

THE DESIRABILITY OF CRIMINAL PENALTIES FOR BREACHES OF PART IV OF THE TRADE PRACTICES ACT

Julie Clarke and Mirko Bagaric*

Published version: Clarke, J. & Bagaric, M. 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31(3) *Australian Business Law Review* 192-209

1 INTRODUCTION

There has been a significant push recently to introduce criminal sanctions, and in particular jail terms, for breaches of the competition laws contained in Part IV of the *Trade Practices Act 1974* (Cth) (the TPA). This push has led the committee reviewing the competition provisions of the TPA (the Dawson Committee) to recommend that criminal penalties be introduced for individuals and corporations found to have engaged in hard core cartelisation.¹

The two main reasons publicly advanced for the proposed changes are

- (i) that it would put Australia in line with other countries - such as the United States;² and
- (ii) criminal sanctions would discourage breaches of the Act.³

There are, however, weaknesses in both these arguments. The mere fact that other jurisdictions have certain regulatory models says nothing about the desirability of such models - the other jurisdictions may simply have missed the mark.⁴ Otherwise an equally strong argument could be made for re-introducing the death penalty and, if we take our

* Both of the School of Law, Deakin University.

¹ *Review of the Competition Provisions of the Trade Practices Act*, Commonwealth of Australia, January 2003, Recommendation 10.1 ('Dawson Report')
<<http://tpareview.treasury.gov.au/content/report.asp>>.

² Other countries that provide for imprisonment of individuals include: 'Canada (5 years per count), Germany (5 years for collusive tendering), Ireland (2 years), Japan (3 years), Korea (3 years), Mexico (sanction determined by the judicial authority), Norway (6 years), Slovak Republic (5 years) [and the United Kingdom when the *Enterprise Act 2002* comes into operation in 2003 (5 years)]: OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (OECD Publications Service, Paris, 2002) at p 82. This was one of the key factors influencing the decision of the Dawson Committee to recommend the introduction of criminal penalties: Dawson Report, n 1, p 161 ('... the Committee is persuaded by the submissions made to it, particularly in relation to the growing experience overseas, that there should be criminal sanctions for serious cartel behaviour').

³ The Dawson Committee noted that the predominant reason given by those who made submissions favouring the introduction of criminal penalties was 'that the threat of imprisonment would be an effective deterrent to cartel behaviour': Dawson Report, n 1, p 153.

⁴ See, for example, ExxonMobil, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 50, Trade Practices Act Review 2002, p 2, which notes that the 'mere fact that Australia does not currently have such penalties while other jurisdictions do is not sufficient' to justify the introduction of criminal sanctions.

cue from places other than the United States, for outlawing free speech. Reform (as opposed to simply change - which quite often is regressive) is hardly likely to arise from reflexively copying standards and laws operating in other jurisdictions. As a minimum, (progressive) reform can only occur following a thorough independent assessment of the likely benefits of the proposal. The deterrence argument is potentially flawed because it *assumes* that providing the Australian Competition and Consumer Commission ('ACCC') and the courts with a big stick will in fact encourage compliance with the TPA. While there is intuitive appeal to this argument it is certainly not axiomatic that bigger penalties leads to greater compliance with the law.

The purpose of this paper is to look behind the rhetoric that has consumed the debate concerning the desirability of imposing criminal sanctions for contraventions of Part IV of the TPA and examine whether there are sound reasons for the proposal.

Three possible reasons for introducing criminal sanctions in this area are examined. The first is the extension-analogy argument – or the argument for consistency. The argument is that, because the criminal law presently criminalizes similar types of conduct to that which is prohibited under Part IV the law should be expanded to include these breaches. Other, less harmful, conduct is criminalized so consistency and for fairness anti-competitive conduct should not be exempt from such classification. This adopts the extension-analogy approach, which underpins most legal change. This is considered in section three of the paper. This argument, *on balance*, favours the introduction of criminal sanctions. There are certainly far less serious harms that are prohibited by the criminal law. However, ultimately, this type of approach is not persuasive. This is because the terms of reference are too blinkered. It assumes that (i) there is a coherent distinction between criminal and non-criminal wrongs; and (ii) that this distinction is sound. In section four of the paper both of these proposals are refuted.

The second argument is that anti-competitive conduct is of the type that *should* be subjected to the criminal laws.⁵ This requires an analysis of the justification for the criminal law. This is a complex inquiry, because it focuses on what activities the criminal law *should* regulate, not the straight-forward descriptive question (which is at the heart of the first reason) of what it in fact *does* regulate. This inquiry is non-conclusive for the simple reason that there is no secure justificatory rationale which underpins the criminal law.⁶

The third reason that can be advanced for meting out harsher punishment to those who breach the Part IV is that it will encourage greater compliance with the Act. As is noted

⁵ Many who oppose the introduction of criminal penalties have mounted this argument in the negative: that anti-competitive conduct is *not* 'of the type' that should be prohibited. See, for example, Shell Australia, *Submission to the Commission of Inquiry into the Trade Practices Act 1974*, Public Submission 14, Trade Practices Act Review 2002, p 8: 'The legislators have seen fit, appropriately, not to classify breaches of Part IV as a crime ...'

⁶ In fact, it is not even certain that the criminal law as an institution is justifiable. It may be the case that the community may be better served by abolishing the institution of criminal law altogether. See Bagaric M, "The Civil-isation of the Criminal Law" (2001) 25 *Criminal Law Journal* 197. This issue is beyond the scope of this present paper.

above, this assumes that there is a connection between the size of the stick and observance of a law. Whether this is actually the case is examined in section five.

Prior to considering the relevant arguments a brief overview of the existing enforcement regime for cartelisation in Australia (including the Dawson Committee's recommendations for reform) is provided. For comparative purposes, we then outline the regimes in the United Kingdom and the United States.⁷

2 EXISTING ENFORCEMENT REGIME

2.1 Australia

Australian competition law is currently governed by a system of civil penalties with no opportunity for criminal punishment of either the corporation involved or the individuals responsible for the prohibited activity. The civil pecuniary penalties available for such breaches are, however, extremely high; in the case of corporations penalties of up to \$10m are available and, for individuals involved in the contravention, penalties of up to \$500,000 may be awarded for each offence.⁸ Nevertheless s 78 of the TPA makes clear that criminal proceedings do not lie against a person by reason only of contravening a provision of Part IV.⁹

This is in contrast to the way the TPA deals with contraventions of the consumer protection provisions. For example, Part VC of the TPA criminalizes such conduct as false or misleading representations,¹⁰ bait advertising,¹¹ referral selling¹² and pyramid selling.¹³

⁷ Examination of the penalty regimes in other countries for breaches of competition law is provided in the Dawson Report (n 1, ch 10) and ACCC, "Criminal Sanctions and Increased Pecuniary Penalties" in *Submission to the Trade Practices Act Review*, Public Submission 50, Trade Practices Act Review 2002, p 35.

⁸ See *Trade Practices Act 1974* (Cth), s 76(1). Despite the size of the penalties provided for in the legislation, in practice, particularly in relation to individuals, penalties have not been applied at the top scales of those available. See, for example, the comments of Energex in *Submission to the Committee of Inquiry Into the Competition Law Provisions of the Trade Practices Act 1974, and Their Administration*, Public Submission 46, Trade Practices Act Review 2002, p 6 and Round D, 'An empirical analysis of price-fixing penalties in Australia from 1974 to 1999: Have Australia's corporate colluders been corralled?' (2000) 8 CCLJ 83 at 95: 'judges have been reluctant to raise penalties by anywhere near an amount commensurate with the new maximum.'

⁹ 'Criminal proceedings do not lie against a person by reason only that the person: (a) has contravened ... a provision of Part IV ... ; ...': *Trade Practices Act 1974* (Cth), s 78.

¹⁰ *Trade Practices Act 1974* (Cth), s 75AZC.

¹¹ *Trade Practices Act 1974* (Cth), 75AZJ.

¹² *Trade Practices Act 1974* (Cth), s 75AZK.

¹³ *Trade Practices Act 1974* (Cth), s 75AZO. These activities are criminalized despite the apparent recognition (through the size of penalty available) that, financially at least, they are less harmful to society than contraventions of Part IV. The current maximum criminal penalty for breaches of these sections is 10,000 penalty units in each case (equivalent to \$1.1 million), significantly less than the maximum civil penalty available for breaches of Part IV.

