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What's to Know? The New Cartel Offence

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Abstract

This article examines the mental elements of the new cartel offence in the Australian Trade Practices Act 1974. It compares the wording of the offence to the interpretation of mental elements under the Commonwealth Criminal Code in *R v Tang*, a High Court decision on the mental elements of sexual servitude (sex slavery) offence. It concludes that there is no practical difference between the mental elements of the cartel criminal offence and parallel civil penalty provisions and argues that additional mental elements are needed to justify the criminalisation of cartel activity.

WHAT'S TO KNOW? THE PROPOSED CARTEL OFFENCE

ALEX STEEL*

Australian cartel offences were first proposed in the 2003 Dawson Review of the *Trade Practices Act 1974*,¹ but have had an extremely long gestation. Defining the offence began with a press release from the then Treasurer in February 2005.² Three years later, an Exposure Draft Bill and Draft Memorandum of Understanding were released.³ The Department then received a significant number of detailed and thoughtful submissions⁴ – many critical of the approach taken in the Exposure Draft Bill. In October 2008, a revised Exposure Draft Bill⁵ was released, and this was introduced into Parliament in December 2008 with further amendment as the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008. On 26 February 2009 the Senate Standing Committee on Economics recommended the Bill be enacted without amendment,⁶ and the Bill is expected to pass in due course. However, despite the length of this process, the fault elements for the criminal offences remain unclear and inadequate.

I THE OFFENCES AND CIVIL PENALTY PROVISIONS

The Bill amounts to a substantial redrafting of Part IV of the *Trade Practices Act 1974* (Cth) ('*TPA*'), and as such re-defines many breaches of Part IV as cartel behaviour. These prohibited behaviours are described in section 44ZZRD(1) to be cartel provisions of a contract, arrangement or understanding. In general terms those behaviours are conduct by parties in competition with each other that amounts to price fixing; restricting outputs in the production and supply chain; allocating customers, suppliers or territories; or bid rigging ('prohibited

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1 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) ('Dawson Review') ch 10.

2 Australian Treasury, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release No 004, 2 February 2005).

3 Australian Treasury, *Draft Memorandum of Understanding Between the Commonwealth DPP and the ACCC Regarding Serious Cartel Conduct* (2008); Australian Treasury, *Criminal Penalties for Serious Cartel Conduct – Discussion Paper* (2008).

4 Australian Treasury, *Submissions: Criminal Penalties for Serious Cartel Conduct – Draft Legislation* (2008) <<http://www.treasury.gov.au/contentitem.asp?ContentID=1350&NavID=006>> at 15 May 2009.

5 Exposure Draft Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth).

6 Senate Standing Committee on Economics, Parliament of Australia, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 [Provisions]* (2009).

effects').⁷ By defining all the prohibited behaviours in one complex section, the drafters have thus been able to set out the civil penalties and criminal offences in simply worded sections that merely refer to use of cartel provisions. However, the simplicity in wording of the offence sections means that it is not possible to understand the nature of the activities prohibited without detailed referral to the definitional sections. This need to cross-reference other sections creates uncertainty because the mental elements of the offence are not clearly linked to physical elements, either in the offence, or in the definitional sections.

The proposed sections 44ZZRF and 44ZZRG read:

44ZZRF Making a contract etc. containing a cartel provision

Offence

- (1) A corporation commits an offence if:
 - (a) the corporation makes a contract or arrangement, or arrives at an understanding; and
 - (b) the contract, arrangement or understanding contains a cartel provision.
- (2) The fault element for paragraph (1)(b) is knowledge or belief. ...

44ZZRG Giving effect to a cartel provision

Offence

- (1) A corporation commits an offence if:
 - (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the corporation gives effect to the cartel provision.
- (2) The fault element for paragraph (1)(a) is knowledge or belief. ...

