

1

Introduction

1.1 Why focus on anti-cartel law and enforcement?

Over the last two decades the law applicable to cartel conduct and its enforcement have taken on a distinctive character within the broader field of competition law and enforcement. There has been a growing focus by governments, regulators and commentators on cartel activity, singled out as the most serious in economic terms of all anti-competitive conduct and as posing special challenges for detection and prosecution owing to its generally secretive and highly profitable nature.¹ At international and national levels, there has been debate about how such conduct should be legally defined, including how to ensure that benign or welfare-enhancing collaborative activity between competitors is not caught by the legal proscriptions. There has also been debate about what types of sanctions are likely to be most effective in deterring such conduct, underscored by an emerging consensus that sanctions need to be tougher and may include criminal penalties for individuals. These developments have been accompanied by debate about the types of agencies charged with enforcement of anti-cartel laws, and the policies and powers necessary for detecting, investigating and prosecuting cartel conduct.

Consistently with this international focus, Australia's anti-cartel regime underwent a major overhaul in July 2009 with the amendments made to the TPA by the CC&OM Act. The overhaul was driven by a policy decision to criminalise serious forms of cartel conduct. However, in addition to the introduction of cartel offences, a new set of civil prohibitions was created, with associated changes to exceptions and penalty

¹ See generally S Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades', Paper presented at the 24th Annual National Institute on White Collar Crime Conference, presented by the American Bar Association Criminal Justice Section and Center for Continuing Legal Education, Florida, 25 February 2010; International Competition Network, 'Trends and Developments in Cartel Enforcement', Paper presented at the 9th Annual ICN Conference, Istanbul, Turkey, 29 April 2010.

provisions. Investigatory powers were boosted and the model for enforcement reconstructed so as to accommodate the role of the CDPP as the agency that is responsible for prosecuting cartel offences, in conjunction with the ACCC as the investigatory and referral agency. Consequential changes to immunity and cooperation policies have been made. For the first time, the Federal Court of Australia has indictable criminal jurisdiction with significant procedural and evidentiary implications.²

These reforms had a long gestation – more than six years from the recommendation in January 2003 by an independent committee (the Dawson Committee) that there be criminal penalties for serious cartel conduct. They also generated much controversy. Perhaps surprisingly, the controversy did not focus on the question whether serious cartel conduct should be criminal. Indeed, there has been remarkably little debate on that question.³ Rather, the issues on which stakeholders were divided related primarily to the design of the new statutory regime, and the policies and mechanisms for its enforcement. This book does not test the justifications for criminalisation. Now that the initial design phase of Australia's new anti-cartel regime is complete, there is a need for a critical appraisal of its results.

The book examines many features of the Australian regime in detail. It critically analyses the elements of the prohibitions, the exceptions to the prohibitions, the rules governing corporate and individual liability, the policies that guide decisions on enforcement, immunity and cooperation, and the sanctions that apply when conduct is found to be in breach of the law. It also explores the implications of the regime for the approach taken by firms to compliance and liability control.

Some of the issues canvassed in the book arise directly from the introduction of a dual civil/criminal regime for cartel conduct in Australia. However, many of the issues are attributable to long-standing flaws in the approach taken to trade practices legislation generally in this country. In certain respects, the new laws perpetuate old problems and aggravate them by the introduction of criminal liability. Having identified the issues, the book takes the constructive approach of recommending workable solutions. It does so with the benefit of comparative analysis with overseas regimes particularly, but not confined to, the US and EU.

Many of the issues identified in the book are common to any scheme designed to regulate cartel conduct. They are issues that have arisen partly because of the failure of Australian policymakers and political leaders to recognise the complexity and difficulty of the task of devising a dual civil/criminal regime and to undertake a transparent, consultative and in-depth inquiry into the issues at the earliest possible stage.⁴ For a country considering how to accommodate a criminal cartel regime within its existing legislative framework and enforcement institutions, no off-the-shelf 'model' is

² The new jurisdiction is conferred by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2008* (Cth). This legislation raises a host of legal and practical issues that are beyond the scope of this book. They were canvassed in the submissions to and report by the Senate Standing Committee on Legal and Constitutional Affairs on the Bill: see Parliament of Australia, Senate, Senate Legal and Constitutional Affairs Committee, *Inquiry into the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008*, March 2009, Senate Legal and Constitutional Affairs Committee.