On 9 June 2001 the Chairman of the Australian Competition and Consumer Commission ('ACCC'), Professor Allan Fels called for the introduction of criminal sanctions for 'hard core breaches of Part IV' including 'the most serious, flagrant and profitable acts of collusion such as price fixing, market sharing and bid rigging'.¹⁴ The penalties proposed included the possibility of 'imprisonment for executives who engage in these highly profitable, hard core breaches of Part IV'.¹⁵

One year later the ACCC's proposal for criminalizing certain forms of anti-competitive conduct was formalized in their submission to the Trade Practices Inquiry, chaired by Sir Daryl Dawson (The Dawson Review).¹⁶ In that submission the ACCC proposed the introduction of criminal penalties for corporations and executives found to have engaged in hard-core cartel conduct¹⁷ to operate in conjunction with the existing civil penalty regime.¹⁸ Broadly, this would prohibit agreements to fix prices, limit output, share markets and rig bids.¹⁹

The Commission also proposed certain legislative 'safeguards' to 'ensure that criminal sanctions are not applied inappropriately'.²⁰ These would include applying the criminal sanctions only to conduct carried out 'by, or in, large corporations'²¹ – so as to exclude

¹⁴ Fels A, "Regulating in a High-Tech Marketplace" (Paper presented at the *Penalties: Policy, Principles and Practice in Government Regulation Conference*, Sydney, 9 June 2001). See also ACCC, *ACCC Calls for Stronger Criminal Sanctions Including Jail Sentences for Price-Fixing Offences Under the Trade Practices Act*, Press Release, (8 June 2001). Note, this is not the first time that criminal penalties have been proposed for anti-competitive conduct in Australia. See, for example, Corones S, "Penalties for price-fixing: a built-in feature of how we do business in Australia?" (1996) 24 ABLR 160 at 163 discussing previous consideration of the issue by the Australian Law Reform Commission.

¹⁵ Fels, n 14. ACCC 2001, n 14.

¹⁶ The Trade Practices Act Review was announced on 15 October 2001. Information about the Review, including all non-confidential public submissions is available from its web site <<http://tpareview.treasury.gov.au>>.

¹⁷ ACCC 2002, n 7, p 35.

¹⁸ This proposal has prompted significant debate. A majority of the 212 submissions to the Dawson Review have addressed the issue of criminal penalties for hard-core cartels, with opinions sharply divided.

¹⁹ ACCC 2002, n 7, p 35. Specifically the ACCC has proposed that '... in addition [to] the existing civil offences, new criminal offences be created to criminalise agreements (contracts, arrangements or understandings) between competitors that would directly or indirectly: fix a price of a product or service; limit or prevent supply or production of a product or service; restrict the ability of the parties to the agreement to freely supply specified goods or services or to freely supply goods or services to specified customers; in response to a request for tenders, restrict the freedom of one or more of the parties to the agreement to put in independent tenders'.

²⁰ ACCC 2002, n 7, p 21.

²¹ This aspect of the ACCC's proposal was heavily criticised, even by many who support the introduction of criminal sanctions. See, for example, Australian Business Limited, *Submission to the Review of the Trade Practices Act 1974*, Public Submission 112, Trade Practices Act Review 2002, p 3 and Telstra Corporation Ltd, *Initial Submission by Telstra Corporation Limited to the Dawson Committee Review of the Trade Practices Act*, Public Submission 117, Trade Practices Act Review 2002, pp 109-110. In response to criticism the ACCC later proposed 'the criminalisation of hard-core cartel behaviour for all, and not just large, corporations': Dawson Report, n 1, p 149.

small business, trade unions and farmers²² - and ensuring that the offences be tried by a judge and jury with a requirement that the jury verdict be unanimous before a conviction is made.²³

The ACCC proposed that, upon conviction, a maximum custodial sentence of 7 years²⁴ should apply for individuals and, for corporations, a fine 'at the same maximum level that would apply if the contravention were civil' could be imposed.²⁵

The report of the Dawson Committee was handed to the Treasurer in January 2003 and released to the public on 16 April 2003. The Committee recommended the introduction of criminal penalties, including imprisonment, for hard-core cartel behaviour.²⁶ The Commonwealth Government has accepted 'in principle' that criminal penalties may provide a more effective deterrent than civil penalties,²⁷ and has indicated it will set up a working party to resolve some of the implementation problems identified by the Dawson Committee.²⁸

In addition to recommending the introduction of criminal penalties, the Dawson Committee recommended that the maximum pecuniary penalty for corporations be increased,²⁹ that the Court be given the power to exclude an individual involved in a contravention from being 'a director of a corporation or being involved in its management'³⁰ and that corporations be prohibited from indemnifying its 'officers, employees or agents' for pecuniary penalties they might receive.³¹ The Commonwealth Government has agreed to address these issues.³²

22 ACCC 2002, n 7, p 41.

23 ACCC 2002, n 7, pp 21, 43-49.

24 ACCC 2002, n 7, p 54.

25 ACCC 2002, n 7, p 54. In this respect the ACCC has also proposed increasing the level of civil penalties: ACCC 2002, n 7, pp 54-58.

26 Dawson Report, n 1, p 164, recommendation 10.1. This recommendation was made on the proviso that identified problems, including developing a 'satisfactory definition of serious cartel behaviour' first be resolved.

27 Commonwealth, *Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974*, April 2003, p 10
<<http://www.treasurer.gov.au/tsr/content/publications/TPAResponse.asp>>

28 Costello, P. "Release of the Report on the Competition Provisions of the Trade Practices Act 1974, and their Administration and the Commonwealth Government Response", Press Release No 21, 16 April 2003 <<http://www.treasurer.gov.au/tsr/content/pressreleases/2003/021.asp>>

29 Dawson Report, n 1, p 164, recommendation 10.2.1. It was recommended that the penalties 'be raised to be the greater of \$10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate'.

30 Dawson Report, n 1, p 165, recommendation 10.2.2.

31 Dawson Report, n 1, p 165, recommendation 10.2.3.

32 Commonwealth, n 27, p 11.

2.2 United States

The United States has, since the introduction of the *Sherman Act* in 1890, criminalized anti-competitive conduct. Specifically, section 1 of the *Sherman Act* prohibits any agreement that restrains trade. While all such agreements are potentially subject to criminal penalties, in practice the Department of Justice ('DOJ') criminally prosecutes hard core cartel conduct where it can be shown that the corporation and/or individual involved 'has acted with "specific intent" to restrain trade'.³³ Criminal intent to restrain trade can be presumed when clearly illegal conduct, such as price fixing and bid-rigging, is involved.³⁴ Criminal sanctions apply to both corporations and individuals involved in the contraventions. Individuals may be liable for a maximum penalty of 3 years imprisonment and a fine of up to \$350,000.³⁵ Corporations are liable for criminal penalties of up to \$10 million per offence. In the case of both individuals and corporations the fine may be increased to the higher of either twice the pecuniary gain enjoyed by the defendant or twice the gross loss to victims of the conduct.³⁶ This has facilitated very large fines for antitrust breaches, including a fine of \$500 million³⁷ against F. Hoffmann-La Roche for its role in the international vitamin cartel.³⁸ In relation to individual penalties this legislation enabled the DOJ to impose a \$7.5 million fine combined with a one year term of imprisonment on former Sotheby's auction house chairman, Alfred Taubman, for his long-term involvement in illegal price fixing activities.³⁹ More recently, Melvyn Merberg, former executive of food distributor Jitney Ltd was sentenced to serve 'a record 63 months in prison' after pleading guilty to participating in four separate bid rigging schemes.⁴⁰

³³ ACCC 2002, n 7, pp 38, 44.

³⁴ 18 USC §3571(d): 'If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.' See also ACCC 2002, n 7, p 44.

³⁵ The prosecution of individuals is viewed by the US Department of Justice as an 'integral part of antitrust enforcement policy': Chemtob S, "Antitrust Deterrence in the United States and Japan" (Paper presented at a Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, Washington DC, 2000), p 7. Chemtob goes on to detail statistics of fines and prison sentences imposed in the United States: pp 7-8.

³⁶ ACCC, n 7, p 57.

³⁷ This fine is 'the largest single fine imposed in a DOJ case for any crime under any statute': Hammond S, "From Hollywood to Hong Kong - Criminal Antitrust Enforcement is Coming to a City Near You" (Paper presented at the Antitrust Beyond Borders Conference, Chicago, Illinois, 9 November 2001), p 3.

³⁸ F Hoffman-La Roche Ltd agreed to pay this fine on 20 May 1999 for its role in a price fixing and market sharing conspiracy in relation to the selling of vitamins, estimated to have affected more than five billion dollars of commerce: see Department of Justice (US), *F Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel*, Press Release (20 May 1999).

³⁹ Ackman D, "Taubman Sentenced To One Year – Plus A Day", *Forbes*, New York, 22 April 2002, <<http://www.forbes.com/2002/04/22/0422taubman.html>>.

