



## Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

Paula Pyburne  
Law and Bills Digest Section

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## Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

**Date introduced:** 3 December 2008

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** Sections 1–3 on the day of Royal Assent; Items 50 and 51 of Schedule 2 on the day after Royal Assent; all other provisions on the 28<sup>th</sup> day after Royal Assent.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The purpose of the Bill is to amend the *Trade Practices Act 1974* (TPA) to provide for criminal penalties for cartel behaviour.

### Background

What is cartel conduct?

Generally speaking, a cartel is an anticompetitive arrangement between two or more businesses.<sup>1</sup>

The Organisation for Economic Co-operation and Development (OECD) defines ‘hard-core’ cartel conduct more narrowly as:

‘... an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.’<sup>2</sup>

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1. Australian Competition and Consumer Commission website at: <http://www.accc.gov.au/content/index.phtml/itemId/694995> accessed on 29 January 2009.
  2. OECD Council 1998, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*. Adopted by the Council at its 921<sup>st</sup> session on 25 March 1998. See: <http://www.oecd.org/dataoecd/39/4/2350130.pdf> accessed 8 January 2009.

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Currently, Part IV of the TPA relates to restrictive trade practices. Although it does not specifically use the word ‘cartel’ it already contains provisions spread across a number of sections which regulate anti-competitive conduct between two or more businesses. It does this by dividing the conduct into one of two categories, being:

- conduct which is, of itself (referred to as *per se*) regarded as anti-competitive. This conduct is prohibited, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition. The rationale behind a *per se* prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry<sup>3</sup> and
- other conduct which is subject to a competition test.

The TPA does not, in its current form, contain criminal penalties for cartel conduct.

### Dawson Report

The *Review of Competition Provisions of the Trade Practices Act* by the Trade Practices Act Review Committee, chaired by Sir Daryl Dawson (known as the Dawson report) was released in April 2003. The Trade Practices Act Review Committee stated that

despite the problems associated with the introduction of criminal sanctions ... there should be criminal sanctions for serious cartel behaviour... a satisfactory definition of serious cartel behaviour needs to be developed and there needs to be a workable method of combining a clear and certain leniency policy with a criminal regime.<sup>4</sup>

In response, on 2 February 2005 the former Treasurer, the Hon. Peter Costello announced his intention that the Government would amend the TPA to introduce criminal penalties for serious cartel conduct.<sup>5</sup>

Subsequently, a joint media statement advised that the proposed Trade Practices Amendment (Cartel Conduct) Bill 2005 was being prepared.<sup>6</sup> However, the Bill was never introduced.

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3. The *per se* prohibitions in Part IV of the TPA are those relating to exclusionary conduct in subsection 45(2), price fixing in section 45A, exclusive dealing known as ‘third line forcing’ in subsections 47(6) and (7) and resale price maintenance in section 48.

4. Trade Practices Act Review Committee, *Review of Competition Provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, January 2003, p. 162. See: <http://tpareview.treasury.gov.au/content/report.asp> accessed on 8 January 2009.

5. The Hon. Peter Costello, ‘*Criminal Penalties for Serious Cartel Behaviour*’, media release no. 004, Canberra, 2 February 2005. See: <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2005/004.htm&min=phc> accessed on 8 January 2009.

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In a door stop interview on 9 October 2007, the then Prime Minister, the Hon. John Howard stated that the coalition would continue to examine the strength of the trade practices law and make further changes if they were needed. However he stated that he would not make any commitment beyond that.<sup>7</sup>

### The Visy case

The absence of a criminal sanction for cartel behaviour was most notable in the [Visy](#) case<sup>8</sup> which related to price fixing. The cartel came to light following a request from Amcor to the Australian Competition and Consumer Commission (ACCC) for immunity from prosecution. Following disclosure of the existence of the cartel, the ACCC brought an action in the Federal Court alleging that between January 2000 and October 2004, companies in the Visy Group, and certain officers of those companies, engaged in price fixing and market sharing with companies in the Amcor Group, contrary to section 45 of the TPA.

On 2 November 2007, the Federal Court found that Visy, a listed Australian manufacturer of packaging, had committed 69 contraventions of the TPA. In his judgment, Justice Heerey was critical of the cartel, stating:

Had it not been accidentally exposed, it would probably still be flourishing. It was run from the highest level in Visy ... It was carefully and deliberately concealed. It was operated by men who were fully aware of its seriously unlawful nature.<sup>9</sup>

The Court fined the Visy group of companies \$36 million including separate pecuniary penalties for the former chief executive and the former general manager.

### Basis of policy commitment

On 11 January 2008, Treasury issued a [discussion paper](#) to serve as a basis for consulting stakeholders. As part of the consultation process, input was also sought about:

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6. The Hon. Peter Costello and the Hon. Fran Bailey, '[Government progressing trade practices reforms](#)', joint media statement no. 013. See: <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2005/013.htm&min=phc> accessed on 8 January 2009.
  7. The Hon. John Howard, '[Transcript of doorstep interview](#)', Tenix, Williamstown, 9 October 2007. See: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FA2KO6%22> accessed on 8 January 2009.
  8. [Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited](#) (No. 3) [2007] FCA 1617 (2 November 2007).
  9. *ibid.*, paragraph 315. See also Leonie Wood, '[Pratt knew conduct was illegal: judge](#)', *Age*, 3 November 2007, p. 1.

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- how to distinguish the criminal prohibitions from the civil prohibitions, and
- whether telephone interception warrants should be available in relation to the new criminal cartel offences.

In addition, Treasury issued an [exposure draft](#) of the Bill for public comment.

Following the consultation process, and the receipt of numerous [submissions](#) in response to the exposure draft, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon. Chris Bowen announced a package of measures providing criminal sanctions for serious cartel conduct. In announcing the measures he stated that:

Cartel conduct harms consumers, businesses and the economy; that is, by companies fixing prices or reducing choice or distorting the ordinary processes of competition.

The final bill includes a maximum 10-year jail term for individuals who partake in cartel conduct.

The possibility of criminal sanctions for company executives will increase the deterrent effect for businesses that may otherwise rationalise corporate fines for cartel conduct as the 'cost' of doing such business.<sup>10</sup>

### Response to submissions

A number of significant issues which were raised in the submissions to Treasury in response to the exposure draft of the legislation were addressed in the drafting of this Bill. Most notable is the removal of the requirement that the criminal cartel offence is dependent upon an intention of 'dishonestly' obtaining a benefit.

According to the submission by the Law Council of Australia:

The dishonesty test proposed in the exposure draft emerged from the common law in the United Kingdom. In *Feely*<sup>11</sup> the Court of Appeal considered that, as dishonesty is an ordinary word in the English language, the jury, not the judge, should determine whether the defendant's conduct was dishonest according 'to the current standards of ordinary, decent people'.

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10. The Hon. Chris Bowen, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, '[Rudd Government to Introduce Legislation Criminalising Cartels](#)', media release no. 87, Canberra, 27 October 2008. See: <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/087.htm&pageID=003&min=ceb&Year=&DocType=> accessed 8 January 2009.
  11. [1973] QB 530.

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The Court of Appeal in *Ghosh*<sup>12</sup> modified this formulation so that the test contains both objective and subjective aspects.<sup>13</sup>

The main criticism of the ‘dishonesty’ test is that it requires a jury to make a moral assessment by putting themselves in the position of a hypothetical ordinary person and assessing whether, according to the standards of ordinary people, the relevant conduct was dishonest. In addition, the test requires the jury to assess whether the defendant knew that his or her acts were dishonest according to the standards of ordinary people. This moral assessment has the potential to result in inconsistent outcomes.<sup>14</sup>

## Committee consideration

The provisions of the Bill have been referred to the Senate Economics Committee for inquiry and report by 20 February 2009. Details of the inquiry are at its webpage.<sup>15</sup>

At the time of preparing this digest, many of the submissions to the Senate Economics Committee related to the joint venture provisions of the Bill. A discussion of joint ventures is located in the Key Issues part of this Digest.

## Financial implications

According to the Explanatory Memorandum, the Bill has no significant impact on Commonwealth expenditure or revenue.<sup>16</sup>

## Key issues

### ACCC immunity policy and the memorandum of understanding

Described as a revolution in anti-cartel enforcement, the policy of offering immunity from proceedings to the first eligible cartel member to fulfil the policy’s conditions is seen by regulators world-wide as the most effective means of detecting, investigating and prosecuting cartel activity. The ACCC Chairman Graeme Samuel has described the ACCC Immunity Policy as ‘absolutely vital’ in the commission’s efforts to crack

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12. [1982] 3 WLR 110.

13. Law Council of Australia Trade Practices Committee of the Business Law Section, *Submission to the Treasury on the Criminalisation of Cartels*, 5 March 2008, p. 15.

