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The Australian Competition and Consumer Commission Immunity Policy for Cartel Conduct: A Critical Legal Analysis

Pariz Lythgo-Marshall
University of Wollongong

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**UNIVERSITY OF
WOLLONGONG**



**The Australian Competition and Consumer Commission
Immunity Policy for Cartel Conduct: A Critical Legal
Analysis**

This thesis is submitted in fulfilment of the requirements for the
award of the degree

DOCTOR OF PHILOSOPHY

from

University of Wollongong

Pariz Lythgo-Marshall, BA LLB (HONS)

Faculty of Law, Arts & Humanities

School of Law

September 2015

ABSTRACT

This thesis provides a critical legal analysis of the Australian Competition and Consumer Commission's Immunity Policy for Cartel Conduct. The Immunity Policy is touted as the 'most effective anti-cartel enforcement tool in the world' as it aims to increase cartel detection and deterrence by offering the first cartel participant full immunity from civil and criminal penalties. This thesis presents a detailed examination of the theory underpinning the policy's design and intended operation to question whether the current model of assessing the effectiveness of the policy needs to be enhanced in light of more recent theoretical developments.

Building upon this analysis, this thesis employs: a qualitative and cross-comparative investigation into the eligibility and cooperation requirements of the policy; an analysis of how the policy intersects with public and private enforcement within Australia and how this impacts upon confidentiality and third party actions; and a critical examination of some alternative measures to increase cartel detection and deterrence in addition to immunity.

Despite the lionised rhetoric that surrounds the use of immunity policies worldwide, these claims are largely untested. Given the nature of cartel conduct, many quantitative assessments of the Immunity Policy are generated from incomplete or unknown information about cartel conduct and heavily rely on overgeneralised conceptions of rationality to inform the economic modelling upon which these studies are based. As a result, the research in relation to the Immunity Policy is currently quantitatively skewed and in need of a comprehensive analysis using qualitative methods to provide valuable and unique insight into the design and actual operation of the policy.

A qualitative and cross-comparative analysis was conducted to assist that analysis. Semi-structured interviews were conducted with 16 prominent stakeholders in Australia to provide detailed insight into the current design and operation of the policy. This qualitative study helped inform the content and structure of the cross comparative research. To complement these empirical insights, the respective immunity policies in Canada, the United Kingdom and the United States were analysed and compared to the Australian version to develop a model of best practice.

As a result of this analysis, this thesis finds that the current approach to assessing the effectiveness of the Immunity Policy is narrow and outdated. To overcome these limitations, an enhanced model is developed, which is used to inform the recommendations produced by the research. The use of this enhanced approach to the assessment of the Immunity Policy will ultimately strengthen the Immunity Policy and the recommendations made are therefore commended for adoption by the ACCC.

This thesis reveals that there are a number of limitations inherent in the design and operation of the Policy, including the approach most commonly used to assess its effectiveness in achieving cartel detection and deterrence. In light of this, the Immunity Policy should not be viewed as the single most effective anti-cartel enforcement tool but as one important component of the ACCC's overall enforcement armory.

Most importantly, in order for this claim to be truly tested, there is a need for the ACCC to implement viable alternative measures to Immunity, as outlined in this thesis, which can also achieve cartel detection and deterrence and prevent the overreliance on a single enforcement tool.

THESIS CERTIFICATION

CERTIFICATION

I, Pariz Lythgo-Marshall, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law, Arts & Humanities – School of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

Pariz Lythgo Marshall

3rd September 2015

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I THE ACCC IMMUNITY POLICY FOR CARTEL CONDUCT - AN INTRODUCTION

This research will focus on a finite aspect of competition law, that being cartel conduct. Put simply, cartel conduct is conduct that is highly meditated, typically secretive and sophisticatedly designed for personal profit at the expense of consumers and the economy. It generally occurs when two or more competitors in a market illegally collude to exploit the market for individual gain. In Australia, this conduct is regulated by the *Competition and Consumer Act 2010* (Cth).¹

Cartel conduct was criminalised in Australia in 2009, in response to strong calls from the Australian Competition and Consumer Commission ('ACCC'), as well as a brief and incomplete report by the Dawson Committee released in 2003.² The approach taken to make cartel conduct criminal has been to use the same physical elements as those used for the civil cartel prohibitions but require the fault elements of the *Criminal Code 1995* (Cth) to be satisfied in order for a criminal cartel offence to be established. This cartel statutory framework has been criticised as broad and overly complex, creating considerable uncertainty in relation to the way these provisions will be interpreted and applied.³

The focus of my thesis will be on the primary method used by the ACCC to detect this type of secret and deliberate behaviour, namely the Immunity Policy.

The Immunity Policy operates as follows: a cartel participant will be offered immunity from suit by the regulator if they are the first member to come forward with information about a cartel that will assist the regulator in 'unveiling' the cartel.

There has been global acknowledgement by the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN),⁴ and key competition regulatory agencies in the United States, Canada and the

¹ ss 44ZZRD-44ZZRK.

² Trade Practices Committee of Review, 'Review of the Competition Provisions of the Trade Practices Act' (Commonwealth of Australia, 2003) Chapter 10: Penalties and other remedies ('The Dawson Report').

³ Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law Policy and Practice in an International Context* (Cambridge University Press, 1 ed, 2011) Chapter 5.

⁴ OECD, 'Hard Core Cartels – Harm and Effective Sanctions' (Organisation for Economic Cooperation and Development, 2002); International Competition Network, 'Anti-Cartel Enforcement Manual: Chapter 2: Drafting and Implementing an Effective Leniency Policy' (International Competition Network, May 2009).

United Kingdom,⁵ that indicate that an effective immunity policy is essential for the encouragement of both businesses and individuals to disclose cartel behaviour.

According to the competition authorities, immunity policies are designed not only to assist the regulatory agencies to prosecute participants, but also to provide a powerful disincentive for the formation of future cartels.⁶ The authorities argue that there is a greater risk of regulatory detection and enforcement where an effective immunity policy is in place.⁷

It is important to note that a number of different terms are used to describe an immunity policy, including ‘Amnesty policy’ and ‘Leniency policy’ as commonly used in the United States and Europe. As these terms refer to essentially the same notion of an immunity policy, they will be used interchangeably throughout this research.

In Australia, a cartel member must apply to the Australian Competition and Consumer Commission (‘ACCC’) for immunity from suit, who will then decide whether immunity should be granted, according to the criteria outlined in its Immunity Policy.⁸ The Immunity Policy was revised by the ACCC during the time of writing this thesis; the discussion to follow reflects the current position.⁹

In criminal proceedings, the ACCC will make recommendations to the Commonwealth Director of Public Prosecutions (‘CDPP’), and the CDPP will

⁵ See, eg, Competition Bureau, 'Immunity Program under the Competition Act' (Competition Bureau, 7 June 2010); Competition and Markets Authority, 'Applications for Leniency and No-Action in Cartel Cases - Detailed Guidance on the Principles and Process' (Competition and Markets Authority, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf>; DOJ Department of Justice, 'Corporate Leniency Policy' (0091, Department of Justice - Antitrust Division, 1993); DOJ Department of Justice, 'Leniency Policy for Individuals' (0092, Department of Justice - Antitrust Division, 1993).

⁶ Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014) 1; International Competition Network, above n 4, s 2.2.

⁷ International Competition Network, above n 4.

⁸ Australian Competition and Consumer Commission, above n 6, s C, ss 16, 28.

⁹ Australian Competition and Consumer Commission, *ACCC Releases Discussion Paper in Cartel Immunity Policy Review* (September 2013) <<https://www.accc.gov.au/media-release/accc-releases-discussion-paper-in-cartel-immunity-policy-review>>. As part of this review, a number of submissions were put to the ACCC based on the research undertaken in this thesis: Pariz Marshall, 'Submission to the ACCC for the Review of the ACCC Immunity Policy 2013' (University of Wollongong, 2013); Pariz Marshall, 'Submission to the ACCC for the Review of the ACCC Immunity Policy 2013 - Response to the Discussion Paper on Cartel Immunity' (University of Wollongong 2013); Pariz Marshall, 'Submission to the ACCC for the Review of the ACCC Immunity Policy 2013 - Comments on the Draft Immunity Policy' (University of Wollongong, 2014).

ultimately determine whether or not to grant immunity to an applicant.¹⁰ This bifurcated model of cooperation between the ACCC and CDPP is outlined in a Memorandum of Understanding (MOU) between the agencies.¹¹ According to the MOU, cases will be referred to the CDPP where the conduct is deemed to be ‘serious cartel conduct,’ which is determined by reference to a number of factors.¹²

According to the competition authorities, the immunity policy is thus designed to create a ‘race to the finish line;’ in terms of creating an atmosphere of distrust between cartel members, which in turn creates an incentive to apply for immunity. This is particularly important as full immunity is only available to the first cartel member to come forward to the regulator. There are a number of requirements that an immunity applicant must comply with before immunity is granted. Most significantly, a corporation will be eligible for conditional immunity from ACCC-initiated proceedings where:

- (i) the corporation is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity
- (ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA
- (iii) the corporation is the first person to apply for immunity in respect of the cartel under this policy
- (iv) the corporation has not coerced others to participate in the cartel
- (v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel
- (vi) the corporation’s admissions are a truly corporate act (as opposed to isolated confessions of individual representatives)
- (vii) the corporation has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout the ACCC’s investigation and any ensuing court proceedings, and

¹⁰ Commonwealth Department of Public Prosecutions, 'Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process' (Australia's Federal Prosecution Service, 2014) <<http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>> Annexure B.

¹¹ Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, 'Memorandum of Understanding Between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct' (15 August 2014). See Chapter V: Eligibility and Cooperation – Relationship between the ACCC and CDPP, pg 194.

¹² Ibid s 4.2.

(b) at the time the ACCC receives the application, the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel.¹³

The requirements for individual conditional immunity are the same as outlined above except that individuals are not required to prove their admissions are a corporate act.¹⁴

The Immunity Policy also provides for derivative immunity, where an immunity applicant can list all of its related corporate entities and/or current and former directors, officers and employees who will also be immunised from enforcement proceedings.¹⁵

In the event that an applicant was not the first cartel participant to come forward for immunity, their application will be assessed in accordance with the cooperation section of the Immunity Policy:

- (a) did the party approach the ACCC in a timely manner seeking to cooperate
- (b) has the party provided significant evidence regarding the cartel conduct
- (c) has the party provided full, frank and truthful disclosure, and cooperated fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings
- (d) has the party ceased their involvement in the cartel or indicated to the ACCC that they will cease their involvement in the cartel
- (e) did the party coerce any other person/corporation to participate in the cartel has the party acted in good faith in dealings with the ACCC, and
- (f) (for individual cooperating parties only) has the party agreed not to use the same legal representation as the corporation by which they are or were employed?¹⁶

Prior to recent court decisions, the ACCC would endeavor to reach an agreement with leniency parties as to joint submissions about penalties to be placed before the court for adjudication.¹⁷ As a result of these court decisions, the determination of penalties for leniency applicants now rests firmly with the court.¹⁸

Whilst there has been widespread discussion and endorsement of the immunity policy by competition agencies worldwide who claim it to be the most effective anti-cartel enforcement tool in the world, there has not been a comprehensive critical

¹³ Australian Competition and Consumer Commission, above n 6, s 16.

¹⁴ Ibid s 28.

¹⁵ Ibid s 21.

¹⁶ Ibid s H.

¹⁷ Martin Law and McMillan LLP, *Getting the Deal Through – Cartel Regulation* (Global Competition Review, 2011) 17; See Chapter VIII: Alternatives to Immunity – Cooperation, pg 277.

¹⁸ See Chapter VIII: Alternatives to Immunity – Cooperation, pg 277.

analysis of the immunity policy that supports these claims. Importantly, there has not been a significant review of the theoretical model that underpins the policy's design and operation or how this model has influenced the way the immunity policy is most commonly assessed. This calls into question the need to revise the criteria and approach currently used to assess the effectiveness of the policy. This thesis will demonstrate that the theoretical assumptions underpinning the Immunity Policy are flawed, and as a result the criteria and approach used to assess the Immunity Policy needs to be enhanced. An overview of the main findings in relation to the policy will reveal the gaps in the current research that this thesis will address, thus emphasising the significance of this research.

A *Summary of Main findings in Relation to Immunity*

An immunity policy is claimed to be one of the primary and most effective methods in anti-cartel enforcement; designed to encourage cartel participants to come forward to the authorities and reveal their misconduct in exchange for immunity from prosecution or other enforcement action.¹⁹

This policy was designed in the United States and has been commended by anti-cartel authorities worldwide for its effectiveness at 'cracking secret cartels.'²⁰ A substantial portion of the research in the past has involved comparative analyses of leniency policies, particularly the United States and the European Union.²¹ Much of this research has been carried out with the aim of harmonising immunity policies across jurisdictions.

Nicolo Zinglas provides a comprehensive critique of immunity policies in the United States and the European Union by assessing the relative effectiveness of each policy and how this is significantly influenced by the enforcement culture and antitrust perception of the respective jurisdiction. Zinglas observes that although the European Union and United States immunity regimes have come a long way in terms

¹⁹ See eg, Scott D Hammond, 'Cornerstones of an Effective Leniency Program ' (Department of Justice, 2004) 2.

²⁰ Ibid; Australian Competition and Consumer Commission, above n 6, 1.

²¹ See eg, Nicolo Zingales, 'European and American Leniency Programmes; Two Models Towards Convergence?' (2008) 5 *The Competition Law Review* 5; William J Baer, Tim Frazer and Luc Gyselen, 'International Leniency Regimes: New Developments and Strategic Implications' (2005) 246 *Corporate Counsel's International Advisor* 2.

of revising their leniency programs and improving them, the paper concludes by stating that many of the key differences in the immunity policies between the two regimes stem from the inherent differences in competition policy.²²

According to Zinglas, the United States is more deterrence focused and the European Union is more detection focused. He concludes that the United States program is nevertheless more effective due to its history of enforcement which (obviously) differs from the newly revised European Union regime. This kind of comprehensive comparative analysis has not been undertaken in the Australian context. There is a gap in the literature as to how the ACCC Immunity Policy compares internationally and how it has been shaped by the ACCC's enforcement strategy and culture.

One of the key issues emerging in the international cartel enforcement context relates to the opportunity for a cartel participant to be granted immunity in one jurisdiction and then denied it in another jurisdiction, based on the 'first in, best dressed' approach.²³ Additionally, there is the added complexity involved with the issue of immunity confidentiality, whereby information provided by an immunity applicant in one jurisdiction can potentially lead to the proceedings or investigation in another jurisdiction where the cartel participant has not yet sought or been granted immunity.²⁴ The approach taken to address this issue differs from jurisdiction to jurisdiction, which creates a high level of uncertainty for potential immunity applicants that may dissuade them for applying for leniency altogether, in which event the cartel continues to operate.²⁵

In terms of designing the most effective immunity policy, much of the legal

²² Zingales, above n 82, 5.2.

²³ See eg, Marc Hansen, Luca Crocco and Susan Kennedy, 'New Fault Lines In International Cartel Enforcement And Administration Of Leniency Programs - Disclosure Of Immunity Applicant Statements', *Mondaq Business Briefing* 30 January 2012; D. Daniel Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201, 208; Thomas Obersteiner, 'International Antitrust Litigation: How to Manage Multijurisdictional Leniency Applications' (2013) 4 *Journal of European Competition Law and Practice* 16, 18.

²⁴ Kon Stellos and Caterina Cavallario, 'Immunity - A Dilemma for Both Whistleblowers and the ACCC' (2011) 19 *Australian Journal of Competition and Consumer Law* 1876; Michelle Chowdhury, 'From Paper Promises to Concrete Commitments: Dismantling The Obstacles to Transatlantic Cooperation in Cartel Enforcement' (2011) *AAI Working Paper No. 11-09* ; European Competition Network, 'Protection of Leniency Material in the Context of Civil Damages Actions' (European Competition Network, Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, 2012).

²⁵ Christopher R Leslie, 'Editorial -Antitrust Leniency Programmes' (2011) 7 *The Competition Law Review* 175, 178-179, See also, Chapter VII, Confidentiality Across Borders, pg 261.

research in this respect has been produced by the United States authorities. The views of Scott Hammond, former Head of Antitrust Enforcement at the Department of Justice, are prominent and have been endorsed by many of the competition authorities internationally. The viewpoint that has emerged is that the three key characteristics of an effective immunity policy are (1) *Threat of Severe Sanctions* (2) *High Risk of Detection* (3) *Transparency and Predictability in Enforcement*.

1 *Threat of Severe Sanctions*

It has been accepted in a number of jurisdictions that the threat of criminal sanctions provides the most effective deterrence of serious cartel conduct, making the incentive to apply for immunity even greater. In a simple cost-benefit analysis, the perceived benefits must outweigh the perceived costs.²⁶ The criminalisation in Australia of serious cartel conduct has resulted in a maximum goal sentence of 10 years.²⁷ That reform brought Australia in line with other criminal penalties in other countries, with the maximum imprisonment terms in Canada and the United Kingdom and the United States, being 14 years,²⁸ 5 years²⁹ and 10 years³⁰ respectively.

2 *High Risk of Detection*

According to the DOJ, a high risk of detection from regulatory enforcement agencies is another crucial element of a successful Immunity Policy and it is important that sufficient resources are allocated to these agencies to assist in achieving this end.³¹ Without a high risk of detection, cartel members will not be inclined to come forward to report their misconduct in exchange for immunity. Additionally, regulatory agencies must be given robust investigatory powers to ensure that there is a real perceived risk of action being taken by the authorities for those who engage in cartel conduct.³²

²⁶ Ibid; Scott D Hammond, 'Cornerstones of an effective cartel leniency programme' (2008) 4 *Competition Law International* 1, 3-4.

²⁷ *Competition and Consumer Act 2010* (Cth) s 44ZZRG (4).

²⁸ *Competition Act* RSC 1985, c C-34 s 45.

²⁹ *Enterprise Act 2002* (United Kingdom) c. 40 s 188.

³⁰ *Antitrust Penalty Enhancement and Reform Act of 2004*, Pub. L. 108-237(2004), 118 Stat. 665 (2004).

³¹ Hammond, above n 19, 87.

³² International Competition Network, above n 4, s 2.5; See, also: *Competition and Consumer Act 2010* (Cth) s 155.

3 *Transparency and Predictability in Enforcement*

The third hallmark of an effective immunity policy is transparency and predictability. According to this view, an immunity applicant needs to be able to assess, with a sufficient level of certainty, that their application will be successful.³³ To achieve this there needs to be more than simply the publication of regulatory policies and education and compliance programs, but more significantly, the abdication of prosecutorial discretion.³⁴ It is common for prosecutorial authorities to have wide prosecutorial discretion in relation to instigating criminal proceedings. In the context of an immunity policy, prosecutorial discretion can create a high level of uncertainty as to whether an immunity application will be successful. Such uncertainty is therefore undesirable.

These three factors, as advocated by the DOJ, are the most commonly used criteria to assess the effectiveness of an immunity policy in achieving its aims of cartel detection and deterrence. These criteria rely heavily on quantitative methods of assessment and are predicated on the assumptions of the rational actor model. This neo-classical economic model presupposes that humans are rational actors as ‘the basis of an economic approach to law is the assumption that the people involved with the legal system act as rational maximizers of their satisfactions.’³⁵ Despite these limitations, there has not been a comprehensive review of these criteria or their usefulness in providing insight into the design and operation of the immunity policies.

Due to this reliance on quantitative methods of assessment, there appears to be a gap in the discussion of immunity policies from a qualitative and empirical perspective, including a detailed analysis of the theory underpinning such policies. The difficulties associated with researching this area have been acknowledged at an international competition law conference, which confirmed that the lack of transparency of competition agencies and also the secrecy/confidentiality of immunity applications pose a challenge to researchers in this area.³⁶

There has been limited discussion of the theoretical underpinnings of

³³ Ibid s 2.3.

³⁴ Hammond, above n 19, 7.

³⁵ Richard A. Posner, 'The Economic Approach to Law' (1974) 53 *Texas Law Review* 75724, 763. This will be explored further in Chapter II.

³⁶ Leslie, above n 25, 22.

immunity policies³⁷ with Leslie providing a theoretical breakdown of the operation of an immunity policy based on an analysis of the prisoner's dilemma and economic game theory as applied to cartels. Leslie asserts that trust is the foundational element that ensures the continuing formation of cartel behaviour and as a corollary, in order for an immunity policy to be effective, it needs to create distrust between the cartel participants.³⁸

Leslie's observations are largely based on the rational actor and classical deterrence theory associated with the Chicago School of thought, as will be further discussed in Chapter II. As will be outlined in Chapter III, there has been a shift away from these traditional perspectives, some of which have been critical of the assumptions that underpin the orthodox thinking on immunity policies and Leslie's analysis.

In this respect, the direction of this thesis will more closely resemble the approach of Wouter P.J Wils and Professor Caron Beaton Wells, whose commentaries consider some of the underlying social and moral implications of an immunity policy and are more comprehensive in this respect, as compared to other comparative studies.³⁹

Wils aims to analyse the immunity policy, primarily in the United States and European Union, with a view to assessing both its positive and negative effects on optimal antitrust enforcement.⁴⁰ Through a theoretical discussion, Wils explores the concept of optimal deterrence (discussed above) in the context of an immunity policy before turning to consider both the positive and negative effects that may be produced by an immunity policy. Moreover, Wils' analysis extends to a consideration of some of the difficulties that may occur in the implementation of immunity policies, primarily objections of principle and institutional problems, which he believes can be overcome or reduced through an effectively designed immunity

³⁷ Christopher R. Leslie, 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2005) 31 *The Journal of Corporation Law* 453; Wouter P.J Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25.

³⁸ Leslie, above n 37, 466-475. For a detailed examination of Leslie's theory as applied to immunity, see Chapter II.

³⁹ See also, Caron Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171; Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126.

⁴⁰ Wils, above n 37, 97.

policy.⁴¹

In addition to his discussion of the framework of an immunity policy, Wils also considers a number of factors that can impact on the effectiveness of an immunity policy, namely: criminal penalties for individuals; follow on private damages actions; and penalties in other jurisdictions.⁴²

Wils discusses the positive and negative effects of the United States based 'Amnesty Plus' policy, which is essentially a policy 'under which a cooperating company that does not qualify for immunity as to a first cartel being investigated but that uses the occasion of that first investigation to report a second, distinct cartel will receive, in addition to the immunity for the second cartel, a further reduction of the fine for the first cartel.'⁴³ Amnesty Plus was recently introduced into the ACCC Immunity Policy and also exists in the Canadian regime.⁴⁴

Wils also discusses the policy of providing positive financial rewards or bounties to cartel informers. This policy has recently been introduced in South Korea and the United Kingdom.⁴⁵ Wils' analysis is limited and the issues warrant more thorough and comprehensive examination.

Professor Beaton-Wells, from Melbourne University, provides an Australian perspective on many of the issues outlined by Wils.⁴⁶ Beaton-Wells' analysis focuses on four primary issues raised by the ACCC Immunity Policy:

(1) Immunity Policy and Criminalisation: With the introduction of a criminalised cartel regime, Beaton-Wells discusses the potential problems associated with a bifurcated enforcement system between the ACCC and the CDPP and the adverse impact that this may have on immunity applications.

(2) Immunity Policy and Private Enforcement: As mentioned previously, the issue of private enforcement of cartel activity has gained academic momentum. In her

⁴¹ Ibid Part II, C.

⁴² Ibid Part IV.

⁴³ Ibid 67.

⁴⁴ Australian Competition and Consumer Commission, above n 6, s I; Competition Bureau, 'Immunity Program: Frequently Asked Questions' (Competition Bureau, 2013) Q 43.

⁴⁵ Wils, above n 37, 97, Part IV, E. See also, Chapter VIII: Cartel-Specific Financial Reward Systems, pg 320.

⁴⁶ Caron Beaton-Wells, 'Forks in the Road: Challenges Facing the ACCC's Immunity Policy for Cartel Conduct (Part 1)' (2008) 7 *University of Melbourne Law School Research Series* 75.

analysis, Wells questions the level of information disclosure needed to facilitate private cartel actions, comparing the newly implemented cartel protection provisions in Australia with the approach adopted in the United States and more recently in Europe.

(3) Immunity Policy and Settlement: In this section, Beaton-Wells contends that the Canadian approach to cartel settlement could benefit ACCC enforcement efforts and suggests ways in which the ACCC's Cooperation Policy could be improved upon in this respect.

(4) Immunity Policy and Alternative Informant Rewards: Beaton-Wells explores the more controversial concept of implementing an informant reward system for cartel behaviour, similar to the policies adopted in South Korea and in the United Kingdom.

This research is directly relevant to this thesis, as many of the issues canvassed by Beaton Wells' require further cross-comparative analysis and supplementation by empirical evidence.⁴⁷ Despite the comprehensiveness of Beaton-Wells' research in this area there appears to be a "gap" in the literature surrounding the design and operation of an immunity policy from a qualitative and cross-comparative perspective.

More importantly, whilst Wils alludes to the notion of negative moral effects of an immunity policy, he does not extend his analysis to a deeper probing of what impact this may have on the detection or deterrent capabilities of an immunity policy, despite the fact that detection and deterrence is advocated to be one of the key aims of an immunity policy.⁴⁸ A critical study of the theory underpinning the policy and how this may have influenced the criteria most commonly used to assess the effectiveness of the policy is also absent from the work of Beaton-Wells.

During the writing of this thesis, another study emerged conducted by Professor Andreas Stephan and Ali Nikpay that seeks to question the theoretical assumptions

⁴⁷ Beaton-Wells has since conducted further research into the Immunity Policy, which will be discussed in Chapter III.

⁴⁸ International Competition Network, above n 4; Australian Competition and Consumer Commission, above n 6, 1.

underlying immunity policies using data derived from the European Commission.⁴⁹ The research indicates that the decision to apply for immunity is not as simplistic as the rational actor model would predict and this is compounded by the complexities inherent within the decision to apply.

Stephan and Nikpay present empirical data to refute the theoretical assumptions underlying the decision to apply for immunity by demonstrating that the incentives to apply may not be as strong as the competition regulators would suggest. This is evidenced by data that suggests cartels in the European Union ceased to operate prior to the firm self-reporting in return for immunity and also evidence that the policy may be used strategically.⁵⁰ The authors conclude that immunity may not destabilise cartels as much as the theoretical literature would suggest. They outline three key areas that may strengthen immunity policies (1) the need for individual sanctions to create a ‘tangible deterrent effect on those responsible’⁵¹ (2) the recognition of the need for competition regulators to be equipped with appropriate resources and powers to detect cartel conduct without the use of leniency in order to maintain a credible threat and (3) the importance of strengthening compliance programs for corporations.

The existence of this study reflects both the relevance and importance of the research conducted in this thesis. The fact that other researchers, such as those outlined above, are beginning to question the theoretical assumptions underpinning the immunity policy and how this impacts on the policy’s operation, serves to strengthen the arguments within this thesis. It reinforces the need for a comprehensive breakdown of both the theoretical and practical components of the immunity policy, including a cross-comparative analysis and recent empirical data to test the claim that the immunity policy is the most effective anti-cartel enforcement tool in the world.

⁴⁹ Andreas Stephan and Ali Nikpay, 'Leniency Theory and Complex Realities' (University of East Anglia & Centre for Competition Policy - CCP Working Paper 14-8, 2014) <<http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-8.pdf/3a273397-457c-4109-8920-d79c6709774b>>.

⁵⁰ Ibid 14.

⁵¹ Ibid 20.

B *Theoretical Approach and Aims of Thesis*

As previously stated, the immunity policy is designed with the aim that it will lead to the detection of cartel conduct. The ultimate policy goal in this sense is deterrence, based on the assumption that greater detection will result in more effective deterrence. As demonstrated by the summary of main findings above, there has not been a comprehensive study conducted into the theory underpinning the immunity policy, which has been designed through an adaptation of game theory and the prisoner's dilemma. Both of these theories are based on economic theoretical models, which presuppose that humans are rational actors.

As Chapter II will demonstrate, Richard Posner has been a leading advocate of these economic models of behaviour, pioneering the Chicago school of thought, which has had a significant impact on the development of competition policy and specifically the design of the Immunity Policy. This theoretical model has also influenced the way in which the policy's effectiveness is assessed, through the adoption of the DOJ's three effectiveness criteria: (1) Transparency and Predictability (2) Threat of Sanctions (3) Fear of Detection.

This thesis will demonstrate that the rational actor assumptions underpinning the immunity policy are flawed, and as a result the criteria used to assess the ACCC Immunity Policy needs to be enhanced. This is the first gap that this research will fill by critically analysing the current theoretical model underpinning the Policy with a view to outlining an enhanced set of criteria that can be used to assess the effectiveness of the Immunity Policy.

The second gap relates to the overreliance on quantitative methods to assess the policy's effectiveness. As previously stated, there are many difficulties associated with researching cartel conduct, given the extensive number of 'unknowns' in this research area, where reliance is placed on the data available from 'discovered' cartels.

Despite these limitations, the research conducted in relation to cartel conduct and immunity policies specifically, is predominantly quantitative.⁵² This thesis will seek

⁵² Many studies into the immunity policy are predominantly economic and explore themes such as the effect of cartel ringleaders on leniency programs; the impact of cartels on the market; the desirability of granting leniency to more than one cartel; the effectiveness of a single informant leniency model; the impact of financial incentives on whistleblowers; leniency programs as a tool for cartels to

to enhance the way the immunity policy is currently assessed by utilising qualitative methods to investigate the way the policy operates in reality, and reveal the nuances in its design and operation that cannot be captured by quantitative studies.

To this end, the aim of the project is to provide a comprehensive legal and cross-comparative analysis of the ACCC Immunity Policy in order to formulate recommendations for its improvement. Importantly, this thesis will critically analyse the viability of alternative methods to immunity, and whether these alternatives can also achieve the ACCC's aims of detection and deterrence.

C *Significance of Research*

This thesis will contribute to original knowledge by firstly formulating an enhanced set of criteria to assess the immunity policy and secondly by using a qualitative and cross-comparative method to inform these recommendations. This will be the first comprehensive analysis of the ACCC Immunity Policy that includes a theoretical breakdown; formulation of new criteria to assess the policy; empirical insight and a cross-comparative analysis of its kind. Such an analysis is critical given the strong claims from competition regulators of the policy's detection and deterrence capabilities and endorsement of the policy as the most effective anti-cartel enforcement tool in the world. It is necessary to pierce the rhetoric that surrounds the policy in order to assess its true strengths and limitations. This will ultimately reveal that the policy is but one enforcement tool in the ACCC's arsenal and that more is needed to combat the overreliance on immunity, which will be addressed by this thesis.

punish each other; and the deterrence effect of leniency programs and the effect of cartel survival rates: See, eg, Jeroen Hinloopen and Adriann Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' (2008) 39 *The RAND Journal of Economics* 607; Gordon Klein, 'Cartel Destabilization and Leniency Programs – Empirical Evidence' (Discussion Paper No. 10-107, Centre for European Economic Research, 2010); Jose Apesteguia, Martin Dufwenberg and Reinhard Selten, 'Blowing the Whistle' (2007) 31 *Economic Theory* 143; Cécile Aubert, Patrick Rey and William E. Kovacic, 'The Impact of Leniency and Whistleblowing Programs on Cartels' (2005) 24 *International Journal of Industrial Organization* 1241; Julien Sauvagnat, 'Prosecution and Leniency Programs: A Fool's Game' (Discussion Paper, Toulouse School of Economics (TSE) 2011); Andrea Pinna, 'Optimal Leniency Programs in Antitrust' (Working paper 2010/18, Centre for North South Economic Research & Queen Mary, University of London, 2010); Margaret C Levenstein and Valerie Y Suslow, 'What Determines Cartel Success' (2006) 44 *Journal of Economic Literature* 43; Iwan Bos and Frederick Wandschneider, 'Cartel Ringleaders and the Corporate Leniency Program' (CCP Working Paper 11-13 - Maastricht University and the University of East Anglia, 2011).

D *Methodology*

The purpose of this research is to conduct a policy analysis using a combination of summative and formative evaluation. The focus will extend beyond the goals of the immunity policy to also consider the strengths and weaknesses of the policy, which will ultimately be useful for those who engage with the immunity policy, including applicants, their legal counsel, the regulators and policymakers.