Parallel civil penalty provisions in sections 44ZZRJ and 44ZZRK have identically worded physical elements, but lack subsection (2) of the criminal offences. Thus, despite strong support in submissions for a clear differentiation between the civil and criminal offences, the only difference is a fault element of knowledge or belief that relates to a cartel provision. To understand the minimal nature of this requirement, recourse must be had to Chapter 2 of the *Commonwealth Criminal Code Act 1995* (Cth) ('*Criminal Code*'). Contrasts can also be drawn with the approach to accessorial liability for Part IV breaches of the *TPA*.

II COMPARISON WITH 'KNOWINGLY CONCERNED' CASE LAW

Under the current provisions of the *TPA*, civil liability for breaches can extend to individuals by virtue of accessorial provisions. The broadest of these accessorial provisions is where the defendant is knowingly concerned in the

⁷ Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) s 44ZZRA.

prohibited conduct. These sections, sections 75B, 76(1) and 79(1), have been held by the courts to be equivalent to criminal accessory doctrines.⁸ Due to their criminal law basis, courts have thus required that in order for accessory liability to be established, the accused must intend to do the acts that would amount to a breach of the civil provision, and also be aware of the ‘essential matters’ of that breach. While some uncertainty surrounds exactly what ‘essential matters’ amounts to in Part V,⁹ for Part IV the situation seems to now be resolved. In *Rural Press Ltd v Australian Competition and Consumer Commission*,¹⁰ the majority of the High Court stated that essential matters did not extend to a knowledge that the ‘facts were capable of characterisation in the language of the statute.’¹¹ What instead is required is awareness of the facts on which that characterisation is made.

As discussed below, this approach seems to be consistent with the approach taken to offences under the *Criminal Code*. However, the approach taken cannot be assumed to automatically apply to the proposed offence, because the case law on the accessory provisions is based on common law doctrines, whereas the cartel offence is tied to the *Criminal Code* and relates to principal liability.

III THE OPERATION OF CHAPTER 2 AND *R V TANG*

Criminal offences in the *TPA* are subject to Chapter 2 of the *Criminal Code*.¹² Chapter 2 sets out a framework for interpreting elements of offences, and importantly section 5.6¹³ operates to imply fault elements into offences when they are not explicitly set out. The Bill offences appear to have been drafted in light of *A Guide to Framing Criminal Offences, Civil Penalties and Enforcement Powers*, which suggests that, where possible, mental elements should be left to be implied into offences via section 5.6.¹⁴ Creating a contract, arrangement or understanding or giving effect to a provision is a form of conduct, and thus section 5.6(1) imports intention as the relevant fault element.¹⁵ However, because

8 *Yorke v Lucas* (1985) 158 CLR 661.

9 See, eg, *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1; Joachim Dietrich, ‘The (Almost) Redundant Civil Accessorial Liability Provisions of the Trade Practices Act’ (2008) 16 *Trade Practices Law Journal* 37.

10 (2003) 216 CLR 53.

11 *Ibid* [48].

12 *TPA* s 6AA. Other than the proposed cartel offences, the only criminal offences are those for deceptive conduct under Pt V.

13 *Criminal Code* s 5.6 states:

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

14 Commonwealth Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007) 22.

15 Intention is defined in *Criminal Code* s 5.2:

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

the requirement that the contract, arrangement or understanding contain a cartel provision is a physical element that consists of a circumstance, section 5.6 would imply a fault element of recklessness. Because this default is not intended, the offences state that the requisite fault element is 'knowledge or belief'. Belief is the form of intention that the *Criminal Code* uses in relation to circumstances.¹⁶ It is unfortunate that the drafters did not go on to set out in the offences exactly to what this knowledge or belief pertains.

In this regard, the recent High Court decision in *R v Tang*¹⁷ provides guidance. The leading judgment of the court is that of Gleeson CJ, with whom all members of the courts agreed, Kirby J excepted. Tang was the owner of a Melbourne brothel and employed Thai sex workers as 'contract workers'. The terms of this employment were found to amount to slavery and Tang was convicted of a number of slavery related offences, including breaches of section 270.3 of the *Criminal Code*:

270.3 Slavery offences

- (1) A person who, whether within or outside Australia, intentionally:
- (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; ...