14. Clayton Utz Lawyers, ‘*Submission to the Treasury: Exposure Draft Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*’, 7 March 2008, p. 5.

15. See: [http://www.aph.gov.au/Senate/committee/economics\\_ctte/tpa\\_cartels\\_09/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_cartels_09/index.htm) accessed on 8 January 2009.

16. Explanatory Memorandum, p. 7.

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cartels and has credited it with exposing potential cases at the rate of about one a month.<sup>17</sup>

The existing ACCC [immunity policy](#) applies only to civil cartel contraventions. When the Competition and Consumer Policy Division of the Department of Treasury published its discussion paper and draft legislation in January 2008, a [draft copy](#) of a Memorandum of Understanding (MOU) between the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Director of Public Prosecutions (DPP) was also published.

The purpose of the MOU is to facilitate arrangements between the ACCC and DPP in relation to the proposed criminal offences. Essentially, the MOU sets out the responsibilities of the ACCC and the DPP in criminal cartel matters in order to reconcile the differences between the ACCC immunity policy and the existing [DPP prosecution policy](#). For example, ‘the immunity policy and the prosecution policy contain different eligibility criteria for immunity and reflect fundamentally different approaches to when immunity should be granted’.<sup>18</sup>

A [final version of the MOU](#) has now been published. It provides that the ACCC will manage the immunity process for criminal cartel conduct in consultation with the DPP. As the MOU is not a legislative instrument, its content is beyond the scope of this Bills Digest.

### Application of the Extradition Act

The *Extradition Act 1988* (the Extradition Act) provides for the extradition of persons from ‘extradition countries’. An ‘**extradition country**’ includes a country which is prescribed as such by regulations (following the making of an extradition treaty).<sup>19</sup> A valid extradition application would need to satisfy a court that, amongst other things, the conduct is an offence in the overseas jurisdiction **and** in Australia.<sup>20</sup> The offence created by the Bill will be an ‘extradition offence’ and will therefore allow persons to be extradited from Australia to a foreign country for criminal cartel conduct.

According to the Law Council of Australia:

It is important to appreciate that conduct which will under the Bill amount to criminal cartel conduct may already be a criminal offence which is punishable by at least 12

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17. Caron Beaton-Wells, ‘[Forks in the road: Challenges facing the ACCC’s immunity policy for cartel conduct: Part 1](#)’, *Competition and Consumer Law Journal*, Vol. 16, No. 1, August 2008, pp. 71–113, at p. 73.
  18. Clayton Utz Lawyers, op. cit., p. 7.
  19. Section 11, Extradition Act 1988.
  20. Paragraph 7(d), subsection 16(2) and paragraph 19(2)(c) of the *Extradition Act 1988* apply.

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months imprisonment under Australia's general criminal laws and therefore an 'extradition offence'. To the extent to which this is the case, the Bill does not change the extradition status of that conduct.<sup>21</sup>

Clearly, there is already a capacity to extradite Australian citizens for criminal matters such as fraud. However, the position of the United States should be noted:

The United States has tried hard to raise the stakes for foreign executives residing outside of the United States. Thus, as part of the plea bargains in the Vitamins cartel cases, three Swiss executives of one company and three German executives of another leading company agreed to serve short sentences in U.S. penitentiaries. More recently, a Japanese executive agreed to face a possible jail sentence in the United States. There are apparently a number of other foreign executives who have been sentenced to jail for Sherman Act violations and are now fugitives hiding abroad.<sup>22</sup>

Once the criminal cartel provisions are enacted in Australia, it may be that the United States more actively pursues the extradition of Australia citizens for alleged criminal activities in that country. Furthermore, the application of the Extradition Act may be enhanced by the operation of section 155AAA of the TPA.

Essentially, section 155 of the TPA provides that 'where the ACCC has reason to believe that a person is capable of furnishing information relating to a potential breach of the TPA, it may compel the production of information or documents, or attendance to give evidence'.<sup>23</sup> This Bill additionally provides for '*protected cartel information*', defined in **proposed subsection 157B(7)** as information that was given to the ACCC in confidence and relates to a breach, or a possible breach of the cartel provisions.

Section 155AAA was introduced by the *Corporations (New Zealand Closer Economic Relations) and Other Legislation Amendment Act 2007*. In particular, subsection 155AAA(12) provides that the ACCC may provide information that it has been given in confidence or obtained by use of compulsory powers to a foreign government agency in connection with the performance of that agency's functions.

That being the case, it is possible that the ACCC may be requested to provide a foreign government that is investigating cartel conduct in its own jurisdiction, with information

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21. Law Council of Australia Trade Practices Committee of the Business Law Section, [Submission to the Treasury on the Criminalisation of Cartels](#), 5 March 2008, paragraph 278, p. 73.

22. Donald Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-rigging', *George Washington Law Review*, Vol. 69 October/December, 2001, pp. 693-714 at p. 707.

23. Geoff Carter and Sarah Barker, '[Cartel law has an extremely long arm](#)', *Australian Financial Review*, 18 November 2008, p. 63.

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given to it, for example, by a third party in relation to alleged cartel conduct in Australia. The existence of that information may not be known to the person about whom it relates.

### Application of the Surveillance Devices Act

The *Surveillance Devices Act 2004* (Surveillance Devices Act) provides the statutory regime governing the use of surveillance devices by law enforcement officers investigating certain Commonwealth offences. Under section 6, a **surveillance device** includes listening, optical and tracking devices. Subsection 14(1) empowers a **law enforcement officer** to apply for the issue of a surveillance device warrant if it is suspected, on reasonable grounds, that:

- one or more **relevant offences** have been, are being, are about to be, or are likely to be, committed, and
- an investigation into those offences is being, will be, or is likely to be, conducted, and
- the use of a surveillance device is necessary in the course of that investigation for the purpose of enabling evidence to be obtained of the commission of the relevant offences or the identity or location of the offenders.

The amendments to the TPA proposed by this Bill would make a cartel offence a **relevant offence** under the Surveillance Devices Act.

Although the ACCC is not a **law enforcement officer** under the Surveillance Devices Act, the amendments in this Bill would allow the Australian Federal Police to obtain a surveillance device warrant to aid in the investigation of alleged cartel conduct by, for example, monitoring conversations between cartelists, and to communicate the information obtained under the warrant to the ACCC.

Further information about the operation of the Surveillance Devices Act is available in the relevant [Bills Digest](#).

### Telephone interception warrants

The proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (TIAA) will enable the ACCC to request the Australian Federal Police to obtain a telecommunications intercept warrant to investigate criminal cartel offences. The rationale for the amendments was elucidated in the submission to Treasury of the Law Council of Australia as follows:

Cartels are by their nature secretive. There are particular evidentiary difficulties with cartel offences as cartel participants generally seek to avoid documenting their arrangements, and endeavour to conceal cartel communications. Telecommunication systems (including the Internet) are an increasingly common and prevalent method of communication.

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Interception warrants, particularly used in conjunction with an informant, could be a useful resource in ongoing cartel offence investigations, in those cases where cartel communications are predominately made over telecommunications systems including in relation to the implementation phase.<sup>24</sup>

The amendment broadens the considerable investigatory powers already available to the ACCC under Part XID of the TPA.

Telecommunication intercepts record all communications through a relevant line. They record private personal communications, many of which involve individuals who are not involved in any criminal activity. This means that the benefits of gathering information in this way must be weighed against the potential breach of privacy of those individuals.<sup>25</sup>

### Joint ventures

Provisions in the current TPA

The provisions of the TPA which effect joint ventures are as follows:

- a joint venture can take one of two forms:
  - unincorporated ventures between two or more persons, whether corporations or not, carrying on activities in trade or commerce : paragraph 4J(a)(i) or
  - incorporated ventures carried on by two or more parties for a joint purpose with joint control or ownership: paragraph 4J(a)(ii).
- section 45A broadly provides that price fixing arrangements are illegal *per se*. It states that a provision of a contract, arrangement or understanding<sup>26</sup> (CAU) will be regarded as a price fixing provision if it has the purpose or likely effect of either:

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24. Law Council of Australia Trade Practices Committee of the Business Law Section, op. cit., paragraphs 89–90, p. 28.

25. Before issuing the warrant, subsections 46(2) and 46A(2) of the *Telecommunications (Interception and Access) Act 1979* require that consideration of how much the privacy of any person would be likely to be interfered with by the intercepting of communications, the gravity of the conduct constituting the offence being investigated, and how much the information gathered would be likely to assist in connection with the investigation of the offence.