Firstly, an analysis of the origin, design and policy objectives of the immunity policy will be conducted focusing specifically on the United States immunity policy, as this is where the policy was first designed and implemented. Secondly, the theory underpinning the immunity policy will be examined, namely game theory and an adaptation of the prisoner's dilemma, to determine how the Chicago school of neo-classical economic thought has specifically influenced the design and operation of the Immunity Policy. The analysis will turn to recent theoretical developments that shed light on the limitations of the rational actor model, and the criteria currently used to assess the effectiveness of the Immunity Policy.

This analysis will involve conducting classical legal research (narrowly defined) in order to locate policy statements, media statements, second reading speeches, international legal materials and other related policy documents. This will also include examining the enforcement, compliance and prosecution practices of relevant competition authorities.

The third step in the research design will involve an analysis of the practical components of the immunity policy with a view to critically evaluating the ACCC Immunity Policy as an anti-cartel enforcement tool. This stage of the research will involve a cross-comparative analysis of the immunity policies from the United States, Canada and the United Kingdom. The utility of comparative methodology has been described in many academic studies, with its core value not only in 'suggesting a foreign legal institution or solution as a model or guide, but also in showing what solution to avoid.' This step of the research method will adopt the theoretical framework espoused in the work of Kamba 'Comparative Law - A theoretical

framework,⁵³ which structures a comparative framework into three key phases:

1. The Descriptive Phase
2. The Identification Phase
3. The Explanatory Phase.

The first step involves the selection of the jurisdictions for the comparative study. The three main criteria that were used for the selection of the jurisdictions for comparison were as follows:

1. A jurisdiction that is a developed nation, based on a system of the common law;
2. A jurisdiction that has an active anti-cartel regime. Importantly this includes the criminalisation of cartel behaviour;
3. A jurisdiction that has, as part of its anti-cartel regime, adopted an immunity policy that is designed for the detection of cartel conduct.

Based on these criteria, the United States was chosen for comparative study of the Immunity Policy. This is largely due to the fact that the United States is deemed to be the 'Father' of the Immunity Policy, having designed the idea in response to its growing enforcement against cartels. The United States will therefore provide the basis for researching the impetus for the design of an immunity policy, its theoretical underpinnings and its implementation and effectiveness in the United States pursuit of serious cartel conduct.

Secondly, the United Kingdom was selected, in accordance with the abovementioned criteria, primarily due to its historic similarities in law and policy to Australia. An examination of the operation of the immunity policy in the United Kingdom will provide valuable insight into the way in which the policy will potentially operate in the recently criminalised Australian cartel regime. The United Kingdom will be especially useful in this respect, as their anti-cartel enforcement record is more akin to that of Australia, in contrast to the United States, which has had an active criminal cartel regime for several decades.

The cartel regime in the United Kingdom is governed by Section 2 of the *Competition Act 1998* (United Kingdom) c. 41 ('The Competition Act United Kingdom'), which is principally concerned with the civil prohibition against cartel

⁵³ W Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485.

conduct; and Section 188 of the *Enterprise Act* 2002 (United Kingdom) c. 40 ('The Enterprise Act'), which creates the criminal cartel offence. The Competition and Market Authority (CMA) first introduced its immunity policy in 2000.⁵⁴ The CMA has had a solid civil penalty regime in place since the introduction of the civil offence in 1998. The United Kingdom's first, and only, contested criminal cartel case has been generally deemed to be a failure, as it collapsed five days into the trial.⁵⁵ The immunity applicant played a significant role in the demise of this case and has led to criticism directed at the overreliance by the authorities on immunity programs for cartel enforcement in the United Kingdom.⁵⁶ This criticism has ramifications for the use of immunity policies across the globe, and will be particularly pertinent to the Australian regime.

In Canada, cartel law is governed primarily by section 45 of the *Competition Act* RSC 1985, c C-34. In 2012, the Competition Bureau has updated its immunity program⁵⁷ alongside a comprehensive FAQ's bulletin⁵⁸ that is designed to answer questions relating to the operation of the immunity regime. Additionally, the Competition Bureau released its competitor collaboration guidelines in December 2009,⁵⁹ which describe the general approach of the Bureau in applying sections 45 and 90.1 of the Act to collaborations between competitors.

Importantly, like the United Kingdom and Australian regimes, the Canadian cartel regime is divided between that of the Competition Bureau ('The Bureau') for investigation and civil offences, and in the event of a criminal prosecution, the matter is referred to the Canadian Director of Public Prosecutions ('DPP').⁶⁰ An analysis of the bifurcated immunity system is one of the crucial components of the practical operation of the immunity policy, and will therefore be pertinent to the ACCC Immunity Policy.

⁵⁴ Competition and Markets Authority, above n 5.

⁵⁵ See *R v George, Burns, Burnett and Crawley* (unreported) 7 December 2009; (2010) 174 JP 313; (2010) EWCA Crim 1148.

⁵⁶ See eg, Julian Joshua, 'DOA: Can the UK Cartel Offence be Resuscitated?' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 1 ed, 2011) 129.

⁵⁷ Competition Bureau, above n 5.

⁵⁸ Competition Bureau, above n 44.

⁵⁹ Competition Bureau, 'Competitor Collaboration Guidelines' (Competition Bureau, 2009).

⁶⁰ Competition Bureau and Department of Public Prosecutions, 'Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions' (Competition Bureau Canada, 2010) <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf/\\$file/Protocole-entente-Memorandum-of-Understanding.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf/$file/Protocole-entente-Memorandum-of-Understanding.pdf)>.

The use of these three comparative jurisdictions will provide a comprehensive account of the operation of an immunity policy, and will further provide a platform for discussion of some of the more innovative immunity policy developments, as well as identify and explain the challenges that have occurred overseas and its potential impact on the Australian regime. Given the focus on the specific practical design and operation of the immunity policy, the use of three different models of the immunity policy from three selectively chosen jurisdictions will be necessary to channel the appropriate scope of research and the potential breadth of this research. The analysis however, will be confined mostly to the immunity policy itself, as opposed to an overview of each of the anti-cartel enforcement regimes within each jurisdiction.

First, the descriptive phase of comparison will largely involve obtaining the immunity policy in each chosen jurisdiction and outlining the cartel regime and process for immunity. This will require gathering secondary material from competition authorities, international bodies, journal articles and the respective governments for analysis.

Secondly, the identification phase will be primarily focused on identifying the similarities and differences inherent within the immunity policy design and operation across the respective jurisdictions.

Once these areas have been identified and examined, the final explanatory phase will involve evaluating the perceived failures and successes of the immunity policies in each jurisdiction and how they compare with the ACCC Immunity Policy. These areas of examination will be grouped and form respective chapters in this thesis in order to develop recommendations that will improve the design and operation of the immunity policy and the likelihood of their implementation.

Most importantly, the explanatory phase will be complemented by qualitative empirical research in the form of interviews with carefully selected competition lawyers, high profile scholars and ACCC representatives. These qualitative findings will help inform the structure of the remaining thesis chapters. Due to the universal design of the immunity policy, the fact that empirical data will be conducted in Australia will not adversely affect the research findings, as it is intended that the comparative analysis of Canada, the United Kingdom and the United States will supplement these research findings.

Finally, the results from the critical legal analysis of the immunity policy, including those obtained from the empirical data, will be collated with a view to formulating recommendations for the improvement of the design and operation of the ACCC Immunity Policy and the likelihood of any action being taken to implement these recommendations.

E *Outline of Chapters*

This thesis will begin by providing an overview of the origins and design of the immunity policy, focusing predominantly on the influence of neo-classical economic theory on competition law in the United States and how this led to the policy's inception. The chapter will provide a theoretical breakdown of the immunity policy, as an adaptation of game theory and the prisoner's dilemma. Christopher Leslie's theoretical analysis of the immunity policy will be critically analysed with a view to revealing the assumptions underpinning the operation of the policy are largely speculative and over-generalised.

Chapter 3 will be discussed in three parts. The first part will build upon the analysis in Chapter 2 by focusing on the development of the rational actor model and the theoretical developments that have dominated competition law development, most notably, the Chicago neo-classical economic school of thought, and briefly Post-Chicago and the newly devised Neo-Chicago theory. The second part will provide an overview of the Behavioural Economics ('BE') literature and questions whether this model provides a more accurate account of human behaviour than the rational actor model. Whilst the limitations of the rational actor model are clearly exposed by the BE movement, the BE approach is still in its infancy, and thus it does not provide cogent criteria that can be used to assess the effectiveness of the immunity policy. The third part of this chapter will focus on enhancing the existing criteria used to assess the immunity policy to reflect more broadly the principles of public policy. This allows the policy to be viewed in the wider enforcement context in which it operates and its impact on and interactions with other areas of the law. These enhanced criteria will then inform the recommendations made in relation to the ACCC Immunity Policy.

Chapter 4 is the key empirical chapter. This chapter will first outline the methodology used to conduct the semi-structured qualitative interviews. This is

followed by an outline of the key empirical findings in relation to the design and operation of the Immunity Policy. The issues are divided into four main themes based on the level of importance attributed to these issues, which informed the structure of the remainder of the thesis:

1. Perceptions of & Attitudes towards the Immunity Policy for Cartel Conduct
2. Eligibility & Cooperation Requirements of Immunity
3. The Tension between Public & Private Enforcement – Confidentiality and Third Parties
4. Alternatives to the Immunity Policy

Chapter 5 analyses the key features in relation to the eligibility and cooperation requirements of the Immunity Policy based on the empirical data and a cross-comparative analysis of the respective policies in Canada, the United Kingdom and the United States. The issues explored include: whether recidivists should be granted immunity on multiple occasions; how the ‘coercion’ test as an automatic exclusion should be defined; the relationship between the ACCC and CDPP in the bifurcated system of cartel enforcement; and the process of revocation of immunity, including an assessment of the legal basis of the policy. These requirements will be assessed in light of the enhanced criteria in order to formulate recommendations that strengthen the policy, both as a tool of cartel enforcement and also regulatory public policy.

The focus of Chapter 6 will be on how the Immunity Policy intersects with the role of public and private enforcement. The key issue centres upon the confidentiality afforded to immunity applicants and: (1) how this must be balanced against the interests of third parties seeking compensation; and (2) how multijurisdictional applications can impact on the level of confidentiality that can be guaranteed by the regulators to these applicants and the consequences of such disclosure. This chapter will be divided into two parts.

The first section of this chapter will analyse the position in Australia regarding the disclosure of immunity information, before turning to the recent developments in the United States, the United Kingdom and Canada which have significantly impacted upon the issue of disclosure of immunity information on a global scale and pose a threat to the effective operation of immunity policies. The analysis will then focus on restitution as a potential solution to balance the competing interests of private and public enforcement.

The second section of this chapter will focus on the information provided to foreign regulatory agencies pursuant to international formal and informal information-sharing mechanisms. The focus of this section will be upon the waiver of confidentiality agreements in Australia and the aforementioned jurisdictions and its impact on the confidentiality assurances of an immunity policy. The chapter will then advocate for a more streamlined approach to international immunity applications and briefly analyse the proposed avenues for this to be achieved through an analysis of the enhanced criteria.

Given the number of limitations of the Immunity Policy that will have been exposed throughout this research, the final substantive chapter will outline some viable alternatives to immunity that may serve to complement the aims of the existing Immunity Policy. This will include an analysis of the cooperation section of the Immunity Policy and the treatment of second and subsequent applicants who fail to secure immunity. This approach will be compared to the respective policies in Canada, the United Kingdom and the United States to reveal that the current method is unsatisfactory and in a state of flux given recent case law developments.

Secondly, this chapter will outline the current whistleblower protection provisions that exist in Australia pursuant to the *Corporations Act 2001* (Cth) and analyse its effectiveness in providing protection for private corporate whistleblowers. Given that this Act does not apply specifically to cartel conduct, these provisions will be compared to the whistleblower protection frameworks that exist in the above jurisdictions. This comparative analysis will demonstrate that these whistleblower protection frameworks are generally insufficient at providing adequate protection for corporate whistleblowers.

Given these inadequacies, this chapter will analyse the more controversial notion of introducing a cartel informant scheme aimed at encouraging third parties who are not directly involved in the cartel to reveal pertinent information to the regulator in exchange for financial incentives. This analysis will draw upon the extensive experience of the United States in relation to these bounty-type arrangements and will also focus on the specific cartel informant systems in the United Kingdom, South Korea and Hungary in order to formulate a workable model for Australia.

This thesis will conclude by reinforcing the number of limitations inherent within the design and operation of the Immunity Policy, including the approach most

commonly used to assess its effectiveness in achieving cartel detection and deterrence. In light of this, this thesis argues that the Immunity Policy should not be viewed as the single most effective anti-cartel enforcement tool but as one important component of the ACCC's overall enforcement arsenal. Most importantly, in order for this claim to be truly tested, there is a need for the ACCC to implement viable alternative measures to immunity, which have been developed in this thesis, that are also aimed at achieving cartel detection and deterrence.

II THE HISTORICAL AND THEORETICAL UNDERPINNINGS OF THE IMMUNITY POLICY

The aim of this chapter is to theoretically deconstruct the cartel immunity policy to analyse the policy's origins, its history and to critically examine the theoretical underpinnings that have dominated the policy's design and use in jurisdictions worldwide, since its inception in the United States in 1978. This will involve outlining the context in which the immunity policy was designed in the United States to demonstrate how the United States DOJ has shaped and influenced the immunity program to create a policy that is in line with United States enforcement norms and culture. The focus will be on the United States as this country has had the greatest impact on the design and operation of the immunity policy.¹

This chapter will outline the influence that neoclassical theory, based on a combination of game theory and the prisoner's dilemma, has had on the design of cartel immunity policies and how these theories inform the policy's design and operation. This is an important area of focus. Despite the Australian Competition and Consumer Commission's ("ACCC") recent review of the ACCC Immunity Policy,² there remains a significant theoretical void in relation to the assumptions that underlie the policy's design and operation. There have been very few investigations into the theoretical design of the immunity policy and how this may influence its operation or the anomalies surrounding its effectiveness, particularly in Australia.³ In particular, the criterion commonly used to assess the Immunity Policy has been developed within a neo-classical economic framework and presents a very limited

¹ An example of the influence held by the DOJ in relation to the immunity policy's design and operation is the criteria most commonly used to assess its effectiveness: Scott D Hammond, 'Cornerstones of an Effective Leniency Program' (Department of Justice, 2004).

² Australian Competition and Consumer Commission, *ACCC Releases Discussion Paper in Cartel Immunity Policy Review* (September 2013) <<https://www.accc.gov.au/media-release/accc-releases-discussion-paper-in-cartel-immunity-policy-review>>.

³ See, generally: Christopher R. Leslie, 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2005) 31 *The Journal of Corporation Law* 453; Wouter P.J Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25; Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126; Andreas Stephan and Ali Nikpay, 'Leniency Theory and Complex Realities' (University of East Anglia & Centre for Competition Policy - CCP Working Paper 14-8, 2014) <<http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-8.pdf/3a273397-457c-4109-8920-d79c6709774b>>.

means of assessing the policy's effectiveness.⁴

The recent review of the Immunity Policy conducted by the ACCC did not review the theoretical underpinnings or criteria used to assess the effectiveness of the Policy. The discussion paper released in September 2013 outlined a very confined area of review. This included:

- streamlining the processes of granting civil and criminal immunity by utilising a letter of comfort from the CDPP regarding criminal immunity;
- clarification of the terms 'clear leader' and 'coercion' in assessing a party's eligibility for immunity;
- clarification of how cooperation by second and subsequent parties to the cartel will be assessed by the ACCC;
- simplifying the format of the policy.⁵

The review was concluded in September 2014 and a revised *Immunity and Cooperation Policy* was released.⁶

In order to fill this theoretical void, this chapter will analyse the theory underpinning the immunity policy to reveal that it suffers from significant limitations in its ability to accurately predict the immunity policy's operation. This will pave the way for a critical analysis of the way in which the policy should be assessed in the following chapter.

A *The Birth of the Immunity Policy*

The immunity policy was first designed and implemented in the United States in 1978. Cartels by their very nature are difficult to detect, so the immunity policy was designed as a method of detection, by providing an incentive for the cartel participants to reveal the cartel to the authorities themselves. The original United States leniency policy was announced by John H Shenefield on the 4th of October 1978 at the 17th Annual Corporate Council Institute and was designed for cases of horizontal anticompetitive conduct such as price-fixing, bid rigging, output

⁴ For an overview of the way in which the Immunity Policy is commonly assessed, please see: Hammond, above n 1. This aspect will be discussed in Chapter III, pg 83.

⁵ Australian Competition and Consumer Commission, above n 2.

⁶ Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014).

restrictions and market allocation.⁷

The decision to grant leniency by the United States DOJ under the original leniency policy for corporations was based on an evaluation of the following factors:

- Whether the party was the first to come forward;
- Whether the confession was a truly corporate act;
- Whether the DOJ could have reasonably expected it would become aware of the activities in the near future if the corporation had not reported them;
- Whether the corporation promptly terminated its involvement in the activities;
- The candor and completeness with which the corporation reported the wrongdoing and assisted the DOJ in its investigation;
- The nature of the violation and the party's role in it; and
- Whether the corporation had made or intended to make restitution to injured parties.⁸

Originally, the policy left almost all discretion with the DOJ as to whether leniency would be granted, meaning that the DOJ had ultimate discretion to grant leniency, even if all the leniency requirements were met. Therefore, unlike the current incarnation of the policy, the granting of immunity was not automatic.⁹ More significantly, leniency would not be granted if the DOJ had already commenced an investigation. Obviously, many companies were not in a position to know what investigations the DOJ had underway. Thus, in theory, they would have been more reluctant to reveal their misconduct without any guarantee that they would have received leniency.

This version of the leniency policy was deemed largely unsuccessful, with the DOJ receiving only one request for leniency a year, and only 17 applications for leniency in total for the period 1978-1993.¹⁰ During this period, the policy failed to uncover a single international cartel.¹¹ It was clear that the policy was not achieving its aims of cartel detection and deterrence.¹² This resulted in the announcement of a revised leniency policy by the Assistant Attorney General Anne Bingaman of the DOJ in August 1993 at the Annual American Bar Association Spring Antitrust

⁷ See John H Shenefield, 'The Disclosure of Antitrust Violations and Prosecutorial Discretion' (17th Annual Corporate Council Institute, October 4 1978).

⁸ Ibid 466.

⁹ Scott Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (Department of Justice - ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, 2010) 2.

¹⁰ Ibid.

¹¹ Ibid.

¹² See, eg, Gary Spratling, 'Making Companies an Offer They Shouldn't Refuse' (U.S Department of Justice - Antitrust Division, 1998) 1.

Meeting.¹³ These changes are reflected in the United States leniency policy as it stands today.

The United States Corporate Leniency Policy Incarnate

The DOJ Corporate Leniency Policy is tiered in order to induce the first person to come forward and claim leniency, but also to encourage members who may not be the first member to cooperate and receive a discount. In order to qualify for Type A leniency, the corporation must comply with the following:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.¹⁴

If a corporation does not meet any of the six criteria, then the corporation must apply for Type B leniency, which will be judged in accordance with the same six criteria. However, to qualify for Type B leniency, an additional condition is required to be satisfied namely that 'the Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.'¹⁵ This is determined on a case-by-case basis. According to the DOJ, this condition will be assessed by factors such as the timeliness of the application and whether the corporation coerced another party to participate in the illegal activity or clearly was

¹³ See Anne K Bingaman, 'Antitrust Enforcement, Some Initial Thought and Actions' (0867, Antitrust Section of the American Bar Association, 1993).

¹⁴ DOJ Department of Justice, 'Corporate Leniency Policy' (0091, Department of Justice - Antitrust Division, 1993); DOJ Department of Justice, 'Leniency Policy for Individuals' (0092, Department of Justice - Antitrust Division, 1993).

¹⁵ Department of Justice, above n 14, s B(7).

the leader in, or originator of, the activity.¹⁶

One of the policy's most innovative revisions was the abdication of prosecutorial discretion. If a cartel participant was the first to come forward to the DOJ and fulfilled the leniency criteria, then it could be certain to receive leniency.¹⁷ This removed the previous uncertainty in relation to the granting of leniency by the DOJ on a discretionary basis. The revisions also included the creation of a process to assess applications of cartel participants who were not the first to come forward so that the value of their contribution to the investigation could be assessed by the DOJ in exchange for lenient treatment.¹⁸

The DOJ also introduced the concept of vicarious immunity, where all directors, officers, and employees who come forward with the corporation and agree to cooperate also receive automatic immunity, dubbed Type C leniency.¹⁹

Pursuant to the individual leniency policy, an individual can seek leniency, independent of their employer, before an investigation has commenced, if they meet the following criteria:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.²⁰

If an individual satisfies the above criteria, then they will be granted leniency from criminal prosecution.

In addition, executives of a corporation seeking immunity after an investigation has begun will be given serious consideration for lenient treatment – in the form of individual leniency – in exchange for their full cooperation.²¹

Another significant development that accompanied the introduction of the revised United States leniency policy, and a global first, was the creation of the

¹⁶ Ibid; Department of Justice, above n 14, 3.

¹⁷ Department of Justice, above n 14, s A.

¹⁸ See eg, Scott Hammond, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations' (U.S Department of Justice, 2006).

¹⁹ Department of Justice, above n 14, s C.

²⁰ See, Department of Justice, above n 14, s A.

²¹ Department of Justice, above n ; Department of Justice, above n ; Scott Hammond and Belinda Barnett, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters ' (Department of Justice, November 19 2008).

‘marker’ system. Essentially, this system allows a leniency applicant to secure a place in the leniency ‘queue.’ This innovation is said to add to the creation of the ‘race to the finish’ line.²² In 2008, the DOJ published its ‘Frequently Asked Questions’ (FAQ) document outlining the marker process and how it is intended to operate.²³

According to this guidance, in order for a potential applicant to obtain a marker, their counsel must:

1. Report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation;
2. Disclose the general nature of the conduct discovered;
3. Identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and
4. Identify the client.²⁴

The ‘marker’ system has largely been considered by the international competition community law as a ‘success,’ as outlined by the International Competition Network in its document titled 'Drafting and implementing an effective leniency policy.'²⁵ A component of leniency that is unique to the United States concerns the civil liability of leniency applicants. Prior to 2004, a cartel participant who was granted full leniency could be sued by victims of the cartel and be liable for ‘treble damages.’²⁶ This factor would have placed a heavy burden on the decision to come forward for leniency in the first place, as it was almost certain that a corporation would need to pay treble damages to those adversely affected by the cartel.

To resolve this issue, on 22 June 2004, the *Antitrust Criminal Penalty Enhancement and Reform Act*²⁷ was introduced. This Act sought to limit the total private civil liability of corporations that have entered into leniency agreements with the Antitrust Division, including their officers, directors and employees, to actual damages ‘attributable to the commerce done by the applicant in the goods or services

²² Hammond and Barnett, above n 21, 2.

²³ Ibid.

²⁴ Ibid 3.

²⁵ International Competition Network, 'Anti-Cartel Enforcement Manual: Chapter 2: Drafting and Implementing an Effective Leniency Policy' (International Competition Network, May 2009) s 3.

²⁶ *Clayton Act* 15 U.S.C. § 15(a).

²⁷ *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub. L. No. 108-237, 118 Stat. 661, 665-69.

affected by the violation.²⁸ This limits damages for corporations who have met the requirements and obtained leniency to ‘single’ as opposed to ‘treble’ damages, and also makes them no longer jointly and severally liable for damages suffered by their co-conspirator’s customers. If a corporation does not obtain leniency, then they may be held jointly and severally liable for thrice the actual damages suffered by customers of the leniency applicant.²⁹ The legislation also significantly increased the potential criminal penalties for price-fixing by introducing higher fines and up to ten years gaol.³⁰

The purpose of outlining the basic requirements of the Antitrust Division's leniency policy in this chapter is to provide the context in which the policy was designed and developed, given that many countries around the world have uncritically adopted a similar policy in their own competition regimes. This outline will set the scene for the development of the succeeding chapters, as many of the elements surrounding the design and operation of the policy will be critically analysed by comparing the immunity policies in Australia, Canada and the United Kingdom, in addition to the United States.

B *The Influence of Economics on Cartel Enforcement*

The role of economists in the decision to prosecute cartels in the Antitrust Division of the United States DOJ was elevated in the 1970s, which altered the way in which competition authorities used their enforcement powers. The Antitrust Division is responsible for enforcing the *Sherman Act*;³¹ the primary act that regulates competition in the United States. The Antitrust Division serves an advisory, as well as prosecutorial function, and is structured in a hierarchical fashion.³²

The Division is invested with wide investigatory powers, where the division can issue civil investigative demands, which are the equivalent of administrative

²⁸ Ibid s 213 (b).

²⁹ *Clayton Act*, 15 U.S.C. § 15a.

³⁰ *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub. L. No. 108-237, 118 Stat. 661, 665-69, § 215.

³¹ *Sherman Act*, July 2, 1890, ch 647, 26 Stat. 209, 15 U.S.C. 1-7.

³² Department of Justice, *About the Division* US Department of Justice - Antitrust Division <<http://www.justice.gov/atr/about/index.html>>.

subpoenas, in the case of a formal civil investigation.³³ Criminal investigations are more often dealt with through the grand jury investigation, which are inherently broad in both scope and nature, as the scope of inquiry is virtually unlimited.³⁴ In terms of its advisory functions, the Division regularly informs businesses in relation to the legality of proposed activities in the hope of serving a preventative function; this has mostly come to effect under the Merger Guidelines with the passage of the *Hart-Scott-Rodino Antitrust Improvements Act* of 1976.³⁵

The Antitrust Division's history of enforcement did not gain traction until the appointment of Thurman Arnold, a Yale professor and social critic appointed to lead the division in 1938. Arnold significantly expanded and transformed the division.³⁶ During this time, there was a growing reliance on economic evidence as a source for determining which cases the Division would pursue and an increasing belief in the credibility of economic expertise.³⁷ Donald Turner's appointment as Assistant General for Antitrust in 1965 can be seen as influential in this respect, which began with the employment of a small group of special economic assistants in order to review existing and proposed cases.³⁸

During this period, the use of economics in the policy process was significantly enhanced, and the annual number of investigations conducted more than doubled.³⁹ Underpinning this shift towards economic analysis were two sources of underlying tension; the first relating to the intellectual battle between the structural economists and the emerging Chicago School of neo-classical economics during this period.

At a basic level, within the Chicago School, the 'fundamental assumption underlying this position is that the most efficient level of activity is the market.

³³ For an overview of the U.S Department of Justice's investigatory powers, see: Department of Justice, 'Antitrust Division Manual' (US Department of Justice, 2015) <<http://www.justice.gov/atr/public/divisionmanual/atrdvman.pdf>>.

³⁴ Ibid.

³⁵ *Hart-Scott-Rodino Antitrust Improvements Act*, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in 15 and 28 U.S.C. (2000)).

³⁶ See, eg, Spencer Waller, 'The Antitrust Legacy of Thurman Arnold' (2004) 78 *St. John's Law Review* 569.

³⁷ Those who advocated support for these changes included Richard Posner, see: Richard A Posner, 'A Program for the Antitrust Division' (1970) 38 *University of Chicago Law Review* 500.

³⁸ For an overview of the impact of Donald Turner's work on antitrust enforcement. See: Oliver Williamson, 'The Merger Guidelines of the U.S Department of Justice - In Perspective' (US Department of Justice, 2002) <<http://www.justice.gov/atr/hmerger/11257.htm>>.

³⁹ Ibid 5-7. Unsurprisingly, Richard Posner was employed in the Solicitor's Generals Office during this time.

Managers tend to act rationally, seeking out new and greater efficiencies as a means of maximizing profits.⁴⁰ On the other hand, Economic Structuralism places its emphasis on barriers to entry.⁴¹ These subtle but important differences between the two schools of thought fuelled the tension between the Structural Economists and the Chicago Economists within the Antitrust Division, whereby the appointed economists viewed the Division's policy from different perspectives, creating inconsistencies in the Division's activities.⁴²

The second source of tension related to the division between the economists and the lawyers, where the lawyers saw cases through the paradigm of the law, whilst the economists wished to pursue cases based on their economic credibility, and in many cases, regardless of the state of the law. This tension reverberated in the Division over a number of years, leading to a shift in the goals of the Division from 'winning cases' to targeting practices that harm consumers.⁴³ By that time, it became more apparent that the role of economists in the Division had in many instances circumvented the opinion of the lawyers, and became more fully integrated into the culture and practice of the Division.⁴⁴ Accompanying this shift were initiatives such as the establishment of the Economic Policy Office, which served the purpose of forming an economic staff that were assigned to every case at an early stage and who acted as independent analysts, as opposed to technical assistants.⁴⁵

Furthermore, the Assistant Attorney General in the 1970s only brought cases that had economic merit.⁴⁶ Not surprisingly, the growing influence of the Chicago School in the ranks of the Division was marked by the subtle shift towards deregulation of competition within this era, under the neo-classical assumption that markets are efficient and self-correcting and that less state intervention would result in

⁴⁰ Marc Allen Eisner, *Antitrust and the Triumph of Economics - Institution and Policy Change* (The University of North Carolina Press, 1st ed, 1991) 116.

⁴¹ For a general discussion of Economic Structuralism, see: Joseph Love, 'The Rise and Decline of Economic Structuralism in Latin America: New Dimensions' (2005) 40 *Latin American Research Review* 100; see also: Joe Bain, *Barriers to New Competition* (Harvard University Press, 1st ed, 1956).

⁴² Eisner, above n 40, 116-117.

⁴³ See, eg, Patrice Bougette, Marc Deschamps and Frederic Marty, 'When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law' (GREDEG Working Paper No. 2014-23, 2014) <<http://www.gredeg.cnrs.fr/working-papers/GREDEG-WP-2014-23.pdf>> 22.

⁴⁴ Lawrence White, 'The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion' (2010) 5 *Economics, Management and Financial Markets* 26, 33-35.

⁴⁵ Williamson, above n 38, 6.

⁴⁶ White, above n 44, 34.

better results for competition.⁴⁷ Not all members of the Division unequivocally accepted the influence of the Chicago School assumptions, with John Shenefield noting that whilst antitrust was important, populist traditions, as well as popular suspicion of large corporations, could not be ignored.⁴⁸

A majority of the institutional change that had occurred in the 1960s-1970s was cemented by the Reagan Administration in the 1980s.⁴⁹ This was exemplified by cuts in the Division's budget which resulted in the number of economists almost doubling the number of lawyers employed at the Division, as the reliance on economic expertise continued to grow.⁵⁰ It seemed by the time of the Reagan Administration, and the appointment of William Baxter, the Chicago School had reached its peak of influence over the Antitrust Division's enforcement agenda.

It was within this context that the United States leniency policy was born. From this prevailing historical account, it is clear that at the time of the policy's announcement in 1978, there had been a dramatic shift in the status of economics in the Division, and with it the rise of the Chicago School of neo-classical economics. Therefore, there is clear indication that the immunity policy is a creature of neo-classical economic thought and is based on the presumption that humans are rational profit maximisers. The policy is essentially an embodiment of the economic ideals within the Division that existed at the time of its inception.

On a broader level, the shift towards deregulation within this period and a laissez-faire approach to market regulation during this period is evidenced within the policy itself. At its most basic level, the immunity policy is not interventionist nor is it a product of proactive investigation or regulation, rather it is a system whereby the market participants are able to come forward and reveal their anticompetitive misconduct, if they believe it to be in their best interest. This is not to say that it is not an effective policy, but instead, it sheds light on the fact that the policy is extremely conducive to the non-interventionist deregulation position that characterised the Division during that period. 'Organisation, not division leadership, came to play the central role in the definition of priorities – policy became an

⁴⁷ See, eg, Bougette, Deschamps and Marty, above n 43.

⁴⁸ Eisner, above n 40, 149.

⁴⁹ George Krause, *A Two-Way Street: The Institutional Dynamics of the Modern Administrative State* (University of Pittsburgh Press, 1st ed, 1999) 54-55.

⁵⁰ See, eg, Albert Foer, 'The Federal Antitrust Commitment: Providing Resources to Meet the Challenge' (The American Antitrust Institute, 1999) 11.

institutional artifact.⁵¹

It was not until 1993 that the Division introduced its revised policy. The then, Assistant Attorney General of the Antitrust Division was said to have ‘woken the DOJ from its 12 year nap’⁵² by moving away from the Republican Administration’s laissez-faire approach to market regulation and taking on larger-concentration issues. It is no surprise then that this more aggressive approach to antitrust regulation saw the introduction of the current incarnation of the leniency policy, which theoretically makes it economically appealing for companies to come forward and cooperate with the DOJ. Bingham lauded the revised policy as an immediate success.⁵³ This aggressive attitude towards the prosecution of cartel activity in the United States is prevalent and endures to the present day.