On appeal, Tang argued that the trial judge had misdirected the jury on the level of awareness that Tang was required to have in relation to the possession of slaves or exercise of powers attaching to the right of ownership.

It was agreed on all sides that there was no requirement that Tang had to know or believe that the complainant was a slave and that the law defined slavery in terms of control over a person amounting to ownership.¹⁸ This relies on the common law doctrine that ignorance of the law is no excuse. Thus, for the cartel offence, it seems clear that the prosecution would *not* be required to prove that the defendant knew or believed that the provision given effect to or in the contract, arrangement or understanding was, legally, a cartel provision. To paraphrase Gleeson CJ in *Tang*,¹⁹ if a person is aware of the qualities of a provision that by virtue of section 44ZZRD is deemed to be a cartel provision, then intention in relation to that cartel provision may be established regardless of

Difficulties may arise in considering the interrelationship of this implied requirement and the question of what is required for liability in relation to an understanding. That is because the Ch 2 elements are drafted with actions in mind, whereas an understanding is primarily a mental issue. Exactly what conduct the defendant means to engage in where understandings are inferred may be complex and cause difficulties for the prosecution in framing indictments correctly. However in most cases, there will be little difficulty in establishing that the defendant meant to engage in any conduct that is found to amount to the making of a contract, arrangement or understanding.

16 *Criminal Code* s 5.2(2). See also Ian Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 53. See also *R v Tang* (2008) 249 ALR 200, [47], where Gleeson CJ (the other members of the court agreeing, Kirby J excepted) stated in relation to the application of s 5.2(1):

A person has intention with respect to conduct if he or she means to engage in that conduct. Knowledge or belief is often relevant to intention (*He Kaw Teh v The Queen* (1985) 157 CLR 523 at 570). If, for example, it is the existence of a state of affairs that gives an act its criminal character, then proof of knowledge of that state of affairs ordinarily will be the best method of proving that an accused meant to engage in the proscribed conduct.

17 (2008) 249 ALR 200 ('*Tang*').

18 *Ibid* [48] (Gleeson CJ).

19 *Ibid*.

whether the defendant is aware that it is a cartel provision. It may well be that, being aware of the qualities of the provision, the defendant erroneously believes it to be legal. Such beliefs do not exculpate.²⁰ The focus is therefore on what the qualities of a cartel provision might be.

In *Tang*, two possibilities could have been required:

- Tang had to know or believe that the powers she was exercising amounted to a form of ownership or possession over a person, though unaware that this amounted to slavery; or
- Tang had to mean to engage in conduct which amounted to the exercise of powers of ownership or possession over a person, although unaware that this amounted to possession or slavery.

These two possibilities can be used to demonstrate the level of knowledge required to prove a cartel offence.

The first possibility in *Tang* was held to be required by the Victorian Court of Appeal.²¹ Justice Eames held that liability under the offence could only exist if the defendant intended to control the victim in a way that the defendant recognised was a power of possession.²² That was, the defendant had to intend to control the victim in a way that saw the worker as mere property. Harsh or oppressive conduct could not amount to breaches of the offence if the defendant thought that the powers exercised were powers of an employer, contractor or manager. Justice Eames appeared to suggest that a defendant need not consider themselves a slave-owner in terms of any legal definition or social label, but that in order to be liable they were required to consider that the nature of control they exercised was that of owning or possessing the person, not exercising the rights of an employer to direct and control the labour of an employee. As Kirby J described it, the suggested requirement was that the defendant possess an intention in relation to the 'underlying entitlement that gives rise to those elements'.²³ That is, an awareness that the powers were being exercised because of a belief that the defendant had possession of the person as a form of property. The High Court (Kirby J dissenting) held this was not a requirement of the offence.