26. In [Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd](#) [2007] FCA 794 (29 May 2007) Justice Grey, in explaining what is meant by the term ‘**understanding**’, stated at paragraph 37 that:

‘there can be no such thing as an understanding that leaves each party to it free to do whatever it wishes. Whatever word may be chosen to represent the essential element of an understanding for the purposes of the relevant statutory provisions, it is clear that element

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- fixing, controlling or maintaining the price of goods or services or providing for that to occur or
- fixing, controlling or maintaining any discount, allowance, rebate or credit in relation to goods or services or providing for that to occur.
- section 76D provides a defence to the prohibition against price fixing in section 45A if it can be established that the provision of the contract, arrangement or understanding:
  - is for the purposes of a joint venture and
  - does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

#### Effect of the Bill

The Bill contains amendments which will significantly alter the current position regarding joint ventures. **Item 21** of the Bill repeals section 45A. **Item 29** of the Bill repeals section 76D.

The Bill inserts **proposed sections 44ZZRO and 44ZZRP** which provide that the criminal offences and the civil penalty provisions respectively do not apply where a **contract** (but not an understanding or arrangement) containing a cartel provision is for the purposes of a joint venture and:

- the joint venture is for the production and/or supply of goods or services and
- for a joint venture under paragraph 4J(a)(i), the joint venture is carried on jointly by the parties to the contract or
- for a joint venture under paragraph 4J(a)(ii), the joint venture is carried on by a body corporate formed by the parties to the contract for the purpose of enabling those persons to carry on the activity jointly.

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involves the assumption of an obligation, unenforceable in any court of law but merely morally binding or binding in honour.’

And at paragraph 150:

... ‘for an arrangement to exist it must have had an origin. This could arise from a communication or it might be the case that a culture has developed among those engaged in a particular market, so that the recipient of a certain type of information will know that there is an expectation that he or she should act upon that information in a particular way.’

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## Content of submissions

Law Council of Australia<sup>27</sup> has outlined some of its concerns about the amendments as follows:

- the Bill limits joint venture exceptions to contracts rather than CAUs so that operational decisions by joint venturers, which are not enshrined in a contract, fall within the definition of a ‘cartel provision’,<sup>28</sup>
- proposed sections 44ZZRO and 44ZZRP only apply to joint ventures for the production and/or supply of goods or services. This definition is contrary to the wider definition of joint venture in section 4J which does not limit the activity of the joint venture beyond being for ‘trade or commerce’,<sup>29</sup>
- the inclusion of section 44ZZRP is unnecessary; and preferably the civil liability for cartel activity should be subject to the existing civil provisions under section 4J and 76C<sup>30</sup>
- the joint venture exceptions in proposed paragraphs 44ZZRO(1)(c) and 44ZZRP(1)(c) may not benefit third parties which enter into a contract with unincorporated joint venture parties to acquire output produced by the joint venture.<sup>31</sup>

## Comment

There has been some suggestion that the proposed amendments will undermine ‘the pro-competitive effects and benefits of joint venture arrangements’.<sup>32</sup> However the following comments are worthy of note:

The law regards each marketplace competitor as being responsible for its own pricing decisions. The result of each competitor making its own decision will deliver, so economic competition theory runs, the best market outcome. This is because each competitor will seek to maximise its profit and make such decisions as are necessary to achieve this end. Conduct which complies with this concept is not illegal. It is

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27. Law Council of Australia, *‘Submission to the Senate Economics Committee: Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’*, Canberra, 30 January 2009, p. 7. See also Ergon Energy, *‘Submission to the Senate Economics Committee: Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’*, Townsville, 20 January 2009, p. 1.
28. Law Council of Australia, op. cit.
29. *ibid.*
30. *ibid.*, p. 8. Section 76C provides a defence to proceedings relating to exclusory provisions in subsection 45(2) of the TPA.
31. *ibid.*, p. 8.
32. Ergon Energy, op. cit., p. 2.

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when competitors seek to subvert this concept by making arrangements between themselves on agreed outcomes that the law steps in.<sup>33</sup>

Whilst the defence against price-fixing by joint venturers will be repealed by the Bill,<sup>34</sup> section 88 of the TPA empowers the ACCC to authorise corporations to enter into, or give effect to CAUs even if they are anticompetitive, or engage in exclusive dealing conduct. **Item 64** of the Bill inserts proposed subsection 88(1A) which empowers the ACCC to authorise corporations to make a CAU which contains a cartel provision or give effect to a provision of a CAU which contains a cartel provision. Whilst that authorisation is in force, none of the parties to the CAU will be in breach of the cartel provisions.

Under the Bill it will fall to a joint venture to obtain an authorisation from the ACCC before entering into the relevant contract, rather than, after the event, proving that there is a defence to the conduct in court proceedings. Given the secretive nature of price fixing this would appear to be an intended outcome of the Bill.

## A quick guide to the criminal cartel provisions

Below is a simplified guide to the criminal cartel provisions which should be read in conjunction with the Main Provisions below.

1. The criminal cartel provisions only relate to conduct which is described as price fixing; restricting outputs in the production or supply chain; allocating customers, suppliers or territories or bid-rigging.<sup>35</sup>
2. Any other anti-competitive conduct which is already regulated by the TPA is not intended to be caught by the new provisions.
3. Even if a provision of a CAU relates to the above conduct it will not be a 'cartel provision' unless it also satisfies the 'purpose/effect condition' **or** the 'purpose condition' **and** the 'competition condition'.<sup>36</sup>

33. Warren Pengilly, 'The Law of Collusion: Aftermath of the Geelong petrol price-fixing case', *Law Society Journal*, December 2007, pp. 80–84, at p. 80.

34. By the repeal of section 76D of the TPA.

35. Proposed section 44ZZRA.

36. Proposed subsection 44ZZRD(1).

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4. There are two criminal offences – the making of a CAU which contains a cartel provision<sup>37</sup> and the giving effect to a cartel provision contained in a CAU<sup>38</sup> – these are the **physical** elements of the criminal offence.
5. A person will not be guilty of a criminal offence unless they **also** satisfy the **fault** element – that is, knowledge or belief that the relevant provision of a CAU was a ‘cartel provision’.<sup>39</sup>
6. Criminal liability applies to both corporations and natural persons.<sup>40</sup>
7. If a corporation is found guilty the Court may impose a financial penalty.<sup>41</sup> Obviously a corporation cannot be sent to jail.
8. If a natural person (and this includes a director or officer of a corporation) is found guilty they may be sentenced to a jail term of up to 10 years and/or be required to pay a financial penalty.<sup>42</sup> It is for the Court to decide the extent of the sentence depending on a number of factors such as the period of time over which the cartel conduct occurred, the amount of money involved and any mitigating factors.
9. The Courts are not obliged to impose a custodial sentence, and a sentence of less than 12 months may be converted to a fine.<sup>43</sup>
10. The criminal offences created by the Bill are indictable offences.<sup>44</sup> They will be determined in a jury trial.<sup>45</sup> The standard of proof is ‘beyond a reasonable doubt’.

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37. Proposed section 44ZZRF.

38. Proposed section 44ZZRG.

39. Proposed subsections 44ZZRF(2) and 44ZZRG(2).

40. Subsection 84(1) provides that the state of mind of a corporation can be the state of mind of an officer of the corporation.

41. Proposed subsections 44ZZRF(3) and 44ZZRG(3). It is important to note that a natural person can be charged under the criminal cartel provisions as an ‘accessory’ or in their own right.

42. Items 17 and 33 of the Bill.

43. Subsection 4B(2) of the *Crimes Act 1914* empowers the court to convert the custodial sentence to a pecuniary penalty, subject to a formula.

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## A quick guide to the civil penalty provisions

Below is a simplified guide to the civil penalty provisions which should be read in conjunction with the Main Provisions below.

1. The civil penalty provisions only relate to conduct which is described as price fixing; restricting outputs in the production or supply chain; allocating customers, suppliers or territories or bid-rigging.<sup>46</sup>
2. Any other anti-competitive conduct which is already regulated by the TPA is not intended to be caught by the new provisions.
3. Even if a provision of a CAU relates to the above conduct it will not be a 'cartel provision' unless it also satisfies the 'purpose/effect condition' **or** the 'purpose condition' **and** the 'competition condition'.<sup>47</sup>
4. There are two civil offences – the making of a CAU which contains a cartel provision<sup>48</sup> and the giving effect to a cartel provision contained in a CAU.<sup>49</sup>
5. A corporation or a natural person (including an officer of a corporation) may be guilty of a civil offence and be required to pay a financial penalty.
6. The financial penalties are set out in the Bill.<sup>50</sup>
7. The standard of proof for civil offences is 'on the balance of probabilities'.

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44. Subsections 44ZZRF(4) and 44ZZRG(5).