The United States Culture of Enforcement

One prominent feature of the United States cartel enforcement record is that it is supported by a strong culture of cartel condemnation. Although the *Sherman Act* was enacted in 1890, according to the previous Chairman of the United States Department of Justice Antitrust Division, Professor Donald Baker, the moral wrongfulness of antitrust conduct did not gain public traction under the 1950s, largely due to the egregious conduct by corporate executives in the Electrical Equipment cases.⁵⁴ This momentum was built over his time as the Chairman, which placed an increasing emphasis on seeking gaol sentences for cartel conduct in the mid-1970s. As a result, the Sentencing Guidelines were passed in 1987. These made imprisonment a readily available remedy for the sentencing court.⁵⁵

These measures reinforced the perception of the moral wrongfulness of antitrust violations in the United States judiciary and legal community, despite the

⁵¹ Eisner, above n 40, 149.

⁵² See, Stephen Labaton, *Profile: Anne K Bingham: Rousing Antitrust Law from Its 12-Year Nap* (July 25) *The New York Times* <<http://www.nytimes.com/1993/07/25/business/profile-anne-k-bingham-rousing-antitrust-law-from-its-12-year-nap.html?pagewanted=all&src=pm>>.

⁵³ Department of Justice, '60 Minutes with Anne K. Bingham, Assistant Attorney General, Antitrust Division, US Department of Justice' (1994-1995) 63 *Antitrust Law Journal* 323, 330.

⁵⁴ Caron Beaton-Wells and Ezrachi Ariel, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 1 ed, 2011) 63.

⁵⁵ *Ibid* 30; US Sentencing Commission, 'Federal Sentencing Guidelines Manual' (US Sentencing Commission, 1987).

mandatory use of the Sentencing Guidelines being found to be unconstitutional in *United States v Booker*.⁵⁶ From 1981 through to 1988, the United States DOJ initiated more criminal prosecutions than during the period 1890 to 1980.⁵⁷ According to Baker, this increase in criminal prosecutions may have contributed to the public perception that cartel violations were akin to covert theft, and thus were perceived by the United States public as immoral and wrong.⁵⁸

In Baker's view, this moral condemnation of cartel conduct has permeated American culture, whereby regular prosecutions and imprisonments are deemed necessary to deter a serious proportion of the potential antitrust wrongdoers and are generally favoured and accepted practices.⁵⁹ William Kovacic, a former Commissioner of the United States Federal Trade Commission, notes that the strategic enforcement of industry areas that the public finds most morally reprehensible, such as public procurement cases, which dominated cases in the 1980s and early 1990s, was and continues to be a key factor for increasing public support for criminalisation and prosecution of antitrust violations.⁶⁰ The United States DOJ is proud of its aggressive enforcement efforts in securing imprisonment for cartel members, with 78 per cent of individuals sentenced in 2012 for cartel related offences. The average prison term has increased since that time from just less than two years to 25 months.⁶¹ This is a stark increase from the period between 1990 and 1999, where only 37 per cent of sentenced individuals went to gaol and the average prison term was only eight months.⁶²

The DOJ has consistently emphasised the importance of harsh penalties and increased individual gaol sentences, as one of the crucial measures in achieving cartel deterrence in anti-cartel enforcement, and advocates that this is one of the

⁵⁶ *United States v Booker* 543 U.S. 220 (2005).

⁵⁷ Beaton-Wells and Ariel, above n 54, 65.

⁵⁸ Donald I Baker, 'Punishment for Cartel Participants in the US: A Special Model?' in Caron & Ariel Beaton-Wells & Ezrachi (ed), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 1 ed, 2011) 27, 65; Baker argues that 'populists frustrations have generated key political support for the creation and enforcement of antitrust laws in the United States at various critical times.' Due to this long history, Baker believes the antitrust laws in the United States have a strong moral dimension, which is less apparent in other areas of the world.

⁵⁹ Beaton-Wells and Ariel, above n 54, 33.

⁶⁰ Ibid.

⁶¹ Department of Justice, *Criminal Program Update - Division Update Spring 2015* U.S Department of Justice - Antitrust Division <<http://www.justice.gov/atr/division-update/2015/criminal-program-update>>.

⁶² Department of Justice, *Antitrust Division 2013 Criminal Enforcement Update* Department of Justice - Antitrust Division <<http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>>.

cornerstones of an effective immunity policy.⁶³ Many countries have criminalised cartel conduct in recent years,⁶⁴ often at the behest of DOJ advocates. But the significant increases in fines and imprisonment terms for cartel offenders has not escaped criticism⁶⁵ and this criticism has resonated with many who question the appropriateness of the criminalisation of cartel conduct.⁶⁶

Aggressive enforcement of cartel conduct in the United States is thus deeply engrained within United States enforcement culture and norms, creating an environment where enforcement policies, such as the immunity policy, are seen as a crucial component of the overall enforcement regime. However, it is questionable whether Australia is an appropriate fit for an immunity policy given that very different enforcement norms and culture exists.

It is not the purpose of this chapter to outline a comprehensive account of all of the institutional and cultural differences between the DOJ Antitrust Division and the ACCC but to make mention of the key differences that have a significant bearing on the way the immunity policy is administered and enforced.

Firstly, the ACCC, as opposed to the DOJ, is an independent statutory authority charged with the administration of the *Competition and Consumer Act 2011* (Cth) (formerly the *Trade Practices Act 1975* (Cth)) on the 1st of January 2011. The ACCC's functions are not as wide as those of the DOJ, in that the ACCC cannot order grand jury investigations.⁶⁷ The grand jury has been described as in *Blair v. United States*, 250 United States. 273 (1919): '...a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the

⁶³ See Hammond, above n 1.

⁶⁴ See generally, Beaton-Wells and Ariel, above n 54, Gregory C. Shaffer and Nathaniel H. Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) 12 *Sedona Conference Journal* 1.

⁶⁵ See eg Caron Beaton-Wells and Brent Fisse, 'US Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique' (2011) 56 *The Antitrust Bulletin* 277.

⁶⁶ See eg, Christine Parker, 'Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality' in Caron & Ariel Beaton-Wells & Ezrachi (ed), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 239; Chris Platania-Phung and Christine Parker, 'The Deterrent Impact of Cartel Criminalisation: Report of a Survey of Australian Business People' (University of Melbourne, 2012); Christopher Harding, 'Cartel Deterrence: The Search for Evidence and Argument' (2011) 56 *The Antitrust Bulletin* 345; Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 37; Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal' (2009) 42 *The Australian and New Zealand Journal of Criminology* 218.

⁶⁷ For an overview of the functions and powers of the grand jury see: Department of Justice, 'U.S Attorney's Manual - Title 9: Criminal - Grand Jury' (US Department of Justice, 2012) <<http://www.justice.gov/usam/usam-9-11000-grand-jury#9-11.010>>.

investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.’

A grand jury has extensive powers to compel witnesses to attend the grand jury to give evidence, to issue subpoenas and to pursue other investigatory leads. Moreover, the grand jury does not need to have a strong basis for pursuing a particular investigatory lead and the grand jury’s deliberations are conducted in secrecy.⁶⁸ Whilst the ACCC has wide investigatory powers,⁶⁹ it has much less experience in conducting criminal investigations, which could have significant implications for its first criminally contested cartel case.

Furthermore, the legislation dealing with the cartel provisions in Australia are more lengthy and complex than the *Sherman Act* cartel provision.⁷⁰ The Australian provisions have been criticised on this basis, with calls for greater clarity and simplification of the provisions to aid understanding of their operation and effect.⁷¹

Secondly, in Australia, the criminalisation of cartel conduct did not occur until 2009, whilst it has been in operation in the United States since the enactment of the *Sherman Act* in 1890. In contrast to the United States, the ACCC system of civil and criminal cartel enforcement is bifurcated, meaning that any granting of criminal cartel immunity must be decided by the CDPP:⁷² a body that has yet to prosecute a criminal cartel case.⁷³

Of particular importance is the way that cartel conduct is viewed generally in the United States. As mentioned previously in this chapter, the DOJ has had a long history of criminal cartel enforcement, which has reinforced the public’s moral condemnation of the conduct and increased support for the DOJ’s vigorous enforcement over a significant period of time. By contrast, in Australia, there is yet to be a criminal cartel trial and many qualitative and quantitative studies have revealed that there is no such unequivocal condemnation of cartel conduct in the

⁶⁸ Ibid.

⁶⁹ *Competition and Consumer Act 2010* (Cth) s 155.

⁷⁰ Ibid ss 44ZZRD-44ZZRK: This refers to Australian cartel provisions.

⁷¹ See eg, Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law Policy and Practice in an International Context* (Cambridge University Press, 1 ed, 2011) Ch 4.

⁷² Commonwealth Department of Public Prosecutions, 'Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process' (Australia's Federal Prosecution Service, 2014) <<http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>> Annexure B.

⁷³ For more on the potential issues associated with a bifurcated system, see Chapter VI, The Relationship between the ACCC and the CDPP, pg 194.

business community or within the public body more generally.⁷⁴ This may be partly explained by the relative infancy of the criminal cartel provisions. However, the absence of the same degree of condemnation does call into question whether the Immunity Policy is an appropriate cultural fit for Australia.

This is not necessarily to say that the Immunity Policy should or will be revoked by the ACCC, but to cast light on the limitations of the Policy's operation in Australia, given its very different enforcement environment from that of the United States.

C *A Theoretical Breakdown of the Immunity Policy*

In addition to a cultural and historical discussion of the immunity policy, it is important to analyse the theory upon which the policy was founded. Christopher Leslie provides one of the most comprehensive breakdowns of the theoretical components of the immunity policy, by investigating how game theory informs the policy's design through an application of the 'prisoner's dilemma.'⁷⁵

Game theory is a tool used for predicting the possible reactions to the actor's own decisions of other actors.⁷⁶ It is a model of human decision-making where there are several decision-makers (called players) who each have different goals that are interdependent: the decision of each affects the outcome for all of the decision makers.⁷⁷ Essentially, Leslie observes that the prisoner's dilemma in the context of

⁷⁴ See eg, Caron Beaton-Wells et al, 'Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement' (The University of Melbourne, 2010) <<http://cartel.law.unimelb.edu.au/go/project-news/project-survey>>; Platania-Phung and Parker, above n 66; Christine Parker, 'Report on Interviews with Civil Respondents in Cartel Cases' (Centre for Regulatory Studies and Law Faculty, Monash University, 2011) <<http://cartel.law.unimelb.edu.au/go/project-news/project-outputs>>; Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5(1) *The Competition Law Review* 123; D. Daniel Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201.

⁷⁵ Leslie, above n 3.

⁷⁶ See generally, Martin Shubik, 'Symposium - Just Winners and Losers - The Application of Game Theory to Corporate Law and Practice - Game theory, Law and the Concept of Competition' (1991) 60 *University of Cincinnati Law Review*; Sims, Stephen W and Theodore S Salant, 'Law and Economics: Game theory and the law: Ready for Primetime?' (1996) 94 *Michigan Law Review*; Ian Ayres, 'Playing Games with the Law' (1990) 42 *Stanford Law Review*; Bruce H Kobayashi, 'Product Differentiation: Game theory and Antitrust: A Post-Mortem' (1997) 5 *George Mason Law Review* 411; Paul Mahoney and Chris William Sanchirico, 'Norms, Repeated Games, and the Role of Law' (2003) 91 *California Law Review* 1281; Pamela Bucy, 'Games and Stories: Game Theory and the Civil False Claims Act' (2004) 31 *Florida State University Law Review* 603.

⁷⁷ The foundations of game theory were laid down in John Neumann and Oskar Morgenstern, *Theory of Games and Economic Behaviour* (Princeton University Press, 1st ed, 1947).

immunity is misses a crucial ingredient – leverage. In the basic prisoner’s dilemma model, the prosecutors have sufficient evidence to convict both prisoners of a minor crime, meaning that both prisoners will serve some gaol time even if neither confesses to the major crime.⁷⁸ However, in the context of immunity, prosecutors generally do not have a provable minor crime to hold over the decision-maker. Leslie proposes there are three ways in which price-fixers can overcome or solve the prisoner’s dilemma; through contract, force and/or trust.⁷⁹

In relation to contracts, Leslie points out that contracts of an illegal nature are unenforceable.⁸⁰ Whilst this is true, outside the realm of legally binding contracts, Leslie’s analysis does not consider that industry practice or custom may be a factor that has *equally* compelling force as an agreement in a legally binding contract. There is common law support for the notion that cultural norms and practices can be as equally forceful as a contractual agreement.⁸¹ If a norm or custom is so prevalent in a particular industry for a long period of time, it can in fact be held to have a legally binding nature, where the custom is ‘well known and acquiesced in’ that ‘everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract.’⁸²

It is significant that Leslie has overlooked the possibility that custom could serve a similar purpose as ‘enforceable contracts’ in perpetuating the trust amongst the cartelists. Japan is a prime example of this, where businesses often have colluded in order to price-fix, despite the introduction of penalties for price-fixing.⁸³ In Japan, a cartel is known as a *keiretsu* that means ‘grouping’ or ‘affiliation’. These cartels have been justified as a reflection of Japan’s group-oriented culture and business system. The cartel activity was not seen by these businessmen as a ‘contract’ as such,

⁷⁸ John Shepard Wiley, 'Reciprocal Altruism as a Felony: Antitrust and the Prisoner's Dilemma' (1988) 86 *Michigan Law Review* 1906, 1915.

⁷⁹ Leslie, above n 3, 461.

⁸⁰ *Ibid*; See also, Anatol Rapoport and Albert Chammah, *Prisoner's Dilemma: A Study in Conflict and Cooperation* (University of Michigan Press, 1965) 25.

⁸¹ See, eg, *Con-stan Industries of Australia Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226.

⁸² *Ibid* 236-238.

⁸³ See for example, a discussion by the Secretary-General, Fair Trade Commission of Japan of the culture of cartels in Japan and the difficulties associated with its enforcement: Akinori Uesugi, 'How Japan is Tackling Enforcement Activities Against Cartels' (2005) 13 *George Mason Law Review* 349.

but simply ‘a way of doing things’ in business, which was deeply embedded in their cultural norms and customs to have contract-like force.⁸⁴

Secondly, Leslie is quick to discount force, such as a threat to kill someone unless they conform to the cartel’s activities, as a criterion that may help solve the prisoner’s dilemma, simply stating that ‘it is probably not relevant to price-fixing conspiracies.’⁸⁵ However there are still instances where duress short of a threat to kill may force cartel participants to cooperate where confession should be their dominant strategy.

This is particularly the case where duress does not necessarily involve ‘mob hits’ but where the circumstances are more significant than Leslie’s description of ‘public shaming devices.’⁸⁶ The possibility of duress is reflected in the use of ‘ringleader’ or ‘coercion’ tests of exclusion, such as the coercion test that exists in Australia and many other jurisdictions.⁸⁷ The existence of these tests indicates that circumstances of duress or coercion are possible ways in which members may feel compelled to join and remain in a cartel when their dominant strategy should be confession. This possibility of duress casts further doubt on Leslie’s arguments that attempt to solve the prisoner’s dilemma within the immunity context.

Furthermore, empirical evidence conducted by researchers from the University of Melbourne suggests that small businesses are often coerced to enter into cartels or risk being driven out of business: a form of economic duress that might otherwise compel a cartel member to participate in and continue a cartel.⁸⁸ This research also revealed that many small businesses operating in a cartel are unaware that the conduct is illegal, that it is criminal and that an immunity policy

⁸⁴ Ibid 364.

⁸⁵ Leslie, above n 3, 461.

⁸⁶ Ibid 462.

⁸⁷ Australian Competition and Consumer Commission, above n X, s16 (iv), s 28 (iv), s 77; Department of Justice, above n 14, sA(6), Department of Justice, above n 14, sA(3); Competition Bureau, ‘Immunity Program under the Competition Act’ (Competition Bureau, 7 June 2010) s 14; Competition and Markets Authority, ‘Applications for Leniency and No-Action in Cartel Cases - Detailed Guidance on the Principles and Process’ (Competition and Markets Authority, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf> s 2.7(e). For further information regarding the Coercion test, see Chapter VI, Cartel Coercion, pg 186.

⁸⁸ Parker, above n 74, 13; See also, Jeffrey Sonnenfeld and Paul Lawrence, ‘Why Do Companies Succumb to Price Fixing?’ (1978) 56 *Harvard Business Review* 145.

exists.⁸⁹ Being unaware of the existence of the immunity policy would affect the essence of the ‘game,’ as Leslie describes it.⁹⁰

Leslie also neglects consideration of the tools of punishment often used by cartelists against other members of the cartel. Competition regulatory authorities around the world have acknowledged that cartels, as sophisticated organisations, will often incorporate methods to punish cartelists who cheat on the cartel and this method is used to ensure the cartel’s intended operation.⁹¹ Therefore, if cartelists incorporate their own methods of ensuring consensus amongst cartel individuals, this will also affect the nature of Leslie’s game of trust and the cartel’s operation.

Furthermore, Leslie’s analysis is not helpful in revealing how the treatment of the second and consequent participants who come forward to the authorities under leniency or cooperation policies (eg the ACCC’s cooperation policy) can affect the nature of the game.⁹²

In general, Leslie’s arguments supporting and analysing the tenets of the theoretical underpinnings of the immunity policy through the prism of neo-classical economics is largely speculative and unconvincing. Many of his assertions are highly questionable, including his assertion that a cartel ‘is essentially a game of trust.’⁹³ Given that many different factors impact on the operation of cartels in addition to trust, it would appear that Leslie’s analysis is incomplete.

Moreover, Leslie frames the options available to cartel participants in his analysis as being two-fold: either confess to the authorities or maintain the cartel.⁹⁴ These are not the only two options available. Silence may also be another strategy employed by a cartel member in the event the cartel is discontinued or dismantled. The credibility of this as a strategy is apparent from the fact that without the immunity policy there is little chance of the authorities being able to detect the cartel. For instance, the ACCC stated that, as at 30 September 2013, that there were 20 in-depth cartel investigations underway, and out of that number only 6 were discovered without an immunity application. Thus, absent the immunity policy, the ACCC’s rate

⁸⁹ Parker, above n s 2.3.

⁹⁰ Ibid; Parker, above n 66.

⁹¹ See, eg, Ian Ayres, 'How Cartels Punish: A Structural Theory of Self-Enforcing Collusion' (1987) 87 *Columbia Law Review* 295.

⁹² Australian Competition and Consumer Commission, above n 6, s H.

⁹³ Leslie, above n 3, 462; See also; Robert Wright, *Nonzero: The Logic of Human Destiny* (Vintage Books, 1st ed, 2000) 341; Rapoport and Chammah, above n 80, 56.

⁹⁴ Leslie, above n 3, 455.

of detection would be around 30 per cent.⁹⁵ Given the low risk of detection, there is a real possibility that, in the event a cartel ceases to exist, all parties to the cartel may choose to remain silent and not apply for immunity.⁹⁶

Leslie's analysis does not consider the possibility that discontinuing the cartel (or dismantling the cartel altogether) may be a viable option. This is especially the case when considered in conjunction with the potential follow-on damages an immunity applicant may be required to pay in all jurisdictions that the cartel may have affected or operated within.⁹⁷ This argument runs counter to Leslie's analysis where he argues that 'a cartel member may simply become more risk averse and wish to end its participation in a criminal enterprise in the most cost-effective manner possible, which is confession.'⁹⁸ Therefore, the very premise on which Leslie bases his prisoner's dilemma arguments fails to take account of a potentially more cost-effective third strategy.⁹⁹

Another factor that Leslie fails to consider in his theoretical analysis is that cartelists may intentionally 'game' the policy, meaning there is potential for cartelists, being sophisticated organisations, to set up cartels with the very intention of applying for immunity and evading liability.¹⁰⁰ Given that there is no condition of immunity, at least in Australia, that prevents a cartel recidivist from making successive applications of immunity, there is a real possibility that gaming the policy can happen, and on a continuing basis.¹⁰¹

The very notion of 'gaming' the policy was acknowledged by the ACCC in the October release of the discussion paper and the prospect informed a number of

⁹⁵ Marcus Bezzi, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review?' (Paper presented at the Competition Law Conference, Shangri-La Hotel, Sydney, 4 May 2013).

⁹⁶ For empirical data that supports this proposition, see Chapter V, Silence as a Strategy, pg 129.

⁹⁷ For a detailed discussion of the issues associated with multi-jurisdictional immunity applications, see Chapter VII, Confidentiality Across Borders, pg 261.

⁹⁸ Leslie, above n 3, 472.

⁹⁹ Moreover, firms need not report a cartel immediately upon leaving it, see: Dennis Gartner and J Zhou, 'Delays in Leniency Application: Is There Really a Race to the Enforcer's Door?' (University of Bonn & Tilburg Law and Economics Center (TILEC), 2012) <<file:///C:/Users/pl490/Downloads/SSRN-id2188141.pdf>>.

¹⁰⁰ The ACCC recognises that there may be instances where an applicant is '*deliberately not satisfying its obligations*' or the '*evidence suggests that the immunity applicant has engaged in 'gaming' of the immunity policy*': ACCC, *ACCC Releases Discussion Paper in Cartel Immunity Policy Review* ACCC <<https://www.accc.gov.au/media-release/accc-releases-discussion-paper-in-cartel-immunity-policy-review>>.

¹⁰¹ For more on the issue of recidivism, see Chapter VI, Recidivism, pg 170.

recommendations the ACCC considered for review.¹⁰² A key economic study conducted by John Connor in 2010 also suggested that cartel recidivism on an international scale is increasing.¹⁰³ The potential for cartelists to intentionally exploit the immunity policy in this way is another consideration absent from Leslie's analysis of the theory underpinning the immunity policy. Therefore his analysis provides a very limited view of the policy's operation.

If Leslie's analysis of cartels as essentially a 'game of trust' were viewed in a vacuum, it would seem to present a compelling analysis of how an immunity policy is intended to operate through the application of the prisoner's dilemma. However, as this chapter has demonstrated, there are a number of other important considerations that perpetuate the 'trust' amongst cartelists, or complicate the decision-makers choice to apply for immunity. Moreover, a cartelist is presented with a third viable alternative in addition to continuing the cartel or confessing, where they may discontinue the cartel and remain silent.

There are a number of other theorists, in addition to Leslie, who have used game-theoretical analysis in relation to the immunity policy.¹⁰⁴ These papers give only a brief descriptive account of how game-theoretical analysis applies to immunity policies and in much less detail than Leslie. In many of the papers, the use of the game-theoretical model and the assumptions underpinned by the prisoner's dilemma are not explicitly explained but are implicit from the economic models employed by the theorists in their analysis of leniency programs.¹⁰⁵

¹⁰² Ibid; RC Marshall and LM Marx, 'Section 1 Compliance from an Economic Perspective' in Nicolas Charbit, Elisa Ramundo and William E Kovacic (eds), *An Antitrust Tribute Liber Amicorum* (Institute of Competition Law, 2014) 293, 300-301.

¹⁰³ See, eg, John Connor, 'A Symposium on Cartel Sanctions: Recidivism Revealed: Private International Cartels 1990-2009' (2010) 6 *Competition Policy International* 101; For a detailed analysis on cartel recidivism and immunity, see Chapter VI, Recidivism, pg 170.

¹⁰⁴ See eg, Amedeo Arena, 'Game Theory as a Yardstick for Antitrust Leniency Policy: the United States, European Union, and Italian Experiences in a Comparative Perspective' (2011) 11 *Global Jurist Topics*; Christopher Ellis and Wesley Wilson, 'Cartels, Price-Fixing, and Corporate Leniency Policy: What Doesn't Kill Us Makes Us Stronger' (Department of Economics, University of Oregon, 2008) <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2008&paper_id=339>; Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press, 1st ed, 2008) ; Paolo Buccirossi and Giancarlo Spagnolo, 'The Effects of Leniency on Illegal Transaction: How (Not) to Fight Corruption' (SSE/EFI Working Paper Series in Economics and Finance, 2001) <<http://swopec.hhs.se/hastef/papers/hastef0456.pdf>>; C'ecile Aubert, Patrick Rey and William E. Kovacic, 'The Impact of Leniency and Whistleblowing Programs on Cartels' (2005) 24 *International Journal of Industrial Organization* 1241.

¹⁰⁵ For example, Blum provides an analysis on the rationale of leniency programs and outlines how the abovementioned authors have contributed to the economic empirical evidence on leniency

In defence of the game-theoretical model, Spagnolo suggests that ‘rational choice analysis is particularly well-suited to analyse cartels and policies against them, as wrongdoers are well-educated, calculating firm managers, used to evaluating costs and benefits and to react to incentives, rather than to rage, passions or instinct.’¹⁰⁶ However, there are numerous psychological studies in cognitive behaviour that contradict the notion that humans are in *control* of their emotions or that human decision-making is as simple as the rational actor model predicts and as Spagnolo suggests.¹⁰⁷

This chapter has demonstrated that the theoretical basis upon which the immunity policy has been modelled provides a narrow and limited means of assessing the immunity policy’s operation. In particular, it provides no cogent means for assessing the policy’s effectiveness as a tool of cartel enforcement. Exposing the limitations of the rational actor model as a means to predict human behaviour and developing criteria that can be used to more comprehensively assess the immunity policy’s effectiveness will be the task of the following chapter.

policies, see: Ulrich Blum, 'On the Rational of Leniency Programs: A Game-Theoretical Analysis' (2008) 25 *European Journal of Law and Economics* 209; See, also, Ellis and Wilson, above n 52; Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347.

¹⁰⁶ Spagnolo, above n 104, 271.

¹⁰⁷ Further support for this proposition will be discussed in the following Chapter.

III THE IMPACT OF RATIONALITY ON IMMUNITY POLICY DEVELOPMENT

The purpose of this chapter is to historically trace the concept of rationality to contextualise the meaning of the concept within the field of economics and competition law before discussing the ‘rational actor model’, recent theoretical developments in relation to human behaviour and the implications for the immunity policy.

This chapter will be divided into three parts. The first part will discuss the concept of rationality, its application to law and economics, including the Chicago School’s development of the rational actor model. This section will also touch upon other theoretical developments that also draw upon the assumptions underlying the rational actor model. It is not the purpose of this section to provide a comprehensive historical account of the concept of rationality, as this has been achieved in other works.¹ Nor does there seem to be any unity amongst economists as how to define the rationality, given there are many prevailing views.²

It is also not the intention of this section to provide an extensive historical account of the developments of the Chicago School of neo-classical economic theory, as this work has been canvassed in other research.³ Rather the focus will be on providing a contextual understanding of the origins of the rational actor model and how they ultimately fostered the development of an immunity policy. This part will also review the primary criticisms levelled at the rational actor model to shed light on its limitations as a theory of human behaviour. The aim will be to cast doubt on the model’s ability to provide a sufficient basis upon which public policy should be designed and assessed.

¹ See, eg, K Manktelow and D Over, *Rationality - Psychological and Philosophical Perspectives* (Routledge, 1st ed, 1993).

² See, eg, Herbert Hovenkamp, *The Antitrust Enterprise - Principle and Execution* (Harvard University Press, 1st ed, 1948) 134; Russell Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California Law Review* 1051, 1055; Amital Etzioni, 'How Rational Are We?' (1987) 2 *Sociological Forum* 1, 2; Christine Jolls, Cass Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471, 1488.

³ See, eg, Klaus Hennings and Warren Samuels, *Neoclassical Economic Theory* (Kluwer Academic Publishers, 1990); Robert Ekelund and Robert Hebert, *A History of Economic Theory & Method* (Waveland Press, Inc, 6th ed, 2014); Ross Emmett, *The Elgar Companion to the Chicago School of Economics* (Edward Elgar Publishing Limited, 2010).

The second part of this chapter will analyse the theoretical developments that refute the rational actor assumptions, focusing on the Behavioural Economics Approach (thereafter ‘BE Approach’). It will question whether the BE Approach has emerged as a more appropriate model to adopt in public policy design and assessment in an attempt to more adequately reflect human behaviour and decision-making, compared to the rational actor model. This part will conclude that despite elements of usefulness within the BE approach, the theory is still limited in its ability to provide guiding criteria that can be used to assess the Immunity Policy’s effectiveness.

The final part of this chapter will then develop a new approach to assessing the immunity policy. Recognising the drawbacks of the United States DOJ criteria currently used to assess the immunity policy’s effectiveness, derived from neo-classical economic theory, this part will outline an enhanced method and set of criteria to more comprehensively assess the design and operation of the policy in light of the limitations of the rational actor model.

A *An Exploration of the Development of the Rational Actor Model*

One prevailing view of rationality is that it entails the ability to be logical, to reason or to draw conclusions properly, to be reasonable, sensible and judicious.⁴ The concept dates back to Aristotle’s notion of rationality, who deems the defining characteristic of the human species as the ‘rational animal.’⁵ In his view, rationality is a man’s ability to think about the world and his role in it in terms of scientific or other propositions, who can recognise that pairs of propositions having a term in common sometimes allows a conclusion to be drawn in the form of another proposition that follows logically from them as premises.⁶

Jeremy Bentham’s work was influential on the field of economics through his ‘Principle of Utility.’⁷ This principle dictates that pleasure and pain lie at the heart of all actions of sentient creatures. According to Bentham, motives consist in a desire

⁴ Rationality ‘Psychological and Philosophical Perspectives’ Manktelow and Over, above n X, 2.

⁵ See, eg, Aristotle Taylor, *Aristotle: Nicomachean Ethics, Books II--IV : Translated with an Introduction and Commentary* (Oxford University Press, 2006).

⁶ Rationality ‘Philosophical and Psychological perspectives Manktelow and Over, above n 85.

⁷ See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907).

for pleasure and an aversion to pain, meaning that actions are motivated by the prospect of obtaining some pleasure or of averting some pain. In Bentham's view, a right and proper action is one that promotes the greatest happiness of the greatest number.⁸ This theory is more commonly referred to as Utilitarian Theory and the assumptions that underpin this theory have been incorporated into criminal and enforcement policies for decades.⁹ The critics of Bentham's notion of utilitarianism assert that the concept is unduly narrow, as it requires that an individual acts in the 'right way' when he attempts to maximise his own happiness, without regard to the happiness of others. In other words, the theory is criticised for being too simple and generalised to adequately reflect human behaviour.¹⁰ Furthermore, it is said that the theory does not adequately reflect other non-utilitarian values, such as the concept of 'just dessert.'¹¹

Gary Becker is another leading pioneer in the field of economics and rational action. His early work postulated that all human behaviour is economising in nature and amenable to analysis through economic modelling.¹² Becker liberally applied his rational actor model in his economic analysis of human behaviour to areas as varied and diverse as: how many children one would have; the decision to marry or divorce; criminal activity; altruism; suicide; social interaction; and the allocation of time.¹³ Becker extended his analysis to criminal behaviour in further work and outlines an economic model he proposes is useful in determining how to combat crime in an 'optimal' fashion through the consideration of a number of factors, namely:

(1) the number of crimes, called "offenses" in this essay, and the cost of offenses, (2) the number of offenses and the punishments meted out, (3) the number of offenses, arrests, and convictions and the public expenditures on police and courts, (4) the number of convictions

⁸ Ibid s III.

⁹ See, eg, Darryl K Brown, 'Criminal Law Theory and Criminal Justice Practice' (2012) 49 *American Criminal Law Review* 73; Miriam Baer, 'Linkage and the Deterrence of Corporate Fraud' (2008) 94 *Virginia Law Review* 1295, 1329; Assaf Hamdani and Alon Klement, 'Corporate Crime and Deterrence' (2008) 61 *Stanford Law Review* 271; Matthew Haist, 'Deterrence in a Sea of Just Desserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism' (2009) 99 *Journal Criminal Law & Criminology* 789.

¹⁰ For an overview of primary criticisms, see: Hanna Pitkin, 'Some Neglected Cracks in the Foundation of Utilitarianism' (1990) 18 *Political Theory* 104.

¹¹ See, eg, Alana Barton, *Just Deserts Theory* (2012) SAGE Publications
<<http://www.sagepub.com/hanserintro/study/materials/reference/ref3.1.pdf>>.

¹² Gary S Becker, *The Economic Approach to Human Behaviour* (The University of Chicago Press, 1990).

