

Examining the effectiveness of sanctions in order to deter cartel conduct in Australia

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Australia recently enacted legislation greatly increasing civil penalties and introducing criminal sanctions for engaging in cartel conducts. Through an analysis of the deterrence theory and cartel regimes in countries other than Australia, this article argues that these sanctions do not optimally achieve their stated objective of deterring cartel conducts.

1. INTRODUCTION

On 2 November, 2007 the Australian Federal Court delivered its judgment in one of the most serious cartel cases before the Court, the *Cardboard Box Cartel Case*.⁴⁶³ In this case, the cartel between Amcor Ltd (**Amcor**) and Visy Industries Holding Pty Ltd (**Visy**), who together held 90% market share in the cardboard packaging industry in Australia, had continued for almost five years.

At the time Amcor and Visy engaged in the cartel conduct, they were subject to civil prohibitions. Despite this, cartels were pervasive. They were found to exist in all sectors of industry,⁴⁶⁴ including the airline,⁴⁶⁵ paper manufacturing,⁴⁶⁶ taxi,⁴⁶⁷ and even kart-racing⁴⁶⁸ industries. Many companies became members of cartels, and some companies repeatedly engaged in cartel conducts. This suggested that, for these companies, the economic benefits of cartel conduct far outweighed the sanctions imposed for being caught.⁴⁶⁹

In the *Cardboard Box Cartel Case*, Visy received a civil penalty of \$36 million,⁴⁷⁰ more than twice what was previously imposed by the Court in any cartel case.⁴⁷¹ However,

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⁴⁶³ *ACCC v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673.

⁴⁶⁴ Ken Hendricks, Robert Porter and Guofu Tan, 'Bidding Rings and the Winner's Curse' (2008) 39(4) *Rand Journal of Economics* 1018; Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth) 6; New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 9.

⁴⁶⁵ *ACCC v Qantas Airways Limited* [2008] FCA 1976; *ACCC v British Airways PLC* [2008] FCA 1977; *ACCC v Martinair Holland NV* [2009] FCA 340; *ACCC v Societe Air France* [2009] FCA 341; *ACCC v Cargolux Airlines International SA* [2009] FCA 342.

⁴⁶⁶ *ACCC v April International Marketing Services Australia Pty Ltd (No 5)* [2010] FCA 17.

⁴⁶⁷ *ACCC v White Top Taxis Ltd* [2009] FCA 88.

⁴⁶⁸ *ACCC v Australian Karting Association (NSW) Incorporated* [2009] FCA 1255.

⁴⁶⁹ *Submission to the Trade Practices Act Review*, ACCC Report (2002) 19; *ACCC v ABB Transmission & Distribution Ltd* (2001) ATPR 41-815 at 42-938; David Round and Leanne Hanna, 'Curbing Corporate Collusion in Australia: The Role of Section 45A of the *Trade Practices Act*' (2005) *Melbourne University Law Review* 242, 267; Yuliya Bolotova, John M. Connor and Douglas J. Miller, 'Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis of the U.S. Market' (2009) 5(2) *Journal of Competition Law & Economics* 361, 361.

⁴⁷⁰ The parties negotiated the quantum of the civil penalty, which was accepted by the Court: *Cardboard Box Cartel Case* at 709.

⁴⁷¹ *Cardboard Box Case* at 711. The highest penalty previously imposed was \$15 million in *ACCC v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41-809. An individual penalty imposed in this case was also a new record. The court imposed a penalty of \$1.5 million on Visy Board's former CEO, Harry

this penalty record was miniscule compared to the harm that the Amcor-Visy cartel inflicted on society, which is now estimated to be \$700 million.⁴⁷² In his decision, Justice Heerey called for a change to the regulation of cartel conducts, stating:

The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin. ... Heavy penalties are appropriate for corporations, but it is only individuals who can engage in the conduct. Many countries...have recognised this reality by enacting laws which make cartel conduct by individuals subject to criminal sanctions.⁴⁷³

In response to the decision in, and media interest generated by, the *Cardboard Box Cartel Case*,⁴⁷⁴ Graham Samuels, chairman of the Australian Competition and Consumer Commission (ACCC),⁴⁷⁵ called for Australia to 'fall in line with other jurisdictions by imposing criminal sanctions...for executives who engage in cartel activities.'⁴⁷⁶ On 24 July 2009, the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) (**Cartel Amendments**) was enacted to impose sanctions that would deter both corporations and individuals from engaging in cartel conducts by imposing 'sufficiently detrimental sanctions'⁴⁷⁷ (**Cartel Sanctions**).

2. AN OVERVIEW OF THE CARTEL SANCTIONS

Australia's new regime for eradicating cartels is tripartite. The *Competition and Consumer Act 2010* (Cth)⁴⁷⁸ (CCA) allows for private civil actions instigated by individuals,⁴⁷⁹ actions for civil penalties instigated by the ACCC,⁴⁸⁰ and criminal

Debney, which is almost 67% more than the previous record penalty of \$225 000 imposed on an individual in *ACCC v ABB Transmission & Distribution Ltd (No 2)* (2002) 190 ALR 169.

⁴⁷² Graeme Samuels, 'Opening Remarks' (Speech delivered at the Law Council of Australia Trade Practice Committee Workshop, Gold Coast, 21 August 2010).

⁴⁷³ *Cardboard Box Cartel Case* at 709.

⁴⁷⁴ See generally Matthew Drummond, 'Pratt to Pay Record \$40m fine', [8 October 2007], *Australian Financial Review* (Sydney), 1; Matthew Drummond, 'Checkmate as the King is Cornered', [8 October 2007], *Australian Financial Review* (Sydney) 10; Editorial, 'Boxed into Making a Tough Decision', [9 October 2007], *The Australia* (Sydney); Editorial, 'Cartel Behaviour Should be Criminal', [9 October 2007], *Australian Associated Press General News Wire* (Sydney); Leonie Wood, 'Confessions of a Billionaire', [9 October 2007], *The Age* (Melbourne) 1; Malcom Maiden, 'Visy joins Vizard in Misery', [9 October 2007], *The Age* (Melbourne) 1; Craig Binnie, Ian Royall, Ellen Whinnett and Peter Mickelburgh, 'Pratt Cardboard Deal may have Cost \$700m', [10 October 2007], *Herald Sun* (Melbourne), 1; Editorial, 'ACCC Wants Criminal Sanctions on Cartels', [25 October 2007], *Australian Associated Press General News Wire* (Sydney); Editorial, 'ACCC Boss Wants Jail for Tycoons', [3 November 2007], *The Courier Mail* (Brisbane); Graham Samuels, 'Cartel Ringleaders are Well-Dressed Criminals, so Why Not Send Them to Jail?', [3 November 2007], *The Age* (Melbourne) 2; Andrew Christopher and Georgina Foster, 'Cartel Instigators Belong Behind Bars', [6 November 2007], *Australian Financial Review* (Sydney).

⁴⁷⁵ The ACCC promotes competition and fair trade in the market place for the benefit of consumers, business and the community. Its primary responsibility is to ensure that individuals and businesses comply with the Commonwealth of Australia's competition, fair trading and consumer protection laws. For further information regarding the ACCC, see their website: <http://www.accc.gov.au>

⁴⁷⁶ Graham Samuels, 'Visy News Conference: Opening Statement' (Press Release, 2 November 2007) 3.

⁴⁷⁷ Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth) 25 & 41.

⁴⁷⁸ Formerly known as the *Trade Practices Act 1974* (Cth) (TPA).

⁴⁷⁹ CCA section 82.

prosecutions instigated by the Commonwealth Director of Public Prosecutions (CDPP).⁴⁸¹

2.1 PRIVATE CIVIL ACTIONS

Private civil actions are available for persons to recover compensation for any loss or damage they have suffered as a result of a cartel conduct.⁴⁸² Private civil actions may be instigated against any individual or corporation who was involved in the cartel conduct, up to 6 years after the cartel conduct has occurred. Additionally, where the ACCC or the CDPP have succeeded in a legal action against a cartel party, each can apply to recover damages, on behalf of persons who ‘have suffered, or are likely to suffer, loss or damage’ as a result of the cartel conduct.⁴⁸³ Despite this, most private civil actions are brought as representative actions,⁴⁸⁴ or by large corporate customers who have suffered significant damage.⁴⁸⁵

Private civil actions are primarily concerned with compensating individuals for any loss or damage suffered.⁴⁸⁶ While it is recognised that private civil sanctions can have a deterrent effect,⁴⁸⁷ as the primary goal of private civil sanctions in Australia is compensation rather than deterrence,⁴⁸⁸ it is not appropriate to assess whether private civil sanctions achieve ‘optimal deterrence.’

2.2 ACTIONS FOR CIVIL PENALTIES

The CCA imposes a maximum civil penalty of \$500,000 on individuals⁴⁸⁹ and prohibits corporations and related bodies from indemnifying an individual against this penalty.⁴⁹⁰

⁴⁸⁰ CCA sections 44ZZRJ and 44ZZRK.

⁴⁸¹ CCA sections 6AA, 44ZZRF, 44ZZRG and 79.

⁴⁸² CCA section 82.

⁴⁸³ CCA section 87(1B).

⁴⁸⁴ Representative actions are more commonly known as class actions: Alistair Little, *Product Liability and Class Actions – Will We Go All the Way With the USA?* TressCox Lawyers <<http://www.tresscox.com.au/file/document/resource/61/Public%20Liability%20and%20Class%20Actions.pdf>> 26 May 2011. Representative actions can be brought by an individual on behalf of others where there are seven or more persons having claims against the same person which arise out of the same, similar or related circumstances and give rise to a substantial common issue of law or fact: *Federal Court of Australia Act 1976* (Cth) section 33C.