Instead, the second approach was approved by the High Court. Chief Justice Gleeson held:

Insofar as a state of knowledge or belief is factually relevant to intention as the fault element of the offence, it is knowledge or belief about the facts relevant to possession or using, and knowledge or belief about the facts which determine the

20 See especially *Criminal Code Act 1995* (Cth) s 9.3:

Mistake or ignorance of statute law

(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

This provision has been heavily criticised. See Ian Leader-Elliott, 'Cracking the *Criminal Code*: Time for Some Changes' (Working Paper No 3, University of Adelaide, 2009).

21 *R v Wei Tang* (2007) 16 VR 454.

22 *Tang* (2008) 249 ALR 200, [89].

23 *Ibid* [95].

existence of the condition described in s 270.1. This is a condition that results from the exercise of certain powers. Whether the powers that are exercised over a person are 'any or all of the powers attaching to the right of ownership' is for a jury to decide in the light of a judge's directions as to the nature and extent of the powers that are capable of satisfying that description. This is not to ignore the word 'intentionally' in s 270.3(1). Rather, it involves no more than the common exercise of relating the fault element to the physical elements of the offence (cf *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 568).

In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation. As to the last three powers, their extent, as well as their nature, was relevant. As to the first, it was capable of being regarded by a jury as the key to an understanding of the condition of the complainants. The evidence could be understood as showing that they had been bought and paid for, and that their commodification explained the conditions of control and exploitation under which they were living and working.

It was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants ...²⁴

In this passage, Gleeson CJ draws a distinction between three levels of knowledge: (a) knowledge of the legal elements of slavery; (b) knowledge of the legal elements of possession; and (c) knowledge of the matrix of facts that can be drawn on to establish both possession and slavery. If this is mapped onto the cartel offences, those three levels would appear to be: (a) knowledge of the legal elements of the cartel offence; (b) knowledge of the legal characterisation of activity as either price fixing, having the purpose or effect of reducing competition, etc; and (c) knowledge of the matrix of facts that can be drawn on to establish price fixing, purpose or effect of substantially lessening competition, etc.

The analysis in *Tang* suggests that it would not be necessary for the prosecution to prove that the defendant was aware that the nature of the provision was in any way an anti-competitive provision, as defined in section 44ZZRD. That is, there would be no need to prove that the defendant intended or was aware that the provision might operate in any way that fell within the prohibited behaviour in section 44ZZRD, such as being aware that the provision fell within the definition of fixing prices, or that the defendant was in a competitive market with other parties to the contract, arrangement or understanding. Like possession in slavery, such characterisations of behaviour are legal constructs that are not relevant to liability. How the defendant chooses to characterise or rationalise the behaviour and its effects is irrelevant. A defendant could be convicted under the offences if they in fact believed that the provision was one that merely reflected clever business practice and intended to behave in a lawful manner. Importantly,

24 Ibid [48]–[51].

even if the defendant had obtained legal advice on the legality of the provision, such advice would not protect the defendant from liability.

A significant complication with this approach is the fact that a cartel provision in section 44ZZRD includes provisions which have the 'purpose' of causing the prohibited effects. In such instances, establishing a purpose for the provision is likely to involve demonstrating a degree of awareness of the nature of behaviour prohibited under section 44ZZRD. This issue has arisen in relation to accessory liability.

