

Index

abuse of process 185, 186, 362-3, 366, 369, interaction with Immunity Policy 397 joint submissions on penalties 393-4 371-2, 374, 396 ACCC (Australian Competition and Consumer nature and extent of leniency 392-3, 495 Commission) need for consolidated immunity and aims in taking enforcement action 339-41 cooperation policy 398 approach to calculating discounts 445 process for applying for leniency 394 approach to compliance 338-9 restitution 518, 521 approach to disclosure 407-10 resolution of civil proceedings 366 calculation of base amount of fines 442-3 rewards 379 call for introduction of criminal sanctions 3 settlement 341 concern over facilitating or concerted ACCC Immunity Policy civil proceedings 383 practices 38 enforcement action against Visy Ltd 5 criminal proceedings 388-92 impact of settlements on private follow-on development 380-1, 382-3, 518-22 actions 522-4 disclosure 407-8 individual and corporate enforcement strategy 339, 340 accountability 192-4 importance 379 influence of settlements on penalty restitution 518-22 assessments 433-8 workability under criminal regime 4, 6, 381 - 3investigatory powers 12, 13-19 market definition 15 ACCC Investigation Guidelines and CDPP prosecution policy 341 petrol price-fixing cases 36, 44-5, 46, 50, 54-5, 59, 99 approach to dual proceedings 363 petrol prices report 37, 45-6 criminal or civil investigation 350-2 price-fixing case against NAB 98 decision-making criteria 348 proposed amendment relating to determination of seriousness 29, 30, 34 'understanding' 36-7, 38, 45-6, 47, 55, prosecutions following civil proceedings 372 referral 355, 395 proposed factual matters 59-67 release 7, 29 recommendation in relation to partnerships weakness 29, 88 ACCC Merger Guidelines 130 and body corporates 267 relationship with CDPP 342-3, 345, 348 ACCC-CDPP MOU role regarding cartel offences 2 approach to immunity 382-3 search and seizure powers 12 civil orders 516 deciding on criminal or civil telecommunications interception powers 5-6, 12, 13-19 investigation 349-50 vertical agreements 308 decision to prosecute 358, 361-2 ACCC Cartels: Detection and Deterrence: A Guide decision-making criteria 348-9, 353-9 for Government Procurement Officers 562-3 gaps 353-8, 376-7, 577 ACCC Compliance and Enforcement Policy 133, lack of guidance on liability 192, 194 192, 194, 338-41 liaison arrangements 347 ACCC Cooperation Policy recommended amendments 376-7, 577 civil proceedings 394-8 referral to prosecute 352-8 eligibility 393 revised version 6 roles of ACCC and CDPP 341, 342-8 enforcement strategy 339 evidentiary considerations 59 seriousness of conduct 28-9, 34



602 INDEX

ACCC-CDPP MOU (cont.) Canadian defence 26, 294-5 uncertainty of Australian cartel in Australian law 87 in EU competition law 26, 83-6 legislation 25-7 accomplice see complicity ioint venture exceptions 288, 289 Accountability Model 195, 196 see also naked restraint anti-cartel regime see Australian anti-cartel acquisition of shares or assets exceptions 301-2 see also gun-jumping regime actus reus see physical elements anti-overlap exceptions acquisition of shares or assets administration of justice offences Crimes Act offences 202 exceptions 301-2 exclusive dealing exceptions 300-1 Criminal Code offences 201-2 offences of concealing or compounding a rationales 299-300 cartel offence 202-3 resale price maintenance exceptions 302-3 offences under TPA ss 155(5) and 154R(2) for vertical conduct 6 adroit boundary riding vertical supply agreements 303, 306, 308 commitment to avoid commitment 559-60 anticipated reactions 187, 188, 563 conditions immunised by intellectual property arrangement exception 563 communication requirement 43-4 facilitating practices 560-1 consensus requirement 44 identifying opportunities 556-8 lack of conceptual distinction from 'understanding' 43 insulated conductor stratagem 563-4 JV Ultra-Lights 562-3 legal criteria 43 see also compliance; liability control meaning and interpretation of term 36, adverse publicity, sanctions against 39-40 corporations 460-4 meaning of 'makes' 68 advertisement orders 459-61 parties to 71-3 agreement see also contract; facilitating practices; distinguished from concerted practices in understanding EU 48-9 arrives at US interpretation 47-8 meaning in relation to an understanding 68 see also arrangement; collusion; contract; see also understanding facilitating practices; understanding AS 3806 Compliance Programs (2006) air cargo cartel 194, 442-3 advisory function 541 allowing or authorising establishment and operation 539-40 liability for 161-5 individual accountability 542-3 see also complicity limitations 543, 565 ALRC (Australian Law Reform Commission) principles 540-1 advantages of corporate probation 455-6 use as a general framework 541-2 community service orders 458 ASIC (Australian Securities and Investment internal discipline orders 196 Commission) case against AWB 367 punitive injunctions 456 reform of federal sentencing law 32, 472-3, case against HLP Financial Planning 368 474, 476-7, 478, 482, 484-5, 487, relationship with CDPP 345-6 489-92, 494-5, 499-501, 509, 511, 516, ASIC-CDPP MOU 347, 357 523, 529-32 attempt 184-6, 331 relationship between CDPP and enforcement see also inchoate liability agencies 346 attribution of conduct to a corporation see ALRC Principled Regulation: Federal Civil and corporate liability Australian anti-cartel regime Administrative Penalties in Australia 32 ALRC Same Crime, Same Time: Sentencing of background 3-7 Federal Offenders 472 critical assumptions 568-71 see also sentencing; sentencing factors; future of 580-2 sentencing options; sentencing overview 1-3 principles strengths and weaknesses 571-80 Amcor 408-10, 523 Australian cartel legislation amnesty see immunity Australian Industries Preservation Act 1906 ancillary liability see complicity ancillary restraint coverage of statutory regime 12, 13-19