⁴⁸⁵ Much of this loss is often mitigated through passing some or all of the cartel overcharge onto subsequent purchasers. This defence of passing on has not yet been definitively considered by Australian courts: Matthew Eglezos, 'Recovering Cartel Damages: The Passing-On Defence Under the Trade Practices Act' (2010) 38 *Australian Business Law Review* 174. However, the existence of passing on as a defensive and offensive tool has been well examined in United States antitrust cases: see e.g. *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 (1968); *Illinois Brick Co v Illinois* 413 US 720 (1977).

⁴⁸⁶ Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report 68 (1994) [4.18]; UK Department of Trade and Industry, *A World Class Competition Regime* (2001) Chapter 8; Jeremy Bentham, 'Punishment and Deterrence' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 53.

⁴⁸⁷ They can have this effect because they impose an additional monetary liability on persons who have engaged in cartel conducts.

⁴⁸⁸ Cf treble-damages litigation in the United States.

⁴⁸⁹ CCA section 76(1B). Section 76(1B) imposes accessory liability on individuals involved in the contravention, while Schedule 1 items 44ZZRJ and 44ZZRK impose direct liability on individuals. CCA sections 75B and 76 state that a person is involved in the contravention where they have aided, abetted,

The maximum civil penalty that can be imposed on a corporation for each contravention⁴⁹¹ is the greatest of:

- (i) \$10 million;
- (ii) three times the value of the benefit obtained by one or more persons that is reasonably attributable to the cartel conduct, if the court can determine the benefit; or
- (iii) if the court cannot determine the benefit, 10% of the annual turnover of the corporation for the 12 months concluding at the end of the month in which the contravention occurred.⁴⁹²

This is a slight deviation from the corporate civil penalties available for the contravention of most other sections of Part IV of the CCA (which regulates restrictive trade practices) as it extends the penalty's ambit beyond the benefit obtained by the corporation and any related body corporate⁴⁹³ to 'one or more persons.' As a result, it could allow the Court to take into account the benefit obtained by all parties in the cartel when imposing a penalty on just one party.

When imposing civil penalties on individuals or corporations, the Court may make related orders under sections 80, 86C, 86D, 86E and 87. Section 80 allows the Court to grant injunctions, section 86D gives the Court the power to make adverse publicity orders, and section 86E gives the Court the power to make an order disqualifying a person from managing corporations. Section 86C allows the Court to make:

- (i) community service orders;
- (ii) probation orders for periods of no longer than three years;
- (iii) orders requiring the disclosure of information; and/or
- (iv) orders requiring the person to publish an advertisement.⁴⁹⁴

Section 87 gives the Court the power to make orders compensating any person in whole or part for any loss or damage suffered.⁴⁹⁵

2.3 CRIMINAL PROSECUTIONS

The most controversial aspect of the new regime is the criminalisation of cartel conduct for both corporations and individuals. In Australia, it is now an indictable offence for a corporation or individual to know or believe they are making or giving effect to a cartel agreement.⁴⁹⁶ While the offence of making a cartel agreement does not apply to

counseled, procured or induced the contravention, have been knowingly concerned in the contravention, or have conspired with others to effect the contravention.

⁴⁹⁰ CCA section 77A.

⁴⁹¹ The civil prohibitions are contained in CCA sections 44ZZRJ and 44ZZRK.

⁴⁹² CCA section 76(1A)(aa).

⁴⁹³ CCA section 76(1A)(b).

⁴⁹⁴ CCA section 86C(2). An order to publish an advertisement is usually imposed when there has been a breach of the consumer protection provisions, and will generally be an order to publish a corrective advertisement.

⁴⁹⁵ Provided that the ACCC applies for compensation: CCA section 87(1B).

⁴⁹⁶ CCA sections 44ZZRF, 44ZZRG, 79 and Schedule 1 items 44ZZRF and 44ZZRG. In these provisions, a cartel agreement is 'an agreement containing a cartel provision.'

agreements made before the commencement of the Cartel Amendments, the offence of giving effect to a cartel agreement applies to any agreement, including those made before the commencement of the Cartel Amendments, provided that the agreement has given effect to after the commencement date.⁴⁹⁷

A person can be found guilty of the criminal offence even where all other parties to the agreement have been acquitted,⁴⁹⁸ unless a finding of guilt would be inconsistent with the acquittal of the other parties.⁴⁹⁹

The CCA imposes a maximum jail term of 10 years and a maximum fine of \$220,000 on individuals,⁵⁰⁰ while the maximum fine for a corporation is the same as the maximum civil penalty.⁵⁰¹ The Court can also make the same related orders when an individual or corporation is convicted as those that it can make when imposing a civil penalty.⁵⁰²

3. IMPOSING SANCTIONS FOR DETERRENCE

Sanctions imposed to deter conduct⁵⁰³ are justified on the basis that they prevent conduct from occurring or re-occurring, and consequently reduce the net social cost of the conduct.⁵⁰⁴ This involves putting a price on contravention that is sufficiently high to make engaging in cartel conduct seem wholly unattractive,⁵⁰⁵ so as ‘to deter not only the particular offender, but [also] others who may be disposed to engage in’ a cartel conduct.⁵⁰⁶

There are three components of deterrence: certainty, severity and celerity.⁵⁰⁷ This means sanctions ‘should be relatively certain to be imposed, sufficiently severe as to prove aversive and [be] imposed sufficiently soon after the [conduct] occurs.’⁵⁰⁸ While celerity relies on the prompt and efficient operation of all the mechanisms for the administration of justice, certainty and severity can be built into the sanctions for cartel conduct.

⁴⁹⁷ CCA section 44ZZRG(4).

⁴⁹⁸ CCA section 44ZZRH(1) and Schedule 1 item 44ZZRH(2).

⁴⁹⁹ CCA section 44ZZRH(2) and Schedule 1 item 44ZZRH(2).

⁵⁰⁰ CCA section 79(1)(e) and Schedule 1 items 44ZZRF(4) and 44ZZRG(4) impose a maximum fine of 2,000 penalty units. *Crimes Act 1914* (Cth) section 4AA currently places a value of \$110 on a penalty unit.

⁵⁰¹ CCA sections 44ZZRF(3) and 44ZZRG(3).

⁵⁰² However, the CDPP, not the ACCC, must apply for compensation under section 87(1B) in criminal proceedings.

⁵⁰³ There are a number of other bases for imposing punishment, including retribution and rehabilitation: see generally Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (2005); Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009).

⁵⁰⁴ Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 34-35.

⁵⁰⁵ *TPC v CSR Ltd* (1991) ATPR 41-076; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 32; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [3.5].

⁵⁰⁶ *TPC v Mobil Oil Australia Ltd* (1985) 4 FCR 296 at 298 per Toohey J.

⁵⁰⁷ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 40.

⁵⁰⁸ *Ibid.*

4. A REGIME OF SANCTIONS WHICH ARE CERTAIN TO BE IMPOSED

4.1 LIABILITY MUST BE IMPOSED ON CORPORATIONS AND INDIVIDUALS

Corporations are constructions of the law,⁵⁰⁹ ‘incapable of feeling shame, guilt or remorse’,⁵¹⁰ and can only engage in cartel conducts through actions of the individuals.⁵¹¹ As a result, individuals should be held liable when a corporation engages in a cartel conduct. This is because the imposition of individual liability turns the minds of executives ‘away from the company’s financial losses to their own personal futures.’⁵¹² In recognition of this, Justice Heerey, in the *Cardboard Box Cartel Case*, stated that individual sanctions are ‘critical to any anti-cartel regime.’⁵¹³

Liability should also be imposed on corporations, as deficient organisational policies⁵¹⁴ often encourage, reward, condone, or, at the very least, tolerate cartel conduct.⁵¹⁵ Consequently, the imposition of corporate liability establishes ‘acceptable boundaries of corporate conduct’⁵¹⁶ and can result in ‘preventative programs [that] foster an environment of compliance.’⁵¹⁷ Furthermore, if liability is not imposed on corporations, they may be able to distance themselves from the individuals found liable for cartel conduct and escape any detrimental effects, such as adverse publicity.⁵¹⁸

4.2 CIVIL PENALTIES MUST BE IMPOSED

A sanction regime that imposes only criminal liability is deficient. As a criminal conviction requires a jury to unanimously determine⁵¹⁹ beyond reasonable doubt that a party knew or believed they engaged in a cartel conduct, a criminal conviction will often be difficult to obtain.⁵²⁰ As a result, people may perceive the probability of a criminal conviction as too low to deter them from engaging in cartel conduct where only criminal sanctions are available. Consequently, actions for civil penalties should also be available, as a contravention of a civil prohibition is much more likely to be made out.⁵²¹

⁵⁰⁹ Ibid.

⁵¹⁰ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.39].

⁵¹¹ Donald Baker, ‘Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging’ (2001) 69 *George Washington Law Review* 693, 698; *Cardboard Box Cartel Case* at 709.

⁵¹² Graeme Samuels, ‘The Relationship between Private and Public Enforcement in Deterring Cartels’ (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).

⁵¹³ *Cardboard Box Cartel Case* at 709.

⁵¹⁴ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.39].

⁵¹⁵ Donald Baker, ‘Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging’ (2001) 69 *George Washington Law Review* 693, 699.