IV THE CURRENT APPROACH TO ACCESSORIAL LIABILITY UNDER THE *TRADE PRACTICES ACT*

There are similarities between this analysis and the approach adopted in the 'knowingly concerned' accessory liability *TPA* cases. The judgment of the Full Federal Court in *Rural Press v Australian Competition and Consumer Commission*,²⁵ which was adopted by the High Court on this point,²⁶ stated:

It may be readily accepted, as the appellants contended in the Court below and before us, that concepts underlying s 45(2)(a)(ii) and (b)(ii) of the *TP Act* can be elusive. In this case, however, the primary judge made findings sufficient to establish that Mr Law and Mr McAuliffe were aware of the material facts and circumstances constituting the contraventions of those provisions, even though they may not necessarily have turned their minds to the legal characterisation of those facts or circumstances or to the legality of the conduct. . . . It was not, in our view, necessary for the primary judge to find that Mr McAuliffe and Mr Law knew and appreciated that the purpose or effect of the arrangement was substantially to reduce competition in the market ultimately identified in the judgment. The definition of the market is a mixed question of fact and law involving sophisticated economic and legal concepts. It is not to be supposed that accessory liability is to depend on issues that business people are unlikely to address and, in any event, often cannot be resolved without detailed expert evidence and fine legal analysis.²⁷

In *Rural Press*, the legal characterisation in issue was whether the purpose or effect of the arrangement was to reduce competition in the market. The prosecution was not required to establish that the defendants knew the legally

25 (2002) 118 FCR 236 ('*Rural Press*').

26 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, [48] (Gummow, Hayne and Heydon JJ).

27 *Rural Press* (2002) 118 FCR 236, [162]–[163]. The court discussed the relevant facts establishing the breach:

'The primary judge made specific findings about the role of Mr McAuliffe and Mr Law in the communications with the representatives of Waikerie Printing. Indeed, on those findings Mr McAuliffe and Mr Law were instrumental in the making of the arrangement that gave rise to the contraventions of s 45(2)(a)(ii) and (b)(ii) of the *TP Act*. The other findings which we have recounted establish that Mr McAuliffe and Mr Law intended, by means of the arrangement, to cause Waikerie Printing to stop distributing the *River News* in the Mannum area and that they sought to bring about this result because they perceived that the *River News* was in competition with the *Standard*. The primary judge found that each of them was aware of the general market in which the *Standard* operated. Plainly they were aware that the *Standard* was the only regional newspaper circulating in the Murray Bridge area, including Mannum, before the incursion by the *River News*. They intended that the incipient competition in that area should be brought to an end.' at [162].

defined market – only the fact that two companies were in competition. Because the defendant corporation's liability was based on purpose rather than effect, they were not required to know that the arrangement would be likely to reduce competition, only that this was intended. If this intent had been lacking, it presumably would have been necessary to establish some knowledge of the practical effect of the provision – not to the extent that it would lessen competition or fix prices, etc, but knowledge of sufficient facts to allow such conclusions to be drawn.

Accessory liability under the current provisions of Part IV relates to complicity in primary behaviour that is subject to a civil penalty. The proposed new offences essentially replicate the prohibited behaviour for accessory liability, but in terms of primary liability for a criminal offence. This means that there is no clear differentiation between accessory civil liability and primary criminal liability.

V THE IMPACT OF SECTION 44ZZRD AND PURPOSE ON THE FAULT ELEMENTS

Section 44ZZRD refers to the 'purpose of a provision' as a possible route to establishing a cartel provision. Both common law on the previous provisions,²⁸ and the Explanatory Memorandum²⁹ suggest that purpose in this context will be interpreted to be a subjective test of what the party, or the party including the provision,³⁰ intended its ultimate aim to be. This has the effect of introducing a further mental element into the offence – one of intending a prohibited result, and could provide a clear basis for criminalisation. That is, if the offence were restructured to require subjective purpose for all breaches – removing per se liability, there would be a clear intentional mental element that could explain why such actions were criminal rather than civil. However, because the same subjective purpose is also required for the civil penalty breaches, this mental element fails to provide any differentiation between civil and criminal liability.³¹

Instead, if a prosecution is based on a provision that has a purpose of causing the prohibited effects, there is no difference in practice between the elements of a

28 See, eg, *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573.

29 Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) 15.