critical assumptions when assessing	standards 309
568–71	burden of proof
enforcement of criminal cartel laws 12	competition test 291
Federal Court of Australia Amendment	concerted practices 58
(Criminal Jurisdiction) Act 2008 (Cth)	in criminal trials 29
history and development 3-7	defence of ancillary restraint 295
key reforms 1-2	defence of reasonable precautions 167, 234,
legislative framework 10-12	239–40
managing the future 580-2	dual listed companies exceptions 265
overreach 25-7, 573-4	related corporation exceptions 263
piecemeal nature 259-60	business justification
retrospectivity 275-6	as evidence of lack of an understanding
spirit of the law 557-8	66
strengths and weaknesses 571-80	see also ancillary restraint
territorial jurisdiction 14-17	
treatment of breaches of prohibitions on cartel	Cadbury action 523
conduct 3	CAMAC (Corporations and Markets Advisory
uncertainty 25–7	Committee)
underreach 573–4	Corporate Duties Below Board Level 471
see also legislative drafting; statutory	Personal Liability for Corporate Fault 190
interpretation	Canadian Competition Bureau
Australian Competition Tribunal, market	approach to leniency 397
definition 15	approach to leniency and sentencing
uthorisation	403–5
absence of procedure in US or EU 327-8	Canadian Sentencing and Leniency
and cartel offences 325	Bulletin 403–4
collaborative ventures 293	DPP FPS Deskbook 404
conduct preliminary to a grant of	interaction with DPP 403-5
authorisation 326–7	penalty assessment 441–2
net public benefit test 325	relationship with DPP 344-5
role 31, 324–5, 327–8	cartel conduct
	criminalisation 1-3, 135, 341
pehavioural economics 544	dysfunctional state of exceptions to cartel
pelief	prohibitions 259-62
application of requirement 146–7	international focus and trends 1-3
fault element of cartel offences 138, 145–6	misleading description as 'theft' 22–3
features 145–6	overreach of Australian cartel
jury directions 156	legislation 25-7, 86-7, 96, 99, 108,
lack of settled meaning 138	109–10, 113, 124–5, 573–4
oid-rigging provision	rules reflecting economic seriousness 569,
auctions 123	573-4
bid rotation 123	scheme of prohibitions 11–12
bid suppression 123	serious cartel conduct 22, 28–9, 30, 31, 34
bid withdrawal 123	uncertainty of Australian cartel
cover bidding 123	legislation 25–7
definition 121	underreach of Australian cartel
definition of 'bid' 124	legislation 124, 573–4
government procurement 122	see also bid-rigging provision; cartel
introduction of new prohibitions 11 joint or consortium bidding 125–7	provision; market allocation provision;
	output restriction provision; price-fixing
overreach 124–5	provision
private equity bidding 125–7	cartel legislation
purpose 122–5	Canada Competition Act 1986
underreach 124 counties see rewards	exemptions 26 investigation and prosecution of cartel
	offences 344–5
ooycott collective boycotts 77–9, 116–17	joint ventures 281–2
primary boycotts 109	•
primary boycous 109	partnerships 223–4



cartel legislation (cont.)	jury directions 156–7
EU Treaty	main fault elements 137
classification of provisions 83-6	market manipulation 22, 33, 474-5
concerted practices 48-9, 62, 247	maximum penalties 212
de minimis doctrine 84	names given to prohibitions 33
exemptions 26, 328	subject matter 22–3
implementation doctrine 18	see also dishonesty; fault elements;
jurisdiction 18	imprisonment; physical elements
partnerships and unincorporated	cartel provision
associations 224	classification of provisions 76-89
pursuit of efficiencies 285	competition condition 71, 100, 143, 268, 306
related undertakings 263–4	definition 11, 25, 27, 76
unified enterprise principle 245	extrinsic materials 550
NZ Commerce Act 1986	'gives effect to' 68, 69-71, 548-9
anti-competitive conduct and penalty	liability control 549–51
assessment 490	overreach 25-7, 96, 99, 108, 109-10, 113,
differences from TPA 3–7	124–5, 573–4
exclusionary provisions 108	recommendations for workable rules 575
indemnification 471	reformulation 131–3, 155–6
penalty assessment 446, 447	types 11
UK Enterprise Act 2002	uncertainties 549–51
investigation and prosecution of cartel	underreach 124, 573–4
offences 344	see also bid-rigging provision; fault elements;
jurisdiction	market allocation provision; output
US, antitrust laws 31	restriction provision; price-fixing
US Antitrust Criminal Penalty Enhancement	provision; purpose
and Reform Act 2004 416–17	CDPP (Commonwealth Director of Public
US Antitrust Criminal Penalty Enhancement	Prosecutions)
and Reform Act 2004 Extension Act of	approach to criminal enforcement 341
2010 417	disclosure of information 392
US Federal Trade Commission Act 48, 55	enforcement role 341–8
US Sherman Act	immunity policy 6
acquisition of shares or assets 301–2	powers in relation to cartel offences 2, 12,
commitment to an agreement 58	13–14
core joint venture conduct 287–8	prosecutorial discretion 28–31, 34
intent to benefit test 243	relationship with ACCC 342–3, 345, 348
interpretation of s 1 79, 82	relationship with ASIC 345–6
joint bidding 126–7	relationship with enforcement
joint ventures 272	agencies 346–8
2	see also ACCC–CDPP MOU; immunity
partnerships 223 plus factors 60–1	CDPP Prosecution Policy
private enforcement and immunity	balance between civil and criminal
process 415–17	liability 192, 194
	•
pro-competitive conduct 327–8	charge negotiation 399–401
pursuit of efficiencies 285	cooperation in criminal proceedings 398–401
related corporations 263	decision to prosecute 352, 358–62
understanding and interpretation of	enforcement of cartel offences 341 guilty pleas 485
'agreement' 47–8	
see also Australian cartel legislation cartel offences	immunity 6, 382, 389–90, 395–6
	multiple charges 356
approach to sentencing 473–5	referral to prosecute 357
concealing or compounding a cartel	undertaking not to prosecute 390, 396
offence 202–3	see also enforcement policy
definitional challenges 23–5	circumstantial evidence
determinations of seriousness 28–31	acceptance by the courts 58–9
fault elements as a distinguishing feature	burden in civil cases 66
135	burden in criminal cases 66
fault-based liability 569, 574–5	of an understanding 59
introduction in Australia 1–2	see also tacit collusion