⁵¹⁶ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [3.8].

⁵¹⁷ Ibid [2.54].

⁵¹⁸ New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 77.

⁵¹⁹ *Commonwealth of Australia Constitution Act* (Cth) section 80 provides that the trial of any indictable Commonwealth offence shall be by jury, and the offence of engaging in cartel conduct is an indictable offence.

⁵²⁰ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.41].

⁵²¹ Ibid [2.42].

This is because:

- (i) the standard of proof is lower;
- (ii) civil provisions⁵²² impose strict liability; and
- (iii) a judge decides the outcome.

4.3 CRIMINAL SANCTIONS MUST BE IMPOSED

Imposing criminal sanctions for engaging in a cartel conduct is essential to express the society's disapproval of cartels.⁵²³ It can result in a process of 'public blaming and shaming'⁵²⁴ which, in turn, causes reputational damage,⁵²⁵ especially given that cartel cases generally receive substantial media attention.⁵²⁶ For both corporate and individual offenders, this will generally have adverse reputational consequences.⁵²⁷ This is particularly so for individual offenders, as executives (who are generally the individuals liable for the cartel conduct) 'belong to a social group that is exquisitely sensitive to status deprivation and censure'⁵²⁸ and thus have much more to lose from a criminal conviction than 'street offenders'.⁵²⁹

Criminal sanctions also have a procedural benefit in Australia. While actions for civil penalties have a limitation period of six years,⁵³⁰ a criminal prosecution has no limitation period.⁵³¹ As a result, imposing criminal sanctions means that an action can be brought 'no matter how old the conduct',⁵³² as long as the conduct occurred after the Cartel Amendments entered into force.⁵³³

Criminalising cartel conduct also brings Australia in line with other jurisdictions,⁵³⁴ such as the United Kingdom,⁵³⁵ the United States⁵³⁶ and Canada.⁵³⁷ An internationally coherent approach to criminalisation is desirable as:

⁵²² At least, the civil provisions in the Cartel Amendments impose strict liability. The civil provisions in other jurisdictions also often impose strict liability.

⁵²³ *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 99; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.35]; OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 20. The Treasury believes that the implications of 'wrong doing' inherent in a criminal offence are the key reason that cartel conducts should be criminalised: Department of the Treasury, *Discussion Paper: Criminal Penalties for Serious Cartel Conduct* (2008).

⁵²⁴ Caron Beaton-Wells and Neil Brydges, 'The Cardboard Box Cartel Case: Was All the Fuss Warranted?' (2008) 36 *Australian Business Law Review* 1, 16.

⁵²⁵ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.35].

⁵²⁶ Elizabeth Szockyj, 'Imprisoning White Collar Criminals?' (1999) 23(2) *Southern Illinois University Law Journal* 485, 492.

⁵²⁷ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.35].

⁵²⁸ Gilbert Geis, 'Deterring Corporate Crime' in Ralph Nader and Mark Green (eds) *Corporate Power in America* (1973) 182.

⁵²⁹ Elizabeth Szockyj, 'Imprisoning White Collar Criminals?' (1999) 23(2) *Southern Illinois University Law Journal* 485, 492.

⁵³⁰ CCA section 77(2).

⁵³¹ Graeme Samuels, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).

⁵³² *Ibid.*

⁵³³ CCA sections 44ZZRF and 44ZZRG.

⁵³⁴ Graham Samuels, 'Visy News Conference: Opening Statement' (Press Release, 2 November 2007) 3.

⁵³⁵ *Enterprise Act 2002* (UK) section 188.

- (i) cartel conduct often occurs on an international basis, not within national borders;⁵³⁸
- (ii) it allows for the establishment of a criminal cooperation agreement with these countries, which can ‘provide for overseas competition authorities to undertake formal investigations’,⁵³⁹ and
- (iii) dual criminality is required for extradition procedures to operate.⁵⁴⁰

Additionally, Australia should be looking at the United Kingdom, the United States and Canada for lessons on optimal regulation of cartels, as these countries have a much greater history of prohibiting cartels.⁵⁴¹

4.3.1 Imposition of Criminal Sanctions on Individuals

Where only civil penalties are imposed on individuals, the corporation can absorb the cost of this penalty.⁵⁴² This is the case even where it is an offence to indemnify the individual against the penalty, as compensation for the penalty can easily be built into a salary or bonus payment, which avoids contravening the indemnity provisions.⁵⁴³ As a result, the individual civil penalty simply becomes a part of the corporations ‘cost’ of engaging in cartel conducts. Imposing criminal sanctions on individuals forces them to view cartel conducts as serious illegal activity⁵⁴⁴ as opposed to a reasonable risk taking exercise involving an economic cost/benefit analysis.⁵⁴⁵

Criminal sanctions also increase the incentive for executives to self-report involvement in cartels, so they can take advantage of immunity policies.⁵⁴⁶ This, in turn, increases the probability of actions being successfully brought by the ACCC and the CDPP against the other individuals and corporations who have engaged in, or who are engaging in, cartel conducts.⁵⁴⁷

⁵³⁶ *Sherman Act*, 15 USC §§ 1-2 (1890); *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub L No 108-237 (United States).

⁵³⁷ *Competition Act* (Canada), RSC 1985, c C-34, section 45(1).

⁵³⁸ Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364, 367.

⁵³⁹ New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 31.

⁵⁴⁰ *Ibid* 31.

⁵⁴¹ For England’s history of prohibiting cartels see: *Dyer’s Case* (1414) YB 2 Hen 5, vol.5 (illustrating that the common law prohibited any contracts in restraint of trade); *Mitchel v Reynolds* (1711) 24 ER 347 (where the Court held that the common law permitted a 'reasonable' restraint of trade); *R v Norris* (1759) 96 ER 1189 (where an agreement to fix prices was found to be unlawful). For the United States’ history of prohibiting cartels see: *Morris Run Coal Co v Barclay Coal Co* 68 Pa 173 (1871); *Craft v McConoughy* 79 Ill 346 (1875) (both illustrating that the common law generally prohibited price fixing); *Sherman Act*, ch 647, 26 Stat. 209 (1890). For Canada’s history of prohibiting cartels see: *Competition Act* (Canada), RSC 1889.

⁵⁴² Julie Clarke and Mirko Bagarie, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31(3) *Australian Business Law Review* 192, 206.

⁵⁴³ *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 17.

⁵⁴⁴ OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 18.

⁵⁴⁵ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.45]; Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364, 368.

⁵⁴⁶ Graeme Samuels, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).

⁵⁴⁷ Donald Baker, 'Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 *George Washington Law Review* 693, 698. This will be paralleled by a rise in private civil actions, as

Creating a criminal offence that applies to individuals also brings cartel conducts in line with other similar corporate activities that attract criminal sentences in Australia,⁵⁴⁸ which the Australian Federal Government sees as desirable.⁵⁴⁹ Individuals who engage in corporate activities such as insider trading,⁵⁵⁰ financial market manipulation,⁵⁵¹ and financial market rigging⁵⁵² are subject to criminal liability. These offences result in an individual obtaining an unfair advantage through distorting markets, and have a sense of fraudulence.⁵⁵³ As cartel conducts (i) also results in an unfair advantage being achieved through market distortion and fraudulence and (ii) causes at least as much, if not more harm, than other economic crimes,⁵⁵⁴ individuals involved in cartel conduct should be subject to criminal offences.

4.3.2 Imposition of Criminal Sanctions on Corporations

As corporations cannot be imprisoned, criminal sanctions in the corporate context take the form of a fine.⁵⁵⁵ However, the difference between civil pecuniary penalties and fines is often difficult to appreciate.⁵⁵⁶ This raises the question of whether corporate criminal liability has any utility, given that civil sanctions can be more easily obtained.

Corporate criminal liability is imposed in a number of countries in lieu of civil penalties, including the United States⁵⁵⁷ and Norway.⁵⁵⁸ In such circumstances, many companies will not receive sanctions for cartel conduct that is detected, as a result of the higher standard of proof.

Canada imposes both civil and criminal liability on corporations, with the legislation clearly delineating the conduct that contravenes the civil prohibitions and the conduct being criminal offence.⁵⁵⁹ While a criminal conviction carries high sanctions,⁵⁶⁰ a civil

more information becomes available for such actions to be maintained, because private civil actions are often instigated as a result of information obtained through successful actions under the civil penalty provisions, successful prosecutions and immunity applications: Andrew Morrison, Ross McInnes and Jennifer Thomas, *Enforcement of Cartel Conduct – A New Era of Private Enforcement?* (2006) Clayton Utz

<http://www.claytonutz.com/publications/newsletters/litigation_and_dispute_resolution_insights/20060802/enforcement_of_cartel_conduct-a_new_era_of_private_enforcement.page> at 20 September 2010.

⁵⁴⁸ Graeme Samuels, 'The Relationship between Private and Public enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).

⁵⁴⁹ The Minister for Justice and Customs, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) 35 (**Penalty Guide**).

⁵⁵⁰ *Corporations Act 2001* (Cth) section 1043A.

⁵⁵¹ *Corporations Act 2001* (Cth) section 1041A.

⁵⁵² *Corporations Act 2001* (Cth) section 1041C.

⁵⁵³ Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 August 1974, 984–5.

⁵⁵⁴ Julie Clarke and Mirko Bagarie, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31(3) *Australian Business Law Review* 192, 197.

⁵⁵⁵ New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.33].