⁴⁰ Department of Justice (US), *Former New York City food company executive receives record prison term for antitrust crimes*, Press Release (9 November 2001). See also Wils W, "Does the effective

2.3 United Kingdom

Until recently the United Kingdom had no legislation criminalizing breaches of their competition laws. This changed on 7 November 2002 when the *Enterprise Act 2002* received Royal Assent.⁴¹ The *Enterprise Act* provides specifically for criminalisation of certain forms of *dishonest* anti-competitive conduct. It provides that a defendant will be convicted if, targeting the United Kingdom, ‘he “dishonestly” agrees with one or more persons to make or implement, or to cause to be made or implemented’,⁴² a horizontal agreement to:

- Directly or indirectly fix the price of goods or services;
- Limit or prevent supply or production of goods or supply of services;
- Allocate customers or markets; or
- Rig contract bids.⁴³

This is a separate prohibition which does not depend upon a breach of the existing laws. Under the new laws individuals convicted of an offence may be sentenced up to 5 years in jail and subjected to an unlimited criminal fine.⁴⁴ Corporations are not subjected to criminal prosecution.

The substantive provisions of the *Enterprise Act 2002* will come into operation on 20 June 2003.⁴⁵ Consequently, it is not possible at this stage to gauge how effective the new criminal regime will be in practice.⁴⁶

enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment” (Paper presented at the *EU Competition Law and Policy Workshop/Proceedings*, European University Institute, 2001), p 5, discussing average prison terms and fines; Hammond S, “A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program” (Paper presented at *The 2002 Antitrust Conference: Antitrust Issues in Today's Economy*, New York, 7 March 2002), p 3 and Hammond 2001, n 37, pp 2-3.

⁴¹ For details of the Act's progression through Parliament see: Department of Trade and Industry (UK), “History of the Enterprise Act 2002” <<http://www2.dti.gov.uk/enterpriseact/history.htm>>. See also Department of Trade and Industry (UK), *A World Class Competition Regime*, White Paper, Cm5233, London, July 2001.

⁴² *Enterprise Act 2002* (UK), s 188(1).

⁴³ *Enterprise Act 2002* (UK), s 188(1).

⁴⁴ *Enterprise Act 2002* (UK), s 190.

⁴⁵ Department of Trade and Industry (UK), “The Enterprise Act 2002: Implementation Schedule” <<http://www2.dti.gov.uk/enterpriseact/implementation.htm>>.

⁴⁶ A guide to how these provisions of the *Enterprise Act 2002* are likely to operate in practice have been published by the Office of Fair Trading: Office of Fair Trading, “Powers for Investigating Criminal Cartels: A Consultation Paper”, OFT505, April 2003 <<http://www.offt.gov.uk/Business/Enterprise+Act/publications.htm>>

3 EXTENSION- ANALOGY ARGUMENT

If one adopts existing criminal law practice as a starting point it is not difficult to make out a tenable argument in favour of extending the criminal law to Part IV of the Act. The criminal law prohibits a wide variety of conduct from murder and rape to flying a kite,⁴⁷ the annoyance of others⁴⁸ and not wearing a helmet when riding a pushbike. Further, in terms of the precise conduct proscribed by Part IV of the TPA it is not difficult to identify similarities with existing conduct which is dealt with by way of criminal sanctions.

The purpose of Part IV is explained by Deane J in *Refrigerated Express Lines (Australia) Pty Ltd v Australian Meat and Livestock Corporation*:⁴⁹

Part IV is headed 'Restrictive Trade Practices'. The general purpose and scope of the Part can be described by saying that it contains provisions which proscribe and regulate agreements and conduct which are aimed at procuring and maintaining competition in trade and commerce.⁵⁰

The substantive provisions of Part IV seek to achieve this purpose by regulating or prohibiting certain forms of conduct, including the making or giving effect to anti-competitive agreements (including those that constitute boycotts or price fixing), exclusive dealing, resale price maintenance, taking advantage of market power and entering into mergers which result in a substantial lessening of competition.

These forms of conduct are not intrinsically wrong. Unlike conduct such as murder, assault, rape and theft, they do not inflict *direct* harm on another person. Indeed it has been observed that 'victims' of cartel offences are often not aware that that harmful conduct has taken place.⁵¹ However, there seems to be little question that the conduct proscribed by Part IV is harmful to the community.⁵² Quite simply, it leads to consumers paying more for goods and services and, in this way, unfairly deprives consumers of property – in the form of money.

A sound argument can be made that price fixing and other forms of cartelisation cause at least as much harm as other forms of financial crimes. Whether someone pick-pockets two dollars from an agent or tricks the agent into giving him or her two extra dollars or is able to make the agent pay two dollars more for his or her phone bill as a result of total market dominance in the telephone provider industry would not seem to make a difference to the agent – either way the agent is two dollars worse off. In fact, a single act

⁴⁷ *Summary Offences Act 1966* (Vic), s 4(d)(i).

⁴⁸ See *Summary Offences Act 1966* (Vic), s 4.

⁴⁹ (1980) 44 FLR 455 at 460.

⁵⁰ *Refrigerated Express Lines (Australia) Pty Ltd v Australian Meat and Livestock Corporation* (1980) 44 FLR 455 at 460. This has been reinforced by section 2 of the *Trade Practices Act 1974* (Cth) which provides that the object of the Act is to: '... enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'

⁵¹ See, for example, *Energex*, n 8, p 1.

⁵² See, for example, *Corones*, n 14, p 160: 'The objections to [price-fixing and collusive tendering] are both economic and ethical. At the economic level, price-fixing and collusive tendering entail a loss of economic efficiency and a financial burden on the purchaser, ultimately the consumer or taxpayer. Ethically, they involve deception for financial gain.'

of price fixing probably causes far more cumulative harm than a burglary or theft.⁵³ It has been observed that:

It is not unusual for anti-competitive violations to involve far greater sums than those that may be taken by thieves or fraudsters, and the violations can have a far greater impact upon the welfare of society. ...⁵⁴

Cartels ... enrich participants at the expense of consumers. They injure consumers by raising prices above the competitive level and reducing output. Cartels can be very harmful across wide areas of an economy by artificially creating market power and leads to inefficient and wasteful allocation of resources ... They are blatant frauds on consumers.⁵⁵

More broadly, it is certainly not unusual for the criminal law to prohibit conduct that causes either indirect harm to others or, in some cases, no harm whatsoever. Offences such as drug trafficking and escaping from custody being examples of the former; indecent conduct and drunkenness of the latter.

Criminalisation of cartel conduct would, therefore, go some way to addressing claims that the current criminal law regime benefits those capable of more complex and sophisticated theft or fraud by treating their conduct as forgivable by way of civil pecuniary penalties while other less sophisticated (and less financially devastating) criminals may find themselves behind bars or at least facing criminal conviction and its associated stigma.⁵⁶ It would also bring hard-core cartelisation in line with other comparable (or even less harmful) white collar crimes and would also recognise it as at least as morally reprehensible as other forms of financial crime.

Apart from the deterrence argument it is this fact that this has been pressed most extensively by Prof Allan Fels in his push for the introduction of criminal sanctions.

⁵³ See, for example, OECD, n 2, p 81: 'It remains difficult to place a monetary value on the harm [caused by cartels], but it is surely significant, amounting to billions of dollars annually' and, at p 72; 'the amount of commerce affected by just 16 large cartel cases reported in the OECD survey exceeded USD 55 billion world-wide. ... it is clear that the magnitude of harm from cartels is many billions of dollars annually.' See also Acquah-Gaisie G, "Corporate crimes: Criminal intent and just restitution" (2001) 13 *Australian Journal of Corporate Law* 219 ('Conventional crime may touch only a few people, but corporate crimes can devastate many lives. ...').

⁵⁴ Justice Finkelstein, *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 559, para 28, cited in *ACCC 2002*, n 7, p 25.

⁵⁵ *ACCC 2002*, n 7, p 25. See also Corones, n 14, p 160 and OECD, n 2, pp 71-81.

⁵⁶ See, for example, Wils, n 40, p 28 ('... imprisonment, being society's most onerous and stigmatic punishment, should not be withheld from those with economic power and social status, when it is regularly applied to the poor and powerless ...'); Australian Consumers Association, *Submission on the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 105, Trade Practices Act Review 2002, p 7 ('In the interests of equality of justice, there is no reason that corporate criminals engaged in cartel behaviour, which is a form of theft, should be immune from a jail sentence which is faced by other thieves') and Lynch G, "The Role of Criminal Law in Policing Corporate Misconduct" (1997) 60 *Law and Contemp Probs* 23 at 39-40. The Dawson Report also noted the moral condemnation associated with criminal punishment: 'A criminal conviction represents the condemnation of society in a way that the imposition of a civil penalty cannot ...' (Dawson Report, n 1, p 158).

