ZZRG; and
3. a new joint venture exception under s 44ZZRP, which applies to the new civil penalty prohibitions against cartel provisions under ss 44ZZRJ and 44ZZRK.

The Bill repeals the current prohibition against price fixing under s 45(2) and the joint venture defence to that prohibition under s 76D.²⁴

The new joint venture exceptions under ss 44ZZRO and 44ZZRP differ from ss 76C and 76D in four main respects:

- there is no competition test – the new joint venture defences are available even if the purpose, effect or likely effect is to substantially lessen competition in a market;
- the new joint venture provisions apply to a cartel provision contained in a contract, not to a cartel provision contained in a contract, arrangement or understanding;
- the joint venture must be one “for the production and/or supply of goods or services;” and
- the defendant carries an evidential but not a persuasive burden of proof.

²³ On “defences” and “exceptions” see: *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (Interim New Edition – Uncleared Draft Guide, December 2007) 28-30; S Odgers, *Principles of Federal Criminal Law* (2007) 220-221.

²⁴ By contrast, under the Exposure Draft Bill released in January 2008, no joint venture defence applied to the cartel offences, and the joint venture defence to the new civil penalty prohibitions applied only to unincorporated joint ventures. For a critique of those unsatisfactory features of the Exposure Draft Bill, see C Beaton-Wells and B Fisse, “Criminalising Serious Cartel Conduct: Issues of Law and Policy” (2008) 36 ABLR 166 at 198-199.

5.3 Criticisms of the joint venture provisions in the Bill

5.3.1 A rogue's charter for evading the new criminal and civil per se prohibitions against price fixing and other types of cartel conduct?

The joint venture exceptions under ss 44ZZRO and 44ZZRP of the Bill seem to allow competitors to escape the new per se prohibitions by entering into joint venture arrangements that are marriages mainly for the purpose of avoiding per se liability rather for achieving substantial efficiencies. Unlike the position for the joint venture defences under ss 76C and 76D, the joint venture exceptions under ss 44ZZRO and 44ZZRP do not have the safeguard of a competition test – the exceptions apply even where the defendant cannot provide any evidence that the purpose or likely effect of a cartel provision is not to substantially lessen competition.

5.3.1.1 The problem of JV Ultra-Lights

The concept of a “joint venture”, as defined under s 4J of the TPA, does not require an economic integration of functions.²⁵ The wording “for the purposes of a joint venture” is obscure and it is far from clear that the cartel provision must be solely or even primarily for the purposes of a joint venture. There is no explicit requirement that the provision be for the “sole or dominant purposes” of a joint venture; as discussed below, it may be sufficient that the provision is *substantially* for the purposes of a joint venture. This laxity may open the way for competitors to create quick and easy or “Mickey Mouse” joint venture arrangements to get around the per se prohibitions (ie “JV Ultra-Lights”). This possible loophole should be closed by amending the joint venture provisions in the Bill.

Example A

Assume that ACO and BCO, two of 15 transport companies that compete aggressively against each other in Victoria and NSW, enter into an unincorporated joint venture to “rationalise” their operations. Under the joint venture contract, ACO and BCO continue to use their transport systems but adopt a joint administration system. All customer orders and accounts are handled by the joint administration system which also looks after logistical arrangements for the transport of freight. Customer orders are allocated by an operations manager either to ACO or to BCO depending on the location of their warehouses and other facilities. The joint venture contract guarantees each of them at least 40% of the total business handled by the joint venture. The parties agree not to compete against each other inside or outside the joint venture. The customer allocation and non-compete provisions in the joint venture contract are cartel

²⁵ Compare and contrast the approach taken under s 1 of the Sherman Act: see G Werden, “Antitrust Analysis of Joint Ventures” (1998) 66 Antitrust LJ 701, at 713-715.

provisions (under s 44ZZRD(3)(a) and (b)). Two substantial purposes of the cartel provisions are: to achieve some modest cost savings by using a common administration system; and to lock the parties into the joint venture arrangement necessary to achieve those cost savings. However, the dominant purpose of the cartel provisions is to lessen competition between ACO and BCO by reducing the competition that has previously existed between them.