⁵⁵⁶ This is despite the fact that there can be flow on effects from a criminal conviction, such as exclusion from public procurement processes: New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 77.

⁵⁵⁷ *Sherman Act*, 15 USC §§ 1-2 (1890); *Criminal Fine Improvements Act*, 18 USC (1987); *Clayton Act*, 15 USC § 4 (1914).

⁵⁵⁸ *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 81.

⁵⁵⁹ *Competition Act* (Canada), RSC 1985, c C-34, section 45. The criminal offence is for 'hard-core' cartel behaviour, while the civil prohibition governs all other agreements: Jim Dinning and Mark Katz, 'Canada:

contravention only allows the Court to impose an order ‘prohibiting any person...from doing anything under the agreement’ or ‘requiring any person...to take action.’⁵⁶¹ The clear delineation of civil and criminal conduct means that, where the conduct is only subject to the criminal offence, but there is only enough evidence to show that a corporation engaged in cartel conduct on a civil standard, no sanctions will be imposed.

John Coffee Jr has suggested that both civil penalties and fines should be imposed, with civil penalties representing the ‘price’ of the conduct, and fines representing the ‘punishment’ for acting in a morally reprehensible way.⁵⁶² However, where the aim is deterrence, this is effective only if the corporation has concurrent civil and criminal liabilities. Such a situation exists in Austria in relation to bid-rigging,⁵⁶³ where corporations face additional fines of up to \$10 million if convicted based on criminally.⁵⁶⁴ This is currently not practicable in Australia, as the ACCC believes concurrent civil and criminal liabilities would give rise to issues of ‘double jeopardy.’⁵⁶⁵ While the principle of double jeopardy only applies to parallel criminal offences and, as a result, there is no general prohibition on imposing both a civil penalty and a criminal sanction,⁵⁶⁶ it is perhaps better to impose only a civil penalty or only a criminal sanction on corporations, as criminal sanctions that build in both the “price” and the “punishment” of the cartel conduct saves court resources from being wasted on parallel criminal and civil proceedings.

Criminal sanctions do not apply to corporations in the United Kingdom, because the United Kingdom Government believes that corporate criminal sanctions add little deterrent effect due to the significant difficulties in obtaining corporate criminal convictions.⁵⁶⁷ However, this ignores the additional benefits of imposing criminal liability, as discussed above.

4.4 A SUMMARY OF THE OPTIMAL SANCTION SYSTEM FOR CERTAINTY IN DETERRENCE

In order to deter optimally a cartel conduct, liability should be imposed on both corporations who engage in cartel conduct and the individuals who enter into cartel agreements on their behalf.

Optimal sanctions must impose criminal liability for cartel conducts, with the option to fall back on civil penalties whenever the criminal prosecution fails or is not viable,⁵⁶⁸

Cartels' in Global Competition Review, *The Asia-Pacific Antitrust Review* (2010) <<http://www.globalcompetitionreview.com/reviews/25/sections/88/chapters/937/introduction/>> at 21 September 2010

⁵⁶⁰ *Competition Act* (Canada), RSC 1985, c C-34, section 45(2) imposes a maximum fine of \$25 million.

⁵⁶¹ *Competition Act* (Canada), RSC 1985, c C-34, section 90.1.

⁵⁶² John C. Coffee Jr, 'Paradigms Lost: The Blurring of Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101(8) *Yale Law Journal* 1875, 1876.

⁵⁶³ Dawson Review, Chapter 10.

⁵⁶⁴ *Hard Core Cartels*, OECD Report (2000) 49.

⁵⁶⁵ *Submission to the Trade Practices Act Review*, ACCC Report (2002).

⁵⁶⁶ Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 15.

⁵⁶⁷ *Submission to the Trade Practices Act Review*, ACCC Report (2002) 40.

⁵⁶⁸ This is despite the fact that the Federal Government has stated that civil penalties should only be imposed where criminal offences are not: Penalty Guide, 56. However the Federal Government clearly

making it more probable that a sanction will be imposed. Consequently, the criminal offences and civil prohibitions should cover the same conduct, with the legislation or a corresponding government policy setting out conduct that will only be subject to actions for civil penalties.⁵⁶⁹

4.5 COMPARING THE CARTEL SANCTIONS TO THE OPTIMAL SANCTIONS

The Cartel Sanctions are optimal from a certainty perspective, as they impose parallel civil and criminal liability on corporations and individuals, and provide a policy indicating when criminal proceedings will result. Additionally, civil proceedings will be considered for cartel conducts only if the possibility of a criminal conviction has been ruled out.⁵⁷⁰

The *ACCC Approach to Cartel Investigations (Cartel Guidelines)*⁵⁷¹ provides that a cartel conduct is to be prosecuted criminally 'wherever possible.'⁵⁷² However, criminal proceedings will only be initiated when:

- (i) the CDPP forms the opinion that there is enough evidence to prosecute;
- (ii) the CDPP believes it is in the public interest to prosecute; and
- (iii) the conduct is assessed as serious.⁵⁷³

Despite Justice Finkelstein stated that '[c]onduct that affects the public, such as the anticompetitive behaviour that is outlawed by the TPA [now the CCA], can never really be considered as anything other than serious',⁵⁷⁴ and despite the definition of cartel conduct in the Cartel Sanctions only encompassing conduct that the OECD defines as serious,⁵⁷⁵ the ACCC does not view all cartel conducts as serious.⁵⁷⁶ The ACCC provides a non-exhaustive list of factors to be used while assessing cartel conduct.⁵⁷⁷

believe civil liability can be imposed where there is also a civil offence, as there are a number of statutes that impose parallel civil and criminal liability: see eg CCA, *Corporations Act 2001* (Cth).

⁵⁶⁹ Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 16.

⁵⁷⁰ Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 15; Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009); *ACCC Approach to Cartel Investigations* (2009) [32] – [35]; CCH, *Australian Trade Practices Commentary*, 'Cartel Amendments in Force' (at 13 September 2010) ¶30-500.

⁵⁷¹ (2009).

⁵⁷² Cartel Guidelines, [10]; Graeme Samuels, 'Opening Remarks' (Speech delivered at the Law Council of Australia Trade Practice Committee Workshop, Gold Coast, 21 August 2010).

⁵⁷³ Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009); Cartel Guidelines [19].

⁵⁷⁴ *ACCC v ABB Transmission & Distribution Ltd (No. 2)* (2002) 190 ALR 169 at 173.

⁵⁷⁵ CCA section 44ZZRD; *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD Report (1998).

⁵⁷⁶ Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009); Cartel Guidelines, [10].

⁵⁷⁷ See Cartel Guidelines, [14]; ACCC and CDPP, *Memorandum of Understanding regarding Serious Cartel Conduct* (2009) [4.4].

5. IMPOSING SUFFICIENTLY SEVERE SANCTIONS

For optimal deterrence, the same conduct must be subject to both civil penalties and fines (**monetary sanctions**). Optimal monetary sanctions should encompass the dimension of severity, and consequently be so high that engaging in cartel conduct is seen to be wholly unattractive.⁵⁷⁸

6. A REGIME OF OPTIMALLY SEVERE SANCTIONS FOR CORPORATIONS

6.1 THE THEORY OF OPTIMAL DETERRENCE

The theory of optimal deterrence is the natural starting point in determining optimal sanctions to deter corporations from engaging in cartel conducts. This theory states that the penalty for corporations who engage in cartel conducts should be set at a level equal to the net social harm caused by the conduct, multiplied by the probability of detection.⁵⁷⁹

6.1.1 Defining Net Social Harm

The social harm of a cartel conduct includes the excess profits earned by all parties,⁵⁸⁰ as well as any deadweight loss, the umbrella effects of the conduct,⁵⁸¹ and the costs of enforcing the law.⁵⁸² However, Posner states that umbrella effects⁵⁸³ should not be part of a penalty, as the cartel parties have also conferred benefit on the non-cartel sellers, in the form of higher profits, and hence the gain to the non-cartel sellers offsets the loss to consumers.⁵⁸⁴ Additionally, the Australian Federal Government does not believe that investigation costs should be included in a monetary sanction.⁵⁸⁵ Accordingly, in calculating optimal monetary sanctions for Australia, the social harm of a cartel conduct should include only the excess profits earned by all cartel parties and any deadweight loss.

However, the net social harm must also take into account any social benefit resulting from the cartel conduct. Some commentators have suggested that a cartel conduct has

⁵⁷⁸ *TPC v CSR Ltd* [1991] ATPR 41-076; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 32; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [3.5].

⁵⁷⁹ Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 36; *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Report (2002) 72; Dawson Review, 164; Brendan Sweeney, 'The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the United States, Europe and Australia' (2006) 30 *Melbourne University Law Review* 838, 840; Nicole Rich and Neil Ashton, *Submission to the Senate Economics Committee – Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, Consumer Law Action Centre (2009) 2.

⁵⁸⁰ John M. Connor and R. Lande, 'How High do Cartels Raise Prices? Implications of Optimal Cartel Fines' (2005) 80(2) *Tulane Law Review* 513, 517.

⁵⁸¹ Such as an increase in the price of substitute products.

⁵⁸² John M. Connor and R. Lande, 'How High do Cartels Raise Prices? Implications of Optimal Cartel Fines' (2005) 80(2) *Tulane Law Review* 513, 517 – 518; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 35; Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 41.

⁵⁸³ Such as the increase in the price of non-cartel products in the same market and substitute products.

⁵⁸⁴ Richard A. Posner, *Economic Analysis of Law* (7th ed, 2007) 336.