Hard-core collusion is morally reprehensible. It is a form of theft and little different from other white collar crimes (including insider trading and obtaining a benefit by deception) that already attract criminal sentences⁵⁷

The above has dealt with the “harm” aspect of cartelisation - or the ‘actus reus’ component of a criminal offence.⁵⁸ The other paradigm ingredient of a criminal offence is the *mens rea*.⁵⁹ The Australian Laws Reform Commission (ALRC) has recently noted that

... the concept of criminality involves the notion of individual culpability and having a criminal intent for one’s actions.⁶⁰

The requirement of a mental element is considered a hallmark of our criminal justice system. It is an overarching principle of criminal law that doing a forbidden act should not of itself render a person guilty of a crime: it must also be shown that the person had a guilty mind.⁶¹

Traditionally the *mens rea* comes in two different forms, intention and recklessness.⁶² Statutory offences also recognise less culpable states in the form of negligence as being sufficient to ground some offences.⁶³ The requirement of subjective wrongdoing has been further eroded by the concepts of strict liability⁶⁴ and absolute liability.⁶⁵

Thus, especially because of the watering down of the *mens rea* element for many offences, the absence of subjective wrongdoing is not a foundation for resisting a move to make criminal the behaviour proscribed in Part IV.

In any event, while the ACCC initially recommended that dishonest *intent* should not form a necessary element of an offence of hard core cartelisation in Australia,⁶⁶ the elements they have suggested for such an offence all contain either intent or recklessness

⁵⁷ ACCC 2002, n 7, p 24.

⁵⁸ Referred to as the ‘physical element’ in the *Criminal Code Act 1995* (Cth), s 3.1(1)

⁵⁹ Referred to as the ‘fault element’ in the *Criminal Code Act 1995* (Cth), s 3.1(1)

⁶⁰ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Federal Regulation*, Discussion Paper No 65 (April 2002), p 45.

⁶¹ Australian Law Reform Commission, n 60, p 67. See also Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, (December 2002), pp 112-120 and Freiberg A and McCallum R C, “The Enforcement of Federal Awards: Civil or Criminal Penalties” (1979) 7 ABLR 246, p 259.

⁶² Australian Law Reform Commission, n 60, pp 69-72 for a discussion of mental or fault elements under the Australian Criminal Code.

⁶³ See Australian Law Reform Commission, n 60, p 68, discussing the different forms of *mens rea*.

⁶⁴ For further discussion see Freiberg and McCallum, n 61 pp 259-260.

⁶⁵ See Australian Law Reform Commission, n 60, pp 72-76 for a detailed discussion on strict and absolute liability in Australia.

⁶⁶ The main reasoning given by the ACCC for eliminating dishonesty as a requirement is that a ‘business is highly unlikely to enter a cartel agreement bona fide’: ACCC 2002, n 7, p 45. In a subsequent submission the ACCC supported a dishonest requirement: Dawson Report, n 1, p 155. The Dawson Committee did not make recommendations as to the specific requirements of a criminal offence and reached no conclusion about the desirability or otherwise of including a dishonesty requirement: Dawson Report, n 1, ch 10.

to satisfy a 'fault element'. For example, the ACCC proposed that a corporation be guilty of an offence if

it enters into an agreement (contract, arrangement or understanding) or gives effect to a provision of an agreement (etc.), that is intended to, or has the effect of, or which, if it operated as was intended, would have the effect of, price fixing (etc.) of goods or services.⁶⁷

According to the ACCC, this particular prohibition would require either a subjective intent to fix prices or recklessness as to whether it would.⁶⁸

Consequently, if consistency with prevailing criminal law doctrine and practice is used as the guiding determinant there is ample scope for extending the reach of the criminal law to Part IV – or at least to hard core cartelisation as proposed by the ACCC. However, this does not constitute a strong argument in favour of doing so. This stems from the fact, as is discussed in the following section, the criminal law is devoid of a overarching justification and the threshold for making an activity criminal is so low that equally strong argument can be made for criminalizing most activities which involve some degree of harm, risk or non-conformist behaviour.⁶⁹ Consistent with present practice one could use the extension-analogy approach to justify the criminal prohibition of a large amount of trifling conduct. For example, it could be just as persuasively argued that it should be a criminal offence to be late for work - this is certainly no more harmful than parking one's car too long at a parking meter.

Such absurd examples underline much of what is wrong with the criminal law general and more particularly the limits of the analogy-extension argument. Such an approach overlooks the fact that prevailing criminal law standards may well be wrong, ie not supportable by a unifying doctrinal rationale. Thus to adopt them as a starting position would be to perpetuate existing errors. The doctrinal rationale for the criminal law is examined in the following section.

⁶⁷ ACCC 2002, n 7, p 47.

⁶⁸ ACCC 2002, n 7, p 47.

⁶⁹ 'The argument advanced is that what has been traditionally labelled "criminal law" has long since lost its coherence and distinctiveness. Some have reached the barren conclusion that the only thing that distinguishes criminal offences is the procedure by which the legal system handles them.': Australian Law Reform Commission, n 60, p 79, quoting Farrier D, "In Search of Real Criminal Law" in Bonyhady T (ed), *Environmental Protection and Legal Change* (Federation Press, Sydney, 1992), quoting Williams G, *Textbook on Criminal Law* (Stevens & Sons, London, 1978), p 27. See also Australian Law Reform Commission, n 60, pp 45-49 and Hart H, "The Aims of the Criminal Law" (1958) 23 *Law & Contemporary Problems* 404, quoted in Australian Law Reform Commission, n 60, p 46, who reached the conclusion that 'a crime is anything which is called a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name'. This lack of overarching justification is not unique to Australia. See, for example, Ashworth A, "Is the Criminal Law a Lost Cause?" (2000) 116 *Law Quarterly Review* 225.

4 CRIMINALITY FROM THE PERSPECTIVE OF THE OBJECTIVE OF THE CRIMINAL LAW

4.1 The need for justification of the criminal law

As a matter of principle, there should be an underlying theory which unifies and justifies the criminal law. Moreover, the stigmatisation and punishment that are consequent upon a finding of guilt for a criminal offence require a moral justification. Not all practices or types of behaviour call for a moral justification. We do not need to justify playing sport, visiting friends or dancing. However, as Ashworth correctly notes, the criminal law is 'society's strongest form of official punishment and censure.'⁷⁰ It is the precursor to sentencing, which is the area of law where the State acts in its most coercive and intrusive manner. Whereas all other areas of law (such as contract and tort) are concerned with 'simply' regulating the transfer and adjustment of monetary sums,⁷¹ sentencing involves the intentional infliction of some type of harm and hence infringes upon an important concern or interest, such as one's liberty or reputation. As such, it is not dissimilar to activities such as slavery and euthanasia.⁷² It is a 'fundamental ethical principle that we may not inflict pain or disgrace upon another without adequate justification'.⁷³ This point is also noted by Ashworth:

As a type of law, the technique of [the criminal law] is condemnatory and it authorizes the infliction of state punishment. To criminalize a certain kind of conduct is to declare that it should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it. The use of state power calls for a justification.⁷⁴

In order for an act to be deserving of blame and the deliberate infliction of punishment it must breach some type of norm or standard.⁷⁵ The strongest type of prohibitions in our community are embodied in moral norms⁷⁶ - by definition, morality is the ultimate set of principles by which we should live and consists of the principles which dictate how serious conflict should be resolved.⁷⁷ Thus, one might expect to find at least a loose

⁷⁰ Ashworth A, *Principles of Criminal Law* (2nd ed, Clarendon Press, Oxford, 1995), p 16. Ashworth then contends that it should follow that the criminal law should be 'concerned only with central values and significant harms': 16.

⁷¹ See Australian Law Reform Commission, n 60, p 47. Professor Coffee has suggested that the distinction between civil and criminal penalties is that '... characteristically the criminal law prohibits, while the civil law prices': Coffee J, "Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It" (1992) 101 *Yale Law Journal* 1875. See also Coffee "Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law" (1991) 71 *Boston University Law Review* 193, pp 225-228.

⁷² See also Walker N, *Why Punish?* (Oxford University Press, Oxford, 1991), p 2.

⁷³ Barry J V, "Morality and the Coercive Process" (1962-4) 4 *Sydney Law Review* 28, p 29.

⁷⁴ Ashworth, *Principles of Criminal Law*, n 70, p 22.

⁷⁵ See Australian Law Reform Commission, n 60, p 47 ('In criminal law, wrongful acts are punished because they violate some kind of collective interest ...').

⁷⁶ This is not to suggest that there must be a complete convergence between morality and the criminal law. Indeed it would seem untenable to suggest that the criminal law should enforce every moral norm, such as telling lies. A more persuasive view is that the criminal law should enforce only the most fundamental moral prescriptions. This is discussed further below.