¹³ Ibid; For an overview of Becker's work in relation to social welfare, see: John McDonald, 'Crime and Punishment: A Social Welfare Analysis' (1987) 15 *Journal of Criminal Justice* 245.

and the costs of imprisonments or other kinds of punishments, and (5) the number of offenses and the private expenditures on protection and apprehension.’¹⁴

Becker’s use of neo-classical economic analysis and the ‘rational man’ had a significant impact on the view of many sociologists; many of whom were affronted by the notion that many dearly held normative factors central to studies in sociology should be replaced by utilitarian concepts introduced by Bentham, and reinforced by Becker’s work in the field of economics.¹⁵ As a result, at least in the field of crime and criminology, the focus of research went from being based on normative and moral terms to a rational choice frame of reference within the field of positive science.¹⁶

This was represented by a change in focus by criminologists from rehabilitative studies to research directed towards the deterrent effect of punishment and the effect of incentives on crime.¹⁷ Bentham and Becker’s prevailing impact on the study of human behaviour is exemplified by the vast number of economic based studies in the field of cartel conduct that seek assess the effectiveness of the immunity/leniency programs across the world by using rational choice methods.¹⁸

¹⁴ Gary S Becker, 'Crime and Punishment: An Economic Approach' 76 *Journal of Political Economy* 169, 174.

¹⁵ See generally, Philomila Tsoukala, 'Gary Becker, Legal Feminism and the Costs of Moralizing Care' (2007) 16 *Columbia Journal of Gender and Law* 357.

¹⁶ See eg, Edward Lazear, 'Gary Becker's Impact on Economics and Policy' (2015) 105 *American Economic Review: Papers & Proceedings 2015* 80.

¹⁷ See, eg, Shawn Bushway and Peter Reuter, 'Economists' Contribution to the Study of Crime and the Criminal Justice System' (2008) 37 *The University of Chicago Crime and Justice* 389; Julie Clarke, 'The Increasing Criminalization of Economic Law – A Competition Law Perspective' (2012) 19 *Journal of Financial Crime* 76.

¹⁸ Many studies into the immunity policy are predominantly economic and explore themes such as the effect of cartel ringleaders on leniency programs; the impact of cartels on the market; the desirability of granting leniency to more than one cartelist; the effectiveness of a single informant leniency model; the impact of financial incentives on whistleblowers; leniency programs as a tool for cartelists to punish each other; and the deterrence effect of leniency programs and the effect of cartel survival rates: See, eg, Jeroen Hinloopen and Adriann Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' (2008) 39 *The RAND Journal of Economics* 607; Gordon Klein, 'Cartel Destabilization and Leniency Programs – Empirical Evidence' (Discussion Paper No. 10-107, Centre for European Economic Research, 2010); Jose Apestegui, Martin Dufwenberg and Reinhard Selten, 'Blowing the Whistle' (2007) 31 *Economic Theory* 143; Cécile Aubert, Patrick Rey and William E. Kovacic, 'The Impact of Leniency and Whistleblowing Programs on Cartels' (2005) 24 *International Journal of Industrial Organization* 1241; Julien Sauvagnat, 'Prosecution and Leniency Programs: A Fool's Game' (Discussion Paper, Toulouse School of Economics (TSE) 2011); Andrea Pinna, 'Optimal Leniency Programs in Antitrust' (Working paper 2010/18, Centre for North South Economic Research & Queen Mary, University of London, 2010); Margaret C Levenstein and Valerie Y Suslow, 'What Determines Cartel Success' (2006) 44 *Journal of Economic Literature* 43; Iwan Bos and Frederick Wandschneider, 'Cartel Ringleaders and the Corporate Leniency Program' (CCP Working Paper 11-13 - Maastricht University and the University of East Anglia, 2011).

The Economic Approach to Law - Competition Law and Economics: An Introduction

The basis of an economic approach to law, as advocated by Richard Posner, is the assumption that people act as rational maximisers of their satisfactions.¹⁹ As there have been many conceptions of rationality over the course of history, the focus in this chapter will be on the concept of rationality as derived from normative decision theory, which is rooted in economic game theory. As previously described, this concept of rationality presupposes that people make choices based on maximising their utility or minimising the cost to themselves.²⁰

At a basic level, a decision maker is faced with a number of alternatives with each choice being given a certain probability, which therefore equates to a utility for the decision maker. The equation that computes the highest expected utility is the one chosen.²¹

Posner, whilst describing the benefits that an economic mind, with economic tools can bring to the analysis of the law, stated that quantitative analysis and statistical compilation would prove to be extremely useful in identifying patterns and causes of legal and administrative issues.²² Generally, his economic theory of law follows on from Bentham's and Becker's work of the application of economics in the context of non-market legal regulation.

In applying the economic approach to criminal behaviour, Posner adopts the utilitarian concepts developed by Bentham and Becker, stating that when assessing whether criminal penalties are optimal to deter criminal behaviour, he assumes that most potential criminals are sufficiently rational to be deterred. He states that such an assumption has the support of extensive literature.²³ Similarly to Becker, Posner believes that there can be an 'optimal' level of deterrence, whereby after the appropriate punishment has been set; it is adjusted with the appropriate level of

¹⁹ Richard A. Posner, 'The Economic Approach to Law' (1974) 53 *Texas Law Review* 757, 763.

²⁰ *Ibid* 761.

²¹ For an application of this model to crime and punishment, see Becker, above n 14, 172.

²² Posner, above n 19, 765.

²³ Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 *Columbia Law Review* 1193,1205.

probability and severity ‘to bring that cost home to the would-be offender.’²⁴ He published a number of articles with William Landes, writing primarily about economics and law including issues relating to private enforcement,²⁵ the notion of an independent judiciary,²⁶ and the use of legal precedent,²⁷ all of which have been said to be the most productive and important contributions to law and economics.²⁸

Specifically related to this research, Posner believes that the assumption of rationality can be applied in the analysis of law, and that ‘lawyers can apply the theory perfectly well without the help of specialists.’²⁹ He finds that his economic analysis can be applied to law through the economic representations of ‘goods’ and ‘price,’ even though the law is traditionally viewed as a non-market setting. The ‘goods’ for example represent the ‘crimes’ to the criminal and the ‘price’ represents the term of imprisonment, discounted by the probability of conviction.³⁰

In Posner’s model, the legal system is treated as a given and therefore the question is directed towards how individuals or firms within the system react to the incentives they are presented. He refers to the possibility that many academic lawyers may be ‘repulsed’ by the prospect that economists are attempting to ‘wrest their field from them.’³¹

Generally, the work of Posner and those from the Chicago School enjoyed its heyday in the late 1970s, which was categorised by a shift of interventionist policies in the Supreme Court in the 1950s and 1960s to a more laissez faire set of permissive rules.³² The influence of the Chicago School on antitrust policy was essentially two-fold: (1) it advocated that the best tool available to maximise economic efficiency was by way of the neoclassical price theory model (2) the primary goal of antitrust enforcement policy should be economic efficiency.³³

²⁴ Ibid 1206.

²⁵ Richard Posner & Robert Landes, ‘The Private Enforcement of Law’ (1975) 4 *Journal of Legal Studies* 1.

²⁶ Robert Landes & Richard Posner, ‘The Independent Judiciary in an Interest-Group Perspective’ (1975) 18 *Journal of Law and Economics* 875.

²⁷ Robert Landes & Richard Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249.

²⁸ Lloyd Cohen and Joshua Wright, *Pioneers of Law and Economics* (Edward Elgar Publishing, 1st ed, 2009) Ch 11.

²⁹ Posner, above n 19, 762.

³⁰ Ibid 763.

³¹ Ibid 764.

³² See, eg, Nicholas Mercuro, ‘How the Chicago School Overshot the Mark: Antitrust Law and Policy in Terms of the Legal-Economic Nexus’ (2015) *A Research Annual* 405, 417.

³³ Herbert Hovenkamp, ‘Antitrust Policy After Chicago’ (1985) 84 *Michigan Law Review* 213, 220.

The ‘victories’ of the Chicago School of economics that are widely viewed as successful include fixing economic welfare as the primary objective of antitrust; ‘rejecting no-fault deconcentration as a plausible policy option and giving positive regard to productive efficiency’ – meaning that despite many of its criticisms – overall economic efficiency have benefited significantly from these changes in antitrust policy stemming from Chicagoan analysis.³⁴ This was a significant change from the normative analysis of the 1950s and 1960s in which government agencies were aggressively interventionist.³⁵

There have been a number of other ‘waves’ of economic thought since the Chicago neo-classical economic paradigm – most notably the Post-Chicago and Neo-Chicago schools. Both Post-Chicago and Neo-Chicago utilise economics as a form of analysis. However, there are a number of differences between the three schools of thought. The Post-Chicago school is said to be based on newer and more sophisticated forms of economic analysis than the Chicago school of neo-classical economic thought, and places a much heavier emphasis on game theoretic models of firm behaviour that help to identify anticompetitive behaviour.³⁶

Advocates of the Post-Chicago analysis claim that the theory is based on specific testable hypothesis and empirical testing of these models.³⁷ However, many question the usefulness of Post-Chicago theory and whether it does indeed go beyond a pure Chicago analysis, particularly given that many of the underlying assertions of the school are untestable³⁸ or fail to rule out viable alternative theories.³⁹ It has been suggested that the real value of Post-Chicago is reflected in its recognition that markets are actually far more complex and varied than the Chicago school advocates

³⁴ Richard Schmalensee, 'Thoughts on the Chicago Legacy in US Antitrust' in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press, 2008) 22.

³⁵ Daniel Rubinfeld, 'On the Foundations of Antitrust Law and Economics' in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press, 2008) 53.

³⁶ See, eg, Bruce Kobayashi and Timothy Muris, 'Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century' (2012) 78 *Antitrust Law Journal* 147, 151.

³⁷ *Ibid* 150.

³⁸ *Ibid*; Daniel A Crane, 'A Neo-Chicago Perspective on Antitrust Institutions' (2012) 78 *Antitrust Law Journal* 43, 48.

³⁹ Herbert Hovenkamp, 'Post-Chicago Antitrust: A Review and Critique' (2001) *Columbia Business Law Review* 257, 263.

are willing to admit. However, the benefits of Post-Chicago theory, like Chicago, may be oversold.⁴⁰

In contrast, the Neo-Chicago school is in its infancy as a theoretical school of thought and is likely to be a narrower and more cautious approach than its predecessor.⁴¹ This is demonstrated in the Neo-Chicago approach to predatory pricing, where in contrast to the Chicago school, Neo-Chicago would acknowledge that predatory pricing may occasionally happen but claim that the vast majority of predatory price claims are overstated, particularly by competitors.⁴² The Neo-Chicago school insists upon basing its antitrust interventions on evidence-based justifications, which will focus on the operation of the market in a real-world context.⁴³

The Neo-Chicago school also claims to be more diplomatic in its approach to the role of institutions in antitrust policy. Whilst the Chicago school insisted upon a non-interventionist role by the State, in the belief that markets will self-correct, the Neo-Chicago school recognises the positive role that institutions can play in order to intervene to correct competitive market failures.⁴⁴

Although this is a very brief description of the schools of thought that have dominated antitrust policy since the 1970s, the most important aspect in relation to the analysis of the immunity policy is that the rational actor model underpins all of these theories. As demonstrated by the previous chapter, the rational actor model, as derived from the Chicago School of Economics, was central to the development of the immunity policy and currently informs its intended operation. However, the rational actor model is limited in its ability to accurately predict human behaviour. To demonstrate this, it is necessary to outline the key empirical findings that refute the assumptions underlying the rational actor model with a view to exposing its inadequacies as a model of human behaviour and therefore an insufficient basis upon which the immunity policy should be assessed. Many of these empirical studies have been conducted by advocates of the BE Approach.

⁴⁰ Ibid 262.

⁴¹ One of the most advocates of this theory is Daniel Crane, see Crane, above n 38.

⁴² Ibid 45.

⁴³ Ibid.

⁴⁴ See generally David Audretsch, 'Divergent Views in Antitrust Economics' (1988) 33 *Antitrust Bulletin* 135; *contra* Joshua O'Wright, 'Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust' (2012) 78 *Antitrust Law Journal* 241, 245-246.

B The Evolving Concept of Rationality and the Behavioural Law and Economics Approach – A Limited Theoretical Approach to Regulatory Policy and Design

One of the most significant theoretical developments in relation to the concept of rationality was the introduction of the concept of ‘Bounded Rationality’ by Herbert Simon.⁴⁵ Simon contends that people reason and choose rationally, but only within the constraints imposed by their limited search and computational capacities.⁴⁶ He uses the analogy of a computer to illustrate the concept of Bounded Rationality, whereby the human mind is compared with that of a computer with limited processing capacity. In this analogy, the human mind will engage in effort-saving subroutines that sometimes provide reasonable but imperfect solutions which can seem particularly appealing and compelling.⁴⁷ Simon was awarded a Nobel Prize in 1978 for his work on the rational decision-making in business organisations.⁴⁸ He recognises the attraction of the rational actor model but argues that Bounded Rationality does not possess that kind of simplicity and that the ‘assumptions about human capabilities are far weaker than those of the classical theory.’⁴⁹

Simon’s work acknowledges that one of the central failures of classical theory is that it was never designed to examine situations involving decision-making under uncertainty and imperfect competition. He asserts that the neo-classical rational actor model requires an individual to be aware of or have full knowledge of the choices available to him and also the full knowledge and/or ability to compute the consequences that will follow from each different choice.⁵⁰ The rational choice model also requires that the decision-maker will be able to evaluate these consequences with certainty and have the ability to compare consequences that flow from different choices, no matter how diverse they may be. In contrast, Bounded Rationality assumes that the consequences of choosing particular alternatives will

⁴⁵ See, Herbert Simon, 'Nobel Memorial Lecture - Rational Decision-Making in Business Organisations' (Carnegie-Mellon University, 1978).

⁴⁶ Thomas Gilovich, Dale Griffin and Daniel Kahneman, *Heuristics and Biases* (Cambridge University Press, 1st ed, 2002).

⁴⁷ *Ibid* 6.

⁴⁸ Simon, above n 45.

⁴⁹ *Ibid* 5.

⁵⁰ *Ibid* 11.

only be imperfectly known to the individual decision-maker ‘both because of limited computational power and because of uncertainty in the external world, and the decision maker did not possess a general and consistent utility function for comparing heterogeneous alternatives.’⁵¹

Simon’s draws upon psychological research into ‘information processing psychology,’ which explains the process of human decision-making as involving a very selective search in the human mind based on ‘rules of thumb.’⁵² These ‘rules of thumb’ guide the search into promising regions, where solutions will generally be found, even though all possibilities may not be fully explored or imputed.⁵³ During this search process, there is much latitude for the decision maker to form a solution, which is far different from the process of searching for the ‘optimum’ solution that the rational actor model mandates.

Another important implication for the purposes of the immunity policy is that Simon believes that firms or business corporations do not act consistently with the predictions of the rational actor model. Despite the fact that one of the primary purposes of a corporation is profit-maximisation, a firm may suffer from what is called ‘organisational slack,’ which Simon claims will result in decision-making capabilities that are far from optimal.⁵⁴ This organisational slack may be the result of a magnitude of motivational and environmental variables, which ‘serves as a buffer between the environment and the firm’s decisions.’⁵⁵

Simon’s research is widely cited in numerous fields and research projects.⁵⁶ Many have come to accept that Bounded Rationality may provide a more accurate account of the process of human decision-making than the neo-classical model. This has been validated by empirical evidence.⁵⁷ For instance, Kunreuther and his colleagues conducted a qualitative study into the insurance industry, where they surveyed 2055 homeowners living in flood prone areas throughout the United States

⁵¹ Ibid.

⁵² Ibid 20.

⁵³ Ibid.

⁵⁴ Ibid 23.

⁵⁵ Ibid; See also L Bourgeois, 'On the Measurement of Organisational Slack' (1981) 6 *Academy of Management Review* 29; Richard Cyert, James March and G Clarkson, *A Behavioral Theory of the Firm* (Englewood Cliffs: Prentice Hall, 1 ed, 1963); Wen-Ting Lin, 'Organisational Slack and Firm's Internationalization' (2009) 44 *Journal of World Business* 397.

⁵⁶ According to Google Scholar, Simon’s work has been on rational decision-making and bounded rationality has been cited over 215000 times since 1975 for his major works.

⁵⁷ See, eg, Howard Kunreuther and Paul Slovic, 'Economics, Psychology and Protective Behavior' (1978) 68 *The American Economic Review* 64.

and 1006 homeowners in eighteen earthquake areas in California.⁵⁸ The aim of the study was to determine the key factors that influence the voluntary purchase of insurance against the consequences of low-probability events, such as floods or earthquakes.

The advocates of rational actor theory assume that risk-averse individuals would favour a strategy to protect them against rare catastrophic losses that they would not be able to cope with on their own, however the study indicated that 'people preferred to insure against relatively high-probability, low-loss hazards and tended to reject insurance in situations where the probability of loss was low and the potential losses were high.'⁵⁹ Kunreather attributed this to the fact that people have a 'finite reservoir of concern,' meaning that generally people do not have the time or energy to worry about low-probability hazards because if they did they would be overburdened by the number of decisions they would need to consider and this would adversely affect productive life.⁶⁰

In an attempt to overcome some of the limitations said to be inherent in the rational actor model, a new scientific method has been developed that builds upon and incorporates Simon's concept of Bounded Rationality and seeks to enhance the rational actor model. This field is known and referred to in this research as the BE Approach. No consensus has been reached regarding the definition of behavioural economics. This may be due to the fact that the task of explaining human behaviour requires attention to many intellectual disciplines including psychology, cognitive psychology, neuroscience, sociology, philosophy and marketing science. Economics is only one relevant field of research that assists in understanding human behaviour, which is a highly interdisciplinary field of inquiry.

One view of BE states that it is an approach that incorporates psychological insights into the study of economic problems, whilst another defines the concept in relation to psychological phenomena that targets the assumptions underpinning the rational choice model.⁶¹ It has also been said that humans exhibit systematic biases in

⁵⁸ Ibid 66.

⁵⁹ Ibid 67.

⁶⁰ Ibid.

⁶¹ Pete Lunn, 'Regulatory Policy and Behavioural Economics' (OECD, 2014) <<http://dx.doi.org/10.1787/9789264207851-4-en>> 9.

the way both the world and the market are perceived.⁶² Due to this lack of consensus, in lieu of providing a refined definition, this chapter will outline a number of key findings that categorise the BE approach.⁶³

Leading pioneers of this field include Amos Tversky and Daniel Kahneman who received the Nobel Prize for their work on BE. However, the seeds of the BE movement can be traced as far back as to Adam Smith's *'Theory of Moral Sentiments'*.⁶⁴ In addition to Herbert Simon's widely cited theory of Bounded Rationality, Kahneman and Tversky have developed an alternative theory to expected utility theory, called 'Prospect theory.'⁶⁵ Prospect theory states that neo-classical economics bases many of its assumptions on the fact that the individual is acutely aware of all of the options available to him at the time in which a decision needs to be made. But as the research by Kahneman & Tversky suggests, humans are not generally in a position to know of all of the options that are available to them at the time of making a decision and therefore base decisions on incomplete information.⁶⁶ In contrast, the neoclassical model is generally based on the assumption that an individual has access to complete or 'perfect' information.

The first violation of expected utility theory, or the rational actor model, that Kahneman & Tversky discuss relates to certainty, probability and possibility and indicates that people place a greater amount of weight on outcomes that are considered certain, in comparison to those outcomes that are merely probable. This they call the 'certainty effect.'⁶⁷ When asked to choose between a sure gain over a larger gain that is merely probable, the research indicates that people were more likely to choose the sure gain, and are therefore risk averse when it comes to gains. However, the opposite phenomenon is witnessed in the realm of losses, meaning that people are generally risk seeking for a loss that is merely probably over a smaller loss that is certain. This Kahneman and Tversky call the 'The Reflection Effect.'⁶⁸

⁶² Competition and Markets Authority, 'What Does Behavioural Economics Mean for Competition Policy' (UK Office of Fair Trading, 2010) 5.

⁶³ See Behavioural Economics Research – Key Findings, pg 67.

⁶⁴ Adam Smith, *Theory of Moral Sentiments* (Strand & Edinburgh, 2nd ed, 1761).

⁶⁵ This study has almost 30000 citations.

⁶⁶ Daniel Kahneman, Paul Slovic and Amos Tversky, *Judgement Under Uncertainty: Heuristics and Biases* (Cambridge University Press, 1st ed, 1982).

⁶⁷ Daniel Kahneman and Tversky Amos, 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47 *Econometrica* 263, 265.

⁶⁸ *Ibid* 269-270.

Kahneman and Tversky have developed an alternate theory to the rational actor model that posits individual decision making as a two-stage process. The first stage is the editing phase, where an individual conducts a preliminary analysis of the prospects on offer and the second is an evaluation phase, where the individual evaluates the prospects and chooses the one with the highest value.⁶⁹

Prospect theory also suggests that many prospects or decisions may be made in combination or segregation or through a process of cancellation, whereby an individual will effectively 'cancel out' prospects, such as outcome-probability pairs.⁷⁰ It is asserted that within this editing phase, the process by which the editing occurs may be different amongst different individuals, which therefore creates anomalies in choice and this could be dependent and influenced by the context in which the decision is made. These factors are also prevalent in the evaluation phase where many individuals will evaluate the value of the prospect in different ways.⁷¹

Kahneman and Tversky's findings have consistently been used to refute the assumptions that underpin the rational actor model and have been used widely as support for the BE Approach.⁷² Most notably, the Global Financial Crisis of 2008 has led many economists to question the assumption that the market is self-correcting and that humans and firms are perfect maximisers.⁷³ It is asserted that the recent crisis has raised important issues of market failure, regulation of markets, moral hazard and a lack of understanding of how markets actually operate and therefore now, more than ever, it is important to analyse how the BE Approach might help overcome the limitations of the rational actor model by asking questions about whether the neoclassical assumptions are still valid, if they ever were.⁷⁴

Richard Posner appears to have retracted some of his earlier arguments about the utility of neo-classical paradigms and has questioned some of his earlier held

⁶⁹ Ibid 274.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² See, eg, James March, 'Exploration and Exploitation in Organisational Learning' (1991) 2 *Organizational Science* 71; John Anderson, *Cognitive Psychology and Its Implications* (W H Freeman/Times Books/Henry Holt & Co, 3rd ed, 1990); Richard Thaler, 'Toward a Positive Theory of Consumer Choice' (1980) 1 *Journal of Economic Behavior & Organization* 39; Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth & Happiness* (Yale University Press, 1st ed, 2008).

⁷³ Lunn, above n 61.

⁷⁴ See eg, Maurice E Stucke, 'The Implications of Behavioural Antitrust' (The University of Tennessee College of Law - Legal Studies Research Paper Series, 2012).

beliefs about the nature of the free-market.⁷⁵ Posner has recognised the role that individual greed may have played in the global financial crisis of 2008. He criticises the economic profession as being ‘asleep at the switch’ with an overreliance on ‘mathematical models’ that blinded them to the ensuing crisis. He also acknowledges the role that institutions such as the government should have played in helping avoid market failures.⁷⁶ These positions fly in the face of his traditional Chicago neo-classical ideologies that markets are self-correcting. Gary Becker, on the other hand, has remained wedded to the rational choice model. In an interview in 2009, he argued that incorporating ‘more realistic assumptions’ about human behaviour would not have helped to avoid the global financial crisis, and will not solve the problem.⁷⁷

It is important at this stage to emphasise that the rational actor model has served, and continues to serve, an important purpose in analysing human decision-making but that this purpose is very limited, and mostly confined to simple decisions. Increasingly, however, governments, economic organisations, academics and various stakeholders around the world have begun to recognise the value of the BE Approach by starting to take account of BE findings in policy making.⁷⁸

1 *Behavioural Economics Research – Key Findings*

There is a vast array of empirical data related to the BE movement which applies to many different fields. This chapter will focus on a selection of BE research findings, specifically on those that are likely to have implications for the immunity policy, namely:

- Complex Decision-Making
- The Availability and Representativeness Heuristics
- Overconfidence Bias
- Context of Decision Making

⁷⁵ See Richard A Posner, *A Failure of Capitalism - The Crisis of '08 and the Descent into Depression* (Harvard University Press, 1st ed, 2009).

⁷⁶ Ibid.

⁷⁷ Catherine Herfeld, 'The Potentials and Limitations of Rational Choice Theory: An Interview with Gary Becker' (2012) 5 *Eramus Journal for Philosophy and Economics* 73, 75.

⁷⁸ See, eg, Productivity Commission, 'Behavioural Economics and Public Policy' (Australian Government Productivity Commission Roundtable Proceedings, 2007) 67, 131; Judith Mehta, 'Behavioural Economics in Competition and Consumer Policy' (University of East Anglia, 2013); Lunn, above n 61; Competition and Markets Authority, above n 62.

- Habit and Traditions

(a) *Complex Decision Making*

The first finding relates the complexity of a problem and its ability to affect an individual's ability to maximise their utility. This aspect of the BE Approach is closely related to Simon's notion of bounded rationality, discussed above.

Essentially, when a decision-maker is faced with a complex problem, it requires a significant amount of cognitive effort to comply with the predictions of rational choice theory; so instead, studies have shown that a decision maker will employ simplified strategies in order to minimise effort to make selections.⁷⁹ The notion that decision makers simplify complex scenarios in order to make decisions contradicts the rational actor model, as this does not necessarily maximise their utility. In particular, as choices become difficult, consumers naturally tend to defer decisions, often indefinitely.⁸⁰ For example, one study found that individuals were less likely to select a house that maximised their utility (defined by questions the subjects were earlier asked about their preferences) from among five alternatives, as the number of attributes presented to the subjects was increased beyond ten.⁸¹

If this idea is accepted, then it would seem that complexity affects an individual's ability to maximise their utility. If this concept is applied to the context of a decision maker in the process of deciding whether or not to apply for immunity, a rational actor model would predict that the decision maker would compute all the possibilities available, with the assumption that the decision maker is in fact *aware* of all of these possibilities and then will systemically undertake a cost-benefit analysis to find the solution with the greatest utility.

⁷⁹ See Charles Schwenk, 'Cognitive Simplification Processes in Strategic Decision-Making' (1984) 5 *Strategic Management Journal* 111; Irene Duhaime and Charles Schwenk, 'Conjectures on Cognitive Simplification in Acquisition and Divestment' (1985) 10 *The Academy of Management Review* 287.

⁸⁰ See S Iyengar and M Leppar, 'When Choice is Demotivating: Can One Desire Too Much of a Good Thing?' (2000) 79 *Journal of Personality and Social Psychology* 995; E Shafir, I Simonson and A Tversky, 'Reason-Based Choice' (1993) 49 *Cognition* 11.

⁸¹ Naresh K Malhotra, 'Information Load and Consumer Decision Making' (1982) 8 *Journal of Consumer Research* 419, 422-423.

However, immunity related decisions are not a straight forward exercise and the decision to apply often involves competing and complex considerations.⁸² For example, if a cartel participant is involved in an international cartel across a number of jurisdictions, then the decision to apply for immunity becomes multi-jurisdictional. Not only will an immunity applicant need to identify each jurisdiction that the cartel may have affected, but also there is no guarantee that if the applicant is successful in one jurisdiction it will be granted immunity in any other jurisdiction.

This could mean that the evidence provided by the immunity applicant in one jurisdiction where they are granted immunity could be used *against* the immunity applicant in another jurisdiction, in which the cartel participant did not seek or was not successfully granted immunity. This could also lead to a number of civil claims lodged by third parties who have also been affected by the operation of the cartel in *all* of the affected jurisdictions.⁸³ Therefore, as this example shows, the options available to the cartel participant are significantly more complex and varied than the rational actor assumptions predict.

(b) Availability and Representativeness

Representativeness refers to the situation in which probabilities are evaluated by the degree to which A is representative of B by the degree to which A resembles B.⁸⁴ An example can be derived from the research of Cornell psychologist Tom Gilovich, who in 1991 conducted research on the experience of London residents during the German bombing campaigns of World War II. When newspapers released pictures on where the bombs had landed, they evidently appeared to depict ‘clusters’ around the River Thames and also the northwest sector of the map.⁸⁵

This generated great concern among London residents who believed that this cluster pattern indicated that the Germans were able to aim their bombs with great

⁸² See Chapter V, Motivations for Seeking Immunity, pg 126; see, eg, Andreas Stephan and Ali Nikpay, 'Leniency Theory and Complex Realities' (University of East Anglia & Centre for Competition Policy - CCP Working Paper 14-8, 2014) <<http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-8.pdf/3a273397-457c-4109-8920-d79c6709774b>>.

⁸³ See Chapter VII, Confidentiality Across Borders, pg 261.

⁸⁴ Kahneman, Slovic and Tversky, above n 66, 4.

⁸⁵ Howard Kunreuther, 'The Changing Societal Consequences of Risks from Natural Hazards' (1979) 443 *The ANNALS of the American Academy of Political and Social Science* 104, 111.

precision. However, a detailed statistical analysis revealed that the distribution of the bomb strikes was indeed random.⁸⁶ Kahneman and Tversky assert that this approach to the judgment of probability can lead to serious errors, because similarity, or representativeness, is not influenced by several factors that should affect judgments of probability, according to the rational actor model.⁸⁷

The Availability Heuristic refers to the way in which people assess the likelihood of risks by asking how readily examples come to mind. The more readily these relevant examples are to the individual, they are far more likely to be concerned than if they cannot recall such examples. For instance, an individual may assess the risk of heart attack among middle aged people by recalling the number of heart attacks that have occurred in people they know.⁸⁸

Closely related to this heuristic are the concepts of Accessibility and Salience, meaning that if you have personally experienced a heart attack then you are more than likely to believe it will happen than if you saw a story on the news about a person having a heart attack, and the likelihood of this happening again would be affected by how recently the heart attack occurred. Therefore, the Availability heuristic in risk assessment can have a substantial impact on the way the public perceives and reacts to risk and taking precautions. For instance, a person is more likely to purchase flood insurance when they know someone who has experienced a flood.⁸⁹

In the context of criminal enforcement, according to the rational actor model, and the predictions of Gary Becker, criminals will maximise their utility by committing crimes only if the expected benefits exceed the expected costs. According to this theory, in order to deter crime, society must raise the expected costs above the expected benefits of the crime.⁹⁰ This is usually achieved by increasing the severity of the punishment, such as lengthening gaol terms or imposing higher monetary fines.⁹¹

⁸⁶ Thaler and Sunstein, above n 72, 28.

⁸⁷ Kahneman, Slovic and Tversky, above n 66.

⁸⁸ Ibid 11.

⁸⁹ Thaler and Sunstein, above n 72, 25.

⁹⁰ Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100 *Journal of Criminal Law & Criminology* 765, 766.

⁹¹ See, eg, Christopher Harding, 'Cartel Deterrence: The Search for Evidence and Argument' (2011) 56 *The Antitrust Bulletin* 345.

However, if the Availability heuristic is applied, when calculating the anticipated costs of crime, the types of events that are more salient to these potential criminals could significantly impact the analysis conducted by these criminals.⁹² Therefore, in order to determine which deterrence mechanism will be the most effective, it must be understood whether the criminals are likely to over or underestimate the frequency and the severity of punishment that is actually imposed.

In Australia, there is yet to be a criminal cartel case but the potential gaol sentence for cartel conduct is a maximum of 10 years.⁹³ Therefore, at least at the time of writing, cartel participants are likely to *underestimate* the severity of punishment, due to the lack of criminal prosecutions in Australia. The situation could be much different in the United States, where individual imprisonment sentences have been increasing over the past decade, and along with it, the *length* of the gaol sentences.⁹⁴

Because the *severity* of the punishment for cartel conduct is not yet a significant factor in Australia, at least for criminal cartel activity, increasing the frequency of punishment is likely to be more effective, ‘under the assumption that if a criminal knows or knows of someone who has been imprisoned for a particular crime, this information is likely to be available and to cause him to overestimate the likelihood that he will be arrested and convicted if he commits the same crime.’⁹⁵ As mentioned, this cannot yet be assessed in Australia, but in the civil context at least, increasing the frequency of punishment, ie the number of cartels that are discovered and prosecuted is likely to cause potential cartel participants to overestimate the likelihood that they will be detected and held liable.

However, the discovery of cartels rests very heavily on the use of the immunity policy; hence the perception of the immunity policy and its use is likely to have a significant bearing on a potential cartel participant’s estimation of the likelihood of conviction. This consideration becomes even more critical when there is speculation that the authorities are placing too much reliance on the immunity policy as its sole source of cartel detection. That could suggest to potential cartel

⁹² Korobkin and Ulen, above n 2, 1068.