⁵⁸⁵ Penalty Guide, 42.

no redeeming social qualities.⁵⁸⁶ However, it is entirely possible that there may be some benefit reasonably attributable to cartel conducts. For example, if a certain percentage of excess profits is used to enhance the image of the company by engaging in social responsible activities, these activities are a social benefit reasonably attributable to a cartel conduct.⁵⁸⁷ Additionally, an overview of the cases show that cartelists raise many arguments regarding the benefits of cartel conduct, including that cartels prevent destructive price wars, preserve the capacity of an essential supply industry, reduce uncertainty and increase investment, provide orderly and timely supply responses, help the preservation of domestic small firms at times of economic fluctuations and uneven demand, fund desirable collaboration, fund activities such as research and development, increase countervailing power against rapacious suppliers, and provide protection against quality debasement.⁵⁸⁸ While these benefits are usually raised by cartelists to escape from liability and are generally not accepted by the Court,⁵⁸⁹ these benefits may arise from time to time.

6.2 PROBLEMS WITH THE THEORY OF OPTIMAL DETERRENCE

In *ACCC v ABB Transmission & Distribution Ltd (No 2)*,⁵⁹⁰ Justice Finkelstein noted that the theory of optimal deterrence has ‘come under sustained attack by many commentators.’⁵⁹¹ He provides several good reasons for this. Firstly, determining the probability of detection is an arbitrary and costly exercise⁵⁹² which returns lower fines for repeat offenders.⁵⁹³ Secondly, the theory of optimal deterrence relies on the variable of net social harm, which is hard to prove as a matter of fact.⁵⁹⁴ This means that social harm is generally drastically underestimated, and costly to prove.⁵⁹⁵ Thirdly, monetary sanctions are disproportionately low for corporations who have simply made a cartel agreement, as no social harm results from an agreement that has not been given effect to, making the deterrent effect virtually non-existent.⁵⁹⁶

A final reason given by Justice Finkelstein is that the theory of optimal deterrence does not take into account the economic position of the cartel parties.⁵⁹⁷ However, it is submitted that a monetary sanction based on net social harm does take into account the economic position of the cartel parties, as the amount of social harm that can be perpetrated by a corporation is directly referable to its economic position.

⁵⁸⁶ Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364.

⁵⁸⁷ This then becomes a problem of proof, as it must be proven that the company would not have engaged in those socially responsible activities, but for the excess profits obtained through engaging in a cartel conduct.

⁵⁸⁸ Trevor Lee and Hank Spier, 'Abuser Pays – Compensating the Victims of Cartel Conduct' (2008) 16 *Trade Practices Law Journal* 285, 290.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ (2002) 190 ALR 169.

⁵⁹¹ *ACCC v ABB Transmission & Distribution Ltd (No 2)* (2002) 190 ALR 169 at 175.

⁵⁹² Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 41; *ACCC v ABB Transmission & Distribution Limited (No 2)* (2002) 190 ALR 169 at 175 per Finkelstein J; ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 74.

⁵⁹³ Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 41.

⁵⁹⁴ *Ibid* 40; *ACCC v ABB Transmission & Distribution Limited* (2002) 190 ALR 169 at 175 per Finkelstein J.

⁵⁹⁵ *ACCC v ABB Transmission & Distribution Limited (No 2)* (2002) 190 ALR 169 at 175.

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid* 176.

On the basis of these reasons, Justice Finkelstein comes to the conclusion that the theory of optimal deterrence should not be accepted as the basis to calculate monetary sanctions in Australia.⁵⁹⁸ However, these objections to the use of optimal deterrence theory as the basis for monetary sanction calculation can be overcome.

To overcome the problems with proving and calculating the probability of detection on a case by case basis, a multiple can be imposed on social harm to reflect the average probability of detection. To overcome the problem that proving social harm is inaccurate and costly, a formula can be used that is referable to net social harm, but that provides an easier and more accurate basis for calculation. An alternative basis for calculation should also be provided in order to create a deterrent effect where no social harm has yet resulted.⁵⁹⁹ However, in order for the deterrent effect to be optimal, the alternative sanction should not be so low as to be insignificant.

6.3 OVERCOMING THE PROBLEMS WITH OPTIMAL DETERRENCE THEORY

6.3.1 Valuing the Probability of Detection

Across the world, three is the most common multiple imposed on social harm.⁶⁰⁰ This multiple is also being cited as appropriate most often by commentators.⁶⁰¹ However, introducing a penalty simply because it is consistent with other countries is not optimal or desirable, as the other countries ‘may simply have missed the mark.’⁶⁰² In this case, the Bolotova study suggests that they have. This study suggests that only 13% to 17% of illegal cartels are caught.⁶⁰³ As a result, an inverse of the percentage in this range should be used, and therefore a multiple of between six and eight should be imposed.

Some commentators have suggested that a multiple of this magnitude would mean that ‘more than half of firms convicted would go into liquidation if required to pay’ the monetary sanction, and, as a result, innocent employees, shareholders and creditors would be damaged.⁶⁰⁴ If this did in fact result, the sanction would be counter intuitive as, by imposing monetary sanctions that seek to promote competition, competition would be damaged through the removal of competitors.

It has also been said that even if the corporation did not go into liquidation, the fine would most likely cripple the corporation competitively, ‘causing it to reduce its investments in innovation.’⁶⁰⁵ As a reduction in innovation is one of the reasons that

⁵⁹⁸ Ibid 175.

⁵⁹⁹ David Round, 'Consumer Protection: At the Mercy of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 5.

⁶⁰⁰ *Submission to the Trade Practices Act Review*, ACCC Report (2002) 55.

⁶⁰¹ *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Report (2002) 73; Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 41.

⁶⁰² Julie Clarke and Mirko Bagarie, ‘The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act’ (2003) 31(3) *Australian Business Law Review* 192, 192.

⁶⁰³ Yuliya Bolotova, John M. Connor and Douglas J. Miller, 'Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis of the U.S. Market' (2009) 5(2) *Journal of Competition Law & Economics* 361, 367.

⁶⁰⁴ UK Department of Trade and Industry, *A World Class Competition Regime* (2001) [7.15].

⁶⁰⁵ Maurice Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443, 481.

cartels are sought to be deterred, imposing monetary sanctions that cause corporations to reduce investments in innovation would, again, be counter intuitive.

However, this line of argument fails to recognise that maximum sanctions are rarely, if ever, imposed.⁶⁰⁶ Maximum sanctions are intended to indicate to the Court how seriously the conduct should be viewed, and are illustrative of the sanctions that should be imposed in the worse possible case.⁶⁰⁷ It also fails to recognise that the Court considers factors beyond simply the value of the maximum monetary sanction, such as the offender's ability to pay, when deciding the magnitude of the monetary sanction to impose.⁶⁰⁸ As a result, the use of a multiple of six⁶⁰⁹ to denote the probability of detection is appropriate to optimally deter cartel conduct.

6.3.1.1 Should the multiple of six be used for both fines and civil penalties?

To determine this, the rationale for the imposition of fines and civil penalties should be examined. Civil penalties should achieve mere deterrence. Mere deterrence puts a 'price' on the cartel conduct so that it is not economically viable to engage in such a conduct.⁶¹⁰ However, criminal sanctions should go beyond mere deterrence, and also incorporate 'punishment' to reflect the deliberate, calculated nature of – and the element of moral turpitude inherent in – a criminal cartel offence.⁶¹¹ As corporations cannot be imprisoned, the only way to illustrate this is through a higher monetary penalty for a criminal offence. As a result, maximum fines should be significantly more severe than maximum civil penalties.

Another reason why criminal sanctions should be harsher than civil sanctions is that the standard of proof required in an action for civil penalties, while generally thought to be on the balance of probabilities, is actually a flexible standard that increases 'in proportion to the severity of the penalty sought.'⁶¹² As a result, civil penalties should not be so high as to almost warrant proof beyond a reasonable doubt.

As maximum fines must be more severe than maximum civil penalties, it must be determined whether the multiple of six should apply to criminal or civil sanctions. As the multiple of six is calculated by using a formula for mere deterrence, it is appropriate to impose the multiple on the civil penalty.

⁶⁰⁶ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [2.112].

⁶⁰⁷ *Ibid* [26.13]. The 'worse possible case' for cartel conduct is generally accepted to occur when the cartel has been sustained for an extended period, and where the corporations involved obtained large gains and had a large market share: [26.10]. However, if this is the case, significantly higher penalties should have been imposed in the *Cardboard Box Case*, as the Amcor-Visy cartel was sustained for an extended period of time, and Amcor and Visy obtained large gains and had 90% market share.

⁶⁰⁸ CCA section 76; *TPC v CSR Ltd* (1991) ATPR 41-076 at 52,152-3 per French J; *ACCC v NW Frozen Foods Pty Ltd* (1996) ATPR 41-515 at 42,442-5 per Heerey J.

⁶⁰⁹ Erring on the side of caution by accepting the higher bound of the probability of detection.

⁶¹⁰ *TPC v CSR Ltd* [1991] ATPR 41-076; John C. Coffee Jr, 'Paradigms Lost: The Blurring of Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101(8) *Yale Law Journal* 1875, 1876.

⁶¹¹ John C. Coffee Jr, 'Paradigms Lost: The Blurring of Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101(8) *Yale Law Journal* 1875, 1876; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 39.

⁶¹² Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 13.