> INDEX 605

civil and criminal liability	commercial justification see business
differentiation of criminal and civil	justification
prohibitions 19, 25, 27-8, 568, 572	commission by proxy 162
differentiation in the past 32-3	commitment
dishonesty proposal 19–23	ACCC proposal 62
fault elements for cartel offences 19	in an understanding 44-7
giving effect to a cartel or exclusionary	loophole 559–60
provision 70–1	removal of requirement in relation to an
issues and recommendations 572	understanding 46–7
need for more comprehensive systematic	as a requirement in the US 48
framework 31-2	common law doctrine of restraint of
need for narrowly defined prohibitions	trade 79–82, 288
29–31	communication, in an arrangement or an
potential enhancements to current	understanding 43–4
framework 33-4	community service orders 457–9
rules governing corporate capacity to be held	compensation
liable 221	as a relevant factor in setting penalties 524-7
time limit on proceedings 18-19	see also damages; private actions; private
understanding and concerted practices 58	enforcement; restitution
civil proceedings after criminal proceedings	competition
criminal proceedings that fail 369-70	definition 14
criminal proceedings that result in a	treatment under TPA 87
conviction 368–9	Competition Act 1986 (Can) see cartel legislation
civil sanctions	Competition Code 13
need for greater coherence and	competition condition 71, 100, 143, 268, 306
certainty 527–9	competition test, and concerted practices 54
see also civil and criminal liability; damages;	compliance
disqualification; monetary penalties;	cartel provisions and other provisions 549-51
non-monetary sanctions	Compliance Model 537–8, 548, 556
class actions 405	compliance programs 536
classification of provisions	contrasted with liability control 538, 564
Australian approach 86–9	corporate culture of compliance 537, 538-9,
criteria 76–7	564–5
economic principles 77–9	corporate liability 552–4
EU approach 83–6	ethics as a limited guide 558
US approach 79–82	fault elements of cartel offences 551-2
coercion	good corporate citizen 537
as defence 44	implications of introduction of cartel
see also anticipated reactions; superior orders	offences 533–6
collaborative ventures, proposed collaborative	individual responsiblity 547
venture exception 292–5, 315–16	meaning 538
collective acquisition and joint	positive attitude towards 557
advertising 298–9, 554	proactive measures 534
collective bargaining 296–8	rational self-interest 557
collective boycott see boycott	reactive measures 534
collusion	see also liability control
and characteristics of market 64	compliance programs
definitional challenges 39	defence of corporate reasonable precautions
and facilitating or concerted practices	and due diligence 236–8
33-4	impact of anti-cartel legislation 542
key concepts 36	purpose 536
and parallel conduct 40, 61	use of AS 3806 as general framework
see also arrangement; concerted practices;	541-2
facilitating practices; tacit collusion;	see also AS 3806 Compliance Programs (2006)
understanding	complicity
collusive tendering see bid-rigging provision	aiding, abetting, counselling or
Commerce Act 1986 (NZ) see cartel legislation	procuring 174–5
Commerce Commission see NZ Commerce	bases of liability for complicity 168–9
Commission	being knowingly concerned 175-6



complicity (cont.)	see also arrangement; collusion;
in cartel offences 168	understanding
in civil cartel contraventions 168–9	controlling a price 97-9
exceptions and defences 182	see also price-fixing provisions
fault elements 173–81	cooperation
fault elements for cartel	application for leniency 394
contraventions 177–8	Canadian approach 403–5
fault elements for cartel offences 176–7	charge negotiation 380, 399-401
fault elements in relation to mode of	civil proceedings 394–8
commission 179–81	condition of full cooperation 390-1
fault elements in relation to type of principal	criminal proceedings 398-403
offence or contravention	discounts 528
committed 178–9	eligibility for leniency 393
ignorance or mistake 181	impact on sentencing 493-6
liability 167–8	nature and extent of leniency 392-3, 495
omission to intervene 170–3	need for guidance on extent of
parent company liability 245	leniency 397–8
physical elements for liability 169–73	negotiated outcomes in civil
simplification and reform 182-3	proceedings 394–7
special requirement of wrongfulness 173	plea bargaining 380, 401–3
vicarious responsibility 181–2	role in anti-cartel law enforcement 378–80
withdrawal 331–2	submissions to court on penalties 393–4
concealing or compounding a cartel	see also immunity; immunity and cooperation
offence 202–3	policies
concert, acting in 62, 162	coordination 39–40, 43, 51–3, 63
concerted practices	corporate accountability
ACCC concerns 38	and individual accountability 191-2
adoption of concept 28, 559	enforcement discretion 192–4
case for adopting concept 52–3	issues and recommendations 576–7
case against adopting concept 53-5	liability rules and sanctions 569
and competition or rule of reason test 54	and vicarious responsibility 210–12
and corporateness 247	see also corporate liability; corporate
distinction from agreement in EU 48-9	responsibility; vicarious responsibility
EU concept 49–51, 62	corporate cartel conduct
and information exchange 50-1, 63, 64-5	ancillary liability 249-50
options for equating with	corporate model 246
'understanding' 56–8	corporateness 247, 256–8
restriction to civil prohibitions 33–4, 247	humanoid model 246
Tonking's modified version 56–7	reactive disregard 250–3
see also facilitating practices	repeated cartel conduct and the 'whole
conditional intention 138–9	cartel' 248–9
confiscation see forfeiture of proceeds of crime	corporate cheating see evasion
conscious parallelism 40–1	corporate criminal liability
consensus, in an arrangement or an	deterrence 218, 220
understanding 44	justification 219
consortium bidding see bid-rigging provision	need for 213–21
conspiracy 23, 24–5, 58–9	penalties 218
inchoate liability 184–6	recommendations 576–7
plus factors 60–1	retribution 220
withdrawal 332–3	time frame for determining liability 251, 252
see also attempt; inchoate liability	see also individual criminal liability
conspiracy to defraud 23, 24	corporate culture
consumer welfare 77, 88, 324, 478–81	corporate blameworthiness 231
contract	unworkability as a fault element 232
interpretation in US 47–8	see also compliance
meaning and interpretation of term 36,	corporate internal controls
39–40	compliance and liability control 571
meaning of 'makes' 68	internal immunity policy 547–8