⁷⁷ See M Bagaric, 'A Utilitarian Argument: laying the foundation for a coherent system of law'

connection between the criminal law and morality. If this was the case, the answer to present discussion would readily follow. It would 'simply' involve identification of the relevant moral theory or standard which underpins the criminal law and testing whether the conduct proscribed by Part IV is a species of the conduct falling within the general principle. This solution, however, does not present itself. This is because as the law currently stands it is not tenable to urge that a general moral theory underpins the criminal law. Even a cursory glance over the criminal law statute books shows that only a very small portion of criminal offences seek to protect individual rights or interest; at the least of the sort that might concern a general moral theory.⁷⁸

Certainly many traditional common law criminal offences protect important recognisable rights and interests; namely the right to physical (including sexual) integrity and the right to own property. However, the criminal law has grown almost exponentially in the past few decades and offences aimed at securing the rights of others constitute an ever decreasing portion of the criminal law. For example, in Victoria each year only about five thousand offences are dealt with in the Higher Courts (the County Court and the Supreme Courts).⁷⁹ These are the most serious offences and relate to matters such as armed robbery and sexual offences. A further approximately 300,000 offences are dealt with in the Magistrates' Courts.⁸⁰ The offences dealt with at this level relate to a hotchpotch of behaviour. They range from burglary and assault to travelling on a train without a ticket and playing games to the annoyance of another. It is difficult to generalise about the nature of the offences dealt with at this level. For example, in terms of the twenty most common offences about half relate to behaviour which infringes the rights of another (for example, theft, burglary, and unlawful assault) whereas the other half are comprised of victimless offences, such as using a drug of dependence, refusing to furnish a return, being drunk in a public place and unlicensed driving.

However, the offences dealt with in the Magistrates' and Higher Courts only scratch the surface in terms of the number of total criminal offences charged each year. In fact, about 85 per cent of criminal offences never reach the door of a court. Instead they are dealt with on the spot - by means of an infringement notice. The ratio of matters dealt with on the spot to that determined by the courts exceeds 7:1.⁸¹ Most of these offences are simply regulatory in nature, aimed at controlling and deterring certain behaviour. They are typically victimless strict liability offences. For example in 1990/91 the top ten infringement notices which were sent to court for enforcement were exceeding the speed limit over 15km/h and less than 30 km/h; leaving a vehicle in a no standing area; speeding less than 15 km/h over the limit; leaving a vehicle a longer than period fixed; leaving a vehicle at an expired meter; not wearing a seat belt; leaving a vehicle in a

(2002) 10 *Otago Law Review* (NZ) 163.

78 For a discussion of conventional characteristics of a criminal offence see Australian Law Reform Commission, n 60, p 60. See also Australian Law Reform Commission, n 61, pp 112-120.

79 See Casflow Analysis Section, Courts and Tribunals Division, Department of Justice, *Sentencing Statistics: Higher Criminal Courts Victoria*, 1994, 1995, 1996.

80 See Casflow Analysis Section, n 79.

81 See Bagaric M, "Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt with on the Spot" (1998) 24 *Monash University Law Review* 231.

carriageway; parking within nine metres of an intersection; travelling without a ticket; and leaving a vehicle in a no parking area.⁸²

All of these offences constitute paradigm instances of regulatory offences, which do not seek to protect any recognisable right. It follows that it is no longer tenable to suggest that there is connection between the criminal law and contemporary moral discourse - the weight of numbers is simply crushing. It would seem that the only rationale for criminalizing such conduct is that it is presumed to be an effective practical means of controlling and regulating the relevant conduct.

The criminal law is a relatively cheap, convenient, and swift means of reinforcing a system of regulation. Economic considerations and reasons of expediency are treated as outweighing any argument that the criminal law should be reserved for the most antisocial form of behaviour.⁸³

It could be argued that on the spot offences are in effect a separate category of offence and hence need not be accounted for or taken into consideration in developing a general theory of the criminal law. Unlike the case with traditional criminal offences, the disposition of on the spot offences does not necessarily involve the courts. On the spot matters are dealt with by means of an infringement notice which sets out the nature and the circumstances of the offence and the prescribed penalty - which is always a fixed monetary amount. In rare circumstances the penalty can also include a licence order and a conviction. Payment of the fine within the prescribed period (normally 28 days) effectively ends the matter - so long as the fine is paid there is no need for court involvement.⁸⁴

However, the process for dealing with regulatory offences is not different in *nature* to that utilised in the case of traditional criminal offences.⁸⁵ Rather, the difference is only of degree, brought upon by the need to dispense with such matters in a manner which is within the level of economic spending that the community is willing to tolerate. This is evident from the fact that all of the offences which can be dealt with by way of infringement notice can also be dealt with through the courts and there is no requirement that the body which can issue an infringement notice must proceed in that fashion. Even where a notice is issued, at the election of either party, the infringement notice can be revoked and the matter is then brought before a court. Further, even though the infringement notices prescribe a fixed monetary sum, where the matter is determined by a court the maximum penalty is not limited to the nominal amount in the notice, but rather by the maximum penalty for that offence. Finally, recipients of infringement notices who do not have the matter dealt with by a court risk being subject to the harsh criminal sanctions - seizure of assets or imprisonment - where they default in paying the fine. In

⁸² Fox R, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, Canberra, 1995), p 117. More current data is not available, however, there is no reason to suggest that the types of offences dealt with most frequently by way of infringement notice have changed.

⁸³ Ashworth, *Principles of Criminal Law*, n 70, 50.

⁸⁴ Unpaid fines result in the activation of enforcement procedures. For a detailed discussion about the infringement notice system, see Bagaric 1998, n 81 and Fox, n 82.

⁸⁵ See Australian Law Reform Commission, n 60, pp 47-50.

every meaningful respect on the spot offences are genuine criminal offences: they are prosecuted by the state and make the offender liable to criminal sanctions. It is therefore unjustifiable to dismiss them as being irrelevant in an analysis of the nature of criminal law.

It could be contended that the justification for the criminal law lies, not in the fact that is concerned with the protection of discrete rights and interests, but rather than it seeks to prevent generally harmful conduct. Once again this argument is not sound. The harm that is caused by breaches of the civil law is no less than violations of many criminal laws. The purchaser who fails to honour a contract for the sale of land; the solicitor who gives incorrect legal advice; the builder who is six months late completing a home; the doctor who fails to diagnose an illness; the plumber who arrives an hour late to fix the broken pipe; the storeowner who fails to mop up a spill in his or her shop; the taxidriver who as a result of a wrong turn gets his or her passenger late to the airport; the telecommunications company that disconnects the wrong telephone line; and the energy company that fails to prevent a power blackout; are all guilty of conduct which actually, or in all likelihood, causes a far greater amount of unhappiness than occurs as a result of a failure to register one's dog; driving at 70 km/h in a 60km/h zone; flying a kite which annoys another;⁸⁶ or parking too long at a parking meter.

In the end, the decision to make an activity a criminal offence is devoid of a justificatory principle - the criminal law is a set of disparate rules which are devoid of a unifying thread. By and large, most criminal offences are no worse than civil wrongs. The decision whether to make an activity a criminal offence appears to be no more sophisticated than tossing a coin.⁸⁷ Thus no mileage is to be gained by surveying the present criminal law and attempting to extract a common thread which can be applied to the problem at hand.

4.2 What is an appropriate justification for criminalizing conduct?

The absence of an existing justificatory threat does not prevent one hypothesising about what the thread should be. In this regard, the principle of proportionality would seem to be cardinal. In its crudest and most persuasive form, the principle of proportionality is the view that the punishment should equal the crime. The proportionality principle has a strong foundation in sentencing law, and (probably because of its intuitive appeal) also transcends many other areas of the law. As Fox notes, the notion that the response must be commensurate to the harm caused, or sought to be prevented, is at the core of the criminal defences of self-defence and provocation. It is also at the foundation of civil law damages for injury or death, which aim to compensate for the actual loss suffered, and equitable remedies, which are proportional to the detriment sought to be avoided.⁸⁸

⁸⁶ This is an offence pursuant to s 4 of the *Summary Offences Act 1966* (Vic).

⁸⁷ See Freiberg and McCallum, n 61, p 247 ('The characterisation of legislation and legal proceedings as either civil or criminal has been neither logical nor consistent').

⁸⁸ Fox R, "The Meaning of Proportion in Sentencing" (1994) 19 *Melbourne University Law Review* 489, 491. The High Court of Australia has also seized on the concept of proportionality as a limiting factor regarding the exercise of the implied incidental power and purposive powers under the *Australian Constitution*. In exercising these powers the validity of a statute depends on whether it is appropriate or adopted to its legislative purpose: 'a reasonable proportionality must exist

In sentencing law, the principle essentially prescribes that the punishment should fit the crime. It operates to ‘restrain excessive, arbitrary and capricious punishment’⁸⁹ by requiring that punishment must not exceed the gravity of the offence, even where it seems certain that the offender will immediately re-offend.