45. Section 80 of the Constitution.

46. Proposed section 44ZZRA.

47. Proposed subsection 44ZZRD(1).

48. Proposed section 44ZZRJ.

49. Proposed section 44ZZRK.

50. Proposed paragraph 76(1A)(aa).

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## Main provisions

### Proceeds of Crime Act 2002

Section 18 of the *Proceeds of Crime Act 2002* (PCA) provides that where persons are **suspected** of ‘serious offences’, any of their assets/property which are possibly connected with the offences can be frozen (restrained) by court order. This allows law enforcement agencies to investigate the alleged offences whilst minimising the possibility of evidence and assets being disposed of due to the suspects being alerted to the investigation.<sup>51</sup>

Where persons are subsequently **convicted** of ‘serious offences’, Part 2-3 of the PCA provides for the forfeiture of assets/property to the Commonwealth.

Section 338 of the PCA contains the dictionary of terms which are used in that Act. In particular, the dictionary contains the definition of the term ‘serious offence’. **Item 1** of Schedule 1 of the Bill inserts **proposed paragraph (ed)** which will expand the existing definition so that making a contract containing a cartel provision or giving effect to a cartel provision will be classified as a ‘serious offence’.

The effect of this amendment will be that **suspected** cartel behaviour will be caught by the terms of section 18 of the PCA. This means that, subject to certain procedural requirements, an order can be issued to restrain the disposing of, or dealing with, assets/property.

### Telecommunications (Interception and Access) Act 1979

The TIAA prohibits the ‘interception of a communication passing over a telecommunications system’ except in specified circumstances. One of those exceptions is that the interception is pursuant to a **warrant**: subsection 7(2)(b).

Warrants may be obtained in relation to:

- a particular identified telecommunications service – this is known as a ‘telecommunications service warrant’,<sup>52</sup> or
- any telecommunication service that is used or likely to be used by a named individual – this is known as a ‘named person warrant’.<sup>53</sup>

An application for an interception warrant can include a request that the warrant authorise entry on to specified premises.<sup>54</sup>

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51. A. Martyn ‘Proceeds of Crime Bill 2002, *Bills Digest* No. 180, 2001-02 p. 8.

52. Section 46 TIAA.

53. Section 46A TIAA.

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Interception warrants can be issued to aid the investigation of ‘serious offences’. **Item 2** of Schedule 1 of the Bill proposes to amend the TIAA to include ‘cartel offences’ in the existing definition of ‘serious offences’.

## Trade Practices Act 1974

### Introductory provisions

**Item 3** of Schedule 1 of the Bill proposes to insert a new definition of ‘*cartel provision*’ as set out in **proposed section 44ZZRD** into existing subsection 4(1) of the TPA.

Existing subsection 5(1) of the TPA confers limited extraterritorial operation by applying Parts IV (Restrictive Trade Practices), IVA (Unconscionable Conduct), V (Consumer Protection), VB (Price Exploitation in Relation to the New Tax System) and VC (Offences) of the TPA to conduct outside Australia. It applies where the party engaging in the conduct is an Australian citizen, a person ordinarily resident in Australia, an Australian incorporated entity or a body corporate carrying on a business in Australia. The reference to a ‘body corporate carrying on a business in Australia’ gives the provision a broad scope so that an overseas corporation which carries on business in Australia through a branch is included. **Item 4** repeals the existing subsection 5(1) and substitutes **proposed subsection 5(1)** which expands the extraterritorial operation of the TPA to include any other provisions in the TPA to the extent to which they relate to those parts. This means that the criminal cartel provisions will operate extraterritorially in the circumstances outlined above.

Existing subsection 5(4) provides that, where an application to the Court is proposed under subsections 87(1) or 87(1A) relating to conduct outside Australia, the consent of the Minister<sup>55</sup> or the Commission<sup>56</sup> is required before proceedings are instituted. **Item 5** amends subsection 5(4) so that the required consent may also be given by the Director of Public Prosecutions. This is consistent with the MOU between the ACCC and the DPP.

The TPA is based primarily on the corporations power in section 51(xx) of the *Commonwealth of Australia Constitution Act* (the Constitution). Existing subsection 6(2) provides an alternative based on the ‘trade and commerce’ power (section 51(i) of the Constitution) and the territories power (section 122 of the Constitution) in case the

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54. Section 48 TIAA.

55. Applying section 19A of the *Acts Interpretation Act 1901* a reference to ‘the Minister’ in the TPA is a reference to the Minister for Competition Policy and Consumer Affairs.

56. Section 4 of the TPA defines ‘*Commission*’ as the Australian Competition and Consumer Commission.

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corporations power is held to be insufficient for the purpose.<sup>57</sup> **Items 6–13** are consequential amendments to subsection 6(2) of the TPA.

**Item 14** inserts **proposed subsections 6(2C)–(2E)** which are machinery provisions intended to ensure the constitutional validity of the cartel provisions using the corporations power, the territories power and the postal, telegraphic, telephonic power (section 51(v) of the Constitution).

**Item 17** inserts **proposed subsections 6(5A) and 6(5B)**. Importantly **proposed subsection 6(5B)** provides that if a person, other than a body corporate is convicted of a criminal cartel offence, the offence is punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 2 000 penalty units **or both**.<sup>58</sup>

#### The cartel provisions

**Item 19** inserts a new Division 1 in Part IV of the TPA and contains **proposed sections 44ZZRA–44ZZRV**.

It should be stated at the outset that **item 41** of the Bill proposes to repeal existing subsection 84(1) of the TPA and insert **proposed subsection 84(1)**. The effect of the amendment is that where it is necessary to establish the state of mind of a body corporate in a prosecution or proceedings relating to a cartel provision then it is sufficient to show that:

- a director, employee or agent of the body corporate engaged in that conduct and
- the director, employee or agent was, in engaging in that conduct, acting within the scope of their actual or apparent authority and
- the director, employee or agent had that state of mind.

That being the case, a reference to a ‘corporation’ in the Bill will also apply to the directors, employees or agents of the corporation.

**Proposed section 44ZZRB** contains those definitions that are relevant to Division 1 of Part IV of the TPA. It should be noted that **proposed section 44ZZRE** provides that those definitions are to be disregarded in determining the meaning of an expression used in a provision of the TPA other than:

- Division 1 of Part IV (the cartel provisions inserted by **item 19** of this Bill)
- subsection 6(2C) (inserted by **item 14** of this Bill)

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57. Russell V Miller, *Miller’s Annotated Trade Practices Act: Australian Competition and Consumer Law*, 26<sup>th</sup> Edition, Thomson Law Book Company, Sydney, 2005, p. 138.

58. Section 4AA of the *Crimes Act 1914* provides that a ‘penalty unit’ is \$110.

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- paragraph 76(1A)(aa) (inserted by **item 23** of this Bill) or
- subsection 93AB(1A) (inserted by **item 71** of this Bill).

**Proposed section 44ZZRD** creates the ‘*cartel provisions*’. Under **proposed subsection 44ZZRD(1)** a provision of a CAU is a ‘cartel provision’ if two criteria are satisfied, being:

- it must meet the purpose/effect condition in **proposed subsection 44ZZRD(2)** or the purpose condition in **proposed subsection 44ZZRD(3)** and
- it must meet the competition condition set out in **proposed subsection 44ZZRD(4)**.

The purpose/effect condition

**Proposed subsection 44ZZRD(2)** is aimed at *price fixing* conduct. It provides that the purpose/effect condition is satisfied if the provision (of the CAU) has the *purpose*, or has or is likely<sup>59</sup> to have the *effect*, of directly or indirectly fixing, controlling or maintaining—or providing for the fixing, controlling or maintaining—of the price for, or a discount, allowance, rebate or credit in relation to goods or services which are:

- supplied or acquired by any or all of the parties to the CAU: **proposed paragraphs 44ZZRD(2)(c) and (d)**
- resupplied, or likely to be resupplied, where the goods and services were originally supplied by any or all of the parties to the CAU: **proposed paragraph 44ZZRD(2)(e)**
- likely to be resupplied where the goods and services were originally likely to be supplied by any or all of the parties to the CAU: **proposed paragraph 44ZZRD(2)(f)**.

A CAU will not be taken to satisfy the purpose test merely because it recommends or provides for the recommending of a price, discount, allowance, rebate or credit: **proposed subsection 44ZZRD(6)**.

The purpose condition

**Proposed subsection 44ZZRD(3)** is aimed at *output restrictions, market sharing or bid rigging* activity. It provides that the purpose condition is satisfied if the provision (in the contract, arrangement or understanding) has the purpose of directly or indirectly:

- preventing, restricting or limiting the production of goods, the capacity to supply services or the supply of goods and services: **proposed paragraph 44ZZRD(3)(a)**
- allocating between the parties to the CAU:

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59. ‘*Likely*’ is defined in **proposed section 44ZZRB** as including a possibility that is not remote.