meaning 534	general principle 231
positive sanctions 547	see also corporate liability
and prevention of cartel conduct 534-5	corporateness see corporate cartel conduct
see also compliance	Corporations and Markets Advisory
corporate internal discipline 195–7	Committee see CAMAC (Corporations
corporate liability	and Markets Advisory Committee)
ancillary liability 249–50	corrugated cardboard packing cartel
attribution of conduct and fault to a	(Amcor/Visy) 5, 193–4, 236–7, 408, 410,
corporation 209-12, 229-46	430, 431, 442, 470, 523
attribution of exceptions requiring a state of	counterfactual analysis 129, 306
mind 253-6	criminal proceedings after civil proceedings
before or after dissolution 227–8	civil proceedings that do not result in a finding
before incorporation 227	of a contravention 373–4
corporate blameworthiness 220, 231, 233–4	civil proceedings that result in a finding of a
corporate complicity 245	contravention 371–3
corporate fault 218–20	criminal sanctions
corporate intention 215	approach to sentencing 473–5
corporate negligence 215, 221, 232–3, 243	Dawson Committee recommendation 4
Crown immunity 225–7	federal sentencing law 472–3
defence of reasonable precautions and due	first call for introduction 3
diligence 34	need for greater coherence and
directing mind principle 210–11	certainty 529–32
exceptions requiring a state of mind 240–2	sentencing factors 483–5
exclusion of general principles under Criminal	sentencing options 501
Code 210, 229–32	sentencing principles 478-83
government authorities 224–7	sentencing purposes 475–8
intent to benefit the corporation 233–4	Crown immunity 225–7
liability control 552–4	
organisational capacity to be held liable 221	damages
parent corporations 244–6	compensation 524–7
partnerships 223–4	heightened exposure for immunity
policy justifications 213-21	applicants 409–10
provisions 12	private actions 405-7, 415-19, 517, 546
ratification 250–1	and requirement for restitution 519, 520
reactive corporate fault 251–3	in Visy case 523
reactive disregard 251	Dawson Committee
retribution 218-20	ban on indemnification 470, 471
standard of care 215, 239	collective bargaining exception 297
subsidiary corporations 244-6	criminal sanctions 3, 4
successor corporations 228	definition of cartel conduct 27
types of corporations subject to liability 222	differentiation of criminal and civil
unincorporated associations 223-4	prohibitions 19
workable rules 569	dual listed companies exceptions 265-6
orporate negligence	exclusionary provisions 26, 108-9, 110-11
cartel offences 233	joint ventures 274
unauthorised conduct 243	leniency policy 382
under Criminal Code 232–3	market definition 15
corporate reasonable precautions and due	penalty maxima 446
diligence	role 2
burden of proof 239–40	time limit on civil liability 19
complicity, attempt and conspiracy 250	de minimis conduct 84, 334–5
as defence 234–5	defences see exceptions
establishment of defence 235–8	
	detection, probability of 425–7 deterrence
incentive to prevent cartel offences 238–9	
standard of care 239	general 475, 476, 477–8, 505–6
vicarious responsibility 34, 166–7, 234–5	monetary penalties 425
corporate responsibility	optimal deterrence theory 425–8
and corporate action, 214–15	as primary goal of civil sanctions 475-6, 477



deterrence (cont.)	see also anticipated reactions; coercion;
specific 476, 496	superior orders
see also sentencing purposes	
dishonesty	EC (European Commission)
and culpability 20	approach to leniency 398
differentiation between civil and criminal	base fines 441
liability 5-6, 19, 20	fining practices 428, 432-3
flaws 19-23, 571-2	private enforcement and immunity 417–19
questionable precedent 23	recidivism as an aggravating
and subject matter of cartel offences 22–3	circumstance 444
test for dishonesty 20–2	reductions in fines 444–5
disqualification orders	settlement procedure 402
effectiveness 469	EC Damages Actions for Breach of the European
length 466–9	Community Antitrust Rules 417–18
rationale 465–6	EC Leniency Notice 444, 518
under s 86E of TPA 464	EC Settlement Procedure 444
DOJ (US Department of Justice)	economic efficiency
application of sentencing guidelines 473–4	treatment under TPA 87
fining practices 428, 432	see also competition test
firm size and culpability score 443–4	enforcement policy
'hard-core' cartels 3	ACCC Compliance and Enforcement Policy 192
imprisonment and antitrust deterrence	194, 338–41
506–7	approach to dual proceedings 362–3
	bifurcation model 342–3
integration of investigatory and prosecutorial functions 343–4	
	criminal investigation 349–52
joint bidding 126–7	decision-making criteria 348–9
joint ventures 272–3	gaps in 29, 353–8, 363, 370, 376–7
Model Amnesty Letter 518	issues and recommendations 572–3, 577
plea bargaining and conviction rate 401–2	lessons from ASIC experience 345–6, 367
'Principles of Federal Prosecution of Business	liability control framework 564
Organizations' 192, 197	multiple objects and matching modes of
recidivism as an aggravating	enforcement 568, 572–3
circumstance 444	need for policy consolidation and
restitution orders 527	extension 375–7, 570
DOJ Corporate Leniency Policy 518	prosecution 34, 358–62
DOJ/FTC Antitrust Guidelines on Collaboration	recidivism 354, 355, 375
among Competitors 272	referral to prosecute 34, 352–8
DOJ/FTC Antitrust Guidelines for the Licensing of	role of ACCC 338–41
Intellectual Property 314–16	role in anti-cartel regime 337–8
double jeopardy 362–3	roles of ACCC and CDPP 341-8
see also abuse of process	see also ACCC Cooperation Policy; ACCC
dual civil and criminal proceedings	Investigation Guidelines; ACCC-CDPP
abuse of process 362–3	MOU
civil proceedings after criminal	Enterprise Act 2002 (UK) see cartel legislation
proceedings 368–70	enterprise liability
concurrent versus sequential	and accountability 198
proceedings 365–8	see also corporate responsibility; individual
criminal proceedings after civil	responsibility; optimal deterrence
proceedings 371–4	entity, types subject to cartel regulation 12,
double jeopardy 362–3	13–14
generally 362–3	Ergas Committee 314
protection under TPA s 76B 362-4, 372-3	EU Treaty see cartel legislation
'substantially the same' conduct 364–5	European Commission see EC (European
dual listed companies exceptions 264-6	Commission)
due diligence see corporate reasonable	evasion
precautions and due diligence	corporate cheating 457, 459
duress	gaming 557
as defence 44	JV Ultra-Lights 281–2, 285–7, 562–3



loopholes 559-60	particularity 105–7
sham joint ventures 281-2, 285-7, 562-3	persons or classes of persons 105–8
see also adroit boundary riding; compliance;	prior to 2009 amendments 11
liability control	prohibitions 12
evidence	purpose requirement 103
of a conspiracy 58–9	reform proposals 108–11
fault elements 139–40	relationship to output restriction
understanding 59	provisions 112, 114, 116–17
see also burden of proof; circumstantial	exclusive dealing exceptions 300–1, 554
evidence; expert evidence	exemptions see exceptions
exceptions	expert evidence, relevant to proving
acquisition of shares or assets 301–2	collusion 67
ancillary restraint 87, 288, 289–90	Explanatory Memorandum to CC&OM Bill
anti-overlap 6, 299–303, 306, 308	bid-rigging provisions 124
authorisation 324–8, 555	joint bidding 126
collaborations between competitors 292–5,	joint ventures 272
315–16	limitations and omissions 10, 15
collective acquisition and joint	persons relevant to purpose condition 117
advertising 298–9, 554	price-fixing 94, 99, 101
collective bargaining 296–8	prohibited conduct 27, 110
Crown immunity 225–7	supply agreements between competitors 305
de minimis conduct 334–5	306
dual listed companies 264–6 in EU law 85	Explanatory Memorandum to CC&OM Bill (Supplementary)
exclusive dealing 300–1, 554	restriction on production and supply of goods and services 273–4
export arrangements 316–18	
honest and reasonable conduct that ought	umbrella joint venture contracts 277–9
fairly to be excused 333–4	Explanatory Memorandum to CLERP
importance and current problems 259–62	amendments 371
intellectual property 311, 312	export arrangements
joint ventures 253, 255–6, 554, 555	lack of cogent rationale 317–18
liability control 554–5	nature and scope of exception 316–17
liner cargo shipping services 318–21	extraterritoriality
need for functional reconstruction 335–6	effects doctrine 17–18
partnerships 223–4, 266–7	prohibitions 12
provisions 12	provisions 16–17
related corporations 262–4, 554	
resale price maintenance 302–3	facilitating practices
settlement of litigation 322-4	ACCC concerns 38
standard setting 309	adroit boundary riding 560-1
state of mind 253–6	advance price announcements 42
supply agreements 303-7, 554	anti-competitive effects 41-2
test of reasonableness 253, 255-6	basing-point pricing 42
underwriting arrangements and funding	and civil prohibitions 33-4
syndicates 321–2	and concerted practices 49
withdrawal 328–33, 555	examples 42
exclusionary provisions	information exchange 42, 63
Dawson Committee recommendations 108-9,	liability control 545, 560-1
110–11	most favoured customer clause 560
definition 76, 102–3	price protection or price-matching
following 2009 amendments 11	provision 42, 560
'gives effect to' 68, 69	product standardisation or benchmarking
identifying and managing potential traps 551	42
immediate v ultimate purpose 104–5	public speech 42
joint venture defence 109–10	signalling 42, 43
nature of exclusionary purpose 104–5	uniform delivery pricing methods 42
objects of exclusionary purpose 105–8	in US 48
overreach 108, 109–10	see also concerted practices