Example B

Assume that CCO and DCO compete aggressively against each other for construction projects. A tender opportunity arises for a new tunnel project in NSW. There are likely to be 10 or more bidders. CCO and DCO decide not to compete against each other for this tender but to form a joint venture. Under the joint venture each will contribute equipment, labour and managers from their existing resources. The work on tender preparation and project design is done by a special unit created for that purpose. This unit combines and exploits different expertise within each company (CCO has superior tender preparation people; DCO has superior project design people). The joint venture arrangements include restrictions on the freedom of each company to bid for the project outside the tender or to supply project-related services to any other party. The non-compete provisions in the joint venture contract are cartel provisions (under s 44ZZRD(3)(a)). Two substantial purposes of the cartel provisions are: to achieve cost savings by using a common tender preparation and project design unit; and to lock the parties into the joint venture arrangement necessary to achieve those cost savings. However, the dominant purpose of the cartel provisions is to lessen competition between CCO and DCO by reducing the competition that has previously existed between them.

In Example A and Example B above, the joint venture exceptions under ss 44ZZRO and 44ZZRP may apply:

- the joint venture is a “joint venture” within the ordinary language meaning of that term (the venture is an association for mutual profit - *United Dominions Corporation Limited v Brian Proprietary Limited* (1985) 157 CLR 1 at 10) and within the definition in s 4J (the venture is an activity in trade or commerce carried on jointly by two or more persons);
- the joint venture is for the supply of goods or services within the meaning of s 44ZZRO(1)(b) and s 44ZZRP(1)(b);
- the joint venture is carried on jointly by the parties to the contract as required under s 44ZZRO(1)(c) and s 44ZZRP(1)(c); and

- the cartel provisions appear to be “for the purposes of a joint venture”:
 - ⇒ the provisions are related to and further the joint venture;
 - ⇒ the provisions are not solely for purposes other than the purpose of the joint venture: the provisions are for substantial purposes of the joint venture (to achieve cost savings by using a common integrated system for some of the work and to lock the parties into the joint venture arrangement necessary to achieve those cost savings);²⁶ and
 - ⇒ the wording of s 44ZZRO(1)(a) and s 44ZZRP(1)(a) does not say: “for the purposes of a joint venture and not for any other purpose”; “for the purposes of a joint venture and not for the purpose of lessening competition between the parties to the joint venture;” or “for the purposes of a joint venture and not for the dominant purpose of lessening competition between the parties to the joint venture.”

There is no compelling policy justification for exempting a cartel provision from per se prohibition in the case of a JV Ultra-Light arrangement of the kind illustrated by Example A and Example B above:²⁷

- a JV Ultra-Light does not seek to achieve any substantial efficiencies by means of integration of functions, and the efficiencies likely to be achieved are outweighed by the actual or likely lessening of competition between the parties to the joint venture;
- a JV Ultra-Light can easily be created and used as a low-cost device for the main purpose of getting around per se prohibitions against cartel conduct.

²⁶ Query whether s 4F(1) applies to the wording “for the purposes of a joint venture.” On one view, the purposes are the purposes of a joint venture, as distinct from the purposes of the provision, and s 4F(1) does not apply. On another view, the purposes of a joint venture also constitute the purposes that a provision must have, and s 4F(1) does apply. If s 4F(1) does not apply, then a purposive interpretation is necessary. A purposive interpretation based on the 2004 Explanatory Memorandum on the antecedents of s 76C and 76D would exclude the joint venture defence if the sole purpose was to lessen competition between the parties. That interpretation does not cover the type of situation in Example A and Example B above. The sole purpose of the cartel provisions in those examples is not to lessen competition between the parties: a substantial purpose is to achieve cost savings through some degree of economic integration of functions. See further the discussion in section 5.3.1.3 below.

²⁷ For a discussion of s 45A(2) see B Fisse, ‘The Joint Venture Defences under Sections 76C and 76D of the Trade Practices Act’, 15 May 2008, at www.brentfisse.com/publications.html.

5.3.1.2 The problem of JV Ultra-Lights is a known problem

Many courts²⁸ and commentators have considered the danger of sham joint ventures or JV Ultra-Lights being used in an attempt to escape per se liability.