There is, however, an argument that it would be more appropriate to apply this multiple to fines. This is because the multiple of six is grounded in the assumption that, when such a multiple is imposed, corporations will seek to avoid cartel conducts.⁶¹³ This assumption does not match with the civil prohibitions for cartel conducts, as the civil prohibitions can be contravened in the absence of any intention of the corporation. However, this argument is fundamentally flawed as it fails to recognise that actions may be pursued for civil penalties when a criminal prosecution fails. This may occur when a jury cannot unanimously decide that the party knew or believed they had engaged in cartel conduct *beyond a reasonable doubt*. It does not necessarily mean that the corporation had no knowledge or belief, but that the knowledge or belief could not be proven at a very high standard. The multiple of six should therefore be imposed on the maximum civil penalty, and the appropriate penalty in each case can be reduced where the contravention was not deliberate.⁶¹⁴

The magnitude of the increase in fines over civil penalties is difficult to determine, given that no other jurisdiction imposes parallel criminal and civil penalties. A similar situation does exist in Austria, as Austrian courts are able to impose both civil penalties and fines on bid-rigging. However, their legislation provides for a maximum civil penalty of 10% of turnover⁶¹⁵ and maximum fines of up to \$10 million.⁶¹⁶ This means that the criminal penalty could be an excessive addition to the civil penalty,⁶¹⁷ or be very small in comparison to the penalty already imposed.⁶¹⁸ As a result, the experience in Austria is not illustrative of the value of be placed on optimal fines.

Consequently, the only conclusion that can be drawn is that maximum fines must be substantially greater than maximum civil penalties in order to optimally deter cartel conduct. By how much is a matter that can only be determined through experience.

6.3.2 Formula for Calculating Net Social Harm

In recognition of the difficulty in calculating net social harm on a case by case basis, the United States Sentencing Commission (USSC) specifies a generic percentage of commerce affected.⁶¹⁹ This is to 'avoid the time and expense that would be required for the court to determine the actual' harm.⁶²⁰ This generic percentage is based on the presumption that:

- (i) a cartel conduct 'typically results in price increases that [harm] the consumers in a range of 10% of the price';⁶²¹ and
- (ii) the probability of detection is 50%.⁶²²

⁶¹³ Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 40.

⁶¹⁴ *TPC v CSR Ltd* (1991) ATPR 41–076 at 52,152–3.

⁶¹⁵ Preslmayr Rechtsanwälte OG, 'Austria' in Global Legal Group (ed) *The International Comparative Legal Guide to Cartels & Leniency 2010* (2010) 24.

⁶¹⁶ *Hard Core Cartels*, OECD Report (2000) 49.

⁶¹⁷ For small corporations.

⁶¹⁸ For very large corporations.

⁶¹⁹ USSC, *Guidelines Manual* (2009) §2R1.1(d)(1). These sentencing guidelines are not compulsory. Other bases for calculating penalties are provided for in the *Criminal Fine Improvement Act*, 18 USC (1987).

⁶²⁰ USSC, *Guidelines Manual* (2009) §2R1.1.

⁶²¹ Douglas H. Ginsburg, Statement to the United States Sentencing Commission 13–14 (July 15, 1986).

⁶²² John M. Connor and R. Lande, 'How High do Cartels Raise Prices? Implications of Optimal Cartel Fines' (2005) 80(2) *Tulane Law Review* 513, 523.

As a result, the base fine is specified as 20% of affected commerce, by multiplying the average harm by the inverse of the probability of detection. However, as the average cartel overcharge is now estimated to be 18%, and the probability of detection results in a multiple of at least 6, the relevant fine would be 108% of affected commerce, a maximum sanction that ventures far beyond mere deterrence.

As a result, it is better to employ a variation of social harm that focuses only on the redistribution of wealth from consumers to producers,⁶²³ being the excess profits. Net social harm is then calculated as the excess profits obtained by all parties, minus any social benefit. However, as a cartel conduct generally has no redeeming social qualities,⁶²⁴ perhaps the best way to calculate net social harm is to provide a formula based solely on excess profits, so that the absence of social benefit is not required to be proven by the ACCC or the CDPP in each case. However, both parties must have the ability to provide evidence that there are social benefits flowing from the cartel conduct. If they can succeed in proving this, then the value of the social harm should be reduced by the Court accordingly.

Calculating sanctions based on excess profits is in line with Dawson Review recommendation,⁶²⁵ the OECD recommendation,⁶²⁶ the views of the Australian Law Reform Commission,⁶²⁷ the model of absolute deterrence,⁶²⁸ the Penalty Guide⁶²⁹ and the *Proceeds of Crime Act 2002* (Cth). Additionally, excess profits can be effectively calculated, as shown by many studies prepared by experts in treble damages litigations in the United States.⁶³⁰

A formula that calculates social harm based on excess profits must ensure that it incorporates the social harm caused by all parties, as the harm caused by cartel conduct only arises from the combined efforts of all parties. However, it will often be difficult to prove the excess profits obtained by cartel parties who are not the subject of the legal proceedings, as the ACCC's power to obtain evidence under section 155 is limited to that which 'constitutes, or may constitute, a contravention' of the CCA. As evidence of excess profits, it is required to calculate the penalties, as opposed to prove a contravention and the ACCC must rely on the cooperation of the other cartel parties – something they are not likely to receive, as such evidence would tend to incriminate the cartel party not subject to the legal proceedings. As a result, the excess profits of the other cartel parties must be determined from the excess profits of the defendant

⁶²³ Katalin Cseres, Maarten Pieter Schinke and Floris O.W. Vogelaar, *Criminalization of Competition Law Enforcement* (2006) 227.

⁶²⁴ Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364.

⁶²⁵ Dawson Review, 164.

⁶²⁶ *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 19.

⁶²⁷ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [26.14].

⁶²⁸ *Ibid* [25.10].

⁶²⁹ Penalty Guide, 38.

⁶³⁰ ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 54. This is notwithstanding that calculating "excess profits" requires determining the price the members of the cartel would have charged in the absence of the cartel, which is a notoriously difficult task.

corporation. In addition to this being necessary, it may also be preferable in practice, as it reduces enforcement costs.⁶³¹

To calculate net social harm from the excess profits of the defendant corporation, the market share of the other cartel parties relative to the defendant corporation must be taken into account. As a result, the formula should be:

$$P + [P \times (S/M)]$$

where:

- (i) *P* represents the excess profits obtained by the defendant corporation;
- (ii) *S* represents the combined market share of all other cartel parties; and
- (iii) *M* represents the market share of the defendant corporation.

For example, to determine the social harm where the defendant corporation has obtained \$1 million in excess profits and has 20% market share, and all other cartel parties have a combined market share of 40%, the formula would be applied as follows:

$$\$100,000,000 + [\$100,000,000 \times (40/20)]$$

to return a value of \$3 million for social harm.

6.3.3 Determining the Alternative Basis

An alternative basis for maximum monetary sanctions is required for where no social harm has resulted. This alternative basis should be tied to the economic position of the corporation instead of imposing a specific monetary value.⁶³² This is because a specified monetary value may be enough to ruin a small corporation, but may be completely insignificant to a larger corporation, causing the sanction to ‘be little more than a “licence fee” for engaging in’ a cartel conduct.⁶³³ As a result, the alternative basis should have a reference to the corporation’s turnover.

Other countries using turnover to calculate the extent of civil or criminal liability usually impose a maximum monetary sanction of 10% of the corporations’ annual turnover.⁶³⁴ This percentage has generally been effective in deterring cartel conducts,⁶³⁵ and therefore the percentage should be used for optimal deterrence.

6.4 SUMMARISING OPTIMAL SANCTIONS FOR CORPORATIONS

For civil contraventions, the sanctions should impose a maximum penalty of six times the social harm caused by the cartel conduct or, where there has been no social harm, 10% of the corporation’s annual turnover. The fine imposed for engaging in a criminal

⁶³¹ Katalin Cseres, Maarten Pieter Schinke and Floris O.W. Vogelaar, *Criminalization of Competition Law Enforcement* (2006) 228.

⁶³² *ACCC v ABB Transmission & Distribution Limited (No 2)* (2002) 190 ALR 169 at 176.

⁶³³ *Ibid.*

⁶³⁴ Dawson Review, Chapter 10; ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 69.

⁶³⁵ ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 69.

cartel conduct should be calculated in the same way. However, the multiple of social harm and the percentage of turnover should be significantly higher for the fine. Social harm should be calculated, in the absence of any proof of social benefit, as

$$P + [P \times (S/M)]$$

where:

- (i) *P* represents the excess profits obtained by the defendant corporation;
- (ii) *S* represents the combined market share of all other cartel parties; and
- (iii) *M* represents the market share of the defendant corporation.

6.5 COMPARING THE CARTEL SANCTIONS TO THE OPTIMAL SANCTIONS

The Cartel Sanctions impose on corporations, as a civil penalty or fine, the maximum of:

- (i) \$10 million;
- (ii) triple the value of the benefit obtained by one or more persons that is reasonably attributable to the cartel conduct; or
- (iii) if the court cannot determine the benefit, 10% of the annual turnover of the corporation;⁶³⁶

The Cartel Sanctions are optimal in three ways. Firstly, they provide a number of alternatives to calculate the monetary sanctions. Secondly, they provide for monetary sanctions on the basis of turnover and the excess profits obtained by the corporation. Thirdly, they provide for a sanction of 10% of turnover. However, there are many reasons why the Cartel Sanctions fall far short of being optimal to deter corporations from engaging in cartel conducts.