fault elements	General Electric Corporation 195, 196,
belief 138, 145–6	238
cartel offences 135, 137	Ghosh test 20–2, 23
of civil cartel prohibitions 135-6	see also dishonesty
complicity 173–81	gives effect to
conditional intention 138-9	liability control 548-9
coverage and application 139–40	meaning of 69–71
degree of detail of which D must be	purposes of this form of liability 68, 69
aware 151–2	government authorities, corporate
and differentiation between civil and criminal	liability 224–7
liability 19, 70–1	government procurement 122
evidence 139–40	group boycott see boycott
fault concepts 137–9	gun-jumping
intention 28, 137, 140–2	see also exceptions
introduction for cartel offences 19	
jury directions 156–7	heavy electrical equipment conspiracies
knowledge 138, 143-5	(US) 195, 196, 238
knowledge or belief 28, 138, 142-3, 150-1	Hilmer Committee Review 12, 13, 260
liability control 551-2	honest and reasonable conduct that ought fairly
mistake of fact 152–3	to be excused 333–4
mistake of law 153–5	horizontal agreements between competitors
reactive corporate fault 251-3, 257-8	criteria for classification 76–7
recklessness 138	economic principles relevant to
reformulation 155–6	classfication 77–9
wilful blindness 147–50	EU approach to classification 83–6
Federal Court of Australia	lawful and unlawful conduct 39-40
criminal jurisdiction and cartel offences 2, 12,	US approach to classification 79–82
market definition 15–16	ICN (International Competition Network)
uncertainty in relation to sentencing 475	effectiveness of bifurcated system 343
federal sentencing law	maximum fine calculation 447
ALRC recommendations 32, 472–3, 474,	penalty reductions and settlement
476–7, 478, 482, 484–5, 487, 489–92,	systems 397
494–5, 499–501, 509, 511, 516, 523,	plea bargaining and settlement 402
529–32	Ignorance see mistake of fact; mistake of law;
criticisms 472	wilful blindness
current state 472–3	immunity
ines	ACCC policy 4, 6
in addition to imprisonment 502-3	applications 384
against corporations 212, 424, 504–5	CDPP policy 6
against individuals 443, 501, 503-4	civil proceedings 383
assessment 438–40, 445–6	criminal proceedings 388–92
base fines 440-3, 528	derivative immunity 386–7, 391
benefits-based 447-50	disclosure of information 386, 392
guidelines 501	eligibility criteria 384–5, 389
inability to pay 503-5	granting of conditional and final civil
maximum 501	immunity 386
turnover-based 450-3	internal 547–8
see also monetary penalties	markers 383
fixing, controlling or maintaining a price 71,	'paperless process' 384
93–5, 100, 141	restitution as a condition 518-22
fixing a price 95–6	review of immunity decisions 388
see also price-fixing provision	revocation 387-8, 391-2
forfeiture of proceeds of crime 204, 556	undertaking not to prosecute 390
see also money laundering offences	see also ACCC Immunity Policy
FTC (US Federal Trade Commission) see	immunity and cooperation policies
DOJ/FTC	ACCC traditional approach to
fuel industry see petrol industry	disclosure 407-10



EU approach to private emorcement and	special requirement for wrongrumess 175
immunity 417–19	tacit implication 186–91
issues and recommendations 577–8	vicarious liability 165–7
need for more coherent and effective	workable rules 569
approach 419–20, 570	see also complicity
private enforcement 405-7	individual responsibility
'protected cartel information' scheme 410-15	allocation of individual and corporate
role in anti-cartel law enforcement 378-80	responsibility 192–5
US approach to private enforcement and	importance at level of enforcement
immunity 415–17	discretion 194-5
imprisonment	internal discipline orders 195-7
ALRC recommendations 509, 511	and liability control 547
concurrent and cumulative sentences 510-11	neglect in AS 3806 542-3
fixing the non-parole period 508-10	neglect in enforcement actions 193-4
as last resort 505	inducement and attempted inducement 184-6,
and general deterrence 505-6	333
suspended sentences 507-8	information disclosure orders 459-61
inchoate liability	information exchange
for attempt, conspiracy, inducement and	and concerted practices 50-1, 64-5
attempted inducement 184-6	defence for information recipients 51
double inchoate liability 185–6	effects of 63
see also attempt; conspiracy; inducement and	pro-competitive effects 53-4
attempted inducement	public versus private nature of
incidental effect, price-fixing 94	communication 63, 65
incitement 333, 470	see also facilitating practices
see also inchoate liability; inducement and	injunction
attempted inducement	punitive 218, 456
indemnification 470-2	under TPA s 80 250, 252, 257
individual accountability	innocent agency 162
corporate internal discipline systems 195–7	insulated conductor stratagem 186–9, 563–4
enforcement discretion 192–5	intellectual property
importance of securing 569	competition test for licensing agreements 314
recommendations for securing 575–6	cross-licensing 313
and corporate accountability 191–2, 198–9	exceptions 311, 312
see also individual liability; individual	limitations on exceptions 312–13
responsibility	loophole 313, 563
individual criminal liability	need for fundamental reassessment 314–16
deterrence 216	proposed collaborative venture
enforcement difficulties 216-17	exceptions 315–16
see also corporate criminal liability	intention
individual liability	conditional intention 138-9
allowing or authorising cartel conduct 161–5	fault element of cartel offences 66-7, 137
as an accomplice 167–8, 552	meaning and application 137, 140-2
commission by proxy 162	internal discipline orders 195–7
extended liability under TPA s 6 159–60	International Competition Network see ICN
and formulation of cartel offences 23-4	(International Competition Network)
inchoate liability 184-6	investigation
innocent agency 162	access to information gathered by
insulated conductor stratagem 186–9, 563–4	enforcement agency 407-8, 410
joint commission 162	legal professional privilege 545
omission to intervene 170–3	power of investigation 12, 13–19
physical elements for liability on basis of	privilege against self-incrimination 216, 373
complicity 169–73	public interest immunity privilege 408–10,
physical and fault elements 160–1	413
as principal party 159–60	search and seizure 12
provisions 12	telecommunications interception 5–6, 12,
shut-eyed sentries 186–9	13–19
significance of principles and rules 158	see also cooperation; immunity