³ The reasons for this are complex and beyond the scope of this book. For a preliminary review of the degree of support for criminalisation in Australia from various constituencies, see C Beaton-Wells, 'Criminalising Cartels: Australia's Slow Conversion', *World Competition: Law and Economics Review*, vol. 31, 2008, p. 205. See further the Cartel Project website at <<http://www.cartel.law.unimelb.edu.au>>.

⁴ See further C Beaton-Wells, 'Australia's Criminalization of Cartels: Will it be Contagious?', in R Zach, A Heinemann and A Kellerhals (eds), *The Development of Competition Law: Global Perspectives*, Academic Society for Competition Law Series, Edward Elgar, Cheltenham, UK, 2011 (forthcoming).

available for adoption.⁵ The Australian experience teaches that criminalisation should not be seen as a bolt-on modification to an existing regime. Cartel criminalisation requires close examination and, in some respects, re-evaluation of the existing law and enforcement practices so as to ensure that they are compatible with the introduction of a criminal regime.

The remaining sections of this Introduction provide a brief background to the emergence of the anti-cartel regime in Australia in 2009 (Section 1.2), identify more specifically the aims and scope of the book and outline the structure of the chapters that follow (Section 1.3).

1.2 A new anti-cartel regime for Australia – background

Up until 2009, the legal prohibitions applicable to cartel conduct under the TPA had largely retained the form in which they were introduced in 1974, and the consequences of breaching the prohibitions had remained civil in character.⁶ The first formal call for the introduction of criminal sanctions was made by the ACCC in 2002 in its submission to the Dawson Committee.⁷ Evidently, the ACCC was influenced by the growing international focus on cartel conduct. Since cracking the most famous international cartel case to date (the lysine cartel) in 1996,⁸ the US DOJ has been seeking to persuade foreign regulators and governments of the merits of criminal antitrust enforcement.⁹ In particular, it sponsored a recommendation by the OECD in 1998 calling for tougher sanctions for what were called ‘hard-core cartels’, defined in terms of the practices of price-fixing, market division, output restriction and bid-rigging.¹⁰ The ACCC argued that the civil enforcement regime had failed to deter cartels and that a strong message needed to be sent that cartel behaviour was comparable with other white-collar criminal offences and should be treated accordingly. The civil enforcement regime was also said to be out of step with international trends and, in particular, with the approach taken by Australia’s major trading partners.¹¹

⁵ Even in the case of New Zealand, despite a longstanding tradition of trans-Tasman harmonisation, there are such significant differences in both substance and style between its *Commerce Act 1986* and the TPA that the chances of ‘copying’ directly from the Australian cartel legislation are minimal. See Ministry of Economic Development (NZ), *Cartel Criminalisation*, Discussion Document, January 2010.

⁶ Modelled on the US *Sherman Act*, Australia’s first antitrust statute, the *Australian Industries Preservation Act 1906* (Cth) made it an offence to enter into a contract or combine ‘with intent to restrain trade or commerce to the detriment to the public’ punishable by a fine of up to GBP500 and imprisonment for up to a year for a second offence. The Act proved largely ineffectual in the face of attacks on its constitutionality: see *Huddart Parker and Co Ltd v Moorehead* (1909) 8 CLR 330; G de Q Walker, *Australian Monopoly Law*, Cheshire, 1967, ch. 2; D Round and M Shanahan, ‘Serious Cartel Conduct, Criminalisation and Evidentiary Standards: Lessons from the Coal Vend Case of 1911 in Australia’, *Business History*, vol. 51, no. 6, November 2009, p. 875. Its successor, the *Trade Practices Act 1965* (Cth), abandoned the scheme of prohibitions and penalties and relied on a system of voluntary notification, based on the UK model.