⁹³ *Competition and Consumer Act 2010* (Cth) Part IV.

⁹⁴ Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law Policy and Practice in an International Context* (Cambridge University Press, 1 ed, 2011) 507.

⁹⁵ Korobkin and Ulen, above n 2, 1068.

participants that if you do not come forward on your own accord, then there is a strong likelihood that the cartel will not be detected at all.⁹⁶

(c) *Over Confidence Bias*

Even when people may be aware of the actual probability distribution of a particular event occurring, their predictions as to the likelihood of that particular event happening to them are subject to what is called ‘Over Confidence’ bias. This encompasses the belief that good things are more than average likely to happen to us and consequently, bad things are less likely than average to happen to us.⁹⁷

Related to the Over Confidence bias is the ‘confirmatory’ or ‘self-serving’ bias; the term used to describe the observation that actors often interpret information in ways that serve their interests or preconceived notions.⁹⁸ For instance, studies have shown that within the corporate context, managers exhibit ‘undue confidence in their firms’ ability to overcome obstacles and a self-serving perception of information that might objectively signal future problems’ which could potentially mislead those who would invest in their firms’ securities.⁹⁹

In applying this research to the position of a cartel participant, it is likely that an individual involved in a cartel will exhibit Over Confidence bias in relation to the success or predicted success of the operation of the cartel, and therefore this would adversely affect their decision to apply for immunity. Closely related to this argument is the prospect that even if a cartel member is aware that other cartels have failed, the Over Confidence bias will lead them to believe that the cartel they are involved in will not fail. This is also supported by evidence that many cartel

⁹⁶ Megan Dixon, Ethan Kate and Janet McDavid, 'Too Much of a Good Thing?: Is Heavy Reliance on Leniency Eroding Cartel Enforcement in the United States?', 2014 <<https://www.competitionpolicyinternational.com/too-much-of-a-good-thing-is-heavy-reliance-on-leniency-eroding-cartel-enforcement-in-the-united-states/>>; OECD, 'Ex officio Cartel Investigations and the Use of Screens to Detect Cartels' (Organisation for Economic Cooperation and Development, 2013) 5; Stephan and Nikpay, above n 82, 13.

⁹⁷ See generally Christine Jolls, 'Behavioral Economic Analysis of Redistributive Legal Rules' (1998) 51 *Vanderbilt Law Review* 1653.

⁹⁸ Korobkin and Ulen, above n 2, 1055.

⁹⁹ *Ibid* 1056.

members do not apply for immunity unless the cartel has already failed.¹⁰⁰ Although it has been acknowledged by those conducting the studies of BE that the Over Confidence bias is not a universal phenomenon, it is argued that the bias is prevalent, often massive and difficult to eliminate. This is particularly challenging because confidence controls action.¹⁰¹

(d) *Context of Decision Making*

As discussed previously,¹⁰² advocates of the rational actor model base their assumptions on a decision-maker maximising their utility in a lacuna, devoid of any context that may affect their decisions. In contrast, BE studies acknowledge that decisions are often inextricably bound to the context in which they are made, and can affect the decision that the decision-maker ultimately makes.¹⁰³

One of the most important findings to emerge from the BE Approach relates to the way in which individuals view gains and losses. These concepts fall within the category of ‘Framing’ and ‘Reference Points.’ As mentioned previously, the studies conducted by Kahneman & Tversky have shown that when a decision is framed in terms of ‘losses’ then an individual is more likely to exhibit ‘risk seeking’ behaviour, whilst if a decision is framed in terms of ‘gains’ then an individual is more likely to be ‘risk averse.’¹⁰⁴

Applying these findings to the immunity policy, it would seem that the way in which the immunity decision is framed is crucial in influencing decision-making behaviour. If the decision to apply for immunity is seen as a ‘gains’ decision, presumably in the form that the applicant will ‘gain’ immunity and thus are not prosecuted, then cartel participants are likely to be risk-averse, meaning that they are more likely to decide to apply for immunity than risk being exposed and prosecuted. However, if the decision to apply for immunity is seen as ‘loss,’ due to the possibility

¹⁰⁰ See, eg, Andreas Stephan, 'An Empirical Assessment of the European Leniency Notice' (2009) 5 *Journal of Competition Law and Economics* 537; Office of Fair Trading, 'The Impact of Competition Interventions on Compliance and Deterrence' (Office of Fair Trading, 2011) 36.

¹⁰¹ Dale Griffin and Amos Tversky, 'The Weighing of Evidence and the Determinants of Confidence' (1992) 24 *Cognitive Psychology* 411, 432.

¹⁰² See Chapter II, A Theoretical Breakdown of the Immunity Policy, pg 47.

¹⁰³ Kahneman, Slovic and Tversky, above n 66, 545-547.

¹⁰⁴ A Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 *Science* 453, 453.

of diminished cartel profits or potential civil or criminal liability, including possible follow-on damages actions, then the immunity applicant is more likely to exhibit ‘risk-seeking’ behaviour. It has been argued by some commentators, such as Jeffry Rachlinski, that plaintiffs are likely to perceive litigation options as ‘gains’ since they stand to receive money, whereas defendants are likely to perceive their options as ‘losses.’¹⁰⁵

Therefore, it is possible that cartel participants are likely to view the decision to apply for immunity as a loss decision, which is likely to make them more risk-seeking, ie ‘take their chances.’ This finding contradicts the rational actor model, which would predict a decision maker’s decision as being independent of the framing and reference effects propounded by the BE Approach.

Studies have shown that mood and emotion can also affect individual decision-making. According to Schwarz, our feelings ‘may influence which information comes to mind and is considered in forming a judgment, or serve as a source of information in their own right.’¹⁰⁶ The impact that thoughts, feelings or moods can have on human decision-making is yet another consideration that is absent from the rational actor model. As mood can change the way an individual processes information, either positively or negatively, it can be argued that a cartel participant seeking immunity, is likely to not be acting within the assumptions of rational actor theory, and this could significantly impair their capacity to make a decision that maximises their utility.¹⁰⁷

(e) Habits & Traditions

According to the predictions of rational choice theory, individual decision-makers base their decisions on a complete set of information, which is independent of behaviours, meaning that it is based on the assumption that the way an individual has acted in the past will not affect their current preference structure.¹⁰⁸ However, BE advocates argue against this and claim that the way an actor has performed in a

¹⁰⁵ Korobkin and Ulen, above n 2, 1105.

¹⁰⁶ Kahneman, Slovic and Tversky, above n 66, 546.

¹⁰⁷ For empirical support for this, see Chapter V, Motivations for Seeking Immunity, pg 126.

¹⁰⁸ Korobkin and Ulen, above n 2, 1112.

certain way in the past can increase the likelihood that they will act in a similar way in the future.

This is most effectively illustrated by the notion of ‘sunk costs’ and how it affects an individual’s decision-making process, despite the fact that it does not accord with the rational actor model. Many BE studies have shown how people regularly cite ‘sunk costs’ as a reason that they are pursuing a certain type of action, for instance in the decision to undertake an activity that they would prefer not to, on the basis that they had already bought a ticket to the particular sporting event or theatrical performance.¹⁰⁹ In the context of a cartel, it is obvious that a cartel participant would have ‘sunk’ time, energy and presumably capital (at least at the outset) throughout the duration of the cartel and this could be another relevant factor in determining whether or not to seek immunity and potentially affect their willingness to give up on the cartel.

In addition, the ‘power of tradition’ is cited as having a powerful effect on human decision-making.¹¹⁰ The concept is derived from the notion that the utility individuals gain from conforming to a shared family, group or community practice, can outweigh the inherent value of the behaviour.¹¹¹ In the context of cartels, there is the existence of group behaviour or mentality that is more likely to influence the decision making process, such as the decision to join a cartel, remain in a cartel or apply for immunity. According to behavioural economists, habits, traditions and addictions are much more difficult to manipulate than the rational actor model predicts.

This would help to explain scenarios where people engage in forms of self-blackmail, such as writing incriminating letters that may be sent in the event that something happens, in order to force them to make a particular decision and stick with it. This could explain why cartel participants tend to keep pieces of incriminating evidence of the cartels operation – almost like leverage or blackmail to

¹⁰⁹ See H Arkes and C Blumer, 'The Psychology of Sunk Cost' (1985) 35 *Organizational Behavior and Human Decision Processes* 124; J Brockner and J Rubin, *Entrapment in Escalating Conflicts: A Social Psychological Analysis*. (Springer-Verlag, 1st ed, 1985); H Garland and S Newport, 'Effects of Absolute and Relative Sunk Costs on the Decision to Persist with a Course of Action' (1991) 48 *Organizational Behavior and Human Decision Processes* 55; H Garland, 'Throwing Good Money After Bad: The Effect of Sunk Costs on the Decision to Escalate Commitment to an Ongoing Project' (1990) 75 *Journal of Applied Psychology* 728.

¹¹⁰ Kahneman, Slovic and Tversky, above n 66, 546-547.

¹¹¹ Korobkin and Ulen, above n 2, 1114.

ensure compliance- that cannot otherwise be explained by rational choice theorists.¹¹²

2 Implications Of BE Research Findings

The selected BE findings discussed above have a significant bearing on the way the immunity policy is intended to operate, and does in fact, operate. These empirical results have been replicated in multiple contexts using different subjects to produce a convincing body of evidence. The BE Approach should therefore be seriously considered by the ACCC and competition authorities worldwide to reassess common assumptions of the immunity policy's operation. As this chapter has shown, there are many circumstances where individuals are unlikely to act in accordance with the rational actor model on which the policy is currently based.

There is a growing recognition of the significance of the BE Approach and particularly how it will help shape competition policy in the future. Calls for recognition of the BE Approach have been made by influential figures, such as the Former Head of the United States Fair Trade Commission, William Kovacic; members of the Competition and Markets Authority in the United Kingdom, and various commentators including Maurice Stucke, Cass Sunstein & Richard Thaler.¹¹³ Recently, a report published by the OECD¹¹⁴ recognised the utility of the BE Approach. Behavioural principles have been used in the design of the *Credit Card Accountability Responsibility and Disclosure (CARD) Act*,¹¹⁵ which was signed into United States law by President Obama in May 2009 and was targeted at regulating credit cards; the *Affordable Care Act*,¹¹⁶ which reformed United States health care; a number of 'MyData' initiatives that seek to supply consumers with information to help inform their decisions; the promotion of behaviourally informed occupational pension schemes and the replacement of the Food and Drug Administration's 'food pyramid'

¹¹² Aubert, Rey and Kovacic, above n 18, 1246.

¹¹³ See, eg, William E Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from U.S Experience' in Caron & Ariel Beaton-Wells & Ezrachi (ed), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 45; Competition and Markets Authority, above n 62; Stucke, above n 74; Thaler and Sunstein, above n 72.

¹¹⁴ This report does not necessarily reflect the views of the OECD: Lunn, above n 61.

¹¹⁵ *Credit Card Accountability Responsibility and Disclosure Act of 2009*, Pub. L. No. 111-24, 123 Stat. 1743 (2009).

¹¹⁶ *Patient Protection and Affordable Care Act*, 42 U.S.C. § 18001 (2010).

for communicating nutritional balance with a simple ‘food plate.’¹¹⁷

A report issued by the former United Kingdom Office of Fair Trading in 2010 detailed a number of instances where behavioural findings have had an important impact on competition policy.¹¹⁸ The report recognised both the significance and limitations of implementing these findings into anti-cartel enforcement policy.¹¹⁹ The report did not discuss the impact that BE findings may have on the United Kingdom leniency policy but concluded that the BE movement can impact on the way the market behaviour is perceived. It noted that BE findings may not represent the fundamental shift in economic thinking that some advocates assert it to be, but recognised that the BE movement ‘is an incremental advance in our understanding.’¹²⁰

The recognition of the behavioural findings and their significance for antitrust was mirrored by the remarks of J. Thomas Rosch, as the Commissioner of the United States Federal Trade Commission in 2010.¹²¹ These comments recognise that our reliance on neo-classical assumptions of rationality as the basis for antitrust enforcement, ‘may be costing us too much in the form of aggressive antitrust law enforcement.’¹²²

The BE Approach thus has a strong foothold in policymaking around the world, and this influence continues to grow.¹²³ However, the approach is limited in its ability to provide established principles in which the effectiveness of the immunity policy can be assessed, which is exemplified in many of the criticisms directed at the BE Approach. We now turn to these criticisms.

¹¹⁷ Lunn, above n 61, 27.

¹¹⁸ Competition and Markets Authority, above n 62.

¹¹⁹ Ibid.

¹²⁰ Ibid 40.

¹²¹ J. Thomas Rosch, 'Behavioral Economics: Observations Regarding Issues that Lie Ahead' (Federal Trade Commission - Vienna Competition Conference, 2010).

¹²² Ibid 9.

¹²³ See, eg, Andrew Reeson and Simon Dunstall, 'Behavioural Economics and Complex Decision-Making - Implications for the Australian Tax and Transfer System' (CSIRO, 2009); Australian Securities & Investment Commission, *ASIC Increasing Use of Behavioural Economics Across its Regulatory Business* (18 March 2015) ASIC <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-059mr-asic-increasing-use-of-behavioural-economics-across-its-regulatory-business/>>; Department of Finance and Deregulation, 'Influencing Consumer Behaviour: Improving Regulatory Design Research Design' (Australian Government - Department of the Prime Minister and Cabinet, 2012); Maurice E Stucke, 'Behavioral Economists at the Gate: Antitrust in the 21st Century' (2007) 38 *Loyola University Chicago Law Review* 513.

3 *Criticisms of the Behavioural Economics Approach*

The prime criticism of the BE Approach is that, in contrast to the rational actor model, there is no unified theory of BE findings that can help policymakers formulate policy in any predictable or potentially useful way.¹²⁴ These criticisms stem from the assertion that the increasing proliferation of BE findings have led to an inconclusive and broadly inconsistent model of human behaviour, and that even if some of the findings hold true, these are not sufficient to constitute an alternate theory of human behaviour.¹²⁵ These criticisms have some force as the BE findings are much more complex and diverse than the simple assumption that underpins the rational actor theory (that humans are profit maximisers of their utility). The BE Approach claims ‘to greater realism in their behavioural models and more accuracy in their behavioural predictions will be empirically dubious and incomplete at best and empirically false and misleading at worst.’¹²⁶ In this way, the BE Approach does not proscribe where their predictions will occur and where they will not¹²⁷ and thus fails to offer any clear policy implications for competition law.¹²⁸

However, as mentioned previously, this has not stopped policymakers around the world from heeding the B.E findings to varying degrees when formulating policy. The reason that a universal theory of human behaviour has not yet been formulated is likely to be attributed to the fact that human behaviour *is inherently complex*; a fact that tends to be overlooked by many rational actor proponents. It may be that such an alternate theory may never be developed. This is not a sufficient reason to disregard the BE Approach, particularly when these findings have consistently refuted the basic assumptions underpinning the rational actor model.

Secondly, critics of the BE Approach argue that the behaviour of individuals varies widely, depending on particular differences in education, training, cognitive capacity, sex and cultural background, and thus these cognitive biases do not affect

¹²⁴ See, eg, Joshua Wright and Judd. E Stone II, 'Misbehavioral Economics: The Case Against Behavioral Antitrust' (2012) 33 *Cardozo Law Review* 1517, 1522; Amanda Reeves and Maurice E Stucke, 'Behavioral Antitrust' (2011) 86 *Indiana Law Journal* 1527, 1543.

¹²⁵ Avishalom Tor, 'Understanding Behavioral Antitrust' (2013) 92 *Texas Law Review* 573, 608.

¹²⁶ Gregory Mitchell, 'Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence' (2002) 91 *Georgetown Law Journal* 67, 122.

¹²⁷ Wright and Stone II, above n 124, 1534.

¹²⁸ *Ibid* 1526.

humans consistently.¹²⁹ This criticism is directed at the fact that BE theorists fail to comprehend that human behaviour is neither constant nor uniform ‘but rather variable and heterogeneous’ and relies on an assumption of a set of deviations from the rational actor model that does not exist.¹³⁰ Furthermore, it is contended that the incorporation of the BE Approach will add to the complexity of policy regulation as ‘the state of the literature is such that there appears to be too many ways in which consumers stray from the rational actor model, often in ways that conflict with each other.’¹³¹

The fallacy in this argument is that it assumes that the BE approach attempts to provide a ‘meaningful overall characterisation of the quality of human judgment which is neither possible nor sought after.’¹³² This is not to say that this approach is the only credible view of human decision making capabilities but it is one that provides a more accurate reflection of reality and presently can play a role in certain fact specific contexts, such as merger review.¹³³ This criticism of the BE approach is thus unpersuasive.

However, these claims have been disputed by many economists and proponents of the rational actor model, who assert that the BE findings are equally empirically flawed as those conducted by economists employing the rational actor assumption.¹³⁴ In this respect, the proponents of the rational actor model assert that the BE findings are conducted using similar methods and therefore BE advocates cannot criticise them on this basis.¹³⁵ Moreover, there are claims that the BE findings are a product of misleading questions where people believe that they are giving the right answer to a different question than the one the experimenter believes they are answering.¹³⁶ Critics of the BE Approach thus claim that the findings of BE are as unreliable and inconsistent with human decision making as the rational actor model.

¹²⁹ Mitchell, above n 126, 83.

¹³⁰ Tor, above n 125, 579.

¹³¹ Productivity Commission, above n 78, 89.

¹³² Gilovich, Griffin and Kahneman, above n 46, 9.

¹³³ Amanda Reeves, 'Behavioral Antitrust: Unanswered Questions on the Horizon' (2010) *The Antitrust Source* 14.

¹³⁴ Reeves and Stucke, above n 124, 1538-1539. See also Richard A Posner, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 *Stanford Law Review* 1551, 1566; Mitchell, above n 126, 114-119.

¹³⁵ Some have argued that the approach is less useful than a Post-Chicago analysis: Wright and Stone II, above n 124, 1551.

¹³⁶ Gilovich, Griffin and Kahneman, above n 46, 11.

These criticisms have not been accepted by those who endorse the BE Approach who respond that their findings have been consistently replicated in real-life situations and are thus more accurate than the generalised assumptions underpinning the rational actor model.¹³⁷ For example, much BE research is based on actual market transactions, including field experiments and data.¹³⁸

A more credible criticism relates to the way that the BE findings are currently published, as there is no established means of careful peer review nor are the BE findings subject to a well-recognised standard of measurement, such as the psychological standard.¹³⁹ On this basis, it is difficult to investigate and assess the credibility of each of the BE findings as they continue to emerge. Like any new area of research, there is a need for each new finding to be carefully reviewed, and the BE approach is no exception. The reason that this chapter focuses on the findings that are well known and generally accepted is to help overcome these credibility issues. The way in which the BE research should be standardised is beyond the scope of this thesis, but it is nevertheless important that any research in its infancy is approached carefully.

A third criticism is that even if behaviour appears to be irrational facially, more often than not, there is a rational explanation for the behaviour.¹⁴⁰ Christopher Leslie gives the example of predatory pricing in the market to show that behaviour that would seemingly appear irrational may be in fact directed towards a more rational long-term business strategy.¹⁴¹ Where one firm engages in dangerous predatory pricing, it is not necessarily because the firm wants to, but by acting irrationally, that firm may be able to drive out the other competitors in the monopoly, in a similar way to the game of 'chicken.'¹⁴² Leslie provides many other examples that illustrate this point.¹⁴³

¹³⁷ See, eg, Reeves and Stucke, above n 124, 1539.

¹³⁸ Stefano DellaVigna, 'Psychology and Economics: Evidence from the Field' (2009) 47 *Journal of Economic Literature* 315, 320- 365.

¹³⁹ Mitchell, above n 126, 125.

¹⁴⁰ See, eg, Amital Etzioni, 'Behavioural Economics: Toward a New Paradigm' (2011) 55 *American Behavioral Scientist* 1099, 1104; R Andreano and J Suiegfried, *The Economics of Crime* (John Wiley, 1980); Becker, above n X; Charles Murray, *Losing Ground: American Social Policy 1950-1980* (BasicBooks, 1st ed, 1984).

¹⁴¹ Christopher R Leslie, 'Rationality Analysis in Antitrust' (2010) 158 *University of Pennsylvania Law Review* 261, 295-297.

¹⁴² *Ibid* 296.

¹⁴³ *Ibid* 273.

For those who endorse the BE approach, Leslie's argument may be true for some aspects of human behaviour, but it does not justify the general assertion that all irrational behaviour is rational. Leslie in many ways contradicts himself by calling upon some of the findings from the BE approach to justify the rational actor model. He speaks of judicial bias as having a significant bearing on the way that rationality is constructed.¹⁴⁴ Unbewittingly, it seems, he is trying to explain that irrational behaviour is rational by drawing upon concepts of the BE approach.

Another criticism directed at the BE approach is that it acts as a restriction on individual liberty and is paternalistic in nature.¹⁴⁵ This aspect has been extensively debated and discussed in forums such as the OECD¹⁴⁶ and the Australian Productivity Report into behavioural economics and policy,¹⁴⁷ which centres upon the issue of the potential negative impacts of incorporating BE findings into policy.

Liberty is one of the key values in our society as 'the capacity to live one's life in an autonomous way is one of the most central of all social values in modern, democratic societies.'¹⁴⁸ The concepts of liberty and autonomy rest on the notion that everyone in our society is free to make their own choices, and to also make their own mistakes, and to learn from them. Paternalism, particularly in its most extreme form, poses a direct threat to our notions of liberty and autonomy of decision-making through State intervention into individual choices, oft referred to as the 'Nanny State.'¹⁴⁹

It is claimed that by incorporating BE findings into policy-making, particularly consumer policy, which directly influences individual decision-making, the state is removing the autonomy of individuals, and in most cases, without their awareness or consent.¹⁵⁰ If it is accepted that liberty and autonomy of the individual is an important value of our democratic society, then any infringement of this value should be treated very carefully.

¹⁴⁴ Ibid 307-317.

¹⁴⁵ See, eg, Joshua Wright and Douglas Ginsburg, 'Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty' (2012) 106 *Northwestern University Law Review* 1033, 1070.

¹⁴⁶ See, eg, Lunn, above n 61, OECD, *Behavioural Economics* OECD

<<http://www.oecd.org/gov/regulatory-policy/behavioural-economics.htm>>.

¹⁴⁷ See Productivity Commission, above n 78.

¹⁴⁸ Ibid 99.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 100.

One of the most prominent responses to this criticism has been the development of the theory of ‘Nudge’ by Richard Thaler and Cass Sunstein.¹⁵¹ This approach seeks to influence the choices of individuals without constraining these choices. The acronym NUDGE stands for the following:

- iNcentives – does not at any point try to discredit supply and demand theory of traditional economic theory – looks at key questions such as: Who uses? Who chooses? Who pays? Who profits?
- Understand mappings – ‘A good system of choice architecture helps people to improve their ability to map and hence to select options that will make them better off.’
- Defaults – based on the premise that humans will often chose the path of least resistance¹⁵²
- Give feedback – ‘the best way to help Humans improve their performance is to provide feedback.’ Examples include warning labels etc
- Expect error – humans are susceptible to making errors.
- Structure complex choices – ‘People adopt different strategies for making choices depending on the size and complexity of the available options.’

Sustein and Thaler dub this form of policy making as ‘libertarian paternalism,’ which strikes at the core of the assumptions that underpin classical economic theory that people always make decisions in their best interest.¹⁵³ They argue that in most forms of policymaking, paternalism is unavoidable and as long as it is libertarian paternalistic, then individuals still have the freedom of choice in decision making and this is therefore acceptable.

As a theory in its infancy, the BE approach does provide useful insights into human decision-making in an attempt to more accurately reflect a model of human behaviour. The theory is subject to wide criticism and debate, despite its foothold in policy-making circles around the world. One view is that the approach relies on outdated psychological testing that was appropriate for the time in which it was

¹⁵¹ See Thaler and Sunstein, above n 72; Richard Thaler and Cass Sunstein, 'Libertarian Paternalism' (2003) 93 *The American Economic Review* 175.

¹⁵² Thaler and Sunstein, above n 72, 87.

¹⁵³ See Thaler and Sunstein, above n 151.

developed, yet it does not account for the significant developments in neurological science that have occurred since the 1980s.¹⁵⁴

Professor Jones advocates for a convergence of fields to broaden and enrich the BE analysis, such as the incorporation of research involving disciplines such as evolutionary biology that will ‘blend the many virtues of BE with virtues of other disciplines.’¹⁵⁵ There are others who also recognise the value of the BE approach but remain cautious of the way it should be incorporated into public policy and adopt the view that the BE approach should ‘supplement not substitute’ the existing rationality model, given its current limitations.¹⁵⁶

As this section has demonstrated, there is much further development needed within the BE approach in order for it to provide a cogent model or set of criteria that can be used in policy making. This research is beyond the scope of this thesis. Instead, what can be gained from this discussion is the recognition of the flaws inherent within the rational actor model. Whilst no alternative theory exists to replace this theory, the focus must be on supplementing and enhancing the existing model. The next part will outline a model that attempts to achieve this within the context of the immunity policy.

C *A New Approach to Assessing Cartel Immunity*

This chapter has demonstrated that the neo-classical rational actor model is limited in its ability to predict human behaviour. There have been a number of alternative theoretical developments, most notably the BE Approach, which seek to overcome these limitations. Whilst some of the main findings of the BE Approach potentially impact the immunity policy’s operation, the most significant limitation with this approach is that it does not provide an overarching theory or a cogent set of criteria that can be used to assess the policy. As demonstrated in Chapter II,¹⁵⁷ the immunity policy was designed within the neo-classical framework as part of the DOJ’s anti-cartel enforcement agenda. The criterion most commonly used to assess the policy’s

¹⁵⁴ Owen Jones, 'Why Behavioral Economics Isn't Better, and How it Could Be' (Vanderbilt Law School - Law & Economics Working Paper Number 14-30 - Public Law & Legal Theory Working Paper Number 14-32, 2014) 22.

¹⁵⁵ *Ibid* 24.

¹⁵⁶ Tor, above n 125, 88.

¹⁵⁷ See Chapter II, *The Birth of the Immunity Policy*, pg 34.

‘effectiveness’ was also designed by the DOJ using this classical deterrence framework.¹⁵⁸ According to the former Director of Criminal Enforcement at the DOJ, Scott Hammond, the three ‘cornerstones’ of an effective immunity policy are:

1. Threat of Severe Sanctions
2. High Risk of Detection
3. Transparency and Predictability of Enforcement

1 *Threat of Severe Sanctions*

It has been accepted in a number of jurisdictions that the threat of criminal sanctions provides the most effective deterrence of serious cartel conduct, making the incentive to apply for immunity even greater.¹⁵⁹ These assumptions are based on the classical deterrence theory that presumes that the ‘rational actor’ will be deterred from committing crimes when the risk of detection is high and the sanctions are severe.¹⁶⁰ According to Hammond, the threat of severe sanctions is premised on two considerations:

- (a) The perceived risks must outweigh the potential rewards: In a simple cost-benefit analysis, the perceived benefits must outweigh the perceived costs.
- (b) Criminal sanctions provide the greatest inducement to cooperation: The DOJ believes that the threat of criminal sanctions is the greatest threat to an individual and this is the primary reason that many companies will not engage in cartel conduct in the United States.¹⁶¹

2 *High Risk of Detection*

According to Hammond, a high risk of detection from regulatory enforcement

¹⁵⁸ See, Scott D Hammond, 'Cornerstones of an Effective Leniency Program ' (Department of Justice, 2004).

¹⁵⁹ This is primarily illustrated through the implementation of criminal penalties for cartel conduct in for example Australia, Canada, the United Kingdom, the United States: see, eg, Clarke, above n 17.

¹⁶⁰ See, eg, Harding, above n 91.

¹⁶¹ Hammond, above n 158, 7-9.

agencies is another crucial element of a successful immunity regime and it is important that sufficient resources are allocated to these agencies to assist in achieving this end.¹⁶² Without a high risk of detection, cartel members will not be inclined to come forward to report their misconduct in exchange for immunity. In order to induce cartel participants to come forward, Hammond states that there is a need to create a culture that condemns white-collar crime. He also believes it is necessary to introduce individual immunity to create distrust between corporations and their employees. Additionally, regulatory agencies must be given robust investigatory powers to ensure that there is a real perceived risk of action being taken by the authorities for those who engage in cartel conduct.¹⁶³

3 *Transparency and Predictability in Enforcement*

The third hallmark of an effective immunity program, according to Hammond, is transparency and predictability. An immunity applicant needs to be able to assess, with a sufficient level of certainty, that their application will be successful. To achieve this, the DOJ has published its standards and policies in relation to leniency and also provides an explanation as to how the DOJ will exercise its prosecutorial discretion in its application of these standards and policies:

The Division has sought to provide transparency in the following enforcement areas: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements; (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Leniency Program.¹⁶⁴

The DOJ has also published a number of model conditional immunity templates that are publicly available for potential applicants to review.¹⁶⁵ Hammond believes that the sacrifice of prosecutorial discretion through the granting of upfront

¹⁶² Ibid 9-10.

¹⁶³ Ibid 12.

¹⁶⁴ Ibid 19.

¹⁶⁵ Department of Justice, 'Model Corporate Conditional Leniency Letter' (Department of Justice - Antitrust Division, 2008) <<http://www.justice.gov/atr/public/criminal/239524.htm>>; Department of Justice, 'Model Individual Conditional Leniency Letter' (Department of Justice - Antitrust Division, 2008) <<http://www.justice.gov/atr/public/criminal/239526.htm>>.

immunity is necessary to create the high level of certainty necessary for potential applicants to come forward.¹⁶⁶

The above three criteria have been widely endorsed in the competition community as the primary method to assess the effectiveness of an Immunity Policy.¹⁶⁷ It is clear that these criteria are premised on the neo-classical assumptions that humans are rational actors, based on classical deterrence theory. They are based on the rational actor model, which has been shown in this chapter to be severely limited in its ability to predict human behaviour. By employing the rational actor model to assess the effectiveness of the Immunity Policy, the policy is viewed in a vacuum, isolated from the wider enforcement context in which it operates, including its interactions or impact on other areas of the law.¹⁶⁸

Professor Caron Beaton-Wells recognises the limitations of the current effectiveness criteria to assess cartel immunity.¹⁶⁹ Beaton-Wells points to recent figures released by the ACCC that indicate that the initial signs of the introduction of criminal sanctions for cartel conduct appear to contradict the impact that severe sanctions would have on immunity applications.¹⁷⁰ In fact, Beaton-Wells states that the introduction of criminal sanctions may have had the opposite effect than the ACCC intended, with a reduction in the overall number of immunity applications.¹⁷¹ This could be attributed to a number of factors, such as the newly forged relationship between the ACCC and the CDPP, where the processing of immunity applications in a bifurcated system may not be as timely and consistent as initially anticipated.¹⁷²

¹⁶⁶ Hammond, above n 158, 5.

¹⁶⁷ See, eg, OECD, 'Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes' (Organisation for Economic Cooperation and Development, 2002); OECD, 'Leniency for Subsequent Applicants' (Organisation for Economic Cooperation and Development- Working Party No.3 on Cooperation and Enforcement, 2012); International Competition Network, 'Anti-Cartel Enforcement Manual: Chapter 2: Drafting and Implementing an Effective Leniency Policy' (International Competition Network, May 2009)X; International Competition Network, 'Anti-Cartel Enforcement Manual: Compilation of "Good Practices" from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group' (International Competition Network, 2011); European Competition Network, 'ECN Model Leniency Programme' (European Competition Network, 2012).

¹⁶⁸ Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126, 153.

¹⁶⁹ See Caron Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171; Beaton-Wells, above n 168.

¹⁷⁰ Beaton-Wells, above n 168, 10-11.

¹⁷¹ *Ibid* 12.

¹⁷² *Ibid*; For a detailed analysis of the issues in relation to the relationship of the ACCC and CDPP, see Chapter VI, The Relationship between the ACCC and the CDPP, pg 194.

Despite these factors, the decline in overall immunity applications directly contrasts with the predictions of the rational actor model.