612 INDEX

jail see imprisonment meaning and application 138, 142-3 joint bidding see bid-rigging provision as to purpose of cartel provision alleged 150-1 joint commission 162 ioint venture exceptions ancillary restraint 288, 289 legal professional privilege 545 Canadian defence of ancillary restraint 294-5 legislative drafting competition test as an element of 291-2 piecemeal changes 259-60 contract proxy provisions 274-5 prescriptive style 88-9 core joint venture conduct 287-8 see also statutory interpretation economic integration of functions 272-3 leniency see cooperation; immunity liability see corporate liability; individual efficiencies 285 flame arrester procedure 555 liability; liability control 'for the purpose of a joint venture' 273, liability control adroit boundary riding 548, 555, 556-64 282-95 joint venture defence. 109-10, 268 arrest 545 joint venture requirement 270-4 cartel provision and other provisions 549-51 liability control 554, 555 constraints on executives subject to mental element 288-90 investigation 546 pre-contractual joint venture arrangements or continuous disclosure obligations under understandings 279-80 Corporations Act 546 contracts with competitors 545 proposed collaborative ventures contrasted with compliance 538, 547, 564 exception 292-5 provisions 267-70 corporate liability 552-4 reform proposals 296 crisis control procedure 546 requirement of a contract or contract D&O insurance 546 dawn raids 545 proxy 274-82 requisite intention and reasonable document control procedure 545 belief 280-1 employment contracts 546 restriction to production and supply 273-4 exceptions 554-5 retrospective application of contract facilitating practices 545 fault elements of cartel offences 551-2 requirement 275-6 sham joint ventures and JV handling ACCC enquiries 545 Ultra-Lights 281-2, 285-7, 562-3 handling exclusive dealing exceptions and umbrella joint venture contracts 276-9 other exceptions 545 jurisdiction hot files 545 territorial immunity applications 545 conduct nexus 16-17 implications of introduction of cartel geographical nexus 14-16 offences 533-6 see also extraterritoriality importance to enforcement policy 565-6 jury trial, directions 156-7 importance to research into cartel conduct and JV Ultra-Lights 281-2, 285-7, 562-3 impact of cartel legislation 547-8, 566 indemnification 546 knowingly concerned, liability for being individual liability 552 bases of liability for complicity in cartel and individual responsibility 547 conduct 168 insulated conductor stratagem 563-4 fault elements 175-6 issues and recommendations 571-80 individual liability 552 legal professional privilege 545 time limits 250 legal representation 546 withdrawal 331-2 Liability Control Model 538, 543-4, 556 knowledge loopholes 559-60, 565 conscious awareness 143-5 management of traps set by legislation 546, fault element of cartel offences 135, 137, 138 548-56 meaning 138, 143-5 meaning 534, 543 wilful blindness 147-50 minimisation of collateral effect of private knowledge or belief actions for damages 546 degree of detail of which D must be sensitive internal inquiries 545 aware 151-2 settlement discussions 545 fault element of cartel offences 137 sidewinder liability 555-6



types 545-6, 547

INDEX 613

naked restraint, rule of reason analysis 79-82

National Competition Council see NCC whistleblower procedure 545 (National Competition Council) see also compliance 'likely', meaning 101-2 NCC (National Competition Council) limitation periods 18-19, 69, 251, 252 export arrangements 317 partnerships 266-7 liner cargo shipping services dubious rationale 320-1 standard setting 309-10, 311, 312 nature and significance of NCC Review of Sections 51(2) and 51(3) of the exemptions 318-20 Trade Practices Act 1974: Final lysine cartel 3 Report 266-7, 309-10, 311, 312, 317 negotiated penalties impact 436-8 maintaining a price 96-7 see also price-fixing provision judicial approach to joint submissions 433-5 makes, meaning in relation to contracts, non-monetary sanctions arrangements or understandings 68 adverse publicity orders 460-4 management by exception 251 advertisement orders 459-61 market allocation provision against corporations 218, 453-61, 515, 516 allocation of customers 119, 120, 121 ALRC recommendations 516 allocation of suppliers 119 community service orders 457-9, 516 allocation of territories 119, 121 design weaknesses 528-9 definition 118-19 disqualification orders 464 gaps in definition 119 information disclosure orders 459-61 introduction of new prohibitions 11 probation orders 455, 516 meaning of 'allocate' 120-1 range 33 market definition 14, 15-16, 18, 128 under TPA 453-4 market manipulation see cartel offences NZ Commerce Commission, approach to market power leniency 397 ancillary restraint 79-82 misuse 33 obstruction of justice 200, 216, 356, 555-6 vertical supply agreements 369-70 see also offences relating to administration of see also cartel conduct iustice market sharing see market allocation provision OECD (Organisation for Economic Cooperation mens rea see fault elements and Development) methodological individualism 213-15 definition of 'hard-core' cartel conduct 26 MFN clause see most favoured customer clauses immunity and restitution 518 Minister for Competition Policy and Consumer plea bargaining and settlement 402 Affairs, appointment 5 recommendations in relation to cartel mistake of fact 152-3, 181 offences 25, 26 mistake of law 153-5 offences relating to the administration of justice monetary penalties Crimes Act offences 202 adjustments for aggravating and mitigating Criminal Code offences 201-2 factors 443-5 offences of concealing or compounding a against corporations 212, 424 cartel offence 202-3 against individuals 460-4 offences under TPA ss 155(5) and base fines 440-3, 528 154R(2) 200-1 benefit maximum 447-50 offences relating to money laundering and deterrence 425 proceeds of crime 203-4 fining practices in US and EU 428 offences relating to organised crime level and effectivness 527 associating in support of serious organised limitations 454-5 criminal activity 205 maximum 33, 446-7 directing an activity of a criminal organisation 206-7 optimal deterrence theory 425-8 over last 35 years in Australia 429-32 supporting a criminal organisation 205-6 recommendations 528 OFT (UK Office of Fair Trading) turnover-based 450-3 base fines 442 money laundering offences 203-4, 556 collaborative agreements 328 most favoured customer clauses 42, 247, disqualification orders 468-9 560 private enforcement and immunity 419