The principle is also particularly relevant concerning the decision whether to make conduct a criminal offence. As is noted above, the criminal law is the strongest form of pain that we as a society inflict on our fellow citizens. It then follows that such treatment should be reserved for the most serious wrongs - where seriousness is assessed against the criteria of the level of harm caused to others.

This requires some awareness of the interests that are essential to human flourishing. Andrew von Hirsch and Nils Jareborg,⁹⁰ in the context of evaluating criminal offence seriousness, have developed a ‘living standard’ criterion which measures the importance that relevant interests have for a person’s standard of living. In this regard they have proposed that the most important interests to human flourishing, in descending order of importance, are physical integrity; *material support and amenity* (ranging from nutrition and shelter to various luxuries); freedom from humiliating or degrading treatment; and privacy and autonomy.⁹¹

If we adopt this formulae as being even approximately accurate⁹² then it would seem that there is a relatively firm foundation for criminalizing conduct prohibited by Part IV (in particular hard core cartels) - higher prices for consumers interferes with their capacity to fully enjoy the material amenities of life.

between the designated object or purpose and the means selected by the law for achieving that object or purpose’ (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 297). The proportionality criterion has also been used to determine whether a law infringes a constitutional limitation, express or implied, which restricts a head of power.

⁸⁹ Fox, n 88, p 492.

⁹⁰ von Hirsch A and Jareborg N, “Gauging Criminal Harm: A Living-Standard Analysis” (1991) 11 *Oxford Journal of Legal Studies* 1.

⁹¹ It has been argued that the approach adopted and conclusions reached by von Hirsch and Jareborg have uncanny similarities with a transparently utilitarian evaluation of harm analysis. The considerations they identify are no more than a rough arm chair utilitarian scale of the primacy of interests relevant to happiness. For example, it seems evident that the most essential requirement to the attainment of any degree of meaningful happiness is physical integrity and subsistence, followed by material support and minimal well-being and so on. The type of infringement which most seriously interferes with our capacity to attain happiness is our physical integrity. The next thing many seem to value most is material support. Freedom from humiliation and privacy and autonomy, though not necessarily in that order, are also important interests towards the road to happiness. See Bagaric M, “Proportionality in Sentencing: its role and justification” (2000) 12 *Current Issues in Criminal Justice* 142.

⁹² This analysis has been described by one eminent commentator as the ‘foremost modern attempt to establish some parameters for ... proportionality’: Ashworth A, *Criminal Justice and Sentencing* (2nd ed, Butterworths, 1995), p 93.

However, it is important to acknowledge that this conclusion is tentative. To shore up this argument it must be *established* (beyond the cursory comments above) that the soundest justification for the criminal law is to prohibit seriously harmful conduct. This requires a thorough analysis of the objectives of the criminal law and the goals that are attainable through a process of criminalisation.⁹³ While this is beyond the scope of this paper, at least one of the areas for future meaningful research in this area has been identified.

5 DETERRENCE ARGUMENT

The main argument in favour of harsher penalties for those who breach Part IV of the TPA is that it will deter offenders from engaging in the prohibited conduct.⁹⁴

There are two broad forms of deterrence. Specific deterrence aims to discourage crime by punishing offenders for their transgressions and thereby convincing them that ‘crime does not pay’. General deterrence seeks to dissuade potential offenders from engaging in unlawful conduct by illustrating the unsavoury consequences of offending. There have been a considerable number of studies conducted, observations noted and arguments made concerning the efficacy of punishment to deter offenders. It is not possible in a paper of this size to summarise the respective arguments and, in any event, this would be tedious. Instead we note the conclusions that one of us has previously reached (based upon a consideration of relevant empirical evidence) about the efficacy of punishment to deter offenders.⁹⁵

5.1 Specific Deterrence

It is inordinately difficult to obtain information regarding the effectiveness of sanctions in deterring offenders from committing offences at the expiry of a sanction. Offenders may not re-offend for numerous reasons, apart from the fear of being subject to more punishment. The offending may have been a ‘one-off’ in any event; a suitable opportunity may not again present itself or rehabilitation may have occurred.⁹⁶

⁹³ For further comments on this issue, see M Bagaric, "The 'Civil-isation' of the Criminal Law" (2001) 25 *Criminal Law Journal* 197

⁹⁴ ACCC 2002, n 7. See also Dawson Review, n 1, pp 153, 163. Deterrence also seems to be at the heart of the current civil regime: ‘The principal, and I think probably the only, object of the penalties imposed by s 76 is to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act’ (Justice French in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152, quoted in Corones, n 14 p 160). However, in recent times there have been suggestions that there is also an element of ‘punishment’ in the existing penalty regime: see Round, n 8, p 88.

⁹⁵ See Bagaric M, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing, London, 2001).

⁹⁶ See also Nagel D, “General Deterrence: A Review of the Empirical Evidence” in Blumstein A, Cohen J and Nagin J (eds), *Deterrence and Incapacitation*, (Washington DC, National Academy of Sciences Press, 1978), p 96 where Nagel adverts to the difficulty in distinguishing between rehabilitation and specific deterrence.

However, the available evidence supports the view that severe punishment (namely imprisonment), generally, does not deter offenders: the recidivism rate of offenders does not vary significantly, regardless of the form of punishment or treatment to which they are subjected.⁹⁷ Thus, there is no empirical evidence to suggest that meting out harsher penalties to those who breach Part IV will reduce the likelihood of those who recidivate in this area. This, however, was not the chief deterrence argument suggested in favour of harsher penalties. The main deterrence rationale that was offered concerned the notion of general deterrence.

5.2 General Deterrence

When analysing the evidence concerning the efficacy of punishment to achieve general deterrence, there are broadly two different levels of inquiry. Marginal deterrence concerns whether there is a direct correlation between the severity of the sanction and the prevalence of an offence. Absolute deterrence relates to the threshold question of whether there is any connection between criminal sanctions and criminal conduct.

Marginal Deterrence

It is intuitively appealing to suggest that the threat of harsher penalties will lead to greater compliance. Underpinning this sentiment is rational choice theory of offending, which has gained some prominence over the past two decades or so.⁹⁸ On this account, offenders are not viewed as agents who simply respond to adverse social situations and psychological needs. Rather, so theory goes, offenders (or at least many of them) are active-decision makers who factor a large number of variables into the decision whether or not to commit an offence. This includes the precise means of committing the offence (including appropriate targets) and a risk assessment of the engaging in the offending conduct.

For the vast majority of crime, the available evidence does not support this picture. Instead, it seems that most offenders commit crimes in response to situational factors such as opportunities and transient motives. Where this is so, there is no firm evidence that increasing penalty levels result in a reduction in crime.⁹⁹

⁹⁷ The Panel on Research on Deterrent and Incapacitative Effects, “Incapacitation” in Blumstein, Cohen and Nagin, n 96, p 66; Bagaric M, “Incapacitation, Deterrence and Rehabilitation”: Flawed Ideals or Appropriate Sentencing Goals” (2000) 24 *Criminal Law Journal* 19, pp 34-5.

⁹⁸ For an excellent summary of the literature in this area, see Gabor T and Crutcher N, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures* (Department of Justice Canada, Research and Statistics Division, Ottawa, 2002).

⁹⁹ Following a comprehensive review of the evidence regarding marginal deterrence, Zimring and Hawkins stated that: ‘Studies of different areas with different penalties, and studies focusing on the same jurisdiction before and after a change in punishment levels takes place, show rather clearly that the level of punishment is not the major reason why crime rates vary. In regard to particular penalties, such as capital punishment as a marginal deterrent to homicide, the studies go further and suggest no discernible relationship between the presence of the death penalty and homicide rates.’: Zimring F E and Hawkins G J, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, Chicago, 1973), p 29. See also Walker N, *Sentencing in a Rational Society* (Penguin, Harmondsworth, 1969), pp 60-1, 191. For more recent analysis, with essentially the same result, regarding the efficacy of the death penalty as a deterrent, see Hood R, *The Death Penalty: A*

However, to the extent that marginal deterrence does work, it is in the context of offences where the offender has the time, inclination and resources to do a cost-benefit analysis – white collar crime being the paradigm case in point.¹⁰⁰ In such cases, for a penalty to provide an effective deterrent the expected gain from the contravention must exceed the gain from the violation.¹⁰¹ The current penalty regime in Australia, combined with the small risk of detection, does not meet this requirement:¹⁰²

‘The fact that the same companies and one individual involved in price-fixing in *ACCC v Pioneer Concrete (Qld) Pty Ltd* had engaged in the same conduct before suggests that pecuniary penalties alone are not having a deterrent effect.