⁷ Submission to the Trade Practices Act Review Committee, Parliament of Australia, 2 June 2002, Submission No. 56 (Australian Competition and Consumer Commission). The then ACCC Chairman, Allan Fels, was reported in the press as supporting criminal sanctions for collusive tendering in the construction industry as early as 1994: T Dodd and K Bice, ‘TPC Push Against Collusive Tenderers’, *Australian Financial Review*, 7 October 1994, p. 1.

⁸ JM Connor, *Global Price Fixing: Our Customers Are the Enemy*, Kluwer Academic, Boston, 2001.

⁹ C Harding, ‘Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Cartels’, *Critical Criminology*, vol. 14, 2006, p. 181; A Ezrachi and J Kindle, ‘Cartels as Criminal? A Long Road from Unilateral Enforcement to International Consensus’, in C Beaton-Wells and A Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, Hart Publishing, Oxford, 2011, ch. 18.

¹⁰ See Organisation for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL, 14 May 1998, p. 3.

¹¹ Submission to the Trade Practices Act Review Committee, Parliament of Australia, 2 June 2002, Submission No. 56, p. 9 (Australian Competition and Consumer Commission).

The Dawson Committee agreed in general terms but its recommendation in favour of criminal sanctions was subject to the resolution of key issues – in particular, the definition of the conduct that would be sufficiently serious as to warrant criminal sanctions and the workability of the ACCC *Immunity Policy* under a criminal regime.¹² The committee chose not to resolve these hard issues and referred them back to the government.¹³ However, it did give consideration to issues relating to the civil prohibition on exclusionary provisions and, accepting criticisms about the scope and application of the prohibition, made recommendations for its reform.¹⁴ Those recommendations, while accepted initially by the government, were not implemented.¹⁵

In 2003, the Treasurer accepted ‘in principle’ the Dawson Committee’s recommendation,¹⁶ emphasising the need for any new criminal penalty regime to apply broadly, not to impose ‘significant additional uncertainty and complexity for business’ and to ‘work well in the context of the Australian legal system’.¹⁷ Despite this apparent acknowledgment of the wide-ranging implications of criminalisation, the process adopted subsequently to develop the legislative proposals was marked by secrecy, obfuscation and delay.¹⁸

A working party was appointed and reported to the government in 2004.¹⁹ It did not call for submissions publicly and it is not known whether it undertook any consultation beyond the bodies represented on it (those being the ACCC, CDPP and the responsible government department, the Treasury). It did not release its report or recommendations for public consideration and a subsequent request for access to its report under freedom of information legislation was refused.²⁰ Unlike the practice in respect of proposals for the reform of corporate and financial services regulation, or the practice followed in the UK and Canada for proposed cartel law changes, no public discussion paper was issued.²¹ Nor was there a reference to the peak federal law reform body, the ALRC, notwithstanding the significance of cartel criminalisation as a reform.²²

¹² Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, pp. 163 (Conclusions point 2) and 164 (Recommendation 10.1).

¹³ For criticism of the Dawson Committee’s handling of this and other issues, see B Fisse, ‘The Dawson Review: Enforcement and Penalties’, *University of New South Wales Law Journal*, vol. 26, 2003, p. 315.

¹⁴ Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, ch. 8.

¹⁵ See Chapter 4, Section 4.4.3.

¹⁶ Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, January 2003 (16 April 2003), pp. 161–2.

¹⁷ P Costello, Treasurer, *Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974*, 2003.

¹⁸ See further C Beaton-Wells, ‘The Politics of Cartel Criminalisation: A Pessimistic View from Australia’, *European Competition Law Review*, vol. 3, 2008, p. 185.

¹⁹ P Costello, Treasurer, ‘Working Party to Examine Criminal Sanctions for Cartel Behaviour’, Press Release, 3 October 2003, Treasury.

²⁰ See *Fisse v Secretary, Department of the Treasury* (2008) 172 FCR 513. Further background and documents relevant to the freedom of information request are available at Brent Fisse Lawyers, *News*, <<http://www.brentfisse.com/news.html>>.