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- the persons who have acquired (or are likely to acquire) or supplied (or are likely to supply) goods or services from the parties to the CAU: **proposed subparagraphs 44ZZRD(3)(b)(i) and (ii)**
- geographical areas in which goods or services are supplied (or likely to be supplied) or acquired (or likely to be acquired) to the parties of the CAU: **proposed subparagraphs 44ZZRD(3)(b)(iii) and (iv)**
- ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:
  - one or more parties to the CAU does bid, whilst one or more of the other parties to the CAU does not: **proposed subparagraph 44ZZRD(3)(c)(i)**
  - separate bids by two or more parties to the CAU are made on the basis that one is more likely to be more successful than the other: **proposed subparagraph 44ZZRD(3)(c)(ii)**
  - separate bids by two or more parties to the CAU are made on the basis but not all the bids are proceeded with: **proposed subparagraph 44ZZRD(3)(c)(iii)**
  - separate bids by two or more parties to the CAU are made but a material component of the bid is worked out in accordance with the CAU: **proposed subparagraph 44ZZRD(3)(c)(v).**

Other features of the ‘purpose/effect’ and the ‘purpose’ tests

Under **proposed subsection 44ZZRD(7)**, in determining whether a CAU meets the ‘purpose/effect test’ or the ‘purpose test’, it is immaterial whether the supply, acquisition or production contemplated by the CAU happens or the capacity contemplated by the CAU actually exists.

An aggregation principle<sup>60</sup> applies to demonstrate that a provision of a CAU meets the purpose/effect test: **proposed subsection 44ZZRD(8)**. This means that a provision may be aggregated with other provisions of a CAU, or with provisions of another CAU if there is at least one common party to both of the CAUs in question. A provision in similar terms relates to the purpose test: **proposed subsection 44ZZRD(9)**.

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60. This is consistent with existing subsections 45(4) and 45A(5) of the TPA.

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The competition condition

**Proposed subsection 44ZZRD(4)** provides that the competition condition<sup>61</sup> is satisfied if at least two of the *parties* to the CAU are, or are likely to be, in competition with each other in relation to the circumstances listed in **proposed paragraphs 44ZZRD(4)(c)–(j)**.

**Proposed section 44ZZRC** contains an extended meaning of the term *'party'*. Under the proposed provision if a body corporate is a party to a CAU then *each* body corporate related to that body corporate is taken to be a party to the CAU. According to the submission by Blake Dawson the proposed definition 'has the potential to significantly expand the scope of persons that could be liable for contraventions of the cartel prohibitions'.<sup>62</sup>

### Criminal Offences

**Proposed section 44ZZRF** provides for the first of the two criminal offences—that a corporation commits a criminal offence if it makes a CAU that contains a cartel provision.

The Note to **proposed subsection 44ZZRF(1)** states that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility. The Explanatory Memorandum explains those general principles as follows:

Subsection 3.1 of the Criminal Code provides that a criminal offence consists of *physical elements* and *fault elements*.

In relation to the physical elements, subsection 4.1(1) of the Criminal Code provides that a physical element of an offence may be conduct, or a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs...

In relation to the fault elements, subsection 5.1(1) of the Criminal Code provides that a fault element for a physical element may be intention, knowledge, recklessness or negligence...<sup>63</sup>

In the case of **proposed subsection 44ZZRF(1)** the physical element—that is, the requisite conduct—is the making of the CAU which contains the cartel provision. The fault element is knowledge or belief: **proposed subsection 44ZZRF(2)**. According to section 5.3 of the Criminal Code a person has *knowledge* of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

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61. According to the Explanatory Memorandum (at p. 18) 'the competition condition restricts the criminal and civil prohibitions to 'horizontal' conduct in relation to the production of the relevant goods or the supply or acquisition of the relevant goods or services.

62. Blake Dawson Lawyers, [Submission to the Treasury on the Criminalisation of Cartels](#), 7 March 2008, paragraph 3.7, p. 12.

63. Explanatory Memorandum, p. 30.

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**Proposed subsection 44ZZRF(3)** provides the penalties on conviction for the offence as a fine not exceeding the greater of the following:

- \$10 000 000
- three times the total value of benefits that have been obtained by one or more persons that are reasonably attributable to the commission of the offence, where the court can determine them
- if the court cannot determine the total value of the benefits above, then 10 percent of the corporation's annual turnover during the 12 month period ending at the end of the month in which the corporation committed, or began committing, the offence.

**Proposed subsection 44ZZRF(4)** provides that it is an indictable offence.<sup>64</sup> Under section 80 of the Constitution, the trial is by jury.

**Proposed section 44ZZRG** provides for the second of the two criminal offences—that a corporation commits a criminal offence if a CAU contains a cartel provision and the corporation gives effect to the cartel provision. The fault element and penalty are the same as for the first criminal offence: **proposed subsections 44ZZRG(2) and (3)**. As with the first criminal offence, the second is also an indictable offence: **proposed subsection 44ZZRG(5)**.

**Proposed subsection 44ZZRG(4)** provides that the criminal offence provision applies to contracts and arrangements made, and understandings arrived at, before, at or after the commencement of the section. Whilst this would seem at first glance to have retrospective application, that is not the case. The physical element of this offence is giving effect to the cartel provision in a CAU, rather than the making of a CAU which contains a cartel provision.

Under **proposed paragraph 44ZZRH(1)(a)** a corporation **may** be found guilty of an offence against proposed sections 44ZZRF or 44ZZRG even if each other party to the CAU is a person who is not criminally responsible.<sup>65</sup> A corporation cannot be found guilty of an offence against proposed sections 44ZZRF or 44ZZRG where all the other parties to the CAU have been acquitted of the offence, and a finding of guilt would be inconsistent with their acquittal: **proposed subsection 44ZZRH(2)**.

It should be noted here that existing paragraph 78(a) of the TPA provides that criminal proceedings do not lie against a person by reason only that the person has contravened any of the provisions of Part IV. **Item 30** amends that provision to specifically remove the

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64. In the Federal jurisdiction an *indictable offence* is one which is punishable by more than 12 months imprisonment: section 4G *Crimes Act 1914* (Cth).

65. That is, they have not satisfied the fault element of the offence because they lack knowledge and belief.

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criminal cartel provisions from that protection. For further information about enforcement see items 22-62.

### Civil penalty provisions

The **physical elements** which constitute a criminal offence are the same as those which constitute a civil contravention, that is, the making of the CAU which contains the cartel provision or the giving effect to a provision of a CAU which contains the cartel provision. The significant difference between the criminal and the civil offences is that there is no requirement for a **fault element** in the civil offence. This means that issues of ‘knowledge and belief’ are irrelevant in the civil penalty provisions.

**Proposed section 44ZZRJ** provides for the first of two civil penalty provisions—that a corporation contravenes the section if it makes a CAU which contains a cartel provision.

**Proposed section 44ZZRK** provides for the second of the two civil penalty provisions—that a corporation contravenes the section if it gives effect to a cartel provision which is contained in a CAU. The second civil penalty provision applies to contracts or arrangements made, or understandings arrived at, before at or after the commencement of the section: **proposed subsection 44ZZRK(2)**.

### Exceptions

**Proposed sections 44ZZRL–44ZZRP** set out the circumstances in which the criminal offences and/or the civil penalty provisions do not apply.

**Proposed section 44ZZRL** provides that neither the criminal offences nor the civil penalty provisions apply where a corporation has given the Australian Competition and Consumer Commission (ACCC) a collective bargaining notice under subsection 93AB(1A).

**Proposed section 44ZZRM** provides that neither the criminal offences nor the civil penalty provisions apply where the corporation has applied for authorisation from the ACCC within 14 days of making a CAU which contains a cartel provision, and that provision will not come into force unless and until authorisation is given.

Under **proposed section 44ZZRN** neither the criminal offences nor the civil penalty provisions apply if the CAU which contains the cartel provision is made between two related bodies corporate.

**Proposed subsection 44ZZRO(1)** provides that the criminal offences do not apply where a contract containing a cartel provision is for the purposes of a joint venture and:

- the joint venture is for the production and/or supply of goods or services: **proposed paragraph 44ZZRO(1)(b)** and

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- the joint venture is carried on jointly by two or more persons, whether or not in partnership: **proposed paragraph 44ZZRO(1)(c)** or
- the joint venture is carried on by a body corporate formed by the parties to the contract for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate: **proposed paragraph 44ZZRO(1)(d)**.

**Proposed subsection 44ZZRP(1)** provides that the civil penalty provisions do not apply where a contract containing a cartel provision is for the purposes of a joint venture under the same terms as those set out in **proposed subsection 44ZZRO(1)**.

For the exceptions in **proposed sections 44ZZRL–44ZZRO**, the defendant bears the evidential burden of proof. This is in accordance with subsection 13.3(3) of the Criminal Code.