OFT (UK Office of Fair Trading) (cont.)	reciprocal supply agreements 307
role in investigation and prosecution of cartel offences 344	resale price maintenance exceptions 302–3 vertical supply agreements 308
oligopolistic interdependence 40-1	see also competition test; exceptions; rule of
optimal deterrence 425–8	reason
organised crime offences	petrol industry
associating in support of serious organised	ACCC report on petrol prices 37, 45–6
criminal activity 205	alleged price-fixing cases 36, 44–5, 46, 50,
directing an activity of a criminal	54–5, 59, 99
organisation 206–7	concerns over coordinated conduct 37
supporting a criminal organisation 205-6	FuelWatch scheme 53
output restriction provision	physical elements
capacity 116	of criminal and civil prohibitions 25, 33–4
definition 111, 113, 114–15	definition of 'gives effect to' 69–70
introduction of new prohibitions 11	definitional problems 27–8
output reduction 77–9	for liability on basis of complicity 169–73
overreach 113	plus factors, as indicators of understanding 60-
particularity 117	Pratt, Richard 5, 30, 193, 194, 200, 396, 555,
persons or classes of persons 117	556–8, 564
production 115–16	price-fixing provision
purpose 112–14	common purpose 91–2
relationship to exclusionary provisions 112,	controlling a price 97–9
114, 116–17	definition 76, 90, 100–2
restrictions on quality 117–18	downstream price-fixing 101
restrictions on quantity 117–18	effect or likely effect on a price 93–5
rostering 114	exceptions 94–5
short-run v long-run purpose 113	fixing a price 95–6
supply agreements 114	giving effect to 70
overreach	incidental effect 94
of Australian cartel legislation 25-7	introduction of new prohibitions 11
bid-rigging provision 124–5	issues of interpretation and application 90
controlling a price 99	'likely' in relation to supply of goods or
exclusionary purpose 108, 109–10	services 101–2
fixing a price 96	maintaining a price 96-7
issues and recommendations 573–4	price, discount, rebate, allowance or
output restriction provision 113	credit 100
	price-fixing by buyers 101
parallel conduct 40, 61	prior to 2009 amendments 11, 89–90
parole 508–10	providing for 99–100
see also imprisonment	subjective v objective purpose 91
partnerships	substantial purpose 92-3
exception 223-4, 266-7	primary boycott see boycott
liability 223–4	principal party, individual liability as 159-60
party, to a contract, arrangement or	private actions
understanding 71-3, 92	ALRC recommendations 523
penalties see disqualification orders; monetary	compensation as a relevant factor in setting
penalties; non-monetary sanctions;	penalties 524–7
sanctions; sentencing options	impact of ACCC settlements 433-8
per se liability	impact of ACCC settlements on follow-on
authorisation 31	actions 522–4
collaborative ventures between	relationship with public enforcement
competitors 292-5	regime 517, 532
consent 259-60	restitution as a condition of immunity 518-22
definition for cartel conduct 25-6, 89, 108,	US and EU approaches to 517
132–4	see also class actions; damages
joint venture exceptions 267-70, 272,	private enforcement
289–90, 291	EU approach to disclosure of
market allocation provisions 119	information 417–19



immunity and cooperation 405–7	redress facilitation orders 460
impact of ACCC settlements 433-8, 522-4	rehabilitation
low level 517, 521	and contrition 492–3
'protected cartel information' scheme 410–15	of corporations 196
tension between public and private	prospect of 498
enforcement 517	related corporations exceptions 262-4, 554
US approach to disclosure of	remedies
information 415–17	provisions in legislation 12
privilege against self-incrimination 216, 373	see also damages; injunction
probation orders 455-7	reparation see compensation; damages
Productivity Commission 320–1	resale price maintenance exceptions 302–3
prosecutorial discretion	restitution see damages; immunity; private
charge negotiation 396-7, 399-401	actions; private enforcement
decision to prosecute 352, 358-62	restorative justice see sentencing purposes
and determinations of seriousness 28-31, 34	retribution
granting immunity 6, 382, 389-90, 395-6	corporations 218–20
and public interest 32-3, 341, 358-62	as sentencing purpose 476, 477
referral to prosecute 357	retrospective application of legislation 275-6
undertaking not to prosecute 390, 396	rewards 380, 397
in the US 343	rosters 114, 550
'protected cartel information'	rule of reason 26
application of scheme 411	analysis of ancillary or naked restraint 79-82
concept of PCI 411-15	and concerted practices 54
effect of provisions 411	see also ancillary restraint; competition test
factors for determining when PCI is	
disclosed 411	safe harbours see exceptions
provisions 12, 411–15	sanctions
purpose of scheme 410	against corporations 212, 218, 453-61
providing for the fixing, controlling or	against individuals 42
maintaining of a price 71, 93-5, 100, 141	alternatives to monetary penalties under
provision	TPA 453-4
Australian approach to classification 86-9	approach to pecuniary penalty
criteria for utility of classification	assessments 433-8, 438-40, 445-6
system 76–7	approach to sentencing for cartel
definition of 'provision' 75	offences 473–5
economic principles relevant to	balance between corporate and individual
classification 77-9	sanctions 422
EU approach to classification 83-6	balance between public and private
purpose of a provision 90–1	mechanisms of enforcement 422, 532
US approach to classification 79-82	ban on indemnification 470-2
public interest, and prosecutorial	issues and recommendations 527-32, 578-9
discretion 32-3, 341, 358-62	level of pecuniary penalties 424-33, 462-4
public interest immunity privilege 408–10, 413	maximum penalties 429-31, 462
punitive injunction, sanction against	need for greater coherence and
corporations 456	certainty 527–32, 571
purpose	negotiated penalties 433-8
common purpose 91–2	penalty provisions in legislation 12
immediate 104–5	sanction design and application 421-3
of a provision 90–1	statutory scheme in Australia 423-4
subjective v objective 91	see also civil sanctions; criminal sanctions;
substantial purpose 92-3, 105	disqualification orders; fines;
ultimate 104–5	imprisonment; monetary penalties;
	non-monetary sanctions; probation
reactive corporate fault 251-3, 257-8	orders; sentencing options
reasonable precautions defence see corporate	scapegoating 191-2, 386
reasonable precautions and due diligence	Senate Economics Committee
recidivism 354, 355, 375, 444	contract requirement in joint ventures
recklessness 138	281–2