30 See, eg, *Seven Network Ltd v News Ltd* [2007] FCA 1062, [2402]–[2410].

31 The issue of purpose aside, it would seem that there is no requirement that any further fault elements be implied into the proof of s 44ZZRD, although it is the definitional basis of the cartel offences. This is because whether a provision fixes prices, or the parties are in competition, is a legal consequence based on underlying facts. As such it amounts to a finding of law (or mixed fact and law) and knowledge as to such consequences and is not required as a result of s 9.3 of the *Criminal Code*:

Mistake or ignorance of statute law

(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

It is suggested that the role of s 44ZZRD is to directly or indirectly create the cartel offences. Similar reasoning was applied in *Rural Press*.

civil and a criminal breach.³² For a prosecution based on a likely effect of a provision, there is in theory a distinction in the requisite level of knowledge of the underlying facts that would be relied on to prove that effect. However, in practice lack of knowledge of such facts would significantly reduce the quantum of any punishment imposed and would mean prosecution would be less likely.

VI DEFINING THE WRONGNESS

In its report on the Bill, the Senate Standing Committee on Economics largely assumed that any delineation between the civil and criminal offences would be on the basis of a different form of physical element and concluded that this was impossible to adequately define.³³ However, criminality in commercial areas is largely based on the mental state of the defendant in doing conduct that is otherwise lawful. As outlined above, the flaw of the new offences is the failure to articulate any such mental element.

Principled criminal law requires a clear moral wrong to be identified in the prerequisites of the offence, and this is established by mental elements.³⁴ At times, the act itself may be so clearly wrong that nothing more than intention to do the act or achieve the result is required to establish liability – crimes of homicide and assault are good examples. At other times the act in some circumstances is lawful, and a further element is required to establish liability. Sexual intercourse is only a crime if done with evidence of a defendant's awareness or indifference to the lack of consent of the victim. At other times, the differentiation between a lawful exercise of the behaviour and crime lies in the defendant falling short of a socially agreed standard of behaviour. In such circumstances – such as indecency or offensiveness – the defendant is expected to know of the standard and if unaware is in essence punished for a lack of socialisation. Other versions of this imposition of community standards include offences of criminal negligence where the defendant's behaviour is so far below the appropriate standard that liability changes from civil to criminal – such as in negligent manslaughter.

Earlier versions of the cartel offence recognised this need to provide an additional element of wrongness to justify criminality. The January 2008 Exposure Draft offence required that the contract, arrangement or understanding be made 'with the intention of dishonestly obtaining a benefit'. However, in seeking to locate this in a dual requirement of both dishonesty and a profit motive, the proposed offence became mired in debates about the appropriateness of introducing an explicitly moral element or one based on community standards, and whether to restrict the offence to a purely financial motive. The current form

32 Distinctions based on the difference between a civil and criminal standard of proof are not sufficient in that the conduct is in both cases the same.

33 Senate Standing Committee on Economics, above n 6, 31–3.

34 See, eg, Stuart P Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (2006), 30–47.

of the offence appears to be an overreaction to this criticism, one that solves the problem of defining the culpability by removing any reference to one.

Justice Kirby, in his dissent in *Tang*, argued:

To exercise such a power [of slavery], as if over property that the person owns or possesses, it is inherent that the person deploying that power does so based upon a notion of that person's entitlement to act as he or she does. What is done is not done mindlessly, thoughtlessly or carelessly. It is done out of a sense of power, founded on a sense of entitlement ... In the present case, this is not to oblige (in effect) that the accused should know the precise terms of the statute or of antecedent treaties. It is simply to apply the statutory postulate of 'intention' not only to the physical elements but also to their quality and the 'circumstances [that] make [them] criminal'.³⁵

Justice Kirby's approach provides a clear statement of the fundamental issues that should be considered in drafting offences in this area. Unlike the slavery offence, civil penalties exist for any breach that is not entirely innocent. Imposing criminal liability thus should require an additional aspect of wrongness.³⁶ Justice Kirby's dissent locates this in an appreciation by the accused of the quality of the behaviour.