The principal defect under the current regime is that it does not give sufficient emphasis to the role played by the individual in relation to price-fixing and collusive tendering. The message that needs to be conveyed is that from an individual manager’s point of view, price-fixing and collusive tendering do not pay. They cost. And the cost is so high that the conduct is not worth contemplating.’¹⁰³

World Wide Perspective (Clarendon Press, Oxford, 1996), ch 6, esp 211-2. The most recent extensive literature review on the topic also failed to identify a link between heavier penalties and the crime rate: von Hirsch A and Bottoms A, *Criminal Deterrence and Sentence Severity* (Hart Publishing, Oxford, 1999), p 47-8.

¹⁰⁰ Recently, the New Zealand Ministry of Commerce took the view that ‘the arguments are relatively strong for assuming a high degree of rationality when firms make decisions about whether to comply with a competition law’: Ministry of Commerce (NZ), Penalties, Remedies and Court Processes Under the Commerce Act 1985: A Discussion Document (Wellington, 1998), p 7. Corones suggests the motives for managers proposing to engage in anti-competitive conduct is simply to ‘advance their own careers and act in their own self-interest’: Corones, n 11, p 160. See also Wils, n 40, p 8.

¹⁰¹ Wils, n 40, p 11. See also Chemtob, n 35 at 3 (‘Starting from the proposition that most corporate crimes are motivated by the desire for pecuniary gain, it is an easy step to conclude that to deter those crimes effectively, the expected penalty must at least equal, if not exceed, the expected gain’).

¹⁰² The Dawson Committee has recommended that the maximum pecuniary penalty on corporations be increased to a maximum of ‘either a multiple of the gain or a proportion of the corporation’s turnover’ (Dawson Review, n 1, p 164). The Government has stated in response that it will increase the maximum pecuniary penalties available for corporations. The Government does not, however, indicate whether it will increase the penalties to the level recommended by the Dawson Committee: Commonwealth, n 27, p 11. If it does the penalties available will come closer to approximating optimal penalties for price fixing. However, for reasons set out below, even the proposed penalties would not constitute an effective deterrent.

¹⁰³ Corones, n 14, p 164. See also Energex, n 8, p 6 (Currently in Australia ‘The expected gains to price-fixers, if we can assume that they are rational expected profit maximisers, appear to be greater than the expected costs of orchestrating and putting into effect a price agreement with rivals ...’), Round, n 8, p 123 (‘The fact that [price-fixing] is still quite common [in Australia] suggests that to a rational price-fixer the expected gains from colluding on prices with rivals exceed the expected costs of being detected, prosecuted and found in breach of the Act’) and Baxt R, “Thinking about Regulatory Mix – Companies and Securities, Tax and Trade Practices” in Grabosky P and Braithwaite J (eds), *Business Regulation and Australia’s Future* (Australian Institute of Criminology, Canberra, 1993), pp 124-127. Compare BP, *Submission to the Review of the Provisions of the Trade Practices Act 1974 by BP Australia Pty Ltd*, Public Submission 47, Trade Practices Act Review 2002, p 5 (‘...current penalties provide sufficient deterrence’); Shell, n 5, pp 1, 7-8 (‘... there would be very few corporations or individuals where the prospect of a penalty [the size of the current maximum] would not act as an adequate deterrent’); Vodafone, *Submission to the Trade Practices Act Review*, Public Submission 60, Trade Practices Act Review 2002, p 6

The question then becomes, what level of penalty is required in order for individuals to consider the cost so high as to be ‘not worth contemplating’? There have been a number of studies undertaken on optimal penalties in white collar crimes and it is beyond the scope of this paper to go into them in any detail. The most significant finding coming from these studies is that, for fines against corporations or individuals to be high enough to provide an effective deterrent, they would need to be ‘impossibly or unacceptably high’.¹⁰⁴ For example, Wils has observed:

‘The expected fine is that imposed if the violation is detected and punished, multiplied by the probability of detection and punishment. The gain, which the firm obtains from the violation, divided by the probability of being fined, thus constitutes a floor below which fines will generally not deter.’ [footnotes omitted]¹⁰⁵

‘In the United States, the figure of 10% of the selling price appears to be widely accepted as an estimate of the average price increase from price-fixing. ... Assuming [the cartel] lasts 5 years [the gain from a price cartel] would be in the order of 50% of the annual turnover in the products concerned. However, ... the price increase caused by the cartel will depress demand ... Assuming ... profits of 5% of turnover, the gain from the price cartel lasting 5 years would be in the order of 25% of the annual turnover in the products concerned ... [The estimated] probability of a successful government prosecution of a price-fixing conspiracy in the United States [is], at most, between 13 and 17 percent. ...

Assuming a 10% price increase, and a resulting increase in profits of 5% of turnover, a 5-year duration and a 16% probability of detection and punishment, the floor below which fines will generally not deter price-fixing would be in the order of 150% of the annual turnover in the products concerned by the violations.’ [footnotes omitted]¹⁰⁶

Based on an assessment of current fine levels in the United States and the European Union Wils went on to conclude that current finds were approximately 10 times lower than that required to effectively deter cartel behaviour.

The answer cannot, however, simply be to increase fines imposed on a corporation to the optimal level. While it may be possible to determine, at least approximately, an ‘optimal penalty’ for deterrence in theory, in practice such a financial penalty is not likely to prove effective. This is because the financial penalty required to meet the optimal level would often exceed the corporation’s ability to pay (reducing deterrence value).¹⁰⁷ In addition,

(‘Financial penalties against both the individual and the company are sufficient deterrents against anti-competitive actions’); Business Council of Australia, *Submission to the Dawson Review of the Trade Practices Act 1974 and Its Administration*, Public Submission 71, Trade Practices Act Review 2002, p 117 (‘the severe penalties which currently apply for those offences are an adequate deterrence’) and Australian Chamber of Commerce and Industry, *ACCI Submission to the Dawson Committee Review of the Trade Practices Act*, Public Submission 104, Trade Practices Act Review 2002, pp 85-88.

¹⁰⁴ Wils, n 40, p 11.

¹⁰⁵ Wils, n 40, pp 11-12.

¹⁰⁶ Wils, n 40, pp 13-13 . For further detailed discussion of optimal penalties for competition law contraventions see Ministry of Commerce (NZ), n 100, pp 8-11. See also Dawson Report, n 1, pp 160-161.

¹⁰⁷ Referring to a study conducted by Craycraft, Craycraft and Gallo in 1997, Wils notes that, between

even if it could pay the cost would be borne by the wrong people; namely shareholders, creditors and, ultimately, consumers.¹⁰⁸

Similarly, in relation to individuals, a financial penalty (in particular a civil one), is unlikely to provide effective deterrence. First, as is the case for corporations, the individual may be ‘judgement-proof’ – unable to ‘pay the minimum financial penalty required for effective deterrence’.¹⁰⁹ Second, even if an individual could pay the fine imposed, there is an additional problem of indemnification – it is relatively easy for the corporation to indemnify, at least indirectly, an executive or employee that has been financially penalised for anti-competitive conduct.¹¹⁰ In the same vein, research has shown that most individuals who have admitted or have been held to have engaged in price fixing conduct retain their existing employment – or find other equivalent, or more rewarding, employment elsewhere.¹¹¹

Because financial penalties alone cannot provide effective deterrence to white-collar corporate criminals, alternative penalties need to be considered if deterrence is to be achieved. One possibility is imprisonment.¹¹²

1955 and 1993, if optimal fines had been imposed on firms convicted of price-fixing ‘58% of the firms would not have been able to survive ... without becoming technically insolvent’: Wils, n 40, p 15, citing Craycraft C, Craycraft JL and Gallo JC, “Antitrust Sanctions and a Firm’s Ability to Pay”, 12 *Review of Industrial Organisation* 171. See also Calkins, S. ‘Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties’ (1997) 60 *Law and Contemp Probs* 127 at 143 (‘... were the numbers raised sufficiently high, the great majority of individual defendants would be unable to pay’).

¹⁰⁸ For further discussion see Wils, n 40, pp 16, 18; ACCC 2002, n 7, p 34 and Acquah-Gaisie, n 53, p 7.

¹⁰⁹ See Wils, n 40, p 10 (fn 27). See also Freiberg A, “Monetary Penalties Under the Trade Practices Act 1974 (Cth)” (1983) 11 *ABLR* 4, pp 16-18 discussing the capacity of an individual defendant to pay penalties under the trade practices and the consequences of inability to pay.