²¹ Cf. the policy on best practice processes in regulation issued by the Australian Government’s Office of Best Practice Regulation at Australian Government, Department of Finance and Deregulation, Office of Best Practice Regulation, *Australian Government Consultation Requirements*, 21 April 2009.

²² This body had recently examined and reported on the related subjects of federal civil and administrative penalties and sentencing of federal offenders and hence would have been well-placed to examine the issues involved in cartel criminalisation: see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95, 2002; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 2006. Note also the earlier report by the Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report 68, 1994.

The Treasurer announced the legislative proposals in a press release in 2005.²³ The release contained scant detail with respect to the elements of the proposed 'cartel offence'. Significantly, however, it indicated that the offence would include an element of dishonesty.²⁴ An exposure draft of the Bill was not released for comment. Treasury papers indicated that the Bill would be introduced into parliament in the winter sittings of 2006.²⁵ However, it was not introduced and no explanation for the delay was offered. In 2007 the Bill was listed again for parliamentary attention, this time within days of high-profile ACCC enforcement activity and renewed calls by the regulator for criminal sanctions for cartel conduct.²⁶ However, a federal election intervened and the Bill lapsed.

Towards the end of the election campaign, the ACCC achieved record-breaking penalties against a price fixing cartel in the cardboard packaging industry.²⁷ These penalties were imposed in an enforcement action against Visy Ltd, one of Australia's largest manufacturing companies, and Australia's fourth richest man, Visy Chairman, Richard Pratt. In the media coverage that accompanied the announcement of the settlement and Pratt's public apology, the Prime Minister (John Howard) declined to re-commit the government to criminalisation.²⁸ The response of the Labor opposition was to promise, if elected, to introduce criminal penalties in its first year in office.²⁹

On election, consistent with a general commitment to renewing competition policy in Australia, the Labor government appointed the country's first Minister for Competition Policy and Consumer Affairs – Christopher Bowen.³⁰ Bowen released an exposure draft of the CC&OM Bill, together with a discussion paper and a draft of the ACCC–CDPP MOU, in January 2008.³¹ In particular, he sought submissions on the questions as to whether dishonesty should be an element of the new offence and whether the ACCC should have telecommunications interception powers.³² The submissions on both questions were divided,³³ but also raised a host of other complex legal and practical issues relevant to the design and enforcement of the proposed legislation.³⁴

23 P Costello, Treasurer, 'Criminal Penalties for Serious Cartel Behaviour', Press Release No. 4 of 2005, 2 February 2005.

24 The terms of the proposed offence were to 'prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from the customers who fall victim to the cartel'.

25 See Australian Government, *Budget Paper No. 2: Budget Measures 2006–07*, 2006, Pt 2: Expense Measures – Treasury, Budget 2006–7.

26 In particular, around this time, publicity was given to significant penalties for price fixing in the air-conditioning industry, a global airline cargo cartel in which the national carrier Qantas has been implicated and the announcement of an ACCC investigation into price-fixing in stevedoring operations on Australian wharves. See M Drummond, '\$9.2m Punishment for Air-Con Cartel', *Australian Financial Review*, 27 July 2007, p. 18; S Creedy, 'Fines Bolster Class Action against Qantas', *The Australian*, 6 August 2007, p. 29; Australian Competition and Consumer Commission, 'ACCC Institutes Legal Proceedings against Stevedores and Senior Executives for Alleged Collusion', Media Release #233/07, 24 August 2007.

27 See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673.

28 See 'No Plans to Make Price Fixing Criminal', AAP, 9 October 2007; 'PM Back-Pedals on Cartel Penalties', *Australian Financial Review*, 10 October 2007, p. 1.

29 C Bowen, 'Howard and Costello Take Conflicting Positions on Criminal Penalties for Cartel Behaviour', Press Release, 9 October 2007, Budget 2006–7.

30 See Treasury, *The Hon Chris Bowen MP*, Treasury, <<http://www.treasurer.gov.au/Main.aspx?PageID=089&min=ceb>>.

31 See Treasury, *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 11 January 2008.

32 See Treasury, *Criminal Penalties for Serious Cartel Conduct*, Discussion Paper, 11 January 2008, pp. 3–6.

33 The submissions are available at Treasury, *Submissions: Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 11 January 2008.