### Anti-overlap provisions

Currently Part IV of the TPA allows that some conduct is not to be subject to the ‘per se’ prohibitions.<sup>66</sup> The High Court in *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* had this to say about the overlapping of provisions in Part IV of the TPA:

The detailed scheme of regulation of restraints on trade appearing in the TPA has the consequence that a variety of arrangements, occurring in different commercial contexts, must be tested against the criteria in the several sections of that Act. It follows that an arrangement may fall within the scope of more than one section of the TPA. The question of which section applies to an arrangement may be determinative of whether or not the arrangement constitutes a violation of the TPA, as different sections impose different legal consequences. That there would exist such overlap was recognised by the Parliament in enacting the TPA: for example, subsection 45(6) has the purpose of ensuring the proper allocation of regulatory responsibilities for a given arrangement that may fall within the scope of sections 45 and 47 of the TPA...

... it should be recognised that the different sections in Part IV of the TPA are not intended to work in a mechanical or artificial way. The scheme adopted in Part IV therefore should be interpreted and applied in a manner that allows the provisions to work together so as to give effect to the identified legislative policies.<sup>67</sup>

Currently ‘anti-overlap’ provisions operate in relation to the following:

- covenants under section 45B

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66. That is, the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry.

67. [2003] HCA 59 (8 October 2003), paragraphs 55–56.

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- resale price maintenance under section 48
- exclusive dealing under section 47
- dual listed companies under section 49 and
- acquisition of shares in the capital of a body corporate or the assets of a person under section 50.

The role of anti-overlap provisions is to make it clear which section is relevant to a particular arrangement.

**Proposed sections 44ZZRQ–44ZZRV** preserve these ‘anti-overlap’ provisions.

**Proposed section 44ZZRQ** is about *covenants* affecting competition. ‘*Covenant*’ is defined in section 4 of the TPA as being ‘annexed to or running with an estate or interest in land’.

Existing subsection 45B(1) applies to covenants in real estate transactions. In essence, it provides that a covenant is unenforceable if the covenant has the effect of substantially lessening competition in any market in which a corporation would, but for the covenant, supply or acquire goods or services. Existing subsection 45B(9) provides for three exceptions to this rule.

**Proposed section 44ZZRQ** preserves these exceptions by quarantining those covenants to which subsection 45B(9) applies from the application of the cartel criminal offences or civil penalty provisions.

**Proposed section 44ZZRR** is about resale price maintenance which is described in existing sections 96 and 96A of the TPA as including the following conduct by a supplier:

- attempting to induce a person not to sell the supplier’s products or services at less than a price specified by the supplier
- making it known to a person that the supplier will not supply him or her unless that person agrees not to sell below the supplier’s specified price or
- entering into an agreement for the supply of goods or services containing a provision that the purchaser will not sell below the supplier’s specified price.

Section 48 provides that a corporation or person is not to engage in resale price maintenance. However under subsection 88(8A) of the TPA, the ACCC may authorise resale price maintenance, upon application by the corporation or person. While the authorisation remains in force, section 48 does not prevent the person from engaging in that conduct in accordance with the authorisation. **Proposed section 44ZZRR** preserves this exception.

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**Proposed section 44ZZRS** is about exclusive dealing. Subsection 47(1) of the TPA prohibits a corporation from engaging in the practice of exclusive dealing. Some examples of exclusive dealing are:

- supplying goods or services on condition that the purchaser does not acquire goods or services from a competitor of the supplier: existing subsection 47(2)
- supplying goods or services on condition that the purchaser acquires other goods or services from a third party: existing subsection 47(6)
- acquiring goods or services on condition that the supplier accepts some restriction as to the freedom to supply third parties: existing subsection 47(4)
- refusing to supply goods or services because the purchaser has dealt or refused to cease dealing in a competitor's products: existing subsection 47(3)
- refusing to acquire goods or services because the supplier refuses to accept some restriction on the right to supply third parties: existing subsection 47(5).

**Proposed subsection 44ZZRS(1)** provides that the criminal cartel offence in proposed section 44ZZRF and the civil penalty provision in proposed section 44ZZRJ do not apply to the making of a CAU which contains a cartel provision where that cartel provision would otherwise be a breach of the exclusive dealing prohibition in section 47. This is because the following exceptions continue to operate:

- subsection 47(10) provides an exception from the prohibition where engaging in the conduct did not have the purpose, effect or likely effect of substantially lessening competition
- subsection 88(8) provides that the ACCC may authorise exclusive dealing, upon application by the corporation or person, and
- subsection 93(1) of the TPA provides that a corporation may notify the ACCC of conduct amounting to exclusive dealing.

Similarly, **proposed subsection 44ZZRS(2)** provides that the criminal cartel offence in proposed section 44ZZRG and the civil penalty provision in proposed section 44ZZRK do not apply in relation to giving effect to a CAU which contains a cartel provision where that cartel provision would otherwise be a breach of the exclusive dealing prohibition in section 47.

**Proposed section 44ZZRT** is about dual listed companies. The term '*dual listed company arrangement*' has, according to section 4 of the TPA, the same meaning in that Act as in section 125-60 of the *Income Tax Assessment Act 1997*. It is an arrangement under which two publicly listed companies, while maintaining their separate legal entity status, shareholdings and listings, align their strategic directions and the economic interests of their respective shareholders.

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Subsection 49(1) of the TPA provides that a corporation must not make a dual listed company arrangement if the arrangement has the purpose, or would have or be likely to have the effect, of substantially lessening competition. However under subsection 88(8B) of the TPA, the ACCC may authorise a dual listed company arrangement upon application by the corporation or person. While the authorisation remains in force, section 49 does not prevent the person from engaging in that conduct in accordance with the authorisation. **Proposed section 44ZZRT** preserves this exception.

**Proposed section 44ZZRU** is about the acquisition of shares or assets. Existing section 50 prohibits the acquisition by a corporation of either shares in a body corporate or assets of a natural person if the acquisition has the likely effect of substantially lessening competition in a market. However, under section 95AT of the TPA, the Australian Competition Tribunal may authorise a merger, upon application. While the authorisation remains in force, section 50 does not prevent the acquisition of shares or assets. **Proposed section 44ZZRU** preserves this exception.

Subsection 45A(1) deems price fixing CAUs to have the purpose, effect or likely effect of substantially lessening competition. Existing subsection 45A(4) of the TPA provides that existing subsection 45A(1) does not apply to a provision of a CAU in relation to the price for goods or services to be collectively acquired, or for the joint advertising of the price for the re-supply of goods or services collectively acquired. **Proposed section 44ZZRV** provides for exceptions to the cartel criminal offences and civil penalty prohibitions to reflect the existing exemption in current subsection 45A(4) of the TPA. This is because existing section 45A is deleted by **item 21** of this Bill.

Where a defendant wishes to rely on the anti-overlap provisions in **proposed sections 44ZZRQ–44ZZRV**, they bear the evidential burden of proof in accordance with subsection 13.3(3) of the Criminal Code.

#### Amendments to Part VI of the TPA—enforcement and remedies

**Items 22–62** of the Bill make amendments to various sections of Part VI of the TPA.

Existing section 76 of the TPA sets out the manner for determining the maximum pecuniary penalty for a body corporate found to have breached certain provisions of the TPA. **Item 23** inserts **proposed paragraph 76(1A)(aa)** which provides for the penalty payable by a body corporate for a breach of the civil cartel prohibitions. The penalty is the greater of the following:

- \$10 000 000
- three times the total value of benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence, where the court can determine them

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- if the court cannot determine the total value of the benefits above, then 10 percent of the body corporate's annual turnover during the 12 month period (known as the *turnover period*) ending at the end of the month in which the body corporate committed, or began committing, the offence.

This is similar to, but not exactly the same as, the penalty payable for all other breaches of Part IV of the TPA.

Existing subsection 76(3) of the TPA requires that where proceedings are instituted against a person for breaches of more than one provision of Part IV, a court cannot impose more than one penalty in respect of the same conduct. **Item 24** amends the subsection to remove the criminal cartel provisions from this requirement. **Item 25** amends existing subsection 76(4) of the TPA so that where two or more of the limits set out in paragraphs 76(1A)(aa), (a) and (b) apply, then the penalty payable is an amount up to the highest of those limits.

**Item 29** repeals existing section 76D which provides defences to price fixing provisions. This is a consequential amendment because the defences refer to section 45A which is also repealed.

**Items 31–36** amend existing section 79 to include offences against the criminal cartel provisions. In particular, **item 31** inserts **proposed paragraph 79(1)(aa)** which provides that a person who 'attempts to contravene' one of the criminal cartel provisions is taken to have contravened that provision.<sup>68</sup>

**Item 33** inserts **proposed paragraphs 79(1)(e) and (f)** which provide that where there has been a contravention of the cartel offence provision by a person who is not a body corporate, it is punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 2 000 penalty units **or both**.<sup>69</sup>

**Item 39** inserts proposed subsection 80(9) to allow the Director Public Prosecutions to make application to the Court for the grant of an injunction in relation to a contravention of the criminal cartel provisions. This is consistent with the terms of the MOU between the ACCC and the DPP.