In relation to the ‘fear of detection’ criterion, Beaton-Wells outlines empirical work that suggests that fear of detection is not necessarily a highly material factor in seeking immunity.¹⁷³ In this vein, she suggests that corporate culture and the flow-on effects of immunity applications made overseas in respect of conduct potentially affecting Australian markets may be factors that lead to applications, as opposed to simply a fear of detection.¹⁷⁴

Finally, Beaton-Wells states that the ACCC and immunity practitioners do not perceive the abdication of prosecutorial discretion as beneficial. This is particularly in the case of determining the penalty for ‘second-in’ immunity applicants, where the ‘ACCC relies heavily on the non-transparent, highly discretionary nature of the (Cooperation Policy) to provide cooperating parties that are ineligible under the AIPCC with the same degree of immunity as is available under that policy.’¹⁷⁵

In light of her analysis, Beaton-Wells suggests that the current criteria employed to assess the effectiveness of the immunity policy are of limited utility in real-world application. She suggests there is a more nuanced, qualitative approach needed to assess how such policies work in practice in specific jurisdictions. This is reflected most notably in the context of private cartel enforcement, where the ACCC’s focus is primarily on the threat that disclosure might pose to future immunity applications, rather than on providing any opportunity to facilitate redress for cartel victims.¹⁷⁶

Beaton-Wells analysis has two important implications: the first relates to the recognition that the immunity policy operates within a wider administrative and enforcement context than the current criterion accounts for. Therefore, the DOJ effectiveness criterion needs to be extended to accommodate the limitations of the neo-classical model and assess it according to wider public policy principles. The second implication relates to the method employed to assess these criteria and how the adoption of a qualitative empirical approach can help produce more nuanced

¹⁷³ Ibid 165-166

¹⁷⁴ Ibid 166.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid 168. See also Chapter VII, The Role of Private and Public Enforcement – Confidentiality and Third Parties, pg 230.

understandings of the operation of the immunity policy, then purely quantitative or numerical studies.¹⁷⁷

As a result, the current criteria used to assess the effectiveness of the immunity policy need further development. Therefore, in accordance with wider public policy principles, the current criteria would be extended to include an assessment of the following factors in relation to the immunity policy:

- Threat of sanctions
- Fear of detection
- Transparency
- Accountability
- Consistency
- Proportionality

This section will briefly outline the meaning of each criterion with the aim of formulating key questions that can be used to assess the immunity policy. The first three of these criteria have been described above as they form the DOJ's criteria most commonly used to assess the policy's effectiveness. The purpose of this section is to introduce the most important considerations related to each of the criteria rather than to provide an extensive historical analysis of each of the terms. The above criteria were chosen because of their extensive use in many areas of the law to assess policy, including criminal law, constitutional law, administrative law and international law.¹⁷⁸ Similar criteria are often used by law reform bodies, such as the Australian Law Reform Commission, to guide their assessment of a particular area of the law and to establish standards that can be measured.¹⁷⁹ A number of these

¹⁷⁷ For an outline of the methodology employed in this study, see: Chapter IV, Research Design, pg 100.

¹⁷⁸ See eg, OECD, 'APEC-OECD Integrated Checklist on Regulatory Reform' (Organisation for Economic Cooperation and Development, 2005) <<http://www.oecd.org/regreform/34989455.pdf>>; Attorney's General Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Australian Government, 2009); Commonwealth Ombudsman, 'Better Practice Guide to Complaint Handling' (Commonwealth Ombudsman, 2009); Constitutional Law Book; Joanne Bird, 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 739, 759; Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' (Commonwealth of Australia, 1995) <<http://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf>>; Attorney-General's Department, 'Australian Administrative Law Policy Guide' (Australian Government, 2012).

¹⁷⁹ Australian Law Reform Commission, 'Managing Discovery: Discovery of Documents in Federal Courts, Report 115' (Australian Law Reform Commission, 2011) [2]; Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders, Report 103' (Australian Law Reform Commission, 2006) [5]; Australian Law Reform Commission, 'Family Violence - A National Legal Response, Report 114' (Australian Law Reform Commission, 2010) [3].

principles are also enshrined in legislation or form part of legislative principles.¹⁸⁰ These examples illustrate that these principles are widely accepted in Australia as guiding and informative in the design and administration of public policy. For this reason, it is not necessary to provide a comprehensive historical account of each of the principles, but rather to provide an overview of each of the concepts and pose key questions that can be used to assess the immunity policy.

Through the employment of wider principles of public policy, it is possible to assess the immunity policy with reference to its interaction with other aspects of the law and the enforcement context, such as private enforcement¹⁸¹ or the international anti-cartel enforcement context.¹⁸² Although the examples used to support the new criteria will be primarily Australian, many of these principles are internationally significant and are therefore capable of wider application.¹⁸³

4 *Transparency*

In addition to the threat of sanctions and fear of detection (described above), the concepts of transparency and predictability already form part of the criteria currently used to assess the effectiveness of the immunity policy.¹⁸⁴ However, the DOJ does not provide a clear definition of ‘transparency’. According to the ACCC’s *Compliance and Enforcement Policy*, transparency involves two primary considerations:¹⁸⁵

- the ACCC’s decision-making takes place within rigorous corporate governance processes and is able to be reviewed by a range of agencies, including the Commonwealth Ombudsman and the courts

¹⁸⁰ See, eg, *Legal Services Directions 2005* (Cth) Appendix B; *Legislative Standards Act 1992* (Qld) s 4.

¹⁸¹ See Chapter VII, *The Role of Private and Public Enforcement – Confidentiality and Third Parties*, pg 230.

¹⁸² See Chapter VII, *Confidentiality Across Borders*, pg 261.

¹⁸³ OECD, ‘Regulatory Policies in OECD Countries - From Interventionism to Regulatory Governance’ (Organisation for Economic Cooperation and Development, 2002) 112: ‘Linking regulatory policy with governance will also cement acceptance of regulatory policy as a permanent feature of government and public administration and one that is central to its overall performance and ability to meet citizens’ expectations.’

¹⁸⁴ Hammond, above n 158, s V.

¹⁸⁵ Australian Competition and Consumer Commission, ‘Compliance & Enforcement Policy’ (ACCC, 2015).

- the ACCC does not do private deals—every enforcement matter that is dealt with through litigation or formal resolution is made public

These considerations do not constitute a definition of ‘transparency’ that can be used to assess the Immunity Policy. The OECD outlines a number of relevant definitions that have been used in the international community that demonstrate the broad nature of the term.¹⁸⁶ PriceWaterhouseCoopers defines transparency as ‘the existence of clear, accurate, formal, easily discernible and widely accepted practices’¹⁸⁷ whereas the World Trade Organisation believes the terms involves three core requirements:

- 1) to make information on relevant laws, regulations and other policies publicly available;
- 2) to notify interested parties of relevant laws and regulations and changes to them; and
- 3) to ensure that laws and regulations are administered in a uniform, impartial and reasonable manner.¹⁸⁸

Whilst there is no universally accepted definition of ‘transparency’ there are three key considerations that are central to its definition that can be employed to assess the immunity policy, that serve the basic democratic principle of openness.¹⁸⁹ These are:

(a) Publication of relevant information

This entails the availability of a clear, detailed and user-friendly description of the immunity policy’s requirements and implementation process.¹⁹⁰ The DOJ criterion supports this by stating the importance of publishing relevant policy documents is crucial to the consistent and predictable operation of the policy.¹⁹¹

¹⁸⁶ OECD, 'Public Sector Transparency and the International Investor' (Organisation for Economic Cooperation and Development, 2003) 20.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ OECD, above n 183, 66-71; see generally, Robert Vaughn, 'Transparency in the Administration of Laws: The Relationship Between Differing Justifications For Transparency and Differing Views of Administrative Law' (2011) 26 *American University International Law Review* 969.

¹⁹⁰ OECD, above n 186, 39.

¹⁹¹ Hammond, above n 158.

Key Question/s: Is there clear, detailed and user-friendly publication of the immunity policy requirements and implementation processes by both the ACCC and the CDPP?

(b) *Prior Notification and Consultation*

A report published by the OECD on regulatory reform stated that ‘prior notification and consultation of regulatory proposals to the public could enhance both the legitimacy and the effectiveness of regulatory measures.’¹⁹² In this vein, the design and operation of the immunity policy should be subject to public consultation that should be comprehensive, timely, transparent and accessible. When determining which public recommendations to take on board, the regulatory body should be accountable for their decisions by disclosing the comments received and react to or publish the reasons for taking them into account or not.¹⁹³ The report published by the OECD warns that regulatory agencies should be acutely aware of becoming ‘captive’ to special interests and avoid consultation fatigue.¹⁹⁴

Key Question/s: Has there been a comprehensive, transparent, timely and accessible public consultation in relation to the immunity policy? Are these consultations publicly available? Has the regulatory authority provided reasons for the inclusion/exclusion of the recommendations?

(c) *Procedural Transparency*

The regulatory authority must administer its policy in a uniform, impartial and reasonable manner.¹⁹⁵ This concept is intrinsically tied to the accountability of the regulatory authority and therefore this consideration is likely to overlap with the discussion of reviewability.

¹⁹² OECD, above n 186, 44.

¹⁹³ Ibid.

¹⁹⁴ OECD, above n 183, Annex IV.

¹⁹⁵ OECD, above n 186, 46-48.

However, procedural transparency also relates to the inclusion of ‘review rights’ such as the ‘right to appeal.’¹⁹⁶

Key Question/s: Does the ACCC and the CDPP administer its policy in a uniform, impartial and reasonable manner? Does the policy list any procedures for review or ‘review rights’?

5 *Accountability*

The concept of accountability broadly refers to the notion that elected officials are accountable to citizens for governmental performance which forms a key component of democratic governance.¹⁹⁷ In the context of regulatory authorities, these agencies should be accountable to their principals for the manner in which they exercise the powers and discretions given to them.¹⁹⁸ The principle of accountability is intrinsically linked to the concept of legitimacy, where democratic ideals mandate that the regulators who exercise government or public powers that are not directly elected should be held accountable for their decisions in other ways.¹⁹⁹

Professor Nicolaidis from the European Institute for Public Administration in the Netherlands believes that accountability involves two dimensions: the first is democratic, and the other more procedural, relating to the justifications of a regulator’s decisions.²⁰⁰ The focus here will be on the second dimension of accountability, as this research is not concerned with the overall democratic accountability of regulators, but primarily with how the regulator can be held accountable for their decision in relation to the Immunity Policy.

A number of measures have been identified that ensure accountability. These include: consultation, access to information and due process rules when making individual decisions or sanctions.²⁰¹ The first two factors have been discussed in the context of transparency and therefore demonstrate the overlapping nature of the proposed criteria.

¹⁹⁶ Ibid.

¹⁹⁷ Peter May, 'Regulatory Regimes and Accountability' (2007) 1 *Regulation & Governance* 8, 9.

¹⁹⁸ Bird, above n 178, 741-743.

¹⁹⁹ Ibid.

²⁰⁰ OECD, 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (OECD Working Paper on Regulatory Management and Reform, 2005) 7.

²⁰¹ Ibid 14.

The due process rules largely refer to the reviewability of regulatory decisions. Administrative review refers to the opportunity for a complaint to be heard by an independent administrative body or judicial body.²⁰² The reviewability of administrative decisions ‘can be seen as the ultimate guarantor of transparency and accountability.’²⁰³ Administrative law accountability, such as through the Administrative Appeals Tribunal, provides a strong form of accountability, as it involves a response to the regulator’s failure to meet the required standard.²⁰⁴ On the other hand, the opportunity for judicial review is generally limited on the basis of ultra vires or lack of procedural fairness. The ACCC recognises the importance of accountability in the administration of its policies and sets out a comprehensive list of mechanisms in its aim to ensure its fair and transparent operation.²⁰⁵

Key Question/s: What are the accountability mechanisms that assure the effective implementation of the Immunity Policy? Do these accountability mechanisms apply to both the ACCC and the CDPP? More specifically, are decisions made in respect of the Immunity Policy subject to administrative or judicial review?

6 Consistency

The concept of consistency is rooted in the English law tradition through the doctrine of precedent.²⁰⁶ The proposition that laws are to be applied equally, without ‘unjustifiable differentiation’ is cemented in the rule of law.²⁰⁷ The principle requires that the justice system should be consistent in the application of laws and in practice.²⁰⁸ The term has often been used in the criminal law context in relation to sentencing:

Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the

²⁰² OECD, above n 183, 75-76.

²⁰³ Ibid.

²⁰⁴ Bird, above n 178, 747-748.

²⁰⁵ See Australian Competition & Consumer Commission, 'The ACCC's Accountability Framework for Investigations' (ACCC, 2013).

²⁰⁶ See eg, Karen Steyn, 'Consistency - A Principle of Public Law' (1997) 2 *Judicial Review* 22.

²⁰⁷ Ibid.

²⁰⁸ Australian Law Reform Commission, above n 179, [2.72]-[2.73]; Australian Law Reform Commission, above n 179, [5.16]-[5.20], ch 20, 21.

law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.²⁰⁹

The CDPP also states that consistency is one of the principles upon which the *Prosecution Policy* is based, where one of the main aims of the policy is to ‘promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions.’²¹⁰

Inherent within the principle of consistency are two competing considerations: the fettering of discretion given to public bodies and the requirement that they act consistently in the interests of fair administration.²¹¹ It is important that decision-makers retain a degree of discretion so that they can depart from their own policies where the circumstances require it.²¹² However, the policy needs to be ‘consistent with the statute under which the relevant power is conferred.’ In this vein, the decision-maker should not be precluded from ‘taking into account relevant considerations’ but should also not take account of irrelevant considerations.²¹³

Related to consistency is the principle of certainty in that issues of uncertainty may lead to inconsistency.²¹⁴ This is reflected to some extent in the criteria currently used to assess the immunity policy, where the DOJ believes that a high degree of certainty is necessary to ensure that potential applicants know how they will be treated in accordance with the policy and the consequences if they fail to do so.²¹⁵

The publication of policies, reporting of outcomes and the requirement to disclose the reasons for the decision are key ways to measure consistency.²¹⁶ These methods can help guard against ‘arbitrary decisions and reliance on erroneous

²⁰⁹ See *Lowe v The Queen* (1984) 154 CLR 606, 610-611: The observations of Sir Anthony Mason may be regarded as the origins of contemporary Australian doctrine on the issue of consistency.

²¹⁰ Commonwealth Department of Public Prosecutions, 'Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process' (Australia's Federal Prosecution Service, 2014) <<http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>> 2, 4 [2.3].

²¹¹ Steyn, above n 206, 26.

²¹² *Ibid.*

²¹³ *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, [24] (Gleeson CJ).

²¹⁴ Australian Law Reform Commission, above n 179, [2.74].

²¹⁵ Hammond, above n 158, s V.

²¹⁶ See, eg, Queensland Ombudsman, 'Good Decision-Making Guide' (Queensland Ombudsman, 2007) 6: 'Written agency (administrative) procedures can provide valuable guidance on the decision-making process in order to achieve consistency and fairness.'

notions' and ensure that decisions are determined on a case-by-case basis.²¹⁷ In this way, there is significant overlap with the principles of transparency and accountability.

It must be noted that the Immunity Policy operates in a multi-dimensional capacity. In Australia, the policy is administered in a bifurcated system, meaning that there is a need for consistency in the processes and decision-making across both the ACCC and the CDPP.²¹⁸ The policy also operates in an international context, where various regulators across the world have enacted similar policies into their anti-cartel enforcement regimes.²¹⁹ Therefore, the issue of consistency is relevant to multi-jurisdictional immunity applications.

Key Question/s: Are there currently sufficient ways to assess whether the Immunity Policy is being applied consistently? Are the ACCC and CDPP consistent in their administration and operation of the Immunity Policy? Does the policy operate consistently in the context of multi-jurisdictional applications at an international level?

7 Proportionality

The meaning of proportionality is largely tempered by the context in which it is used. Historically, the concept can be traced back to German constitutional and administrative jurisprudence.²²⁰ The use of the principle spread to the European Community, where it is widely used in relation to human rights discourse and judicial decisions.²²¹ An example is the freedom of speech rights under Articles 10 and 14 of the *European Convention on Human Rights*.²²²

²¹⁷ Emily Johnson, 'Should 'Inconsistency' of Administrative Decision Give Rise to Judicial Review?' (2012) 71 *AIAL Forum* 50, 54.

²¹⁸ See Chapter VI, Eligibility and Cooperation in Cartel Immunity, pg 170.

²¹⁹ See Chapter VII, The Role of Private and Public Enforcement – Confidentiality and Third Parties, pg 230.

²²⁰ See Helmut Goerlich, 'Fundamental Constitutional Rights: Content, Meaning and General Doctrines' in Ulrich Karpen (ed), *The Constitution of the Federal Republic of Germany* (1988) 45-65.

²²¹ See, eg, M Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Boston: Martinus Nijhoff, 1993) 125-37.

²²² *Protection for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force September 3 1953), as amended by Articles 10 and 14.

The principle is now endorsed on many levels in the international community, particularly in relation to the law of armed conflict²²³ human rights treaties and constitutions and international documents around the world.²²⁴ On a domestic level, the principle is often referred to in the context of criminal law, administrative law and constitutional law.²²⁵ For instance, the High Court has affirmed the use of proportionality as a basic principle of criminal sentencing, as ‘a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.’²²⁶

Furthermore, the concept has been widely used in the context of administrative law; as Justice Kirby has observed:

Under European law it is now well-established that a public authority (including the Executive Government) may not impose legal obligations except to the extent that they are strictly necessary in the public interest to attain the purpose of the measure authorised by the legislature. If the burdens imposed are clearly out of proportion to the authorised object, the measure will be annulled. There must therefore exist a reasonable relationship likely to bring

²²³ Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 *European Journal of International Law* 889, 915-16; James Crawford, Jacqueline Peel and Simon Olleson, 'The ILC's Articles on Responsibility of States for International Wrongful Acts: Completion of the Second Reading' (2007) 12 *European Journal of International Law* 963-991.

²²⁴ See eg, Nicholas Emililou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, 1996); Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999); David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 1st ed, 2004); E Sullivan and Richard Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford University Press, 2009) 6: provides an overview of the longstanding acceptance of proportionality in Western countries and argues that ‘every intrusive government measure that limits or threatens individual rights and autonomy should undergo some degree of proportionality review.’

²²⁵ See, eg, *The Sentencing Act 1991* (Vic) s 5(1)(a); *Sentencing Act 1995* (WA) s 6(1)(a); *Crimes (Sentencing) Act 2005* (ACT) s 5(1)(a); *Sentencing Act* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k); *Crimes Act 1914* (Cth) s 16A(2)(k); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Zecevic v Director of Public Prosecutions* (Vic) (1987) 162 CLR 645 at 662; *Johnson v The Queen* (1976) 136 CLR 619 at 636; *Markarian v The Queen* (2005) 228 CLR 357 at [69]; See, eg, *Legal Services Directions 2005* (Cth), Appendix B; *Legislative Standards Act 1992* (Qld) s 4; Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85; *McCulloch v Maryland* (1819) 4 Wheat 316 at 421; *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 260; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

²²⁶ See, eg, *Hoare v R* (1989) 167 CLR 348 at 354; *Veen (No 1) v R* (1979) 143 CLR 458 at 467; *Veen (No 2) v R* 143 CLR 472; *R v Channon* (1978) 20 ALR 1; Mirko Bagaric and Athula Pathinayake, 'Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation' (2015) 40 *Australian Bar Review* 64, 68.

about the apparent objective of the law. The detriment to those adversely affected must not be disproportionate to the benefit to the public envisaged by the legislation.²²⁷

In light of its widespread use as a guiding principle, proportionality can be seen as a ‘trade-off’ device that aids in resolving conflicts between norms, principles and values by acting as a legal standard by which individual or state actions can be assessed.²²⁸ The modern conception of the principle in administrative law emphasises that ‘proportionality requires the administration to balance all relevant interests at issue and then to use its discretionary powers in light of this balancing exercise.’²²⁹ More specifically, the assessment of proportionality generally involves a three-stage test: (1) Suitability; (2) Necessity; and (3) Proportionality *stricto sensu*, meaning proportionality in the narrow sense.²³⁰ These factors are assessed cumulatively but more emphasis is placed on the factors in ascending order:

(a) *Suitability*

With respect to the measure at question, the means adopted by the government need to be rationally related to the stated policy objectives.²³¹ On this basis it is necessary to ascertain whether the adopted measure is suitable or appropriate to achieve the objective it pursues.²³²

(b) *Necessity*

This step entails the use of a ‘least-restrictive’ means test to ensure that the measure does not curtail individual rights any more than is necessary to achieve stated public policy goals.²³³ This test requires two important considerations. The first relates to whether there are less restrictive or milder measures that could be utilised, and secondly, whether the alternative measures are equally effective in

²²⁷ Peter Johnson, 'Proportionality in Administrative Law: Wunderkind or Problem Child?' (1996) 26 *Western Australian Law Review* 138, 147; *New South Wales v Macquarie Bank* (1992) 30 NSWLR 307, 323-324.

²²⁸ Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law: In Comparative Perspective' (2007) 42 *Texas International Law Journal* 371, 375.

²²⁹ Johnson, above n 227.

²³⁰ See, eg, Andenas and Zleptnig, above n 228, 388-399; Matt Meir, 'Let the Press and Government Grapple: The Constitutional Question Posed by a Statutory Right of Reply' (2012) 17 *Media and Arts Law Review* 368, 374; Pnina Alon-Shenker and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2013) 59 *McGill Law Journal* 375, 378-379.

²³¹ Christopher Michaelsen, 'Reforming Australia's National Security Laws: The Case for a Proportionality-Based Approach' (2010) 29 *University of Tasmania Law Review* 31, 41.

²³² Andenas and Zleptnig, above n 228, 383-384.

²³³ Michaelsen, above n 231.

achieving the pursued objective. The basic objective of this test is that ‘the measure adopted by the state should do minimal harm to citizens or the public interest.’²³⁴

(c) *Proportionality stricto sensu*

This final step is the most complex and requires an analysis as to whether the effects of a measure are disproportionate or excessive in relation to the interests affected.²³⁵ This is the stage that requires the true balancing of the competing objectives.

The Australian Law Reform Commission cautions against placing too much emphasis on the proportionality principle, as the importance and complexity of the issues under consideration is likely to involve value judgments and subjectivity.²³⁶ In light of these remarks, and other limitations of the principle²³⁷ the principle of proportionality will be used as an overall guiding principle. This use of proportionality as a guiding principle has been legislatively adopted in Australia. For example the *Federal Court of Australia Act 1976* (Cth) stipulates in section 37M(2)(e) that: ‘the resolution of disputes (must be) at a cost that is proportionate to the importance and complexity of the matters in dispute.’ Moreover, the ACCC itself incorporates proportionality as a guiding principle by emphasising that the ACCC’s enforcement response must be ‘proportionate to the conduct and resulting harm.’²³⁸

Key Question/s: In conjunction with the assessment of the other guiding criteria, do the measures taken in relation to the Immunity Policy satisfy the three-stage proportionality test? If not, what other alternatives exist that may better satisfy this test?

These criteria do not seek to replace the current criteria used to assess the Immunity Policy but are aimed at enhancing the existing model. The use of this enhanced criterion allows the policy to be assessed within the enforcement context in which it operates, where its interaction with other areas of the law can be critically analysed. It carries with it the importance of recognising that the Immunity Policy

²³⁴ Andenas and Zleptnig, above n 228, 383-384.

²³⁵ Ibid.

²³⁶ Australian Law Reform Commission, above n 179, [2.75]-[2.76].

²³⁷ See, eg, Tom Hickman, 'Problems for Proportionality' (2010) *New Zealand Law Review* 303; Kiefel, above n 225, 91-92.

²³⁸ Australian Competition and Consumer Commission, above n 185: ‘The ACCC’s enforcement response is proportionate to the conduct and resulting harm, and the implementation of the ACCC’s enforcement policy is governed by the following guiding principles.’

cannot continue to be assessed in accordance with traditional neo-classical economic assumptions, as the policy does not operate in a vacuum. The assessment of the Immunity Policy's operation has largely been conducted with reference to numerical or quantitative economic studies that seek to assess the policy's effectiveness.²³⁹

Examples of methods employed to assess the policy's effectiveness in this respect have included numerical examinations of immunity applications and outcomes; the number of proceedings brought versus the number of those proceedings that have resulted in a finding or liability and the quantum of penalties that have been imposed.²⁴⁰ The use of such quantitative methods provides an extremely narrow view of the immunity policy's operation and is limited in what it can reveal about the policy's effectiveness. This is due to the fact that these assessments heavily rely on the information provided by the competition authorities, which is often not forthcoming.²⁴¹ The limited means of assessing the proportion of cartel activity that may be taking place at any given time is another significant factor that distorts the quantitative assessment of the policy's effectiveness.

It is for these reasons that this thesis will adopt a qualitative, empirical assessment of the Immunity Policy as an alternative method to assess its effectiveness, in conjunction with the enhanced guiding criteria. The next chapter will outline the methodology that will be employed to execute this empirical assessment.

This chapter has illustrated that the Immunity Policy was born within the context of US cartel enforcement under the influence of neo-classical economics. At its core lies the assumption of the rational actor model. Whilst the assumption of rationality has strong support, particularly in the Chicago economics school of thought, this chapter has analysed more recent theoretical developments that cast light on the limitations of the rational actor model.

Empirical research and advancements in studies such as psychology, sociology and neuroscience have shown that humans do not often conform to the predictions of the rational actor model. This has important implications for the way that the Immunity Policy was designed, given that there are limitations in the theory upon which the policy was originally based. Therefore, there are strong indicators

²³⁹ See, eg, the economic studies referenced at above n 18.

²⁴⁰ Beaton-Wells, above n 169, s IV; Ibid.

²⁴¹ See, eg, Beaton-Wells and Fisse, above n 4.

that the rational actor model does not provide a sufficient theoretical model for the Immunity Policy.

In this vein, this chapter argued that the Immunity Policy should be subject to the same public policy principles that inform other areas of the law, particularly in the international law context. It is the aim of this thesis to apply these public policy principles in relation to the Immunity Policy, to strength, enhance and reconcile the aims of the Immunity Policy with those of public and private cartel enforcement law and the other areas of law with which it intersects.

IV RESEARCH DESIGN

This Chapter will outline the research design used to gather, analyse and interpret the empirical data obtained from the conducting of semi-structured qualitative interviews in relation to the Immunity Policy. The results of this data analysis will be used to supplement the main research findings obtained from secondary research and generate the final recommendations aimed at strengthening the existing Immunity Policy.

It was decided that the most appropriate qualitative research tool to gain an in-depth insight into the design and operation of the Immunity Policy was to conduct semi-structured qualitative interviews. There were several reasons for this decision. Firstly, quantitative data is inherently unreliable in the field of cartels, as it is significantly difficult to tell how many cartels are operating at any time or what the nature of the cartel conduct is. The difficulty faced by researchers in this area is well documented.¹ When the research was first conceived in 2012, there was very limited statistical information available as to the number of cartel immunity applications made to the ACCC since the policy was revised in 2005.² Furthermore, the information that was available was highly generalised. For example, the ACCC made a bold assertion that it has received over 100 ‘approaches’ in relation to immunity since 2005.³ However, the word ‘approaches’ did not indicate how many of these approaches actually resulted in immunity applications, and how many actually progressed into civil proceedings or settlement. These statistics also did not reveal whether these immunity ‘approaches’ were generated by domestic or international cartels.

However, more detailed immunity information was later provided by the ACCC in 2013, presumably due to criticism in relation to the lack of transparency

¹ See eg, John Connor, 'Cartels Portrayed: Detection' (2011) *AAI Working Paper No. 11-05* 23; Gregory Werden, Scott Hammond and Belinda Barnett, 'Deterrence and Detection of Cartels: Using all the Tools and Sanctions' (2011) 56 *The Antitrust Bulletin* 207; OECD, *Cartels and Anti-Competitive Agreements* Organisation for Economic Cooperation and Development <www.oecd.org/competition/cartels>; Australian Competition & Consumer Commission, 'Updated Immunity Policy to Uncover Cartel Conduct' (Media Release, MR 225/14, 10 September 2014).

² Australian Competition & Consumer Commission, 'Revised 'first in' Immunity Policy for Cartel Conduct' (Media Release, MR 210/05, 29th August 2005).

³ Rod Sims, 'Opening Address: IBA Competition Conference' (Paper presented at the International Bar Association 9th Competition Mid-Year Conference, Sydney, 21 March 2013).

surrounding this information.⁴ Even with the publication of more statistical information in relation to the Immunity Policy, the ACCC acknowledges that it is still difficult to ascertain the percentage of immunity ‘approaches’ out of all the cartels currently operating. These factors make it very difficult for researchers to use quantitative data as a tool in this field of research. This is compounded by the fact that the use of statistical data provides a very limited and generalised description in relation to the immunity policy’s current operation.

Secondly, the use of surveys was seriously considered as another possible option which could be used to gather information relating to the immunity policy.⁵ It was thought that an online short response questionnaire could be sent to individuals who directly deal with the Immunity Policy, which could potentially allow for a greater sample of individuals to be captured, as opposed to the number of people who could be interviewed.

It was ultimately decided that the use of qualitative surveys would be too limited for the scope of research that was necessary for a comprehensive analysis of the design and operation of the Immunity Policy. This is due to the fact that the breadth of the research questions could only be sufficiently answered through very sophisticated and comprehensive responses that could not be accommodated by qualitative surveys.⁶ Even if the surveys were to be conducted with an option for long-response questions, the value of the information provided in an interview is not only derived from what has been said, but *how* it has been said.⁷

In line with the framework analysis methodological approach, which will be explained below, it was necessary to conduct interviews to construct and develop knowledge surrounding the Immunity Policy, which was a crucial component of learning the themes and patterns that underpin the discussions within the interview

⁴ Marcus Bezzi, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review?' (Paper presented at the Competition Law Conference, Shangri-La Hotel, Sydney, 4 May 2013); Caron Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171.

⁵ See eg, Harrie Jansen, 'The Logic of Qualitative Survey and Its Position in the Field of Social Research Methods' (2010) 11 *Qualitative Social Research* 11; Research Sage Publications, 'Introduction to Survey Methods' (1998) 46 *Current Sociology* 1, 1-6; James W Chesebro and Deborah J Borisoff, 'What Makes Qualitative Research Qualitative?' (1997) 8 *Qualitative Research Reports in Communication* 3.

⁶ Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (Sage Publications, 3 ed, 2002) 341.

⁷ Ibid; Tony Greenfield, *Research Methods for Postgraduates* (Arnold, 1996) 169.

data.⁸ This approach provided the opportunity to understand the Immunity Policy and its associated issues, without being foreclosed by the strict confines of an unresponsive set of data. It was also important to clarify some of the more complex and controversial questions in relation to issues that generated strong moral responses. Many examples of these responses were found in the discussions relating to whether cartel informants should be paid to provide information to the regulators.⁹ Many of the opinions and emotions tied to these issues cannot be captured by a 100 words or less response of the kind commonly found in survey studies.

Finally, the use of semi-structured interviews as a research tool is a flexible research method and this is generally aided by the use of open-ended questions. It is an effective way of ‘finding out from them things we cannot directly observe.’¹⁰ The use of open-ended questions was most suited to answering the research questions, as it provided the opportunity to learn from the most primary source of information, that being those who directly deal with the immunity policy, as opposed to deriving information from the overgeneralised and limited published information.

At the time of commencement of this research in 2012 there were no other published empirical studies related to the Immunity Policy that had been conducted through semi-structured interviews. However, during the time of this research, Dr Caron Beaton-Wells commenced a similar project in relation to the Immunity Policy, titled ‘The Immunity Project.’ In conjunction with the recent review of the Immunity Policy, Beaton-Wells conducted a similar study of stakeholder opinion using semi-structured qualitative interviews. While Beaton-Wells has not published all of the findings in relation to her research, many of her findings have informed recent academic papers in relation to the immunity policy.¹¹ Her findings enrich the debate in this field, as her research is both recent and relevant to this thesis. Thus, the existence of other empirical work in relation to the immunity policy has strengthened the relevance of the research undertaken in this thesis.

⁸ Mary C Lacity and Marius A Janson, 'Understanding Qualitative Data: A Framework of Text Analysis Methods' (1994) 11 *Journal of Management Information Systems* 137, 139.

⁹ See also Chapter V, Cartel Informant System, 161.

¹⁰ Patton, above n 6, 341-342.

¹¹ Beaton-Wells, above n 4; Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126.

A *The Interviews*

The primary study involved semi-structured qualitative interviews with a total of 16 individuals. These interviews were conducted for between one and two hours each. Each interviewee was asked questions relating the design and operation of the immunity policy derived from a set of pre-determined questions to ensure an adequate level of consistency.¹² These open-ended questions allowed for greater flexibility with responses, and opportunities to follow a tangent or new idea that may have not have been initially anticipated. It also allowed for the tailoring of certain aspects of the questions to the particular interviewees' interests or experience. These interviews were conducted primarily in Sydney, with others conducted in Melbourne.