34 For a detailed critique of the issues, see C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, 2008, p. 166.

In October 2008, Bowen released a second exposure draft of the CC&OM Bill.³⁵ Dishonesty had been removed in recognition of the enforcement problems likely to arise if dishonesty were an element of a cartel offence.³⁶ The ACCC would have telecommunications interception powers, and the proposed maximum jail term was increased from five to 10 years. However, many of the issues highlighted in the first round of consultations were not addressed. In particular, the much-criticised breadth of the proposed cartel offences and the civil prohibitions was not rectified by means of exceptions and defences to exclude vertical conduct from per se liability under the cartel prohibitions, and to avoid imposing liability for legitimate and often pro-competitive joint venture activity.³⁷ Moreover, concerns remained as to how the involvement of the CDPP would affect the operation of the ACCC *Immunity Policy*, another issue highlighted early in the year but on which there had been no further announcement.³⁸

More consultations followed,³⁹ and on 3 December 2008, the CC&OM Bill was introduced to parliament.⁴⁰ The Bill adopted so-called ‘anti-overlap’ exceptions for vertical conduct that had been missing from the exposure draft Bills. At the same time, a revised MOU between the ACCC and CDPP was released and adjustments were made to both the ACCC *Immunity Policy* and the treatment of immunity under the CDPP *Prosecution Policy*.

The CC&OM Bill was referred to a Senate Economics Committee. Two issues dominated the submissions and the public hearing.⁴¹ The first was whether the proposed scheme differentiated adequately between conduct warranting criminal treatment and conduct to be treated as a civil contravention, and the related question as to whether faith should be placed in the ACCC and CDPP to draw this distinction in the exercise of their discretion.⁴² The second was whether the proposed joint venture exceptions were too narrowly drawn – in particular, whether or not they should be confined to contracts and whether or not they should be limited to contracts for joint supply or production.⁴³ The committee was not persuaded that either of these issues required amendments to the Bill and recommended that it be passed unamended.⁴⁴ However, it did recommend that the ACCC prepare guidelines to ameliorate uncertainty about

³⁵ See Treasury, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008.

³⁶ See P Pyburne, ‘Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’, Bills Digest No. 90, 2008–09, ISSN 1328–8091, 4 February 2009, pp. 6–7; Transcript of evidence of Scott Rogers before Senate Economics Committee, 16 Feb 2009, p. E6.

³⁷ See, e.g., the comments of N Berkovic, ‘Practices Bank on Anti-Cartel Law Bonanza’, *The Australian*, 31 October 2008, p. 31.

³⁸ This was an issue highlighted in several of the submissions in response to the first Exposure Draft CC&OM Bill released in January 2008 (the submissions are available at Treasury, *Submissions: Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 11 January 2008). See further the discussion in C Beaton-Wells and B Fisse, ‘Criminalising Serious Cartel Conduct: Issues of Law and Policy’, *Australian Business Law Review*, vol. 36, 2008, p. 166, pp. 218–24; C 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, 2008, p. 71, pp. 75–91.

³⁹ As recorded in Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, p. 12 310, C Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer.

⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, p. 12 309, C Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer.

⁴¹ Parliament of Australia, Senate Economics Committee, *Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*.

⁴² Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, February 2009, [3.2]–[3.18], [3.48]–[3.50], [4.2]–[4.10], [4.17]–[4.18].

⁴³ Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, February 2009, [3.19]–[3.27], [4.12]–[4.16].