The Dawson Committee Report issued a general warning against “joint venture agreements designed as a cover for anti-competitive agreements.”²⁹

A stronger alarm bell was rung by Allan Fels in 2003 in “Looking Back on Ten Years of Australian Competition Law” (2003) 11 CCLJ LEXIS 15), Fels criticised the relative laxity of ss 76C and 76D as compared with the much stricter approach under the former joint venture exemptions under s 45A(2).³⁰

“.. the recommendations concerning joint ventures [ie as later adopted in ss 76C and 76D] would also seriously threaten the application of the TPA. Presently there is provision for more lenient treatment of price fixing, market sharing and the like in relation to genuine joint ventures. The provisions define joint ventures very tightly. But Dawson has recommended a very loose definition of joint venture. Such a law would mean that it should be comparatively easy if competitors want to agree on prices, or to divide up a market between them, simply to establish themselves as a joint venture. Such actions would only be prohibited if the commission could establish in a court of law that there was 'a substantial lessening of competition'. The British Airways/Qantas pricing agreement on the Kangaroo Route would almost certainly have not been subjected to an authorisation application under the looser joint venture approach. Had the proposed new definition applied the important challenge to the banks' credit cards cartel - as we saw it - which played a crucial role in setting the RBA credit card reforms, would have been made immensely difficult and would quite probably not have proceeded.”

A similar concern was raised in 2004 by Warren Pengilley in “Thirty Years of the Trade Practices Act: Some Thematic Conclusions” (2004) 12 CCLJ 6 at [45]:

“The major criterion of a joint venture which should not be condemned per se is the quality of integration. If a new venture is set up by two corporations and there is

²⁸ Eg *Timken Roller Bearing Co v US*, 341 US 593 at 598 (1951); *General Leaseways, Inc v National Truck Leasing Association*, 744 F 2d 588 (CA 7th Cir, 1984). See eg *Texaco Inc v Dagher*, 547 US 1 at 4 (2006) (noting that the creation of Equilon, the joint venture vehicle, was based on “numerous synergies and cost efficiencies” and that “nationwide there would be up to \$800 million in cost savings annually”).

²⁹ *Review of the Competition Provisions of the Trade Practices Act* (2003) 140.

³⁰ See B Fisse, ‘The Joint Venture Defences under Sections 76C and 76D of the Trade Practices Act’, 15 May 2008, at www.brentfisse.com/publications.html.

substantial, even if not total, integration of production, managerial, distribution, financial and other operations, then the venture should be subject to a competition test. If this integration does not exist, the joint venture may simply mask a cartel and should be condemned accordingly. . . .”

Under US antitrust law, economic integration of functions is essential for joint ventures that wish to avoid per se liability under s 1 of the Sherman Act; see G Werden, “Antitrust Analysis of Joint Ventures” (1998) 66 Antitrust LJ 701, at 713-715.

The risk of JV Ultra-Lights and how that risk is avoided under US antitrust law is set out in FTC/DOJ, *Antitrust Guidelines for Collaborations among Competitors* (2000) at 8-9 (footnotes and examples omitted):³¹

“3.2 Agreements Challenged as Per Se Illegal

Agreements of a type that always or almost always tends to raise price or reduce output are per se illegal. The Agencies challenge such agreements, once identified, as per se illegal. Typically these are agreements not to compete on price or output. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.

If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal. See Example 4. In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed (by a joint venture entity created by the collaboration or by one or more participants or by a third party acting on behalf of other participants) one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. Participants in an efficiency-enhancing integration typically combine, by contract or

³¹ Compare and contrast the weaker concept of economic integration of functions in A Harpham, D Robertson & P Williams, “The Competition Law Analysis of Collaborative Structures” (2006) 34 ABLR 399 at 419.

otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation. The integration must be of a type that plausibly would generate procompetitive benefits cognizable under the {G-1700} efficiencies analysis set forth in Section 3.36 below. Such procompetitive benefits may enhance the participants' ability or incentives to compete and thus may offset an agreement's anticompetitive tendencies. *See* Examples 5 through 7.