**Items 41–48** make amendments to existing section 84 which is about conduct by directors, servants and agents. In particular, **item 41** amends subsection 84(1) by inserting

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68. This amendment is consistent with section 11.1 of the Criminal Code which provides that a person who 'attempts' to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed. Subsection 11.1(2) requires that, for the person to be guilty, their conduct must be more than merely preparatory to the commission of the offence.

69. This is consistent with **proposed subsection 6(5B)**.

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references to the cartel offences and civil penalty provisions, so that the state of mind of directors, employees or agents of a corporation can be imputed to the corporation in proceedings related to a cartel offence or a cartel civil penalty provision. Similarly, **item 43** inserts into subsection 84(3) references to the cartel offences and civil penalty provisions, so that the state of mind of an employee or agent of a person other than a body corporate can be imputed to that person in proceedings related to a cartel offence or a cartel civil penalty provision.

**Items 49–51** amend section 86 of the TPA which is about the jurisdiction of courts. **Item 50** inserts **proposed subsections 86(3A) and (3B)** to confer on the Supreme Court of a State and the Supreme Court of a Territory (subject to the Constitution) jurisdiction in relation to any matter in a civil proceeding under proposed section 44ZZRI. **Item 51** inserts **proposed paragraphs 86(4)(ba) and (bb)** which operate so that the jurisdiction conferred by item 50 is an exception to the general principle that the Federal Court has exclusive jurisdiction in relation to all other trade practices matters.

**Items 52–57** make amendments to sections 86C–86E of the TPA to allow the Director of Public Prosecutions to make applications for a range of orders in relation to a person who has contravened the criminal cartel provisions. Under the existing provisions of the TPA, only the ACCC can make such applications. This is consistent with the MOU between the ACCC and the DPP.<sup>70</sup>

#### Amendments to Part VII of the TPA—authorisations, notifications, clearances

**Items 64–85** make amendments to Part VII of the TPA which relates to authorisations, notifications and clearances in respect of restrictive trade practices.

Section 88 of the TPA empowers the ACCC to grant immunities, called ‘authorisations’ in relation to certain of the competition provisions of the TPA. The ACCC may authorise corporations to enter into, or give effect to CAUs even if they are anticompetitive, or engage in exclusive dealing conduct. **Item 64** inserts **proposed subsection 88(1A)** which empowers the ACCC to authorise corporations to make a CAU which contains a cartel provision or give effect to a provision of a CAU which contains a cartel provision. Whilst that authorisation is in force, none of the parties to the CAU will be in breach of the cartel provisions. **Item 65** amends subsection 88(10) to extend the immunity to include a person who becomes a party to the CAU after it is made.

**Item 66** inserts **proposed subsections 90(5A) and 90(5B)**. These subsections provide that the ACCC **must not** grant authorisation under proposed subsection 88(1A) in respect of a CAU unless all of the following are satisfied:

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70. See the discussion about ACCC immunity policy and the memorandum of understanding at pp. 7–8 of this Digest.

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- that the provision of the CAU would result, has resulted, or is likely to result in a benefit to the public and
- that the benefit would outweigh or does outweigh the detriment to the public constituted by any lessening of competition that would result from the CAU.

**Items 86 and 87** amend subsections 101(1A) and 101(2) respectively. The effect of these amendments is to make a decision by the ACCC not to grant an authorisation, a decision which is reviewable by the Australian Competition Tribunal.

### Amendments to Part VII of the TPA—collective bargaining

**Items 70–84** make amendments to Subdivision B of Division 2 of Part VII which is about collective bargaining.

According to the ACCC:

Collective bargaining is an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions (which can include price) with a supplier or a customer.<sup>71</sup>

Under section 93AB of the TPA, a corporation may lodge a collective bargaining notice with the ACCC, where the corporation has made, or proposes to make, a contract that contains an exclusionary provision, a price fixing provision, or a provision that may substantially lessen competition.

In particular, **item 71** inserts **proposed subsection 93AB(1A)** which sets up a separate collective bargaining framework for cartel activity. It allows a corporation to give the ACCC a collective bargaining notice in the following circumstances:

- the corporation has made, or proposes to make, a contract that contains a cartel provision which has the purpose or effect of price fixing, or intends to give effect to a provision of a contract that contains a cartel provision which has that purpose or effect
- the corporation has made, or proposes to make, a contract which contains a cartel provision whose purpose includes output restrictions or market sharing, or intends to give effect to a provision of a contract which contains a cartel provision with that purpose.

Existing section 93AF prevents a corporation from lodging multiple collective bargaining notices in circumstances where the ACCC has lodged an objection notice in relation to a specified contract or proposed contract or where the collective bargaining notice has been withdrawn. **Items 82 and 83** insert **proposed section 93AEA** and amend existing

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71. See Australian Competition and Consumer Commission website at: <http://www.accc.gov.au/content/index.phtml/itemId/776296>, accessed on 14 January 2009.

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paragraph 93AF(a) respectively. The effect of these two amendments is to create two separate sections in similar terms, preventing the lodgement of multiple collective bargaining notices, one in respect of contracts containing a cartel provision, and the other in respect of other contracts.

### Amendments to Part X of the TPA—international liner cargo shipping

**Items 86–102** amend various sections within Part X of the TPA which relates to international shipping. According to the Productivity Commission:

Part X provides exemptions for ocean carriers providing liner cargo shipping services from key provisions of Australia’s regulation of restrictive trade practices. In particular, it allows them to group together to coordinate the provision of their shipping services to and from Australia through a wide variety of formal agreements (*conference agreements*). It also provides exemptions to Australian exporters and importers (shippers) to negotiate collectively with ocean carriers.

To receive the exemptions, carriers must register their agreements. They must negotiate with designated peak shipper bodies representing Australian exporters and importers over minimum service levels to be provided on specific routes by the agreement parties...

While an agreement is in operation and when requested by designated shipper bodies, carriers are required to negotiate (but are not required to come to an agreement) on service conditions, including freight rates.<sup>72</sup>

**Items 86–102** contain consequential amendments so that where a conference agreement is registered, the parties will be given partial and conditional exemptions from the cartel provisions.

### Amendments to Part XIB of the TPA—the telecommunications industry

**Items 103 to 111** amend various sections within Part XIB of the TPA which relates to the telecommunications industry.

According to the Productivity Commission:

Part XIB of the TPA establishes an anti-competitive conduct regime for telecommunications markets additional to that applying generally to all markets under Part IV. There are two central differences: Part XIB makes use of an *effect* or *likely effect* test, whereas Part IV uses a *purpose* test; Part XIB, but not Part IV, allows the ACCC to issue competition notices to firms it alleges are engaged in anti-competitive

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72. Productivity Commission, ‘Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping’, [Productivity Commission Inquiry Report No. 32](#), February 2005, p. 93.

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conduct. Such notices ... provide strong incentives for firms to modify their conduct, even if those firms consider the conduct is not anticompetitive ...<sup>73</sup>

And further:

There are also provisions for exemption orders where the ACCC is satisfied that the resultant public benefit outweighs any public detriment of lessened competition, or the conduct will not breach the competition rule.<sup>74</sup>

**Items 103–111** contain consequential amendments to include references to the cartel provisions.

#### Amendments to Part XII of the TPA

Existing subsection 157(1) of the TPA provides that, in matters relating to authorisations or merger clearances the ACCC **must** furnish to a corporation a copy of every document that has been given to it, or obtained by it in connection with the matter, and a copy of any other document in its possession which has come to its attention in connection with the matter. Where the ACCC does not comply with a request from a corporation for production of these documents, the Court is empowered to make an order directing the ACCC to comply with the request: existing subsection 157(2).

**Item 113** inserts **proposed subsections 157(1A) and (1B)** which allow the ACCC to refuse to comply with a request from a corporation under subsection 157(1) for ***protected cartel information***<sup>75</sup> and the matters which the ACCC must take into account in making that decision.

**Item 116** inserts **proposed sections 157B–D**. In particular, **proposed subsection 157B(1)** provides that that the ACCC is **not required** to produce to a court or tribunal a document containing protected cartel information or to disclose protected cartel information to a court or tribunal except with the leave of the court or tribunal. **Proposed subsection 157B(2)** provides that in exercising its powers to grant leave, the court or tribunal **must** have regard to specified matters, and no others.

However **proposed subsection 157B(4)** provides that the ACCC **may** produce documents or disclose protected cartel information to a court or tribunal. **Proposed subsection 157B(5)** sets out the matters which **must** be taken into account in exercising the power to produce or disclose protected cartel information. In any event, neither the document

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73. Productivity Commission, 'Telecommunications Competition Regulation', [Productivity Commission Inquiry Report No. 16](#), September 2001, p. 151.

74. *ibid.*, p. 160.