⁴⁴ For criticism of the committee’s report: see J Clarke, ‘Review Misses Bill’s Key Point’, *Australian Financial Review*, 21 April 2009, p. 26; I Wylie, ‘Cartel Output Restrictions – Construction and Common Sense Collide and Particularity of “Persons” under the Trade Practices Act 1974’, *Australian Business Law Review*, vol. 38, 2010, pp. 23 and 28.

the approach to be taken to the enforcement of the dual criminal/civil regime.⁴⁵ Subsequently the Minister announced minor amendments to the joint venture exceptions in the Bill.⁴⁶

The CC&OM Bill passed both Houses of Parliament on 16 June 2009, received Royal Assent on 28 June, and the main provisions took effect on 24 July 2009. On 14 July 2009, the ACCC released guidelines on the new laws and its proposed approach to investigations.⁴⁷ In the lead up to and on the amendments taking effect, reportedly there was considerable activity in the business and legal community to ensure compliance with the new laws. An increase in ‘tip-offs’ to the ACCC was also reported.⁴⁸ Yet the first prosecution was said by the ACCC Chairman to be unlikely before the expiry of his term in mid-2011.⁴⁹

1.3 Aims, scope and structure of this book

The aims of this book are:

- to explain in detail the main features of Australia’s anti-cartel regime and identify and discuss key issues of formulation, interpretation and application
- to consider possible alternatives and recommend approaches that address the issues identified
- to deepen the analysis and provide support for the approaches recommended by drawing comparisons with established regimes in other jurisdictions – in particular, the US, EU, UK and Canada
- to draw on the extensive interdisciplinary literature and empirical research available from both Australia and overseas to support and enrich the analysis
- to help inform future debate in Australia, as well as capture critical lessons from the Australian experience for the benefit of those in other jurisdictions interested in the design or redesign of an anti-cartel regime.

The scope and structure of the body of the book have been determined largely by the predominant features of the Australian regime. However, the book is not intended to be exhaustive of the topics relevant to cartel regulation in Australia. In particular, it does not discuss:

- the economic, social or political policies underpinning cartel regulation and the criminalisation of cartel conduct
- powers of investigation
- pre-trial or trial procedure and rules of evidence
- rules of evidence or procedure and other issues specific to the institution of representative proceedings

⁴⁵ Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, February 2009, [4.11] Recommendation 1.

⁴⁶ For an explanation of the amendments moved by the government, see Supplementary Explanatory Memorandum and Correction to the Explanatory Memorandum, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, Parliament of Australia.

⁴⁷ See Australian Competition and Consumer Commission, ‘Never a Better Time to Stop Cartel Conduct’, Press Release 166/09, 14 July 2009. The guidelines are available at Australian Competition and Consumer Commission, *Cartels and Your Business*, 2009, Australian Competition and Consumer Commission, <<http://www.accc.gov.au/cartels>>.

⁴⁸ M Jacobs, ‘Attack on Cartels as Tip-Offs Climbs’, *The Australian Financial Review*, 18 January 2010, p. 10.

⁴⁹ J Evers, ‘Samuel Plays Down Cartel Fear’, *Australian Financial Review*, 10 February 2010, p. 7.

- international convergence in relation to substantive law or policy or international cooperation in relation to investigations, including issues relating to mutual legal assistance and extradition
- the past and likely future effects of the anti-cartel regime on business behaviour and level of cartel conduct in the Australian economy (although the analysis in the book is relevant to such an assessment).

Our interest in pursuing each of those areas has been constrained by the need to restrict output in order to meet initial demand for a work on the basic foundations of liability, enforcement-related policies, sanctions and compliance and liability control.

Chapter 2 outlines the basic legal framework governing cartel conduct in Australia and gives particular consideration to the most critical design issue in developing such a framework, that is, how to distinguish between criminal and civil treatment of such conduct. It also addresses the coverage of the framework in terms of the entities, territory and time frames to which it applies.

The next three chapters are concerned with the elements of the statutory offences and civil prohibitions. Chapter 3 focuses on the physical element of collusion as reflected in the requirement under the TPA of a contract, arrangement or understanding between competitors. It considers the conceptual and evidentiary dimensions of collusion. The chapter also includes a detailed critique of proposals to broaden the meaning of ‘understanding’ to capture tacit forms of collusion.

Chapter 4 examines the physical element relating to a particular type of cartel provision contained in a contract, arrangement or understanding, being a provision concerned with price-fixing, output restriction, market allocation, bid-rigging, boycotting or some type of conduct that substantially lessens competition. It highlights the overly inclusive and prescriptive approach that has been taken to defining these provisions in the Australian legislation and, with the benefit of overseas comparisons, suggests a reformulation of the statutory definitions to overcome such problems.