6.5.1 *Strike One: Maximum Fines Equal to Maximum Civil Penalties*

The Cartel Sanctions impose maximum fines of equal value to maximum civil penalties for the same conduct. As a result, the availability of corporate criminal sanctions appears to be redundant.

6.5.1.1 *Is there any utility in maximum fines equal in value to maximum civil penalties?*

The Department of Treasury has noted that corporate criminal sanctions may be necessary to support the creation of individual criminal sanctions, as there ‘may be constitutional difficulties in the creation of a Commonwealth offence for individuals but not for corporations if the corporations power is relied on to support the provision.’⁶³⁷ As a result, the criminal sanctions may have been imposed on corporations in an attempt to validly impose criminal liability on individuals. However, a Commonwealth head of power is only required for the validity of the accessorial liability provisions contained in section 79, which, as it creates accessorial liability, requires a corporate offence for it to be valid in any case. The direct individual offence does not require a Commonwealth head of power to be valid, as it is contained in Schedule 1 of the CCA, which applies in each State and Territory as a law of that jurisdiction.⁶³⁸ Even if the direct individual

⁶³⁶ CCA section 76(1A)(aa).

⁶³⁷ Department of Treasury, *Trade Practices Act Review* (2003) Chapter 10.

⁶³⁸ *Competition Policy Reform Act (Western Australia) 1996* (WA); *Competition Policy Reform Act (Northern Territory) 1996* (NT); *Competition Policy Reform Act (Queensland) 1996* (Qld); *Competition*

offence was part of the CCA, and therefore relied on a Commonwealth head of power for its validity, it would be supported by the corporations' power, as it extends to laws regulating persons by and through whom the corporation carries out its functions and activities.⁶³⁹ Additionally, the external affairs power may support the creation of a Commonwealth cartel offence for individuals, if it is accepted that the Commonwealth can legislate on matters of international concern,⁶⁴⁰ as regulating cartel conduct is a matter of international concern.

There are, however, two features of a criminal conviction that give utility to the corporate criminal offence, as it currently stands. Firstly, an action for civil penalties has a limitation period of 6 years, while a criminal prosecution has no limitation period. However, limitation periods are simply creations of the statute⁶⁴¹ that were developed with reference to private civil actions rather than actions instigated by authorities. As actions for civil penalties are more closely related to criminal prosecutions than private civil actions, there is no reason that the limitation period for actions for civil penalties could not be removed or increased, if it was thought to be in the interests of justice.⁶⁴² Secondly, there can be flow on effects, such as exclusion from public procurement processes,⁶⁴³ which may deter corporations where simply a civil penalty could not.

Accordingly, the current corporate criminal offence does have some utility.

6.5.1.2 Is there any reason why maximum fines should not be greater in value than maximum civil penalties?

The Explanatory Memorandum of the Cartel Bill⁶⁴⁴ provides no reason for imposing maximum fines equal in value to maximum civil penalties, apart from stating that the monetary sanctions were imposed to give effect to recommendation 10.2 of the Dawson Review.⁶⁴⁵ However, recommendation 10.2 deals with civil penalties, not fines. As such, there is no reason why for the maximum fines to be equal in value to maximum civil penalties.

Policy Reform Act (New South Wales) 1995 (NSW); Competition Policy Reform Act 1996 (ACT); Competition Policy Reform Act (Victoria) 1995 (Vic); Competition Policy Reform Act (Tasmania) 1996 (Tas); Competition Policy Reform Act (South Australia) 1996 (SA).

⁶³⁹ *New South Wales v Commonwealth (Workchoices case)* (2006) 231 ALR 1 at [54].

⁶⁴⁰ The existence and extent of the international concern doctrine remains undetermined: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Stephen, Mason and Murphy JJ; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Polyukovich v The Commonwealth* (1991) 172 CLR 501; *Soulitopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584; *XYZ v Commonwealth* [2006] HCA 25; *Pape v Commissioner of Taxation* [2009] HCA 23.

⁶⁴¹ Terrence Prime and Gary Scanlan, *The Law of Limitation* (2nd ed, 2001) 1; Andrew McGee, *Limitation Periods* (5th ed, 2006) 2. The doctrine of laches imposes a quasi limitation period in equity, as actions are not able to be brought if there has been unreasonable delay: Terrence Prime and Gary Scanlan, *The Law of Limitation* (2nd ed, 2001) 1.

⁶⁴² The *Submission to the Trade Practices Act Review* (ACCC Report (2002) 19) recommended that the limitation period be increased to 10 years for cartel conduct.

⁶⁴³ New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 77.

⁶⁴⁴ Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth).

⁶⁴⁵ Julie Clarke, *Dawson Report 2003*, Australian Competition Law <<http://www.australiancompetitionlaw.org/reports/2003dawson.html>> at 30 September 2010.

6.5.2 Strike Two: Multiple for 'Benefit' Too Small

The Cartel Sanctions impose a multiple of three on the benefit obtained by one or more parties to the cartel conduct. This multiple is only half that should be imposed for a civil penalty, and less than half than the one imposed imposed for a fine.

6.5.3 Strike Three: No Formula for Benefit

The Cartel Sanctions do not provide an explanation of how to calculate the "benefit" obtained by the corporation from the cartel conduct. As a result, the maximum liability of a corporation is uncertain.

6.5.4 Strike Four: Specified Monetary Maximum

The Cartel Sanctions provide for a minimum monetary sanction of \$10 million. This minimum amount will be the maximum penalty for making a cartel agreement, as the 'benefit' is zero, and the turnover provision will not apply, as the benefit is able to be calculated. As previously discussed, this is not optimal as \$10 million is an insufficient deterrent for corporations with high turnover.

7. ESTABLISHING A REGIME OF OPTIMAL SANCTIONS FOR INDIVIDUALS

7.1 EXPLORING OPTIMAL CIVIL PENALTIES FOR INDIVIDUALS

For optimal deterrence, the maximum civil penalty should be high.⁶⁴⁶ However, the optimal value of the penalty is extremely hard to determine, as it is not always clear to what extent an individual is liable for the harm perpetrated by the corporation, or to what extent he benefited from the excess profits obtained by the corporation.⁶⁴⁷ He may have benefited, by a fixed percentage,⁶⁴⁸ or perhaps he did not at all, except in so far as he continues to be an executive of the corporation.

As a result, perhaps the best way to establish the optimal civil penalty for an individual is to aim for consistency with the penalty imposed for contraventions of a similar kind and seriousness.⁶⁴⁹ The other provisions of Part IV of the CCA are similar, as they apply to other restrictive trade practices. Insider trading is also similar, as a benefit is achieved by an individual through market distortion. A contravention of any other provision of Part IV carries a maximum civil penalty of \$500,000,⁶⁵⁰ while insider trading carries a maximum civil penalty of \$200,000.⁶⁵¹ As a cartel conduct is at least as serious as any other contravention of Part IV, a maximum civil penalty of \$500,000 could be imposed

⁶⁴⁶ Caron Beaton-Wells and Neil Brydges, 'The Cardboard Box Cartel Case: Was All the Fuss Warranted?' (2008) 36 *Australian Business Law Review* 1, 16.

⁶⁴⁷ Maurice Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443, 484; OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 19.

⁶⁴⁸ Maurice Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443, 484.

⁶⁴⁹ Penalty Guide, 35; Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth) 34.

⁶⁵⁰ CCA section 76(1A)(b).

⁶⁵¹ *Corporations Act 2001* (Cth) sections 1317E, 1317G.

on individuals who engage in cartel conduct, notwithstanding the penalty imposed on insider trading.

However, the New Zealand Ministry for Economic Development notes that while \$500,000 may appear to be a large sum, it may not have a sufficient deterrent effect on individuals who have a high net worth.⁶⁵² They suggest that a higher maximum should be imposed, as monetary sanctions can always be adjusted downwards to take into account an individual's capacity to pay, but 'cannot be adjusted above the maximum to have an effect on the very wealthy.'⁶⁵³ As a result, the New Zealand Ministry for Economic Development recommend a maximum civil penalty of \$5 million for individuals.⁶⁵⁴ However, when attempting to impose an effective deterrent for individuals for high net worth, a civil penalty calculated as a percentage of an individual's net worth would be a more effective deterrent.⁶⁵⁵ In line with the civil penalties for corporations, a maximum civil penalty of 10% of an individual's net worth should be imposed. The net worth should be assessed when the conduct was engaged in and when the judgment is delivered, and the highest net worth should be used to calculate the civil penalty, so as to overcome any problems of individuals divesting assets to obtain a low penalty.

7.2 EXPLORING OPTIMAL CRIMINAL SANCTIONS FOR INDIVIDUALS

While fines are useful as part of a regime to deter individuals,⁶⁵⁶ imprisonment is the most powerful and effective deterrent for executives.⁶⁵⁷ This is illustrated by the fact that some global cartels have 'specifically excluded the United States from their operations' due to the substantial risk of imprisonment for engaging in cartel conducts.⁶⁵⁸

Imprisonment is such a powerful deterrent because '[n]o price can be given to the loss of one's liberty.'⁶⁵⁹ This is true even despite the fact that few white collar criminals are successfully prosecuted.⁶⁶⁰ The reason for this is simple: executives fear the prospect of jail so much that even the slight probability of imprisonment, even if it is only for a short period of time, will deter them from engaging in the conduct in the first place.⁶⁶¹ As a result, optimal deterrence requires imposing imprisonment terms on individuals

⁶⁵² New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 25.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid 26.

⁶⁵⁵ *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 20.