An agreement may be "reasonably necessary" without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary. In making this assessment, except in unusual circumstances, the Agencies consider whether practical, significantly less restrictive means were reasonably available when the agreement was entered into, but do not search for a theoretically less restrictive alternative that was not practical given the business realities.

Before accepting a claim that an agreement is reasonably necessary to achieve procompetitive benefits from an integration of economic activity, the Agencies undertake a limited factual inquiry to evaluate the claim. Such an inquiry may reveal that efficiencies from an agreement that are possible in theory are not plausible in the context of the particular collaboration. Some claims—such as those premised on the notion that competition itself is unreasonable—are insufficient as a matter of law, and others may be implausible on their face. In any case, labeling an arrangement a "joint venture" will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative."

See also DOJ/FTC, *Statements of Antitrust Enforcement Policy in Health Care* (1996), Policy Statement 8, Statement of Department of Justice and Federal Trade Commission Enforcement on Physician Network Ventures.

5.3.1.3 Possible arguments that there is no problem because a JV Ultra-Light will not have the elements required for a joint venture exception under ss 44ZZRO and 44ZZRP

Will the courts exclude JV Ultra-Lights from the application of ss 44ZZRO and 44ZZRP by adopting a purposive interpretation of the words "for the purposes of a joint venture?" For example, will they interpret these words as meaning: "solely for the purposes of a joint

venture”; “for the purposes of a joint venture and for the dominant purpose of improving goods or services”; or “for the purposes of a joint venture and not for the dominant purpose of lessening competition between the parties to the joint venture?” Perhaps, but this is uncertain and the uncertainty needs to be resolved.

The Explanatory Memorandum for the Trade Practices Legislation Amendment Bill 2004 is the major extrinsic material available on the meaning of “for the purposes of a joint venture” in ss 76C and 76D. The 2004 Explanatory Memorandum says this:

“[g]enuine joint venture activity which does not substantially lessen competition will be a defence under these provisions.”³²

“[showing the existence of a “joint venture”] will ordinarily require the parties to provide evidence that the activity in question is separable from the activities they are individually engaged in and evidence of each party’s contribution to that activity, for example, the capital or skill.”³³

“if the only activity being carried on jointly by the parties is the activity of making, or giving effect to, a contract arrangement or understanding containing an exclusionary provision or other illegal provision, then the provision in question cannot be for the purposes of a joint venture”.³⁴

These statements of legislative intention should not be taken to mean “solely for the purposes of a joint venture.” Joint venture provisions that fix or control prices or restrict supply typically have many substantial legitimate purposes not all of which are for solely for the purposes of the joint venture. For example, R&D joint venture arrangements usually contain restrictions that give exclusive or preferential rights to the joint venture parties. Such restrictions will often be cartel provisions as defined in the Bill under s 44ZZRD or exclusionary provisions as defined in s 4D and those provisions typically will be for the purposes of the joint venture and the purposes of each of the parties to the joint venture. Few corporations want to participate in joint ventures unless to do so will be in their rational self-interest, ie for the purpose of maximising profit for their own shareholders.

The 2004 Explanatory Memorandum does deal with the situation where a price fixing or exclusionary provision is solely for the purpose of an activity other than a joint venture activity. However, the Explanatory Memorandum does not address situations where, as in the case of JV Ultra-Lights, one substantial purpose is to further a joint venture and thereby achieve

³² Para 1.10.

³³ Para 5.283.

³⁴ Para 5.284.

efficiencies, but a dominant further purpose is to lessen competition between the parties to the joint venture. The wording “for the purposes of a joint venture” and the explanation given in the 2004 Explanatory Memorandum is ambiguous in such cases. Under the canon of statutory construction that ambiguity in penal statutes is to be resolved in favour of defendants,³⁵ the ambiguity might be resolved by taking the wording “for the purposes of a joint venture” to mean: “for the purposes of a joint venture and not solely for the purpose of lessening competition between the parties.” On that interpretation JV Ultra-Lights would be able to rely on a joint venture exception.

The Explanatory Memorandum for the Bill (see at pp 60-61) does not seek to resolve the ambiguity of the wording “for the purposes of a joint venture.” The wording needs to be clarified; see section 5.3.5 below.