¹¹⁰ Even though the Dawson Committee has recommended that legislation be amended to prohibit corporations from ‘indemnifying, directly or indirectly, officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent’ (Dawson Review, n 1, p 165, Recommendation 10.2.3), Wils notes that such prohibitions may easily be avoided: ‘... firms can relatively easily indemnify their agents for any threat of fines or any fines effectively imposed, thus taking away the deterrent effect of the penalty on the individuals concerned ... the firm can relatively easily compensate the manager in advance for taking the risk and/or indemnify him *ex post* when he has to pay the fine’ (Wils, n 40, p 27)

¹¹¹ The Dawson Committee has recommended that Courts be given the option of excluding individuals found guilty of hard core cartel conduct from being a director of a corporation or being involved in its management (Dawson Review, n 1, p 165, Recommendation 10.2.2). The Government has indicated it will implement this recommendation. This may reduce the ease with which individuals may obtain future similar employment, however it is unlikely to cover all avenues of involvement in business activity.

¹¹² See, for example, Wils, n 40, p 27 (‘... there is ample evidence that the threat of imprisonment constitutes a very effective deterrent for antitrust offences’). We are here only concerned with the discussing the possibilities that emerge from the range of sanctions that are presently available in the criminal justice system. We note, however, that other new forms of sanctions have been proposed, in the form of employment and education deprivations (see M Bagaric and J du Plessis, “Expanding Criminal Sanctions for Corporate Crimes - deprivation of right to work and cancellation of education qualifications” (2003) 21 *Companies and Securities Law Journal* 6), which *if available* would be suitable for the type of offending discussing in this paper.

A conventional risk-benefit analysis breaks down when the possibility of imprisonment or other criminal sanctions are introduced. It is difficult to impose a dollar amount on the loss of freedom or the stigma¹¹³ associated with serving time in prison or receiving a criminal conviction.¹¹⁴ In the case of senior businessmen, the threat of imprisonment is likely to prove particularly potent. As Liman has observed:

For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations.¹¹⁵

As a result, unlike most traditional crimes that may result from any number of possibly motives, it would appear that in the case of purely financial crimes, at least at a corporate level, there is a case for achieving more effective deterrence by increasing the amount, or changing the nature, of the existing penalty. In particular, it is likely that the threat of criminal sanction, in the form of a fine and/or prison term are more likely to prove an effective deterrent against contraventions of Part IV of the TPA than any amount of pecuniary penalty.

Absolute General Deterrence

Regardless of the conclusion one reaches about marginal deterrence, the evidence relating to absolute deterrence, even for traditional criminal offences is very positive. There have been several natural social experiments where there has been a drastic reduction in the likelihood (perceived or real) that people would be punished for criminal behaviour. The key thing about these events is that the change happened abruptly and the decreased likelihood of the imposition of criminal sanctions was apparently the only changed social condition.

Perhaps the clearest instance of this is the police strike in Melbourne in 1923, which led to over one third of the entire state police being sacked.¹¹⁶ Once news of the strike spread,

¹¹³ A distinguishing feature of the criminal law is that it 'carries, and is designed to carry, a stigma effect': Wils, n 40, p 33. See also Small Business Development Corporation, *Submission to the Trade Practices Act Review*, Public Submission 84, Trade Practices Act Review 2002, p 2 ('The social and commercial stigma attaching to imprisonment for breaching the law can be significant') and Lynch, n 56, p 47.

¹¹⁴ See Chemtob, n 35, p 19 ('... criminal enforcement has the potential to improve deterrence markedly by introducing non-monetary costs into the equation ...'). Compare Australian Industry, Corporation, *Submission to Committee of Enquiry into the Competition Provisions of the Trade Practices Act 1974, and their Administration*, Public Submission 109, Trade Practices Act Review 2002, p 61 ('it is still unsound logic in Ai Group's view, to suggest that imprisonment of individual executives or managers engaged in the cartel activity for the corporation will act as a more effective deterrent to other corporations or individuals').

¹¹⁵ Liman A L, "The Paper Label Sentences: Critique" (1977) 86 *Yale Law Journal* 619 at 630-631 quoted in Wils, n 40, p 28. See also Katyal N K, "Deterrence's Difficulty" (1997) 95 *Michigan Law Review* 2385 at 2416 who notes that 'the threat of jail has different meanings for different people. ... For users of moderate wealth, the threat of jail may provide more of a deterrent than the monetary cost.'

¹¹⁶ The discussion regarding the events of the strike comes from Milte K L and Weber T A, *Police in*

thousands of people poured into the city centre and engaged in widespread property damage, looting of shops, and other acts of civil disobedience including assaulting government officials and setting fire to a tram. This civil disobedience lasted for two days, and was only quelled when the government enlisted thousands of citizens, including many ex-servicemen, to act as 'special' law enforcement officers. This riotous behaviour was in complete contrast to the normally law-abiding conduct of the citizens of Melbourne. Similar civil disobedience occurred following the police strike in Liverpool in 1919 and the internment of the Danish police force in 1944.¹¹⁷

Thus deterrence does work, at the least in the sense of there being a direct connection between crime rates and *some* penalty. In relation to many hard-core cartels, an argument may be advanced that the ease with which individual pecuniary penalties can be transferred to the corporation effectively negates the effect of any existing financial penalty.¹¹⁸ If this is the case, it is necessary to look to other, non-transferable, penalties, in order even to achieve absolute general deterrence. Criminal penalties, especially in the form of imprisonment, are one form of non-transferable penalty.

It should also be noted, in relation to deterrence generally, that it is clear that the greater the perceived likelihood of detection, the more likely it is that prospective offenders will be dissuaded from offending.¹¹⁹ While there are increased efforts to detect cartels, an increased risk of detection will not, by itself, achieve effective deterrence of this form of conduct. This is because the risk of detection of cartels is likely to remain very low for the foreseeable future. Given their nature as highly secretive ventures, it has been observed that the enforcement costs in order to achieve a high level of detection in relation to cartel conduct are extremely high - and perhaps prohibitive.¹²⁰ However, if increased detection measures are not put in place, and the perception that only a remote possibility that breaches of Part IV will be detected is allowed to flourish, then any other measures that are employed to encourage compliance with Part IV are likely to be futile.

Australia, (Butterworths, Melbourne, 1977), pp 287-292.

¹¹⁷ Ashworth A, "Deterrence" in von Hirsch A and Ashworth A, *Principled Sentencing. Readings on Theory and Policy* (Hart Publishing, Oxford, 1998), pp 44 and 51 refers to the Liverpool strike. The Danish experience is discussed in Walker N, *Sentencing: Theory and Practice* (Butterworths, London, 1985) p 85. The view that there is a general link between punishment and crime rate also accords with econometric research that shows an inverse relationship between the incidence of violent offending and the use of imprisonment, but that the length of imprisonment is irrelevant: Wolpin K, "An Economic Analysis of Crime and Punishment in England and Wales, 1894-1967" (1978) *Journal of Political Economy* 815.

¹¹⁸ See, for example, Wils, n 40, pp 27-28, Corones, n 14, p 163 and Ministry of Commerce (NZ), n 100, p 26

¹¹⁹ This was acknowledged by the Dawson Committee who noted that 'certainty of detection is a better deterrent than severity of punishment for most criminal offences' (Dawson Report, n 1, p 158)

¹²⁰ Wils, n 40, p 22.

6 CONCLUDING REMARKS

The proposals to introduce jail terms for breaches of Part IV of the TPA, specifically in relation to hard-core cartels, have not been fully considered. The argument that Australia must bring itself into line with international practice is weak and provides no justification for criminalizing conduct in this country. The second key argument favouring the introduction of criminal penalties, namely the belief that they would provide greater deterrence to would-be offenders, merits further consideration. The key to deterring rational white-collar offenders is to ensure that the potential costs outweigh the benefits and that offenders perceive that there is a greater likelihood of detection if they engage in the prohibited conduct.¹²¹ Despite increased efforts at detection of cartels, the risk of ‘getting caught’ is still likely to remain very small relative to the potential financial gains from the conduct. Given that current potential costs, even presuming they are not transferred to a corporation, are relatively small and cannot effectively be increased to what might be considered the ‘optimal’ penalty, it is necessary to look to alternate penalties in order to achieve effective deterrence. Criminal sanctions, including imprisonment, would bring a new dimension to a conventional cost-risk analysis, and may, as a result prove a more effective deterrent.

Perhaps the most tenable argument for introducing criminal penalty regime to Part IV of the TPA is that anti-competitive conduct is of the kind that *should* be the subject of criminal sanctions. This argument requires an assessment of the objectives of the criminal law. It is to this end that future research should be directed to properly evaluate the desirability of the proposal.

¹²¹ See OECD, n 2, p 92, endnote 12: ‘Sanctions are not the only deterrent to cartel conduct, of course. The probability of detection is a related and important element. Detection can be enhanced in a variety of ways, including the provision of adequate investigation tools, an effective amnesty programme and, in the context of international cartels, effective international co-operation among national competition agencies.’ In this respect the Dawson Committee has recommended a leniency policy be introduced in conjunction with the proposed criminal penalties: Dawson Report, n 1, p 164.