B *The Logistics of the Project*

1 *Recruitment*

The participants were selected on the basis of their current professional position. Contact details were accessed through publicly available records. The interviewees were either:

- identified through contact details of individuals in publicly available records, or alternatively;
- Identified through contact details of employers from publicly available records and then the employer was asked for access to the person in the appropriate professional role.

The individuals identified were initially contacted, primarily via email, depending on whether my supervisors had prior contact with the person. Prior contact between a person and my supervisor/s existed in some cases, for instance, because of professional associations, such as involvement in special interest groups connected with competition law or legal practice. Where there was an existing relationship between the person and my supervisor/s, I was required to make

¹² See eg, Clive Seale, 'Quality in Qualitative Research' (1999) 5 *Qualitative Inquiry* 465.

personal contact with the person to provide initial information about the research and request an interview.

A draft email template was devised that outlined a brief description of the thesis, the aims of the research and sought an opportunity to meet with the participant at a time that was suitable to them. Within this email, it was also important to emphasise how the interviewees' knowledge would be useful to the project and how the researcher had come to know of their knowledge and/or experience in working with the Immunity Policy. In some cases, where the researcher had been referred to contact a particular participant, the name of the person who recommended them would be included in the email, in order to create authenticity and increase the likelihood of the interviewee's acceptance in taking part in the interview. A total of 36 potential participants were contacted, with a total of 16 taking place. Many of the interviewees who declined did so on the basis of busy schedules. There was also an extensive process of follow-up via email for those who indicated they wished to participate but either had to cancel or never responded.

After the initial contact, potential participants who wished to proceed to the next step were sent the *Participant Information Sheet* and were provided with information about confidentiality. Confidentiality was discussed and agreed upon with each potential participant on an individual basis, as confidentiality requirements varied slightly between the interviewees. All potential participants were invited to ask any questions and discuss the research at any time. For participants who agreed to an interview, the time and place was discussed and agreed upon. Before each interview was conducted, the agreed confidentiality details were recorded in the consent form and signed by the participant and researcher conducting the interview.

2 *Sample Selection*

In order to select and recruit a number of individuals, the advice of my supervisors, colleagues within the competition law sector and extensive research into those individuals was relied upon to determine those individuals who were at the forefront of dealing with the Immunity Policy and thus had extensive knowledge and expertise. This process was therefore highly selective and was not intended as a

random sample.¹³ In order to improve the quality of the research, it was necessary that each interviewee had been personally involved with the immunity policy. This access is restricted to high-level legal personnel within a law-firm, as these are the individuals who most commonly interact with the Immunity Policy and are therefore best placed to describe the design and operation of the policy from a first-hand perspective.

In addition to this factor, it was also important to consider representativeness in the research.¹⁴ After considerable research, it was found that those individuals who most commonly deal with the Immunity Policy are generally partners in law firms from large corporate firms. As a result, the perspective of a smaller law firm is likely to be neglected. This is one limitation of this research, as this factor could potentially skew the research results. The reason for this is because large corporate law firms often advise large business in relation to the Immunity Policy and are thus likely to be in favour of the policy, as it potentially allows their client to be immune to civil and criminal proceedings. Therefore, in order to overcome this lack of representativeness, it was imperative to include interviewees from academia, the Bar and members of the ACCC itself.

However, one of the perspectives that is clearly missing from this research is the perspective of class action law firms. These are the firms that generally represent third party claimants who have been adversely affected by cartel conduct who wish to initiate court proceedings against the cartel members. Despite many attempts to contact various individuals with this particular experience, it was not possible to secure an interview. This was also hindered by the fact that there is currently only one active class action firm acting for third parties adversely affected by cartels, which made it more difficult to secure an interview with members of this firm. For the purposes of this thesis, this limitation has been overcome by undertaking further research published by class action firms and individuals to ensure this perspective is properly considered in this research.

The number of interviews conducted was not a primary concern, given that, as explained above, the empirical data is intended to be used as a supplement to the research of secondary sources. Nonetheless, the amount of data generated by these

¹³ Nicholas Mays and Catherine Pope, 'Rigour and Qualitative Research' (1995) 311 *BMJ* 109, 110-111.

¹⁴ *Ibid.*

interviews was extensive. An officially accredited transcriber employed by the University of Wollongong transcribed each of the interviews. Over 100 pages of transcribed data, totalling over 70 000 words resulted. Therefore, the number of interviews that were conducted was appropriate for the time and resources available for this research.

3 *Setting*

In order to accommodate the interviewees and to ensure that as many interviews were secured as possible, it was necessary to travel to the various locations in which the interviewees were employed. A majority of these interviews were conducted in the Sydney CBD, but it was also necessary to travel to Melbourne to conduct three interviews. The amount of travel and availability of the interviewees influenced the number of interviewees that were selected, as it would have been too burdensome to continue recruiting and interviewing participants, when extensive data had already been collected.

Travelling to the offices of the interviewees was the most ideal way to accommodate the very busy workload of all of the interviewees. This also helped to ensure that they were comfortable and willing to be able to discuss the matters in relation to the Immunity Policy.

4 *Outline of the Interview*

At the commencement of each interview, each interviewee was provided a general introduction and a brief outline of my thesis. Each interviewee was then provided with an overview of the aims and purpose of the interview, by acknowledging their intimacy with and knowledge of the immunity policy. The interviewees were informed that their knowledge could help formulate recommendations for the Immunity Policy, which was a key component of this thesis.

Each interviewee was asked whether they consented to an audio recording of the conversation to allow the interviewer to concentrate on the interview and elicit as much information as possible. All but three of the interviewees consented to the audio recording. Handwritten notes were also taken in addition to the audio

recordings. It was also explained to the interviewees that, if they wished to provide any comments ‘off the record,’ that information would be handled discreetly and in confidence. The interviewer would then be able to research these additional and unofficial comments independently. This ensured that the interviewer was able to gain as much information as possible from the interviewees.

It was explained to the interviewees that the approach to the interview was objective and neutral, which meant that the interviewer was open to learning as much about the immunity policy as possible. It was also mentioned that the research had not received any funding, apart from the University of Wollongong itself, and therefore the research was undertaken in an independent capacity.

In line with Michael Quinn Patton’s qualitative interviewing style, it was decided that an open-ended semi-structured interview scaffold would be the most appropriate model to structure the interview.¹⁵ Those who requested that a copy of the interview questions be sent to them prior to the interview-taking place were sent this scaffold.¹⁶ The questions were deliberately designed to be broad and general at the beginning before more specific points were explored.

Generally, the discussion would diverge into other areas, previously unknown, and this style of interview allowed for this type of divergent discussion to develop. This meant that any new ideas and concepts that were discussed with one interviewee could be later added to the interview scaffold and discussed in subsequent interviews with other interviewees. A core set of scaffold questions were used in each interview to ensure consistency throughout the interviews. Additionally, if an interviewee had experience and knowledge in one particular area, then the scaffold questions were modified to accommodate this so that a greater amount of time could be spent on that particular area.

5 *Informed Participants*

With any research that involves human subjects, it is necessary that the ethical risks are recognised and addressed and that informed consent is granted. As part of this responsibility, *Human Research and Ethics Approval* was required before

¹⁵ Patton, above n 6, 344-380.

¹⁶ See Appendix A: Interview Questions.

the commencement of my empirical research to ensure that the research complied with University policy; that the researcher was well-aware of the risks involved in the project and that the steps had been taken to ensure these risks were minimised or eliminated.

(a) Risks

Confidentiality and anonymity were the primary ethical considerations relevant to conducting qualitative interviews and these issues were managed effectively. On an individual level, each potential interviewee was contacted in advance and provided with a consent form, and their confidentiality was assured, both in writing and verbally, prior to the interview taking place. This also applied where the participant requested to remain anonymous, although anonymity was not requested by any of the interviewees. On a collective level, data was kept in the researcher's custody; the exception being during the transcription of audio recordings where the transcription service was bound by contractual obligations of confidence.

(b) Informed Consent

As mentioned above, the broad nature of this research was outlined to potential participants when first approached, and more complete details of the aims of the project and expectations of participants were provided (both verbally and via the *Participant Information Sheet*) when they agreed to participate in the interview or upon request. Once the project had been fully explained, all of the interviewees had the opportunity to ask questions to clarify their involvement, and capacity to consent was acknowledged formally by way of a signed consent form. This form provided written information about the project, and an assurance of confidentiality. The consent form was signed and dated by the participant and stated that the participant had received full explanation.¹⁷

¹⁷ See Appendix B: Participant Information Sheet; Appendix C: Interviewee Consent form.

(c) Withdrawal of Consent

Participants were advised verbally and in writing on the consent form that they could discontinue participation at any time and that there would be no adverse effects on any participant who chose to withdraw their consent. Participants were advised that if they chose to withdraw their consent during the course of the interview they would be able to have their data withdrawn by requesting that the data be deleted or by instructing the transcriber to omit that participant's contributions in the transcription.

(d) Confidentiality

Confidentiality was one of the primary ethical considerations relevant to conducting qualitative interviews and this issue was managed carefully. On an individual level, each potential interviewee was contacted in advance and provided with a consent form, and their confidentiality was assured, both in writing and verbally, prior to the interview taking place.

In light of the fact that the data from this research project is published in a thesis and potentially will be used in journals and presented at conferences; the identity of the participant was kept confidential and published only with permission. All participants provided consent. There were no special requests to maintain anonymity by any of the interviewees. As part of reporting this research, direct quotations from the interview were utilised. However, each interviewee was given the option of being given a pseudonym, and all identifying information (*including relevant possibilities such as the name of the institution, the participant's position, etc.*) could be removed from the published material. No interviewees requested the use of a pseudonym.

On a collective level, the student investigator undertook the conducting of the interviews and analysis of the data only. Data is and will always be in the custody of the student investigator with the only exception being during the transcription of audio recordings when the transcription service was under contractual obligations of confidence.

C Method

The method used to analyse the interview data is referred to as ‘Framework analysis’ or the ‘Framework approach.’¹⁸ Given the diverse range of qualitative methods available to analyse participant interviews, it was important to select a methodology appropriate to the research style and questions. This research is a type of applied policy research and framework analysis is a tool often used with this type of research, as it involves a coherent and systemic approach.¹⁹

This process involves an examination of ‘constant comparison’ whereby each item in the data is checked or compared with the rest of the data in order to establish analytical categories.²⁰ After the interviews are transcribed, researchers using this method are required to immerse themselves in the data with the aim of gaining a thorough and in-depth understanding of the phenomena in question.²¹ Through this process, the data is analysed with the aim of developing a categorical system to reflect the many nuances of the data, instead of reducing the data to a few numerical codes, as is the aim of many quantitative studies.²²

This method is aptly suited for the analysis of semi-structured interviews and policy relevant qualitative research, particularly where the objectives of the investigation are set in advance and the timescale of the research tends to be relatively short.²³ Although the research is deduced from pre-set aims and objectives, the framework approach also reflects the observations of the people studied and in that way is ‘grounded’ and inductive.²⁴

The deductive elements of the method distinguished it from a purely inductive approach, such as grounded theory, where the research develops in response to the data obtained through an ongoing analysis and iterative process.²⁵ In contrast to many inductive methods, the primary aim is not to generate a theory,

¹⁸ This approach was first developed by Ritchie & Lewis, see: J Ritchie and J Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publishers, 2003).

¹⁹ Catherine Pope, Sue Ziebland and Nicholas Mays, 'Analysing Qualitative Data' (2000) 320 *BMJ* 114.

²⁰ *Ibid.*

²¹ Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Allyn and Bacon, 4th ed, 2001) 7.

²² Pope, Ziebland and Mays, above n 19.

²³ *Ibid* 116.

²⁴ *Ibid.*

²⁵ Joanna Smith and Jill Firth, 'Qualitative Data Analysis: The Framework Approach' (2011) 18 *Nurse Researcher* 52, 52-53.

rather it is to describe and interpret what is occurring in a particular setting, in accordance with a set of pre-determined research questions.²⁶

The Process

(a) Stage 1 - Transcription of Interviews

Due to the overwhelming amount of data generated by the interviews, it was appropriate to outsource the transcription of this data. The risk involved with outsourcing this process is that a researcher will not be as familiar with the data then if it were self-transcribed, which is an integral component of the process of understanding the phenomena in question. To minimise this risk, the audio from each of the interviews were listened to against the transcripts to ensure its accuracy and validity. The interviews were also transcribed verbatim to ensure that the original meaning was not altered by the transcriber. The transcription resulted in over 70 000 words of raw data.

(b) Stage 2 – Familiarisation with the Interview Material

This process required complete immersion in the interview data, through the act of reading and re-reading the transcripts to gather an in-depth understanding of the research. This is also referred to as understanding the ‘narrative’ of the data, by searching for the ‘story’ that the interviews reveal.²⁷ During this process, note taking was extremely important. Large margins were deliberately created to allow for analytical thoughts, feelings and impressions about the data to flow freely.²⁸ A separate document was created to note patterns and themes that were generated by a reading of the data, which allowed for the development of and creative engagement with the material. The important of ‘memo-taking’ is a well-documented tool for the development of theories and ideas.²⁹

²⁶ A Srivastava and S Thomson, 'Framework Analysis: A Qualitative Methodology for Applied Policy Research' (2009) 4 *Journal of Administration and Governance* 72, 76.

²⁷ See eg, Terry Locke, *Critical Discourse Analysis* (Bloomsbury Academic, 1st ed, 2004); Bryan Jennar, *Methods of Text and Discourse Analysis* (SAGE Publications, 1st ed, 2000); Berg, above n 21.

²⁸ Nicola Gale et al, 'Using the Framework Method for the Analysis of Qualitative Data in Multi-Disciplinary Health Research' (2013) 13 *BMC Medical Research Methodology* 117, 120.

²⁹ Memo-taking is particularly well-documented in the methodological approach of Grounded Theory, where a crucial component of the analytical process is the development of new ideas and theories, and this is achieved on an on-going basis by writing down thoughts as the analysis progresses. See eg,

(c) *Stage 3 – Coding*

A line-by-line analysis was carried out on the interview material, and a paraphrase or label (otherwise known as a ‘code’) was attached to the sections that were deemed to be of particular importance. These codes can refer to substantive aspects of the data, such as particular behaviours or structures; values, such as those that underpin certain statements, such as a belief in the criminalisation of cartel conduct; emotions (or lack thereof), such as happiness or frustration, or more methodological elements, such as where interviewees became agitated or uncomfortable with certain areas of discussion.³⁰

The identification of these codes was then inputted into a ‘coding matrix,’ where the data was assigned to different themes and categories in the coding matrix.³¹ The primary aim of coding is to allow for the systematic comparison of the data sets, also known as the method of ‘constant comparison.’³²

One of the most significant aspects of this step was that it allowed for the development of a full and comprehensive understanding of the material. More importantly however, this type of analysis revealed aspects of the data that were originally hidden, in the sense that some issues did not seem to be meaningful when a cursory analysis the data was conducted. It was only after the in-depth line-by-line analysis was conducted upon the completion of the interviews that many valuable underlying themes emerged. It was by analysing and reconciling these anomalies that the analysis was made stronger.³³

(d) *Stage 4: Developing and Applying a Working Analytical Framework*

During this process, the codes were finalised to form the working analytical framework, which was added to and changed until the last transcript was coded. The first stage of summarising and synthesising the range and diversity of coded data took place, as the initial themes and categories began to be refined. Each of the subsequent transcripts were then applied to the analytical framework through the

Melanie Burks and Jane Mills, *Grounded Theory: A Practical Guide* (SAGE Publications Ltd, 2011); Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (SAGE Publications, 2006) Chapter 4.

³⁰ Gale et al, above n 28.

³¹ Smith and Firth, above n 25, 4-5.

³² Gale et al, above n 28, 119.

³³ Ibid 4.

assigning of each code, which was abbreviated for ease of identification, and each code was noted directly on the transcripts.

(e) Stage 5: Charting Data into the Framework Matrix

A table was designed to create a matrix where the data could be inputted, which involved the process of summarising the data by category from each transcript. During this process, it was paramount that there was an appropriate balance between retaining the original significance and meaning of the data, as well as reducing it to a manageable level.³⁴ It was important to also include key references and illustrative quotations in the framework matrix, which could then be used in the published findings.

1st and 2nd Level Coding - Table 1

1 st Level Coding	2 nd Level Coding
Restitution to third parties	Roles/Purpose of Public/Private Enforcement
Derivative immunity for employees	Vicarious immunity Carve-out policy
On-going disclosure/cooperation	Mentions recidivism
Multi-jurisdictional issues	Immunity as negotiation (power imbalance) Sovereignty
Cartel Whistle-blower Proposal	Necessity (or lack thereof) Good Samaritan False/vexatious claims
Alternatives to immunity ("Bounty")	Cross-over with whistleblower Morality/ethical considerations Cross-over with credibility

³⁴ Ibid 5.

Opinion on cartel project survey	Moral/Ethical considerations Culture clash Concept of “justice” Lack of knowledge/public perception
Credibility in criminal cartel trials	“Too early to tell” (criminal)
General views of the immunity policy	Impact of criminalisation Necessity/effectiveness U.S influence Cross-over with motivations for seeking immunity Off-setting immorality ACCC transparency Cross-over with overreliance Recording of oral proffers Knowledge of law/ cartel provisions Silence as a strategy Immunity as negotiation v confession Criteria to refer if criminal
Overreliance on immunity policy	Cross-over with motivations for seeking immunity Loss of skill of detection Effectiveness/necessity Alternative methods of detection (s155/Daw Raids/Education/Market analysis) BA CASE ACCC as criminal investigators
The ACCC Cooperation Policy	Responsive regulation Certainty v Flexibility (Principles and substance v black and white rules) “Playing the game” (lawyers) Certainty & wait and see approach Silence as strategy
Relationship between the ACCC/CDPP	“Too early to tell” Transparency

	<p>Sufficiency of proffer/information for criminal immunity</p> <p>Criteria to refer as criminal</p> <p>Difference in process versus difference in culture</p> <p>Time lag</p> <p>Certainty</p>
Confidentiality – PCI – Scheme	<p>PCI in Criminal context</p> <p>Roles/Purpose of Public/Private Enforcement</p> <p>Certainty/Effectiveness/ Impact on immunity applications</p> <p>Transparency</p> <p>Third party “victims”</p> <p>Administration of justice</p> <p>Morality (MD)</p> <p>Too early to tell</p>
Revocation of immunity	<p>Certainty</p> <p>Legal character of policy – reviewability of ACCC decision</p> <p>“Trust/confidence in regulator” (GF)</p> <p>Pragmatic approach (NM)</p>
Enforcement culture (as compared to U.S)	<p>Influence & power of United States</p> <p>Cross-over with ACCC/CDPP relationship</p> <p>Perception of cartel conduct (cross-over with criminalisation)</p> <p>Dibber dobber culture of Australia</p> <p>Criteria to refer as criminal</p> <p>Public lack knowledge</p>
Ringleader Exclusion	<p>Practically/necessity</p> <p>Slight cross-over with recidivism</p> <p>“Above the law” mentality</p>
Cartel Recidivism	<p>Gaming immunity policy</p> <p>Moral/Ethical considerations</p> <p>Crossover with ringleader</p> <p>Organisational structure</p> <p>Amnesty Plus crossover</p>

	<p>Certainty</p> <p>Off-setting immorality</p> <p>Theory v Practice</p> <p>Definitional disputes (certainty v flexibility)</p> <p>Omnibus question</p> <p>Crossover with restitution/revocation (GS)</p>
Theory underpinning policy	<p>‘Rationality’</p> <p>‘Certainty’ – crossover with restitution</p> <p>Corporations as rational actors – company structure</p>
Utilitarian notions of justice/morality	<p>Restorative/responsive regulation versus utilitarianism</p> <p>Cross over with bounty (CBW)</p> <p>“Effectiveness”/“Necessity” outweighs immoral aspects</p> <p>Lack of public knowledge</p> <p>Use for other areas –such as insider trading</p>
Small business experience	<p>Large companies ‘using’/“playing” the system</p> <p>ACCC as unskilled criminal investigators</p> <p>Lack of knowledge</p> <p>Cross-over with criminalisation</p> <p>Recording of oral proffers</p>
Miscellaneous issues	<p>Company structure in immunity applications</p> <p>“Shifting the blame to rogue employee”</p> <p>Policy use for insider trading</p> <p>BA CASE/criminalisation</p> <p>Legal character of the immunity policy</p> <p>Vicarious immunity</p> <p>Silence as an alternative to immunity</p> <p>Cross-over with restitution (Michael Gray)</p> <p>“Gaming policy”</p> <p>Cross over with recidivism (ACCC)</p> <p>ACCC as unskilled criminal investigators</p> <p>Criteria to refer as criminal</p> <p>Amnesty Plus/Cooperation</p>

The 1st level codes were colour-coded to reflect the importance of the issue based on the level of consensus reached in relation to that particular issue. The red highlighted sections indicate the most controversial issues; the yellow indicates pertinent issues; and the green indicates non-pertinent information.

(f) Stage 6: Interpreting the Data

This stage of the analysis is designed to allow for the development of associations and patterns within concepts and themes; interpreting meaning in the concepts and themes that emerge from the data and generally garnering a holistic impression of the meaning of the interviews.³⁵ This was the stage where each of the categories and codes were reflected upon and links were formed between the categories to formulate the key findings emerging from the data. This required a rearranging of the matrix in some places to pull the most controversial and important ideas into groups, and arrange them by theme and importance to the research questions. At all stages, the data was cross-checked with the original source to ensure that the participant accounts were accurately presented and to avoid misrepresentation. Each of the key empirical findings is outlined in the next chapter.

³⁵ Smith and Firth, above n 25.

V EMPIRICAL INSIGHT INTO THE IMMUNITY POLICY: KEY FINDINGS

This chapter is intended to provide a descriptive account of the responses from the interviewees in relation to four key areas outlined below. The proceeding chapters will then provide a critical analysis of these responses, and the issues that arise, in conjunction with further research, to formulate final recommendations in relation to these important areas of the immunity policy's design and operation.

The key findings derived from the analysis of qualitative data can be divided into four primary categories. These are:

- Perceptions of & Attitudes towards the Immunity Policy for Cartel Conduct
- Eligibility & Cooperation Requirements of Immunity
- The Tension between Public & Private Enforcement – Confidentiality and Third Parties
- Alternatives to the Immunity Policy

A *Perceptions of & Attitudes Towards the Immunity Policy for Cartel Conduct*

1 *The Concept of 'Effectiveness'*

When interviewees were asked about any particular issue in relation to the Immunity Policy, they generally responded in reference to the 'effectiveness' of the program:

Interviewee: So, let me first address the effectiveness question. Has the policy allowed better detection and prosecution of cartels? I think it probably has. Ours is quite early in its deployment and so maybe too early to say, but from my observation of the last 7 years that we've had a policy there's a much higher level of reporting than there otherwise would be. So therefore certainly as far as detection is concerned it has been effective, more effective than not having it.¹

The way that the term 'effectiveness' was described throughout a majority of the interviews, and most notably from the lawyers and partners of larger law firms, was through a 'cost-benefit' analysis, expressed in utilitarian terms, in terms of the

¹ Interviewee 4 (Sydney, 17th June 2013) 4.

Immunity Policy serving a 'greater good' for society.² When questioned about any issues that might involve assessments of 'morality' in relation to Immunity, many interviewees quickly deferred to these utilitarian precepts of effectiveness as a means of justifying any moral ambiguity or controversy. This I have termed 'off-setting morality.'

According to the interviewee responses, the 'effectiveness' of the Immunity Policy is primarily assessed in terms of its ability to achieve cartel detection and deterrence. This consideration is given precedence over all other more nuanced or normative factors that may arise within the policy's design and operation or its interaction with other areas of the law. In this way, many of the interviewees framed the concept of 'effectiveness' in purely neo-classical economic 'cost-benefit' terms, without reference or regard to other relevant or normative factors, such as transparency, accountability, consistency and proportionality.

There were some interviewees, namely academics, who recognised this emphasis on utilitarianism but disagreed with its value, advocating instead for a more restorative, responsive type of regulation:

Interviewee: That's basically what I think you have; well...see... that idea, that was more of a restorative, responsive sort of idea. That was more from the earlier philosophy, the sort of Allan Fels philosophy of how to do regulatory enforcement, I think, whereas the current one is much more utilitarian.³

One of the questions put to the interviewees was in relation to the survey results generated by the Cartel Project from the University of Melbourne, which indicated that over half of the general public surveyed *disagreed* with the concept of an immunity policy. These negative views of the Immunity Policy existed even though the survey described to them that the purpose of the policy was for the overall detection of illicit conduct that may not have otherwise been detected.⁴ The reason behind the public's response to the policy may be attributed to the fact that one person in the cartel is escaping 'scot-free' from prosecution when they have admitted

² See also, Matthew Haist, 'Deterrence in a Sea of Just Desserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism' (2009) 99 *Journal Criminal Law & Criminology* 789.

³ Interviewee 1 (Sydney, 9th July 2013) 8.

⁴ Christine Parker, 'Report on Interviews with Civil Respondents in Cartel Cases' (Centre for Regulatory Studies and Law Faculty, Monash University, 2011) <<http://cartel.law.unimelb.edu.au/go/project-news/project-outputs>>.

to participating in a crime. The idea of ‘full’ immunity is unique, in contrast to other prosecution policies around the world, as cartel immunity is guaranteed ‘upfront’ and is often given to a person/or company who is likely to be viewed as equally culpable to the other participants.⁵

When questioned as to why the public may not necessarily agree with an Immunity Policy, many of the interviewees could not understand how the policy could possibly be seen as ‘immoral’ in the eyes of the public, in the sense described above. It was not until the interviewees were prompted or an explanation was provided that this point was fully understood. One interviewee went as far as to suggest that companies are sophisticated organisations, which may therefore exclude them from the morality question altogether:

PM: ...that it’s immoral to let somebody who was the ring leader to stay in the cartel.

Interviewee: But these are companies. I mean these are global companies. I mean this isn’t like the situation where you’ve got a gangs of kids and the 16 year kids getting the 14 year olds to throw rocks at the bus. This is like multi-national corporations with boards and governance structures.⁶

Other interviewees’ first reaction was to laugh at the fact that some people perceive the policy as immoral, whilst others targeted the reliability of the methodology employed to conduct the Cartel Project survey. Some were opposed to engaging with the essence of the question, comparing the Cartel Project study to a ‘Herald sun type activity.’⁷

Thus, a clear theme emerged from the interviewees that separated the ‘effectiveness’ of the policy with its potential ‘immoral’ characteristics. Most interviewees claimed that the former factor was of more importance in their assessment of the policy’s current operation. To this end, many interviewees quickly dismissed any question relating to the moral aspects of immunity.

In stark contrast however, when the interviewees were asked about other more controversial developments relating to immunity, they tended to drawn upon the same ‘morality arguments’ they initially opposed or could not understand to support their arguments. One scenario in which this arose was within the discussions

⁵ Chapter VI, The Credibility Of Accomplice Evidence, pg 203.

⁶ Interviewee 2 (Sydney, 22nd July 2013) 11.

⁷ Interviewee 7 (Melbourne, 26th April 2013) 18.

relating to the introduction of a cartel informant system. This system refers to the concept of financially rewarding those who are not directly involved in the cartel to come forward and provide cartel information to the competition authority. When questioned about the possibility of introducing a financial rewards system in Australia, many interviewees found this proposition morally ‘uncomfortable’ or a ‘bit distasteful’⁸:

Interviewee: I don’t really like the idea of it just instinctively; it’s not something that appeals.

PM: On sort of a moral level?

Interviewee: On a moral basis, yeah.⁹

Most notably, when the interviewees were questioned about the morality of the Immunity Policy, which is essentially a policy rewarding people who have admitted to cartel conduct, these moral elements were often disregarded or not fully understood by the interviewees. But when asked about a cartel informant policy, which is essentially a policy rewarding those not involved (or ‘innocent’) in relation to cartel conduct, many of the interviewees were against this policy on the basis that it goes ‘against gut instinct.’¹⁰

This inconsistent treatment of morality was also illustrated within the discussions relating to the introduction of whistle-blower provisions. These provisions serve to protect third parties who were not directly involved in cartel conduct from employer retaliation upon revealing pertinent information to the authorities. There was a strong sense from some of the interviewees that there is no need for these additional provisions, ‘It’s just a further level of *irksomeness* that I’d prefer to avoid. You know, it’s bad enough as it is’¹¹ (emphasis added). There was another suggestion that instead of those not involved in the cartel being protected through whistle-blower provisions, that these individuals should simply ‘do the right thing’ by coming forward to the regulators, without reward or protection:

Interviewee: No, I don’t believe in paying whistle blowers even in tax. My gut reaction is against it in any field.

⁸ Interviewee 13 (Sydney, 22nd July 2013) 22.

⁹ Interviewee 9 (Sydney, 15th July 2013) 23.

¹⁰ Interviewee 10 (Sydney, 29th July 2013) 21.

¹¹ Interviewee 8 (Sydney, 15th July 2013) 20.

PM: Why is that?

Interviewee: A bit like your comment on the United Kingdom case that failed. Encourages exaggerated and overblown claims, allegations and I suppose I think people should be more abiding anyway when it happens.

PM: Yeah, the idea of a Good Samaritan?

Interviewee: Mmm.¹²

However, in the discussions relating to the actual Immunity Policy there was no indication that immunity applicants should come forward to the authorities and ‘do the right thing.’ From the language used in these discussions, there was also no indication that the interviewees believed that their clients had committed any ‘wrong-doing.’ There was certainly no suggestion that seeking immunity is akin to a confession, or any language of that nature.

These inconsistencies were also found in other areas of discussion. For instance, when discussing the credibility issues potentially faced by immunity applicants, this seemed to be a ‘manageable’ issue for many of the interviewees, particularly because the immunity applicant’s evidence is so imperative to the ACCC’s case. In contrast however, when questioned about the cartel informant system, many interviews were quick to state that paying people to come forward and reveal cartel information would essentially lead to false claims. These interviewees claimed that whistle-blowers are likely to have ulterior motives and be unreliable witnesses as a result.¹³

Therefore, whilst it appeared that credibility is not a significant issue for the interviewees in the context of immunity, it was a central theme in the discussions about the alternatives to immunity. Many of the arguments levied against these alternative propositions, such as whistle-blower protections or a cartel informant system, were directed to the credibility of those revealing cartel conduct outside of an immunity application. The use of negative terms used in these contexts further compounded these observations, where the term ‘bounty hunters’ was used to describe ‘innocent’ whistle-blowers but no such negative terms were used to describe the immunity applicants by a majority of interviewees.

¹² Interviewee 10 (Sydney, 29th July 2013) 21.

¹³ Ibid; Interviewee 7 (Melbourne, 26th April 2013) 41.

These inconsistencies in the discussions were also evident in relation to the ringleader requirement. Prior to the recent review of the policy, a cartel member would be ineligible for immunity if they were deemed to be the key instigator of the cartel activity.¹⁴ This requirement was designed to prevent a cartel member who instigated or coerced other members to join or continue in the cartel from receiving immunity. These ‘ringleaders’ are thought to be more culpable than other cartel members, and thus should be precluded on this moral basis. However, many interviewees did not understand why the ringleader provision may have existed to serve this moral purpose. Instead, many interviewees preferred to focus on the pragmatic aspects of the ringleader requirement or lack thereof, believing ‘it is not a sensible concept.’¹⁵

2 *General Opinions about the Current Operation of the Policy*

(a) *‘Overreliance on the Immunity Policy’*

Given that the immunity policy is often lauded as the ‘single most effective cartel detection tool in the world’, it is pertinent to question whether such a heavy emphasis being placed on one tool of enforcement has led to an overreliance on the policy by competition authorities worldwide. The interviewees were divided on this issue. Those who agreed that too much reliance is placed on the Immunity Policy believed that this has resulted in a loss of skill on the part of competition authorities:

Interviewee: Yeah, I would agree with that for sure. I think that one of the casualties of the immunity policy has been a loss of skill amongst the regulators in detection as cartels used to be detected in a variety of ways. There’s always been whistle-blowers and disgruntled participants that have come forward, even without immunity, but, and there’s anonymous tip-off’s and stuff for generations, but what’s tended to happen is now almost all enforcement activity is generated by immunity applicants. Certainly that’s been my experience, and the Commission very rarely, not in the this Commission (meaning the ACCC), but DOJ and the European Commission, the other anti-trust authorities very rarely have to actually uncover one for themselves through market surveys or price monitoring or other forms of policing, it’s mostly brought to them. It’s not only brought to them, it’s brought to them in a box by the applicant with a proffer, a suite of

¹⁴ The ringleader requirement has been modified in the most recent draft release of the immunity policy, and replaced with a coercion requirement. The coercion requirement essentially serves the same purpose as the ringleader requirement, in that it is designed to prevent a member of the cartel who instigated or ‘coerced’ other members to join or continue in the cartel to be eligible for Immunity: See Chapter VI, Cartel Coercion, pg 186.