5.3.1.4 Possible arguments that there is no problem even if a JV Ultra-Light can make out a joint venture exception under ss 44ZZRO and 44ZZRP

The ACCC will be able to take enforcement action on the basis of the existing prohibition against exclusionary provisions under s 45(2)(a)(i) or (b)(i) and can thereby put JV Ultra-Lights to proof under s 76C that the exclusionary provisions did not have the purpose or likely effect of substantially lessening competition in a market. However, why should ss 44ZZRO and 44ZZRP allow competitors to by-pass the new criminal and civil per se prohibitions under the Bill by using a JV Ultra-Light?

It is unpersuasive to contend that JV Ultra-Lights are subject to the general prohibition under s 45 against agreements that have the purpose, effect or likely effect of substantially lessening competition in a market. First, serious cartel conduct may not necessarily substantially lessen competition in a market. Secondly, it would be a waste of limited enforcement resources to put the ACCC to proof of anti-competitive effects in cases where competitors have used a JV Ultra-Light for the dominant purpose of evading per se liability.

5.3.1.5 Solutions to the problem of JV Ultra-Lights

Part of the solution to the problem of JV Ultra-Lights in the context of the civil penalty prohibitions under s 44ZZRJ and 44ZZRK is to amend s 44ZZRP to include a competition test parallel to that under s 76C. It is difficult to understand why s 44ZZRP does not include a

³⁵ *Murphy v Farmer* (1988) 165 CLR 19; *Chew v The Queen* (1992) 7 ACSR 481; *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J); *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, 145 (Mason, Deane and Dawson JJ); *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826, [45]-[48].

competition test based on the s 76C model. Although a competition test would be unworkable in the context of jury trials for the cartel offences (a policy position reflected by s 44ZZRO), a competition test is workable in civil cases under Part IV where there is no trial by jury.

Another solution is to clarify the meaning of the requirement under ss 44ZZRO and 44ZZRP and s 76C that a provision be “for the purposes of a joint venture”. One possibility would be to provide that a provision is “for the purposes of a joint venture” if and only if the “dominant purpose” of the provision is to further a “pro-competitive activity of a joint venture”. The “dominant purpose” test is akin to that under s 45DD(2) and (3) (as recently applied in *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2008] FCAFC 156) and is meant specifically to exclude JV Ultra-Lights from the application of the joint venture exceptions in ss 44ZZRO and 44ZZRP. A “pro-competitive activity of a joint venture” is an activity that is:

- (a) undertaken jointly by the parties to the joint venture; and
- (b) directed towards :
 - (i) reducing the cost or improving the quality, design or functionality of goods or services to be produced, supplied or acquired by the joint venture; or
 - (ii) increasing the quantity of the goods or services to be produced, supplied or acquired by the joint venture.

5.3.2 Undue narrowness - the new joint venture exceptions are limited to a cartel provision contained in a contract

The new joint venture exceptions are limited to a cartel provision contained in a *contract* – they do not apply to a cartel provision contained in an arrangement or understanding.

Legitimate joint venture arrangements may be arrived at outside a contract, as in the situation where an understanding short of a binding contractual agreement is arrived at as a prelude to drawing up and executing a contract. Another typical situation is that where an initial joint venture under a contract is later implemented by arrangements between the parties on an informal but legitimate basis.

It is difficult to understand the reason for introducing any limitation in ss 44ZZRO and 44ZZRP of the Bill requiring the cartel provision to be in a contract. There is no such limitation in ss

76C and 76D or in s 44ZZRO of the Exposure Draft Bill released in January 2008. Nor is the need for any such limitation explained in the Explanatory Memorandum (see at pp 60-61).

Sections 44ZZRO and 44ZZRP should be amended by extending the wording to cover cartel provisions in arrangements or understandings as well as those in contracts.

5.3.3 Arbitrary and economically unprincipled requirement that the joint venture be “for the production and/or supply of goods or services”

The joint venture exceptions in ss 44ZZRO and 44ZZRP require the joint venture to be “for the production and/or supply of goods or services”. This is a hangover from the old s 45A(2) that was repealed when ss 76C and 76D were enacted. The requirement is arbitrary and economically unprincipled.