Senate Economics Committee (cont.)	parity 482–3
request for guidelines on cartel	proportionality 478–81
investigations 29, 356–7	totality 481–2
review of CC&OM Bill 6-7	sentencing purposes
sentencing	compensation 524–7
approach to cartel offences 473-5	constraint of requirement of fault 478
comparators 474–5	deterrence 475–6, 477
determinations of seriousness of	general deterrence 475, 476, 477–8
offence 28–31	rehabilitation 492–3, 498
factors 483-5	retribution 476, 477
federal sentencing law 472-3	specific deterrence 476, 496
guidelines 531–2	settlement
options 501	admissions 522–4
overseas comparators 475	agreed statements of fact 434, 435, 436,
principles 478–83	522
purposes 475–8	findings of fact 522-4
see also monetary penalties; non-monetary	impact on private enforcement 522–4
sanctions	negotiated penalties 433-5, 436-8
sentencing factors	penalty reductions 397–8
ALRC recommendations 484–5, 487, 489–92,	plea bargaining 402
494, 499–501	recommendations 527–8
corporations 499–501	see also cooperation
degree of contrition/remorse 492–3	settlement of litigation as cartel conduct
discount for cooperation 493–6	322-4
effect on family or dependants 498–9	SFO (UK Serious Fraud Office), role in
effect on person 496	investigation and prosecution of cartel
list of factors 483–5	offences 344
loss, injury or damage 489–92	Sherman Act (US) see cartel legislation
nature and circumstances of offence	shut-eyed sentries 186–9
485–7	sidewinder liability 199–200
need for adequate punishment 496	liability control 555–6
offence as part of course of conduct 488	see also offences relating to administration of
offender characteristics 497–8	justice; offences relating to administration of
other offences to be taken into account	crime
487–8	signalling 42, 43
personal circumstances of victim	see also facilitating practices
488–9	
	single enterprise 244–6, 263 SLC (substantial lessening of competition)
prospect of rehabilitiation 498	
specific deterrence 496	provision
sentencing options ALRC recommendations 530–1	accepted methodology 127–8
	competition in a market 128 direct effects 129
community service 516	economic efficiencies 129–30
dismissals, discharges and releases	
512–14 fines 501–5	following CC&OM Act 75
generally 501	future with – future without
	comparisons 128, 129, 130
imprisonment 505–11	general prohibitions 127 market definition 128
injunctions 218, 250, 252, 257, 456	market structure 128–9
non-monetary sanctions against	prior to 2009 amendments 11
corporations 515	*
other TPA options 515–17	purpose 130–1
probation 516	subjective v objective purpose 130
recognisance 513–14	standard setting
state and territory options 514–15	exception 309
see also disqualification orders; monetary	history of anti-competitive
penalties; non-monetary sanctions	standard-setting 310
sentencing principles	NCC report 309–10, 311, 312
ALRC recommendations 478–83	pro-competitive effects 310-11



INDEX 617

pro-competitive standard-setting exception 311-12 statutory interpretation literalist interpretation 88, 96, 132 purposive interpretation 56, 88, 96, 131, 132, 254, 575, 580 successor corporations, liability 228 superior orders 192-4, 334 supply agreements between competitors examples where exception is necessary 303-7 Explanatory Memorandum comments 305, 306 input supply agreements 304-6 lack of adequate exception 303 liability control 554 reciprocal supply agreements 307 Swanson Committee 68, 69, 108, tacit collusion anti-competitive effects 41-2 examples 42 increase in conduct 42-3 tacit implication in cartel conduct 186-91 telecommunications interception, ACCC powers 5-6 territorial nexus 14-16 see also extraterritoriality TPA (Trade Practices Act) see Australian cartel legislation Treasury (Australian) discussion paper on meaning of 'understanding' 37, 46 non-disclosure of Working Party report on cartel criminalisation 4 role in development of cartel legislation 4, UK Office of Fair Trading see OFT (UK Office of Fair Trading) underreach bid-rigging provision 124 issues and recommendations 573-4 understanding ACCC's proposed amendment 36-7, 38, 45-6, 47, 55 case for equating with concerted practices 52-3 case for not equating with concerted practices 53-5 circumstantial evidence 59 commitment requirement 44-7 communication requirement 43-4 consensus requirement 44

lack of conceptual distinction from 'arrangement' 43 legal criteria 43 meaning of 'arrives at' 68 meaning and interpretation of term 36, options for equating with concerted practice 56-8 parties to 71-3 Treasury discussion paper on adequacy of current interpretation 37, 46 see also arrangement; contract underwriting arrangements and funding syndicates 321-2 unincorporated associations corporate liability 223-4 partnerships 223-4 unreasonable restraint of trade 79-82, 223, 288 US Department of Justice see DOJ (US Department of Justice) US Federal Trade Commission see DOJ/FTC US Sentencing Guidelines 197, 401-2 application by courts 473-4 base fines 440-1 culpability score for adjustments to base fines 443, 444, 526-7 custodial versus non-custodial sentences 515 fines against individuals 462, 502-3 guilty pleas 495 imprisonment and deterrence 506-7 range and adjustment factors for fines 502 restitution 526-7 vertical agreements between competitors ACCC submission 308 exceptions 303, 306, 308 see also supply agreements between competitors vicarious responsibility conduct or state of mind of agent 240-2 conduct or state of mind of director 240-2 conduct or state of mind of employee 240-2

vicarious responsibility
conduct or state of mind of agent 240–2
conduct or state of mind of director 240–2
conduct or state of mind of employee
240–2
and corporate fault 229
corporate liability 210–12
defence of reasonable precautions and due
diligence 34, 166–7, 234–5
individual vicarious responsibility 165–7
liability for complicity 181–2
recommendations 574
subsidiary corporations 244–6
unauthorised conduct 242–4
Visy Industries Holdings Pty Ltd 5, 193–4,
236–7, 408, 430, 431, 442, 470, 523
Visy trap 300–1, 554
vitamins cartel 16–17, 143, 244–6, 430, 432
volume of commerce 440–3

'invitation to collude' theory, and 'solicitation

to conspire' 55



618 INDEX

Westinghouse Corporation 195–7,
238
whistleblowing 51–3, 409, 414, 540,
545
wilful blindness 147–50
withdrawal
liability for attempt 331
liability for complicity 331–2
liability for conspiracy 332–3
liability for inducement or attempted
inducement 333

liability as a principal for giving effect to a provision 330 liability as a principal for making a contract or arrangement or arriving at an understanding 329–30 liability control 555 navigating the maze under the TPA 328–9 Working Party Report on Cartel Criminalisation non-disclosure by Treasury 4 unsuccessful FOI action 4