75. ***Protected cartel information*** is defined in **proposed subsection 157B(7)** as information that was given to the ACCC in confidence and relates to a breach, or a possible breach of section 44ZZRF, 44ZZRG, 44ZZRJ or 44ZZRK.

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produced nor the information disclosed may be adduced in any other proceedings unless it is, once again, subject to a determination under either **proposed subsections 157B(1) or 157B(4)**.

The ACCC is **not required** to provide disclosure of, or produce documents containing, protected cartel information in the following circumstances:

- to a person who is a party to proceedings before a court where the ACCC is not also a party to the proceedings: **proposed subsection 157C(1)** and
- to a person who is considering instituting proceedings but has not yet done so: **proposed subsection 157C(2)**.

However the ACCC **may** provide disclosure of, or produce documents containing, protected cartel information in the circumstances above: **proposed subsections 157C(3) and (4)**. In exercising that power, the ACCC must have regard to the matters in **proposed subsection 157C(5)**.

A refusal of a court to grant leave under **proposed subsection 157B(1)** does not prevent the court from later ordering that:

- a criminal proceeding be stayed on the ground that the refusal would have a substantial adverse effect on the person's right to receive a fair trial: **proposed subsection 157D(2)** or
- a civil proceeding be stayed on the ground that the refusal would have a substantial adverse affect on the hearing: **proposed subsection 157D(3)**.

**Proposed subsection 157D(4)** sets out those matters which the court must consider in deciding whether to stay proceedings.

**Items 117–121** apply to section 163 of the TPA to confer jurisdiction on the Federal Court for cartel offences.<sup>76</sup>

Current section 163A of the TPA confers jurisdiction on the Federal Court to make declarations and certain orders. The amendments to section 163A in **items 122 and 123** ensure that if a prosecution relating to the criminal cartel offences is commenced in the Supreme Court of a State or Territory, then the Federal Court does not have jurisdiction to make those declarations and orders in respect of the offence being prosecuted.

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76. For further information see the Bills Digest for the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 see: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4030%22>, accessed on 4 February 2009.

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## Amendments to the Schedule versions of Parts IV and VB

On 11 April 1995 the governments of Australia entered an agreement – [the Competition Code Agreement](#) – under which the States and Territories of Australia agreed to submit, to their respective legislatures, legislation to implement the version of Part IV of the TPA contained in the Schedule. The intention was to extend the operation of the restrictive trade practices provisions of the TPA to all sectors of the community through the enactment of complementary State and Territory legislation.<sup>77</sup>

To this end, section 150C of the TPA provides that the Competition Code consists of, amongst other things, a schedule version of Part IV of the TPA.

The amendments in **items 126–128** of the Bill are in the same terms as the amendments in **items 19–21** of the Bill except that they apply to natural persons rather than to corporations. This is so that the schedule version of Part IV in the Competition Code is in the same terms as Part IV of the TPA.

## Schedule 2–Other Amendments

**Items 1 and 2** of Schedule 2 of the Bill amend existing section 79A of the TPA to delete incorrect references to section 18A of the Crimes Act 1914 which was renumbered as section 15A by the *Crimes Legislation Amendment Act (No. 2) 1989*.

Existing section 86E of the TPA provides that the ACCC may make an application to the court for an order disqualifying a person from managing corporations in circumstances where the Court is satisfied that the person has contravened, or attempted to contravene Part IV of the TPA and the Court is satisfied that the disqualification is justified. **Item 5** inserts **proposed section 86F** which provides that a person is not entitled to refuse or fail to comply with a requirement to answer a question, give information, produce a document or any other thing, in civil or criminal proceedings for a cartel offence, on the ground that to do so would expose them to disqualification under section 86E.

## Amendments to Part XID—Search and seizure

**Items 7–42** contain amendments to Part XID of the TPA which is divided into five areas being:

- the enforcement regime for finding out whether there has been a contravention of this Act, Part 20 of the *Telecommunications Act 1997* or Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*
- the appointment of inspectors and the issue of identity cards

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77. Russell V Miller, 'Millers' Annotated Trade Practices Act: Australian Competition and Consumer Law, 26<sup>th</sup> Edition', Thomson Lawbook Company, Pyrmont, 2005, p. 1167.

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- entry to premises with the consent of the occupier of the premises
- entry to premises under a search warrant issued by a magistrate and
- some general provisions relating to the operation of electronic equipment at premises.

**Items 7–11** insert new definitions into Part XIX, namely:

- contravention
- data
- data held in a computer
- data storage device and
- *‘executing officer’* which is an expanded definition which will allow the substitution of the inspector named in a search warrant for another inspector.

**Item 13** repeals existing subsection 154F(1) and inserts **proposed subsection 154F(1)**. The subsection provides that an inspector who has entered premises and believes on reasonable grounds that data accessed by operating electronic equipment at the premises might be evidential material **must** do only one of two things which are set out in subsections 154F(2) and 154F(3). Currently the relevant provisions state that the inspector **may** do one of two things.

**Item 17** inserts **proposed subsections 154G(1A) and (1B)**. **Proposed subsection 154G(1A)** will allow the officer executing the search warrant to photograph or make a video recording of the premises, or anything in the premises, which is the subject of a search warrant as long as it is for a purpose incidental to the execution of the warrant. **Proposed subsection 154G(1B)** will empower an officer executing a search warrant to complete the execution of the warrant after a temporary absence of not more than one hour, or for a longer period if the occupier consents in writing.

Existing subsection 154G(2) allows that an executing officer, who in the course of searching for the kind of evidential material specified in the warrant, finds another thing that he or she believes on reasonable grounds to be evidence of an indictable offence against certain other listed statutes, may seize that other thing. **Item 18** amends existing paragraph 154G(2)(a) to amend the list of statutes to include certain indictable offences under the Criminal Code.

**Item 19** inserts **proposed section 154GA** into the TPA which provides that a thing found at the premises that are the subject of a search warrant, may be moved to another place for examination or processing, in order to determine whether it may be seized under a search warrant. **Proposed paragraph 154G(1)(a)** provides that this will occur where it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance **and** that there are reasonable grounds to believe that the thing contains evidential material.

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**Items 20–26** amend section 154H to clarify what action an officer executing a search warrant can take if the officer believes on reasonable grounds that any data accessed by operating electronic equipment at the premises might constitute evidential material of the kind specified in the warrant.

**Item 32** inserts **proposed section 154RA** which provides that an officer executing a search warrant may apply to a magistrate for an order requiring a specified person to provide information or assistance to allow the officer to access data held in a computer, transfer the data to a disk, tape or other storage device or convert the data into documentary form.

**Item 35** amends existing subsections 154U(1) and (2) so that the period of time in which the ACCC is able to hold things seized under a search warrant has increased from 60 days to 120 days.

#### Amendments to Part XII of the TPA

**Items 43–47** amend subsection 155(7) of the TPA to cancel out not only the privilege against self incrimination but also the privilege against exposure to a penalty for individuals who are required to provide information, produce information or give evidence under existing subsection 155(1) of the TPA.

## Concluding comments

It is important to note that cartel conduct has both an economic and moral dimension. From an economic perspective:

Cartel conduct—and in particular price-fixing and market sharing arrangements—have traditionally been seen as not only distorting competitive processes, but, more fundamentally, have been viewed as being against the public interest by attempting to deny consumers, or other acquirers of goods or services, choice in terms of price and/or suppliers. In short, by ensuring that suppliers charge the same price or not pursue one another's customers, price-fixing and market sharing agreements tend to limit or prevent customers from shopping around for the best price or supplier. In the circumstances, customers are effectively dictated the price at which they will purchase or the supplier with which they are to deal.<sup>78</sup>

From a moral perspective:

... Price fixing, market sharing and bid rigging are not 'victimless crimes'. They are comparable to white collar offences such as insider trading or fraud. There is no

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78. Frank Zumbo, 'The dangers of price-fixing and market-sharing arrangements', *Law Society Journal*, May 2001, pp. 52–55, at p. 52.

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question that the punishment must fit the crime, but in the worst cases of collusion, imprisonment does precisely this... It is a harmful, malevolent act. Society no longer treats white collar crime as a lesser evil. People are more inclined today to ask why white collar offenders are not pursued and punished with as much vigour as less sophisticated criminals?<sup>79</sup>

The amendments to the TPA in the Bill reflect both the economic and moral dimensions of cartel conduct. It is clear that, particularly in respect of price-fixing, the amendments will create a significantly different regulatory regime than the one which currently exists. That is their intention—to dramatically alter the mindset of those involved in trade and commerce so that there is an expectation that cartel conduct will attract serious legal consequences.

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79. Professor Allan Fels, 'Speech to Australian Law Reform Commission Conference Penalties, Policy, Principles and Practice in Government Regulation', Sydney, 9 June 2001.

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