The Dawson Committee recommended that s 45A(2) be repealed and replaced by a defence of the kind later enacted in s 76D.³⁶ One of the main reasons for that recommendation was the undue narrowness of the exemptions under s 45A(2) and in particular the undue narrowness of the requirement of joint supply or joint production.

In some situations it will be possible to work around the joint production and supply limitation. For example, joint ventures for the acquisition of goods or services will rarely be solely for the objective of acquisition. Typically, they will also be for producing or supplying services (eg administrative services for the collective acquisition of goods or services; management services for a joint R&D or industry data-gathering project). The existence of this avenue of escape in some but not all situations highlights the arbitrariness of the limitation.

Sections 44ZZRO and 44ZZRP should be amended by revising the wording “for the production and/or supply of goods or services” to read: “for the production, supply and/or acquisition of goods or services”.

5.3.4 Unjustified differences between the joint venture exceptions under ss 44ZZRO and 44ZZRP and the s 76C defence that will continue to apply to the civil penalty prohibition against exclusionary provisions

The Bill preserves the prohibition against exclusionary provisions as well as introducing new civil penalty prohibitions that, with minor changes, would cover the same ground.³⁷ This approach is unnecessarily complex; see section 2 of this submission. However, if the existing

³⁶ *Review of the Competition Provisions of the Trade Practices Act* (2003) 141.

³⁷ The main change needed would be to extend s 44ZZRD(3)(a) to cover the acquisition as well as the supply of goods or services.

prohibition against exclusionary provisions is to remain, the joint venture defence that applies to exclusionary provisions should be consistent with the joint venture provisions that apply to the new civil penalty prohibitions under ss 44ZZRJ and 44ZZRK. There are several major differences between s 76C and ss 44ZZRP, most notably the absence of a competition test under s 44ZZRP and the imposition of a persuasive burden of proof on a defendant under s 76C but not under s 44ZZRP.

Where the cartel conduct involves an exclusionary provision that is for the purpose of restricting the supply of goods or services, the conduct will be subject to both the prohibition against exclusionary provisions and the new civil prohibitions that relate to cartel provisions. It may be pot luck whether a defendant will be charged with a breach of the prohibition against exclusionary provisions or a breach of the new prohibition against restriction of output or allocation of customers. It is also possible that a defendant may be charged with breaching both s 45(2) and s 44ZZRJ or s 44ZZRK, in which event pleadings, preparation for trial and trial will be complicated by the need to deal with two different avenues for denying liability (ie the defence under s 76C and the exception under s 44ZZRP).

There is no apparent policy reason for having more than one joint venture defence or exception that applies to all the per se civil prohibitions against cartel conduct. On the contrary, the principles of equal application of law, consistent regulation, certainty and efficiency require that like cases be treated alike.

Sections 44ZZRJ and 44ZZRK should be amended to include a competition test parallel to that under s 76C (see section 5.3.1.5 of this submission). Section 44ZZRD(3) should be amended to incorporate the definition of an exclusionary provision under s 4D and s 4D and s 76C should be repealed.

5.3.5 Uncertainty – the obscurity of “for the purposes of a joint venture”

The wording “for the purposes of a joint venture” in ss 76C and 76D is uncertain and an ongoing source of frustration in Australian commerce. The same wording is used in ss 44ZZRO(1)(a) and 44ZZRP(1)(a) of the Bill.

5.3.5.1 Obscurities in the wording “for the purposes of a joint venture”

The following obscurities persist:

- (1) It is unclear whether the word “purposes” imports a subjective or objective test as to the objectives of the joint venture.