⁶⁵⁶ Due to reputational damage, and the way a criminal conviction looks to potential employers.

⁶⁵⁷ OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 18-19; *Cardboard Box Case* at 709; Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364, 369.

⁶⁵⁸ New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 28.

⁶⁵⁹ Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009).

⁶⁶⁰ This is due to the resources at their disposal, such as top legal counsel, political connections and deep pockets: Elizabeth Szockyj, 'Imprisoning White Collar Criminals?' (1999) 23(2) *Southern Illinois University Law Journal* 485, 487-488.

⁶⁶¹ Arthur Liman, 'The Paper Label Sentences: Critique' (1977) 86 *Yale Law Journal* 619, 631; *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 20; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (2005) 112.

who engage in cartel conducts by pursuing a criminal offence⁶⁶² because, if executives know they may be subject to imprisonment if caught, then they are significantly less likely to engage in the conduct.

7.2.1 Optimal Prison Sentences

There is a strong argument that short prison sentences are the most cost effective deterrent to cartel conduct, as the marginal gains in deterrence from imposing longer sentences are outweighed by the marginal cost.⁶⁶³

However, having shorter maximum sentences for cartel conduct simply because it is executives who will be serving them is hard to reconcile with the principles of equality and justice.⁶⁶⁴ Additionally, longer maximum sentences reinforce society's condemnation of the conduct.⁶⁶⁵ If maximum sentences are short, cartel conducts may not be seen as serious offences.⁶⁶⁶ This is unacceptable, as they should be seen as serious violations of the law.⁶⁶⁷ Additionally, where the public perception is that cartel conduct is not 'criminal', the best way to change this perception is to impose frequent, significant jail terms on individuals found to engage in cartel conduct.⁶⁶⁸

As a result, maximum imprisonment terms should at least bring the sanctions for cartel conducts in line with other white-collar offences, and optimally bring cartel conducts in line with other offences viewed as 'serious' offences. A 10-year maximum term for a cartel conduct is consistent with other white-collar offences,⁶⁶⁹ and other 'serious' Commonwealth offences, such as theft,⁶⁷⁰ obtaining financial advantage by deception,⁶⁷¹ conspiracy to defraud,⁶⁷² and insider trading.⁶⁷³ Additionally, the United States, a country known for its ability to deter individuals from engaging in cartel conducts, has a maximum jail term of 10 years.⁶⁷⁴ As a result, the maximum imprisonment sentence for individuals who engage in cartel conducts should be 10 years.

⁶⁶² There appears to be too slight a probability of an executive to be imprisoned as a result of the probability of detection and conviction being low.

⁶⁶³ *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 8 & 20.

⁶⁶⁴ *Ibid* 80.

⁶⁶⁵ *Ibid* 8.

⁶⁶⁶ *Ibid* 20.

⁶⁶⁷ *Ibid* 51.

⁶⁶⁸ *Ibid* 101.

⁶⁶⁹ Nicole Rich and Neil Ashton, *Submission to the Senate Economics Committee – Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, Consumer Law Action Centre (2009) 2; *Criminal Code Act 1995* (Cth) section 141.1.

⁶⁷⁰ *Criminal Code Act 1995* (Cth) section 131.1(1).

⁶⁷¹ *Criminal Code Act 1995* (Cth) section 134.2(1).

⁶⁷² *Criminal Code Act 1995* (Cth) section 135.4.

⁶⁷³ *Corporations Act 2001* (Cth) sections 1043A, 1311(1) and Schedule 3.

⁶⁷⁴ *Sherman Act*, 15 USC §§ 1-2 (1890); *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub L No 108-237 §§ 215 (United States). Interestingly, Canada imposes a higher maximum prison sentence of 14 years: *Competition Act* (Canada), RSC 1985, c C-34, section 45(2).

7.2.2 *Optimal Fines*

The Penalty Guide directs the maximum fine to be calculated as ‘5 penalty units multiplied by the maximum prison term in months.’⁶⁷⁵ As 10 years is the equivalent of 120 months, the maximum fine should be the equivalent of 600 penalty units; or \$66,000. However, this is insufficient to deter high (or even medium) net worth individuals. As a result, the maximum fine should be specified, and be based on turnover. For individuals, like corporations, the maximum fine must be higher than the maximum civil penalty to incorporate the element of ‘punishment’.

7.3 **SUMMARISING OPTIMAL SANCTIONS FOR INDIVIDUALS**

The maximum civil penalty for an individual should be 10% of an individual’s net worth at the time of judgement or contravention, whichever is greatest. The maximum fine should be greater than this. Individuals should also be subject to imprisonment, with a maximum term of 10 years.

7.4 **COMPARING THE CARTEL SANCTIONS WITH THE OPTIMAL SANCTIONS**

The Cartel Sanctions impose a maximum civil penalty on individuals of \$500,000, a fine of \$220,000 and/or a maximum jail term of 10 years. The term of imprisonment imposed by the Cartel Sanctions is optimal. However, the individual sanctions fall short of being optimal for a number of reasons.

7.4.1 *Strike One: Maximum Value of Civil Penalties and Fines*

The maximum monetary sanctions imposed are represented by a specified monetary value, as opposed to a percentage of net worth. The Explanatory Memorandum to the Cartel Bill provides no reason for imposing monetary sanctions for individuals at such a level. However, imposing penalties for consistency fails to recognise that cartel conduct is one of the most serious violations of competition law, and thus it should be subject to higher penalties.

7.4.2 *Strike Two: Maximum Fine lower than Maximum Civil Penalty*

By having a lower fine than civil penalty, the Cartel Sanctions fail to recognise that criminal sanctions should be more severe than civil penalties. While it could be argued that they recognise this by making imprisonment a sentencing option, a fine is also an alternative to imprisonment, and so the maximum fine should be higher than the maximum civil penalty.

8. **CONCLUSION**

If the key goal of the Cartel Amendments was to effectively deter cartel conduct in Australia, then they should have created a suite of sanctions which are optimal to deter cartel conduct.

⁶⁷⁵ Penalty Guide, 37-38.

Even if optimal sanctions were created, a number of other supplementary issues may represent that the Cartel Amendments fail to achieve their goal. Firstly, the Court, in conjunction with the ACCC, must impose sanctions sufficient enough to deter a cartel conduct.⁶⁷⁶ Just because a sanction regime is optimal, does not mean that the sanctions imposed will be optimal in every case.⁶⁷⁷ As an illustration of this, the *Cardboard Box Cartel Case* involved a cartel conduct that can be said to be close to the ‘worst possible case’, and thus sanctions close to the maximum should have been imposed. However, the civil penalties imposed by the Court, after being agreed to by the ACCC, were less than 10% of the statutory maximum. Secondly, it is important that an effective immunity policy exists, which encourages businesses and individuals to disclose cartel agreements to the ACCC.⁶⁷⁸ This deters cartel formation as it contributes to the certainty dimension of deterrence, because the potential participants perceive a greater risk of detection and, consequently, sanctions.⁶⁷⁹ Thirdly, the provisions that prohibit cartel conducts, and their exceptions, must be clear so that corporations and individuals know what conduct should be avoided.⁶⁸⁰ If they are not, over-deterrence can result, with people foregoing socially desirable activities because they are unsure what conduct is prohibited.⁶⁸¹ Under-deterrence can also result, as people may not avoid corporate activities that are inherently profitable and only possibly prohibited. Lastly, the ACCC must be vigilant in investigating and enforcing contraventions of the Cartel Amendments, as this contributes to the certainty and celerity dimensions of deterrence.⁶⁸² While these issues are important in determining whether the Cartel Amendments achieve their goal of deterring cartel conduct, they are beyond the scope of this article.

This article has argued that for the Cartel Sanctions to achieve their goal, the sanctions must have sufficient certainty and severity. It can be seen that the Cartel Sanctions have sufficient certainty, as they impose parallel civil and criminal liability on corporations and individuals. However, the Cartel Sanctions are not sufficiently severe as they:

- (i) impose a specified maximum value for monetary sanctions;
- (ii) impose maximum fines on corporations that are equal to the maximum civil penalties;
- (iii) fail to provide an appropriate formula for calculating benefit; and

⁶⁷⁶ *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Report (2002) 87;

⁶⁷⁷ David Round, 'Consumer Protection: At the Mercy of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002) 10.

⁶⁷⁸ *ACCC Immunity Policy Interpretation Guidelines* (14 July 2009) 1.

⁶⁷⁹ ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 74; *ACCC Immunity Policy Interpretation Guidelines* (14 July 2009) 1.

⁶⁸⁰ *Cartel Sanctions Against Individuals*, OECD Roundtable Report (2003) 9.

⁶⁸¹ Richard Posner, 'Optimal Sanctions: Any Upper Limits?' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 65.

⁶⁸² The ACCC has a reputation of 'being one of the most vigilant competition law enforcement authorities in the world, [and] defending consumer interests vigorously.' As a result, it is likely that their enforcement of contraventions of the Cartel Amendments contributes significantly to the deterrence of cartel conduct: Peter Armitage and Wolfgang Hellman, 'Australia: Overview' in Global Competition Review, *The Asia-Pacific Antitrust Review* (2010) <<http://www.globalcompetitionreview.com/reviews/25/sections/90/chapters/940/australia-overview/>> at 21 September 2010.

- (iv) impose maximum fines on individuals that are less than maximum civil penalties.

The implication of this is clear. Without further reform, the Cartel Amendments do not optimally achieve their stated objective of deterring cartel conduct.

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