Chapter 5 tackles the fault elements required to establish liability for an offence or a civil contravention with particular focus on the elements of intention and knowledge or belief relevant to the cartel offences. It considers the extent to which these elements distinguish between the conduct that is the subject of the offences and conduct subject to the civil prohibitions, offers a detailed analysis of the key fault concepts, and highlights the challenges that lie ahead in formulating workable jury directions.

Chapter 6 and Chapter 7 deal with bases of liability for individuals and corporations respectively. Liability as a principal party and liability on the basis of complicity and other forms of ancillary liability are discussed, as are the issues associated with vicarious liability. In Chapter 6, ways in which to reduce unnecessary complexity while still ensuring individual accountability for cartel conduct are explored. The nature and scope of corporate liability for cartel conduct are reviewed in Chapter 7. Options for capturing the ‘corporateness’ of corporate cartel conduct are examined, and a redesigned defence of corporate reasonable precautions is proposed.

Chapter 8 critically analyses the exceptions available for cartel conduct. This is an area of particular practical importance given the overreach of the cartel offences and civil prohibitions. The chapter identifies the economic rationale underpinning each exception, provides a stocktake of the issues yet to be resolved and outlines possible approaches to resolve those issues. The chapter concludes that there is a need for functional reconstruction.

Chapter 9 examines the policies that govern the enforcement of the regime, including the roles and relationship between the ACCC and the CDPP and the criteria that will influence investigatory and prosecutorial decision-making. The statutory provisions governing, and the particular issues raised by, dual civil/criminal proceedings are also canvassed. The chapter documents gaps in the current enforcement policies and legal framework and argues that they need to be filled.

Chapter 10 explores the implications of a dual civil/criminal regime for immunity and cooperation policies. On a positive note, it highlights the significant concession that has been made by the CDPP in aligning the approach that it will take to immunity in cartel cases with that of the ACCC. However, it draws attention to the significant disadvantages facing private claimants for damages as a result of the introduction of the ‘protected cartel information’ scheme. In addition, the chapter makes recommendations for enhancing the approach taken to cooperation under the ACCC *Cooperation Policy*.

Chapter 11 reviews the statutory scheme that applies to sanctions, civil and criminal, for cartel conduct. It reflects on the experience in applying civil pecuniary penalties and identifies reasons as to why the level of such penalties has been low relative to the level required for effective deterrence. It also highlights the weaknesses in the non-monetary sanctions introduced in 2001 and the provision for disqualification orders and an indemnification offence in 2007. Proposals are made for resolving the issues raised. The chapter outlines the provisions under Pt IB of the *Crimes Act* that will govern sentencing for the cartel offences, pointing out the numerous uncertainties and anomalies that arise and supporting key recommendations that have been made by the ALRC for reform. It also reflects on the relationship between private actions and the public sanctions regime and ways in which greater support should be given to mechanisms for compensation under the TPA.

Chapter 12 examines the implications of a liability control framework when reviewing or designing internal corporate controls against cartel conduct. The main theme is that ‘compliance’ is too limited a concept. It does not adequately reflect what is done or what can be done by a corporation seeking to achieve liability control. Corporations generally have internal controls that are not limited to compliance controls but also include strategies and procedures for avoiding, minimising or shifting the risk of liability. This perspective has been neglected in empirical research devoted to ‘compliance’ as well as in much of the literature on compliance programs.

The book concludes in Chapter 13 by highlighting the critical assumptions that have been made in Chapters 2–12 and identifying the key strengths and weaknesses of the anti-cartel regime when tested against those assumptions.

Our intention and hope is that the discussion and analysis in the book will be of interest to a wide audience. That audience includes anyone in Australia or abroad with an interest in the law or policy relating to the regulation of cartel conduct: lawyers, enforcement agencies, legislators and law reform agencies, industry associations, economists, compliance professionals, researchers and university students undertaking courses in competition law, regulation and industrial economics.