- (2) The wording “for the purposes” requires that the provision be related to the purposes of the joint venture but the requisite relationship is unclear. The possible interpretations include:³⁸
- (a) it is sufficient that the provision is in furtherance of the joint venture;
 - (b) the defendant must have believed that the provision was necessary to achieve the purposes of the joint venture;
 - (c) the defendant must have believed on reasonable grounds that the provision was necessary to achieve the purposes of the joint venture;
 - (d) viewed objectively (ie not from the standpoint of anyone’s intentions or beliefs), the provision was reasonably necessary to achieve the purposes of the joint venture.
- (3) Does the wording “for the purposes” mean that the provision must be *solely* for the legitimate purposes of the joint venture?³⁹ Is it sufficient that the provision is *predominantly* for the purposes of the joint venture? Or is it sufficient that the provision is *substantially* for the purposes of the joint venture? If the reference to “purposes” attracts the application of s 4F(1)(a)⁴⁰ it is sufficient that the provision is substantially for the purposes of the joint venture. If so, it is irrelevant whether or not the provision has other substantial purposes even if one substantial purpose is to lessen competition between the parties. Non-compete clauses are often necessary for many joint ventures, and one substantial purpose of such clauses is of course to lessen competition between the joint venture parties.

³⁸ See further B Fisse ‘The Joint Venture Defences under Sections 76C and 76D of the Trade Practices Act’, 15 May 2008, s 3.2, at www.brentfisse.com/publications.html.

³⁹ S Corones, *Competition Law in Australia* (4th ed) 302 suggests that the requirement of a provision “for the purposes of a joint venture” means a provision that the parties to the joint venture would not have entered into the joint venture without. However, with respect, that does not seem correct: price fixers bent on using a joint venture as a sham to cloak price fixing would not enter into the joint venture without a price fixing provision.

⁴⁰ It might possibly be argued that the reference to “purposes” means that the provision must relate solely to the purposes of the joint venture. However, that interpretation seems untenable given that joint venture provisions that fix or control prices or restrict supply typically have many substantial legitimate purposes not all of which are for solely for the purposes of the joint venture. For example, R&D joint venture arrangements usually contain restrictions that give exclusive or preferential rights to the joint venture parties. Such restrictions will often be cartel provisions as defined in the s 44ZZRD of the Bill or exclusionary provisions as defined in s 4D and those provisions typically will be the purposes of the joint venture and the purposes of each of the parties to the joint venture.

- (4) Whose “purposes” and whose belief about the relationship between a provision and those purposes are relevant? All parties to the joint venture? All parties to the joint venture who are “responsible for introducing the provision” (compare *Seven Network Limited v News Limited* [2007] FCA 1062 at [2402] ff)? Only the defendant who is seeking to rely on the joint venture defence or exception?⁴¹ The last possibility is perhaps the most sensible of these possibilities but the question has yet to be tested let alone settled.

ACCC guidelines on ss 76C and 76D may have helped on these questions (although such guidelines would not have binding legal effect). The Dawson Committee Report (2003) recommended that the ACCC publish guidelines.⁴² They have never emerged.

5.3.5.2 Resolving the uncertainty of the wording “for the purposes of a joint venture”

The uncertainty of the wording “for the purposes of a joint venture” discussed in section 5.3.5.1 should be resolved.

Proposal: amend ss 44ZZRO and 44ZZRP and s 76C to provide that:

- “for the purposes” means in furtherance of the objective purposes of the joint venture;
- a provision is “for the purposes of a joint venture” if and only if the “dominant purpose” of the provision is to further a “pro-competitive activity of a joint venture” – see section 5.3.1.5 of this submission; and
- the dominant purpose of a provision is to be determined on the basis of the purpose of the defendant who seeks to rely on the joint venture exception under s 44ZZRO or s 44ZZRP or the joint venture defence under s 76C.

5.4 Conclusion as regards the joint venture provisions in the Bill

The joint venture provisions in the Bill are unsatisfactory in five main respects. Their merits and demerits have never been canvassed in any discussion paper released by the government. The provisions depart from the approach recommended by the Dawson Committee and later adopted in ss 76C and 76D. No justification for the changes is given in the Explanatory

⁴¹ A requirement that the requisite intention and belief be entertained by all parties to the joint venture or even all persons “responsible for introducing” the provision, would be very demanding and arguably too stringent.

⁴² *Review of the Competition Provisions of the Trade Practices Act* (2003) 142.

Memorandum or elsewhere. For example, a competition test would be unworkable in the context of jury trials for the new cartel offences, but that consideration does not warrant removal of the competition test in the joint venture exception under s 44ZZRP for civil penalty proceedings.