In terms of cartel offences, that quality must be some awareness of the anti-competitive nature of the provision in question. To ensure a clear distinction between the civil and criminal instances, and to ensure that only serious or 'hard-core' cartels fall within the criminal offence, there should be proof of a clear intention to act in an anti-competitive manner.

One way to ensure this is to remove from the criminal offence any instance of behaviour which is not entered into for the purpose of restricting competition. That is, per se effect-based liability should be restricted to civil penalties. Criminal liability would thus be based on proof of subjective purpose. Further, while under the civil regime, purpose is defined broadly to include any 'substantial' purpose,³⁷ which in this context means 'real or of substance and not insubstantial or nominal';³⁸ for a criminal breach purpose should be seen as a primary or dominant purpose – a clearly motivating factor underlying the contract, arrangement or understanding. Additionally, the purpose should be one that is clearly aimed at such a result, not one where an anti-competitive effect is an acknowledged side-effect of an overall pro-competitive purpose.³⁹ Insisting on

35 *Tang* (2008) 249 ALR 200, [99], [103]–[104].

36 For discussion of some of the issues of wrongness in this area, see Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 675.

37 *TPA* s 4F(1)(a)(ii), (1)(b)(ii).

38 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 27 ALR 367, 382 (Deane J).

39 For discussion of such issues see *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563.

these two restrictions will ensure a clear distinction between civil and criminal purpose.⁴⁰

The breadth of the civil penalty provisions and the significant penalties that can be imposed are such that there is no requirement or justification for a criminal offence other than in blatant instances of deliberately anti-competitive agreements. Requiring proof of a primary purpose of competition reduction achieves this goal. It does so without introducing new mental elements to competition law, but it provides a clear distinction in culpability between the civil and criminal provisions.

As the offences currently stand, the fault elements require a torturous analysis of the application of Chapter 2 of the *Criminal Code*. This can be avoided by clearly stating what physical elements the fault elements apply to, and an appropriate boundary to the criminal offence can be defined by a requirement of a primary purpose of reducing competition.

The solution endorsed by the Senate Committee of a set of guidelines of what is criminal conduct based on a Memorandum of Understanding between the Australian Competition and Consumer Commission ('ACCC') and the Commonwealth Department of Public Prosecutions is not acceptable. It is a serious abrogation of legislative responsibility to admit that a distinction between civil and criminal provisions has not to date been found, and then leave it to the government authority charged with administering the law to determine the distinction. The committee stated that it was concerned that

any attempt to legislate what it is ... that constitutes a criminal cartel offence risks restricting the judgment of the regulator. The ACCC's case-by-case judgments are important because they are contextual and weigh various factors, one against others.⁴¹

In fact, the very nature of defining criminal offences is to do just that – limit executive agency discretion. Without clear legislative boundaries, business will be unable to test the boundaries of what the ACCC believes its powers to be, and the ACCC will find it hard to resist calls to use its powers more broadly. The result may be a highly uncertain business environment that achieves none of the aims of the legislation.

40 Such an approach is obviously open to the argument that prosecutions will be very difficult to prove except in the most obvious of cases. One response to such arguments is that only the most obvious cases should be seen as criminal. An alternative approach is to recognise that defendants in such cases are likely to be well resourced and may be able to bear the weight of a reversed onus of proof. If such an argument is sustained, Ian Tonking's argument for a business justification defence might be applicable: Ian Tonking SC, 'From Coal Vend to Basic Slag: Winning the Hearts and Minds?' (2009) 32(1) *University of New South Wales Law Journal* 227. A reversed onus of proof is a better result than no onus of proof. For further alternatives, see Brent Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery' (Competition Law Conference, Sydney, 24 May 2008).

41 Senate Standing Committee on Economics, above n 6, 32, [4.8].