Various amendments to the Bill are advisable. Proposed amendments are set out in sections 5.3.1-5.3.5 above.

6. CONCLUSION

The Bill should not be passed by the Senate until the problems discussed in this submission have been resolved by amendments of the kind proposed in sections 2-5 above and as summarised in the Executive Summary.

If enacted in their present form, the provisions of the Bill discussed in this submission will impose unjustified restraints on legitimate business by companies large or small. They will cause unnecessary uncertainty. They will frustrate enforcement by the ACCC and action for civil remedies by plaintiffs. They will also erode support for the legislation. Amendments can readily be made to improve the Bill and to avoid those unwanted outcomes.

ATTACHMENT 1

Brent Fisse – Relevant Experience

Brent Fisse has extensive experience in trade practices and competition law. He has acted for large and small corporations in a wide range of industries including information technology, health, telecommunications, transport, music, financial services, and publishing and broadcasting. He has also acted for several regulatory agencies.

Brent became a partner of Gilbert + Tobin in 1995, after acting for the firm for two years as a consultant and after being a professor of law at the University of Sydney from 1985-1995. At Gilbert + Tobin he practised mainly in trade practices and competition law and telecommunications regulation, often for Optus against Telstra in the mid-to-late 1990s. With Greg Corrigan of Tankstream Systems, he developed online trade practices compliance training programs for over 60 Australian companies. Since retiring from Gilbert + Tobin in 2004, Brent has run a specialist trade practices advisory practice. He teaches post graduate courses on competition law and policy at the University of Melbourne and La Trobe University and is an associate of the Parsons Centre, University of Sydney.

In 1995 Brent advised the ACCC on non-monetary sanctions against corporations, in the form of draft legislative proposals and a commentary on corporate probation and community service orders. More recently, he has advised the Commerce Commission of NZ in price fixing and other matters.

Brent has assisted in the work of various law reform agencies, including: the SA Penal Methods Reform Committee 1973-1974 (consultant); the ALRC (Powers of Criminal Investigation 1974 (consultant); Compliance with the Trade Practices Act 1994 (Commissioner part-time); Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation 2002) (member, Advisory Committee)); and the NSW Law Reform Commission (part-time Commissioner 1990-1997). He acted as a consultant to the Attorney-General's Department in 1974-1975 (Federal Criminal Code project), and as a member of the drafting committee for AS 3806 Compliance Programs in 1997-1998 and 2005-2006.

Relevant publications and papers include: *Corporations, Crime and Accountability* (with John Braithwaite, 1993); *The Impact of Publicity on Corporate Offenders* (with John Braithwaite, 1983); *Howard's Criminal Law* (5th ed, 1989); *Securities Regulation in Australia and New Zealand* (co-editor 1st & 2nd eds with Gordon Walker and Ian Ramsay); "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1983) 56 Southern California Law Review 1145; "The Australian Cartel Offence: Dishonesty?" (2007) 35 ABLR 235; "The Australian Cartel Criminalisation Proposals: An Overview and Critique" (2007) 4 Competition LR 51; "The Joint Venture Defences under Sections 76C and 76D of the Trade Practices Act", 15 May 2008, available at www.brentfisse.com/publications.html, published in P Joseph & M Chetwin, *Joint Venture Law* (2008) 57; "Defining the Australian Cartel Offences: Disaster Recovery" (Competition Law Conference, Sydney, 24 May 2008) available at http://www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf; Caron Beaton Wells & Brent Fisse, "Criminalising Serious Cartel Conduct: Issues of Law and Policy" (2008) 36 ABLR 166; Beaton-Wells & Fisse, "The Australian Criminal Cartel Regime: A Model for New Zealand?" (NZ Competition Law and Policy Institute workshop, 2 August 2008, copy available on request); Beaton-Wells & Fisse, "Criminal Cartels: Individual

Liability and Sentencing" (6th Annual University of South Australia Trade Practices Workshop, 18 October 2008, copy available on request).

Brent is a member of the Law Council of Australia's Trade Practices Committee and the American Bar Association Antitrust Section.