¹⁵ Interviewee 4 (Sydney, 17th June 2013) 17.

documents, a statement, it's almost pre-packaged, so I think it's good in a sense that it's led to enforcement but it's bad in a sense that it's reduced the level of non-participant generated activity. I think there's been a loss of skill amongst some of the regulators.¹⁶

Another argument raised in this context tended towards the suggestion that the immunity policy is not as 'effective' at detection as the regulators currently claim.¹⁷ According to these interviewees, there are a number of reasons why cartel conduct may have come to light, which may not necessarily be attributed to the Immunity Policy.¹⁸ These situations could include, where 'somebody who has been pushed out of the group or somebody's has an affair with somebody's secretary,' or there may have been 'some sort of hotline where people can be reported.'¹⁹ There were other interviewees that agreed with the proposition that regulators may over-rely on the immunity policy as an enforcement tool, but felt this does not mean that they do not also use other enforcement tools.²⁰

On the other hand, there were some strong assertions against the overreliance question, believing that the 'effectiveness' of the policy, in terms of the benefits it provides for greater detection of cartel conduct, outweighs any potential claims of overreliance:

PM: ... you know, looking for lessons there and perhaps there was sort of widespread discussion about perhaps because of the secrecy of cartels that we are over relying on the immunity policy.

Interviewee: No, no.

PM: You don't agree with that?

Interviewee: Absolutely not. And you know, because of their secrecy you need the immunity policy to be able to break the secrecy. You know, it leaves... the cartel operators in a position where they go to sleep at night wondering are they going to be too late if they ring the ACCC in the morning at 7 o'clock and so why not ring them now at 9 o'clock this night before, then I can sleep easier.²¹

¹⁶ Interviewee 2 (Sydney, 22nd July 2013) 6.

¹⁷ Ibid; Interviewee 1 (Sydney, 9th July 2013) 12.

¹⁸ Ibid.

¹⁹ Interviewee 1 (Sydney, 9th July 2013) 12; Interviewee 3 (Melbourne, 26th April 2013) 27.

²⁰ Interviewee 6 (Not recorded, Sydney, 23rd July 2013).

²¹ Interviewee 7 (Melbourne, 26th April 2013) 15.

There were also arguments in support of the notion that we should not ‘fix what is not broken,’ given that the ACCC has finite resources. These interviewees felt that if the policy is supposedly ‘working,’ ‘then that seems to me to put an efficient use of their resources.’²² A majority of the interviewees who were against the proposition of overreliance generally relied on these types of effectiveness arguments to support their views, or were quick to indicate that there lacks an alternative method of cartel detection:

Interviewee: Well then how do you measure it (LAUGHS) whether they’re over relying? I mean what other detection tools do they have?²³

Many of the interviewees spoke about the lack of alternative methods for detecting cartel conduct, due to its inherently secret and deliberate nature. There was a suggestion that even if the ACCC does use other methods of cartel detection, there is a lack of disclosure by the regulator as to what these methods may be.²⁴ When asked about these alternate methods, it was interesting that many interviewees, including the ACCC itself, were quick to indicate that they are ‘proactive’ with the Immunity Policy.²⁵ By ‘proactive’ it was suggested that one of the alternate methods of detection of cartel conduct, was to ‘raise awareness’ and ‘educate’ people about the existence and purpose of the Immunity Policy:

Interviewee: So I think, you know, when you look at the term ‘over reliance’ you sort of sometimes think that you’re just sort of sitting back and waiting for people to come to you but it’s not like that. There’s an element of proactive in there.²⁶

When questioned further about other methods that regulators can use for the detection of cartel conduct, many interviewees could not provide clear or definitive answers. There was reference made to the fact that the *ACCC Cooperation Policy* exists,²⁷ although this is a policy designed for those who are not ‘first in’ and still

²² Interviewee 9 (Sydney, 15th July 2013) 5.

²³ Interviewee 13 (Sydney, 22nd July 2013) 7.

²⁴ Interviewee 3 (Melbourne, 26th April 2013) 27.

²⁵ Interviewees 12 (Sydney, 19th August 2013) 15, 17.

²⁶ Ibid 15.

²⁷ Interviewee 11 (Sydney, 19th August 2013) 15; The ACCC Cooperation Policy has now been combined with the ACCC Immunity Policy as part of the recent revision: Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014) s H.

requires the applicant to come forward to the regulator if they feel this is in their best interest.

There were divided opinions about the use of dawn raids for greater cartel enforcement. Dawn raids refer to the situation where competition authorities globally coordinate raids of company headquarters to seize pertinent cartel information. Whilst some interviewees felt that the number of dawn raids the regulator conducts could be increased, others held strong opposition to this on the basis that they are inordinately expensive to the regulator and intrusive to the company, whose entire internal documents and processes are subject to the raid:

Interviewee: And I wouldn't want our Federal regulator to be rushing around the economy, you know, on the smell of a suspicious rag, you know, undertaking dawn raids here and there, they're massively intrusive, they really disrupt the economy, you know, if taken too far...²⁸

As per the general theme throughout the interviews, the discourse was again heavily concentrated on the 'effectiveness' of the policy; with a sense that if the Immunity Policy is truly an effective method of cartel detection, then there is no real need for other methods of detection to be used. This perspective though, does not account for the s 155 powers of investigation that the ACCC regularly uses to gather evidence to prove its cartel cases.²⁹ When asked what would be the second most effective tool for cartel detection, the ACCC could not indicate 'off the top of my head' what this method may be, as the immunity policy is 'by far the one.'³⁰

(b) Motivations for Seeking Immunity

(i) Corporate Structure

It was important to garner a sense of the motivations surrounding immunity applications to analyse whether the motivations exhibited a straightforward cost-benefit analysis, as the rational actor model would predict, or whether there were more nuanced considerations that influenced the decision to apply for immunity.

²⁸ Interviewee 8 (Sydney, 15th July 2013) 6.

²⁹ *Competition and Consumer Act 2010* (Cth) s 155.

³⁰ Interviewee 11 (Sydney, 19th August 2013) 17.

Interestingly, when questioned about these motivations, a number of the lawyers immediately indicated that those who were directly involved in the cartel are not generally involved in the application for immunity:

Interviewee: Yeah. Well I think, I mean it also comes down to, you know, just as a lawyer and your professional responsibilities, in these sorts of cases you should not be taking instructions from the person who's engaged in the conduct. There needs to be someone at a very senior level.³¹

In line with these suggestions were assertions by some interviewees that senior management had no knowledge of the cartel's operation and that most instances of cartel conduct occur at the 'middle management' level. One of the interviewees believed that there were two key reasons that middle management cartel members would keep the cartel 'strictly confidential' and therefore not apply for immunity (1) they do not want to be seen to be participating in a cartel and (2) they want to receive the praise, reward and recognition for having a stellar sales performance.³²

Other interviewees believed the knowledge of the board members would vary depending on the size of the corporation and the type of management system in place. When questioned further about this lack of knowledge at a senior level and how this is possible, many interviewees tended to qualify their statements, indicating that it would depend on the circumstances of the particular corporation and whether there were any 'red flags' to indicate cartel activity to senior management.³³

There was also strong dissenting opinion in relation to this discussion. One interviewee in particular thought that the suggestion that 'middle management' being involved in cartel activity without the knowledge or consent of the board was part of a larger corporate strategy to blame 'rogue employees.'³⁴ Within this was the suggestion that as long as the company is 'making all this money' then there is a sense of 'wilful ignorance' on behalf of the company:

³¹ Interviewee 9 (Sydney, 15.07.2013) 10.

³² Interviewee 8 (Sydney, 15.07.2013) 13.

³³ These opinions neglect the fact that directors owe a duty of care to the company to ensure that adequate mechanisms are in place to properly monitor management: *Corporations Act 2001* (Cth) s 180. See, eg, *Re One.Tel Ltd (in liq)*; *Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 682; *Sheahan (as liquidator of SA Service Stations) (in liq) v Verco* (2001) 79 SASR 109; *Cashflow Finance Pty Ltd v Westpac Banking Corp* (1999) NSWSC 671.

³⁴ Interviewee 1 (Sydney, 9.07.2013) 14.

Interviewee: Yeah. It was in their interest to have this person making all this money and bringing in all these contracts and they just don't want to know how they're doing it and then when they find out its illegal then they go, oh you're a rogue and we're going to sack you, but before that they weren't doing that.³⁵

(ii) Immunity as a Negotiation

When analysing the discourse surrounding the immunity application, it became evident that coming forward to make an immunity application to the ACCC was treated by a majority of the interviewees as a 'negotiation' as opposed to a 'confession' with the ACCC. This was reflected in the language used when describing the interviewee's general views surrounding the Immunity Policy. Many interviewees described the decision to make an application as being based on a number of relevant factors, primarily in relation to the risks to the applicant and the costs involved.

The language used during the interviews was clear, concise and portrayed in a way that suggested that an immunity application is made as of right or entitlement, as opposed to a situation of revealing unlawful conduct. When questioned about the motivations that cartel members have when applying for immunity, there was no suggestion that applicants were coming forward to 'confess' their crime, or expressing any element of contrition, or acknowledging any wrong-doing, as 'it's a pretty hard sell to say you'll only spend a few weeks in goal... you need to get people comfortable.'³⁶ Instead, the language tended to focus on the burdens and 'risks' surrounding cooperation and the immunity 'prize':

Interviewee: It involves years of cooperation. It involves huge expense to cooperate and so it's not done lightly and there are down sides because you're also exposing yourself to customers in a class action liability. So in making your decision to come forward in Australia, as an advisor to companies who have done so, it's not just a straight forward matter of saying, well you know, there's the prize, go in.³⁷

³⁵ Ibid.

³⁶ Interviewee 2 (Sydney, 22nd July 2013) 5.

³⁷ Interviewee 4 (Sydney, 17th June 2013) 14.

The interviewees were also well aware of the fact that without the immunity application and therefore the immunity applicant's evidence, the ACCC would potentially have a very weak case for enforcement action or even no case at all. There was even some suggestion that the ACCC will 'water-down' the policy requirements to ensure that the immunity application is secured as 'the ACCC...are very loathe to let go of their immunity applicant.'³⁸

The ACCC itself recognised that immunity applicants may treat an immunity application as a negotiation but attributed it to cases where applicants do not fully understand the Immunity Policy: 'but the down side is there are particularly first time applicants who may not fully understand the process or the requirements of the policy itself, particularly the criteria for immunity. So sometimes, for example, when they come in a proper meeting they may see it almost like a negotiation...'³⁹

(iii) Silence as a Strategy

Some interviewees indicated that remaining 'silent,' in lieu of applying for immunity, may be a strategy used by cartel participants that the ACCC has not considered. As discussed in Chapter 2, the decision to apply for immunity is generally presented as a two-pronged strategy.⁴⁰ This is reflected in the discussions surrounding the supposed operation of the policy, through the application of game theory and the prisoner's dilemma.⁴¹ In the context of cartel conduct, decision-making is generally posited as (1) remain in the cartel and not seek immunity or (2) apply for immunity. However, there were interviewees who suggested a third possible scenario: (3) Cease all involvement in the cartel and adopt a 'wait and see' approach:

Interviewee: Well, you've got three choices right. Well sorry; there are three forks in the road. One is you blow the whistle, OK, no penalty but depending on the nature of the industry and so on, follow-on class action, damages, all the publicity, all the distraction and a lot of legal expense but you avoid the penalty. Option two is you sit back, see what happens

³⁸ Interviewee 8 (Sydney, 15th July 2013) 17.

³⁹ Interviewee 11 (Sydney, 19th August 2013) 2: This counters the assumption that the ACCC would hold all of the bargaining power in relation to the granting of Immunity. Presumably, if the applicant does not want to agree to cooperate in way specified in ACCC cooperation agreement then the ACCC can then proceed to grant immunity to second or later applicant that is prepared to enter into the standard cooperation agreement.

⁴⁰ See Chapter II, A Theoretical Breakdown of the Immunity Policy, pg 47.

⁴¹ Ibid.

and then there'll be two forks in the road. One is it does come to the light. You immediately cooperate and you get half the penalty. You get a discount for cooperation.

PM: But they're only two of the perspectives.

Interviewee: Third option is it never comes to light.

PM: And then nothing happens.

Interviewee: And then nothing happens. So it seems to me the size of the discount for cooperation is the price between blowing the whistle and a chance that it never comes to light.⁴²

If this were another option that cartelists are choosing to make in the context of a cartel, then this would change the way the Immunity Policy is intended to operate, in the sense that it deviates from the current prisoner's dilemma model. There were interviewees who believed that this third scenario is unlikely to occur due to the fact that there is the risk that the other cartel members or 'competitors' may change their mind and apply for immunity. More importantly, however, one interviewee mentioned that there is no statute of limitations in relation to criminal liability, thus you would have to 'go to your grave on it' and this would mean that the 'wait and see' approach still leaves cartelists 'fully exposed.'⁴³

(c) Factors Influencing Perception

(i) 'Us and them'

There were many different perceptions that the various stakeholders exhibited toward each other when discussing issues related to the Immunity Policy, including the relationship between the ACCC and members of the legal profession on the one hand and the perception of the interviewees towards the general public on the other.

The most obvious was the relationship between the ACCC and the members of the legal profession who were interviewed. Generally the interviewees were supportive of the ACCC, and expressed 'confidence' and 'trust' in the regulator. This was reflected in the positive dialogue between the regulators and members of the legal profession. When the interviewees criticised the ACCC, they were often quick

⁴² Interviewee 10 (Sydney, 29th July 2013) 2.

⁴³ Interviewee 8 (Sydney, 15th July 2013) 8.

to qualify their statements or to offer explanations as to why the issue may be occurring.

For instance, the interviewees were directed to the recent case example in the United Kingdom⁴⁴ where the CMA was criticised for its overreliance on the immunity applicant's evidence, which resulted in the collapse of its first criminal cartel case. When questioned whether this scenario might occur in Australia, due to the similarities with the bifurcated system of enforcement, many of the interviewees felt that there was no significant risk that this will occur in Australia's first criminal case, as they attributed the CMA's failure to 'negligence'.⁴⁵ There was a strong belief by some of the interviewees that the ACCC and CDPP will 'get it right', because it will be crucial that they do so, in the wake of the CMA's handling of their first criminal cartel case.⁴⁶

A clearer level of division throughout the discussions existed between the perceived knowledge levels of the general public in comparison to the interviewees themselves. Generally there was a sense that, in the eyes of the interviewees, the 'public does not know what is good for them.' This was most evidently reflected in the discussions surrounding the Cartel Project Survey conducted by the University of Melbourne, outlined above, where the question of morality seemed to be correlated with the level of knowledge of the individual in question. When asked about the survey results, and why over 50 per cent of the people surveyed may have disagreed with the Immunity Policy, many of the interviewees attributed this result to the public's general lack of knowledge of the policy's operation or of its importance to the overall anti-cartel enforcement scheme:

Interviewee: Well there were only 50 per cent who were in favour of the immunity policy, I've got to tell you, I suspect that of the 50 per cent that were not in favour, 95 per cent had no idea what is was that was being discussed.⁴⁷

Many of the interviewees expressed concern in relation to the methodology of the survey, and were of the belief that if the nature and operation of the immunity

⁴⁴ See *R v George, Burns, Burnett and Crawley* (unreported) 7 December 2009; (2010) 174 JP 313; (2010) EWCA Crim 1148.

⁴⁵ Interviewee 8 (Sydney, 15th July 2013) 5.

⁴⁶ Interviewee 4 (Sydney, 17th June 2013) 24.

⁴⁷ Interviewee 7 (Melbourne, 26th April 2013) 19.

policy had been accurately described to the members participating in the survey, this knowledge would result in them agreeing with the concept of an immunity policy. Other interviewees were simply surprised or confused as to why members of the public would not agree with it, given the policy's overall benefits to cartel detection and the fact that 'they're sort of a very well sort of established set of policies because, you know, they're used here and around the world so I'm surprised that people don't approve of it so to speak.'⁴⁸ There were some who went as far as to imply that public opinion regarding this matter is of little significance in the overall scheme of things, and the fact that 'general people' may not agree with it should not affect the Immunity Policy or that the fact that it exists:

PM: ... it wasn't interviews, it was a survey, like a random survey and basically...

Interviewee: Oh, *just* people?⁴⁹ (emphasis added)

When these observations were put to the one of the authors of the survey, it was suggested that people answer questions from a moral rather than an economic or pragmatic perspective and tend to base their answers on 'gut instincts' and conceptions of 'right and wrong.'⁵⁰ Moreover, the interviewee defended the design of the questions in the survey stating that the respondents 'were given scenarios that I think were probably sufficient for them to understand what the conduct was that we were asking about and what might be its effects on them as consumers.'⁵¹

(ii) A Difference in Culture

Another important factor influencing the perceptions of the Immunity Policy was the perceived cultural differences in Australia, as compared to the United States. Many of the interviewees commented on the influence that the United States had in compelling other jurisdictions, namely Australia, to adopt the Immunity Policy and that it was ultimately adopted unquestionably and unequivocally, as 'No, no question, I think, that we tended to follow what the United States had done. They paved the way. Scott (Hammond) was a strong advisor to us as to how we'd adapt

⁴⁸ Interviewee 9 (Sydney, 15th July 2013) 4.

⁴⁹ Interviewee 12 (Sydney, 19th August 2013) 9.

⁵⁰ Interviewee 3 (Melbourne, 26th April 2013) 14.

⁵¹ Ibid.

it.⁵² A number of interviewees felt that despite the adoption of the leniency policy in the United States, Australians may not have the same moral condemnation towards cartel conduct, and are not as inclined to see white collar crime as criminal.⁵³

The dominant influence of the United States is seemingly reflected in global cartel enforcement, where the DOJ holds significant power and sway over the cartel enforcement agenda. In contrast, the ACCC does not have the same level of influence:

Interviewee: I don't think that Australia occupies that level of prominence and influence and so if it was suggested that the sort of, sanctioned consequence for a foreign offender was that they wouldn't be allowed to travel to Australia again in their lives, well, I don't think they would care.⁵⁴

A more significant theme to emerge from these discussions was the fact that the Immunity Policy may not be an appropriate cultural fit in Australia. A number of interviewees commented on the fact that in Australia there is a cultural norm that dictates that 'one does not dob in one's mate, so to speak.'⁵⁵ This cultural norm would then seemingly be in direct conflict with the prospect of a cartel member coming forward to the regulator at the expense of all the other members of the cartel. One interviewee in particular acknowledged this 'cultural resistance' to the Immunity Policy but felt this resistance could be overcome over time, particularly when people realise the 'effectiveness' of the Policy:

Interviewee: To me, I mean Australians are a bit resistant to it because culturally it is, it is unusual. Australians pride themselves on not giving up a mate and all that kind of, it's part of the sort of ethos of, it's pretty hard-grained into the Australian psyche that you don't dob people in, so I think it did take some getting used to and but when you look at what's at stake and you know, keeping suppressed illegal activity is, I think these days people have overcome those kind of, that cultural resistance to it.⁵⁶

Another interviewee felt that this cultural resistance could never be overcome, as it signifies a fundamental divide between people who have different ethical

⁵² Interviewee 7 (Melbourne, 26th April 2013) 4.

⁵³ Interviewee 11 (Sydney, 19th August 2013) 11; Interviewee 12 (Sydney, 19th August 2013) 11.

⁵⁴ Interviewee 4 (Sydney, 17th June 2013) 7.

⁵⁵ Interviewee 5 (Sydney, 25th July 2013) 9.

⁵⁶ Interviewee 2 (Sydney, 22nd July 2013) 3.

principles, where ‘some people think that it’s OK to do something for a greater good, which would be it’s OK to let some people get off free because they give the evidence about the other people, whereas other people think it’s always wrong to do the wrong thing regardless of whether there’s a greater good, which would be it’s always wrong to let somebody get off Scot Free if they’ve done something wrong.’⁵⁷ There were others who thought the question was one of balance.⁵⁸

B *Eligibility & Cooperation*

1 *Cartel Recidivism*

The interviewees were asked a hypothetical question in order to gauge how they felt about cartel recidivists. A scenario was put to them that involved: a cartel, namely a corporation, who had been involved in cartel conduct and was granted immunity by cooperating with the regulator. The case went ahead, the private litigation ensued, and then the case was ‘done and dusted.’ That same corporation, with the same individuals, later decides to seek immunity again. The interviewees were asked whether these recidivists should be entitled to immunity for a second, or subsequent, time.

Cartel recidivism was the most significantly divided issue discussed in the interviews. There was no general consensus as to whether cartel recidivists should or should not be entitled to seek immunity for a second time, or anytime thereafter. Many interviewees commented on how interesting this question was, as it was one that many had not put their minds to, and believed that much more time and effort needed to go into formulating their final opinion on the matter.⁵⁹

Those interviewees against the position that recidivists should be entitled to immunity for a second time, indicated that cartel recidivism is a ‘significant problem’⁶⁰ and there is ‘no way they should get immunity’ for the second time.⁶¹ On the other hand, there were many interviewees who could see the issue from a more diplomatic perspective, acknowledging that the concept of recidivism operates as an

⁵⁷ Interviewee 1 (Sydney, 9th July 2013) 7.

⁵⁸ Interviewee 12 (Sydney, 19th August 2013) 10; Interviewee 2 (Sydney, 22nd July 2013) 4.

⁵⁹ Interviewee 3 (Melbourne, 26th April 2013) 14; Interviewee 9 (Sydney, 15th July 2013) 14.

⁶⁰ Interviewee 3 (Melbourne, 26th April 2013) 13.

⁶¹ Interviewee 10 (Sydney, 29th July 2013) 11.

‘aggravating’ factor in other criminal contexts and that the idea that recidivists should be excluded from subsequent immunity applications is ‘good in theory but difficult in practice.’⁶² There were others who believed that recidivism does not occur often enough for the Immunity Policy to be prescriptive about it.⁶³

The concept of ‘moral consciousness’ featured prominently in this discussion, with interviewees being divided as to what role morality should play in policy development:

Interviewee: It’s an interesting question. It depends on whether you approach it from a perspective of what you consider is morally right or what you consider is pragmatically justifiable and you can see the arguments on both sides.⁶⁴

There were those who felt that ‘we have already walked over that line’ in terms of the question of morality, and others who felt that ‘recidivists don’t *deserve* immunity.’⁶⁵ (Emphasis added). During these discussions, the interviewees were told of the possibility that cartelists, as primarily sophisticated corporations, may learn to ‘play’ the Immunity Policy once they realise it is possible to apply for immunity a number of times, for different cartels, without being prevented.

The ACCC recognised this possibility and indicated that there have been scenarios where corporations, who have been savvy to the policy’s operation, have deliberately set up cartels with the purpose of driving out their competitors from the market.⁶⁶ However, there were those who opposed this contention, stating that other cartelists would start to become wary of a ‘serial offender’:

Interviewee: I think again like you know, I don’t think you can sort of be a serial offender and immunity applicants can just sort of move from one cartel to the next and cash your chips. I think the other cartels are going to start to get a little bit wary. I mean would you join a club with someone who dobs you in? I don’t know. I don’t know.⁶⁷

⁶² Interviewee 8 (Sydney, 15th July 2013) 17.

⁶³ Interviewee 11 (Sydney, 19th August 2013) 27; Interviewee 12 (Sydney, 19th August 2013) 27; See Chapter VI, Recidivism, pg 170.

⁶⁴ Interviewee 3 (Melbourne, 26th April 2013) 12.

⁶⁵ Interviewee 8 (Sydney, 15th July 2013) 16-17: The most obvious argument against allowing a recidivist to get immunity twice or more is the utilitarian argument that such an approach encourages cartel conduct by corporations that are adept at playing the game “Enter cartel, get immunity”.

⁶⁶ Australian Competition & Consumer Commission, ‘Review of the ACCC Immunity Policy for Cartel Conduct’ (Discussion Paper, ACCC, 2013) 7.

⁶⁷ Interviewee 2 (Sydney, 22nd July 2013) 12.

There was much discussion surrounding the difficulties associated with the definition of recidivism. Many interviewees were concerned as to how recidivism would be defined if it were ever to form part of the Immunity Policy.⁶⁸ Their concern had clear ties to the notion of ‘certainty,’ as it was observed that lawyers, in particular, would have difficulty advising their client as to whether they would be ineligible for immunity if the concept of recidivism was poorly drafted or overly ambiguous in the policy. However, many of these concerns can be alleviated through careful drafting and the proper exercise of discretion from the ACCC.⁶⁹

There were also concerns as to how recidivism would be determined by the ACCC in a large multi-national corporation, where there exists the possibility that a parent company could be excluded from immunity based on a subsidiary’s involvement in a cartel in another part of the world.⁷⁰ There was also the possibility that a corporation could be excluded from immunity based on recidivism where there were different individuals controlling the cartel at the time in which the first cartel offence was committed.⁷¹

Most of these concerns were levelled towards the suggestion that excluding a cartel recidivist from receiving immunity for a second or subsequent time will reduce the rates of cartel detection, as these recidivists would lose the incentive to report to the regulator.⁷² There were also those that believed that other aspects of the policy, such as the Amnesty Plus regime, would be adversely affected: ‘so if you said, well, you’re not eligible for immunity for a second cartel if you’ve been in a first cartel, that would really cramp the style of the Amnesty Plus program.’⁷³

Therefore, whilst there was not an overall consensus as to how the issue of recidivism should be dealt with, many of the interviewees agreed that recidivists should have ‘limited options,’ in the sense that their prior involvement should be part of the assessment of immunity but were against it becoming an automatic

⁶⁸ Chapter VI discusses how a workable model of cartel recidivism can be achieved. See Chapter VI, Recidivism, pg 170.

⁶⁹ Ibid.

⁷⁰ Interviewee 4 (Sydney, 17th June 2013)18; Interviewee 9 (Sydney, 15th July 2013)16; Interviewee 10 (Sydney, 29th July 2013)12.

⁷¹ *Cf* In the Australian legal system corporations are the subject of rights and liability and the corporate veil is pierced only in exceptional cases. Changes in a corporation’s personnel is not such an exceptional case. See Chapter VI, Recidivism, pg 170.

⁷² Interviewee 8 (Sydney, 15th July 2013) 17.

⁷³ Interviewee 4 (Sydney, 17th June 2013) 19.

exclusionary provision.⁷⁴ These interviewees could not elaborate on how this would be achieved. There was one suggestion that if recidivism were to be implemented into the policy, then there should not be ‘black and white rules’ but the concept should be defined fairly generally, leaving the concept open to flexible interpretation. The precision about the meaning, according to one interviewee, should be developed through precedent.⁷⁵

Another observation in the context of this discussion was the cross-over between cartel recidivism and the ringleader requirement. The ringleader requirement refers to the exclusion of a cartel member from immunity, who is believed to have instigated the cartel or operated as the clear leader of the cartel.⁷⁶ Some interviewees suggested that a recidivist would likely already be excluded from the Immunity Policy by virtue of the former ringleader requirement.⁷⁷ There was one interviewee in particular who asserted that the ‘most simple’ way to deal with the issue of recidivism would be to expand the definition of the clear leader requirement to include recidivists:

Interviewee: Now there’s a lot of debate about who’s the clear leader in a cartel but the very simple solution, and I wouldn’t make a big deal of it in your thesis, I’d just say, you know, the concept of clear leader should be expanded to include recidivists.⁷⁸

Another possible solution put forward by one of the interviewees was to exclude recidivists from immunity but to allow them to be assessed in accordance with the ACCC’s cooperation policy.⁷⁹

When the ACCC was questioned about recidivism, it was suggested that the ACCC is generally reluctant to put up ‘barriers’ for immunity, especially any proposals that involve automatic exclusion.⁸⁰ As to whether the ACCC had experienced cases of recidivism before, there was a suggestion that they have ‘never seen anything like that.’ However, as discussion progressed, it was also indicated by

⁷⁴ Interviewee 2 (Sydney, 22nd July 2013) 12; Interviewee 4 (Sydney, 17th June 2013) 18.

⁷⁵ Interviewee 10 (Sydney, 29th July 2013) 12.

⁷⁶ This requirement has been replaced by the coercion test in the most recent version of the Immunity Policy: Australian Competition and Consumer Commission, above n 27, ss 16 (a) (iv), 22 (a) (iv).

⁷⁷ Interviewee 8 (Sydney, 15th July 2013) 16.

⁷⁸ Interviewee 10, (Sydney, 29th July 2013) 11.

⁷⁹ Interviewee 9 (Sydney, 15th July 2013) 14.

⁸⁰ Interviewee 11 (Sydney, 19.08.2011) 26.

the ACCC that ‘the same applicants have had more than one go.’⁸¹ The ACCC’s current position, according to the representatives, is consistent with the suggestion that if a cartel recidivist does come forward for immunity, the ACCC ‘wouldn’t say no.’⁸²

2 *Ringleader Exclusion*

Prior to the ACCC’s recent review of the Immunity Policy, an immunity applicant could be excluded from immunity if it could be shown that the applicant was the ‘clear leader’ of the cartel.⁸³ A majority of the interviewees supported the removal of the ringleader requirement. For those in favour of removing the requirement, the most common argument made in support of this was the difficulty associated with determining who the cartel ringleader is, particularly in a two-party cartel:

Interviewee: I’d get rid of it. I don’t think it adds anything. Personally I’d get rid of it. I’ve been in two party cartels but you know it’s pretty hard to sort of work out who the ring leader is when there’s only two. Even when there is, it’s sort of not real world. People aren’t, there might be somebody who writes more emails or someone that’s more active but you’re all in it... Like I just think it’s an unnecessary requirement and in practice that doesn’t work. Someone might start off as the ringleader and then someone else may assume the captain’s armband and then it moves through a continuum. I just don’t see it being a useful aspect.⁸⁴

Consistent with the concept of ‘effectiveness’, many of the interviewees who supported the removal of the requirement claimed that it was ‘impractical and unnecessary’⁸⁵ or that there was no ‘utility’ in keeping it.⁸⁶ There were those who felt that they had never been asked in practice about whether their client was, or could potentially be, the ringleader when applying for immunity or at least it was never formally investigated.⁸⁷ Due to the fact that the ringleader question is often never asked or properly investigated, some interviewees felt that there was no need for it,

⁸¹ Ibid 27.

⁸² Ibid 28.

⁸³ This requirement has been replaced by the coercion requirement: Australian Competition and Consumer Commission, above n 27, ss 16(a)(iv), 22 (a)(iv).

⁸⁴ Interviewee 2 (Sydney, 22nd July 2013) 10.

⁸⁵ Ibid; Interviewee 4 (Sydney, 17.06.2013) 17.

⁸⁶ Interviewee 5 (Sydney, 25th July 2013) 4.

⁸⁷ Interviewee 4 (Sydney, 17.06.2013) 17; Interviewee 7 (Melbourne, 16th April 2013) 10; Interviewee 5 (Sydney, 25th July 2013) 4.

as it does not serve a function or purpose. This did not hold true for all the interviewees, as one interviewee in particular indicated that they had been asked the ringleader question in a two-party cartel and had ‘to give the ACCC satisfaction that our client wasn’t the ringleader.’⁸⁸

When questioned about whether the ringleader requirement may serve a ‘moral’ purpose, in terms of excluding a particularly culpable cartel member from being granted immunity, there was one interviewee who felt that they all cartel members are ‘essentially equally culpable’⁸⁹ and therefore maintaining the requirement will not be serving any ‘moral’ purpose. Another interviewee felt that even if the requirement does serve a moral purpose, the requirement can also lead to the maintenance of cartels:

Interviewee: Going back to that moral culpability perspective, there’s a real push back on maintaining it, I think. I tend to think that hanging onto it can actually keep cartels going because everybody in the cartel that’s a ringleader will know that they won’t necessarily get immunity if they go through the door so there’s more trust...

PM: ... that’s very true.

Interviewee: Whereas if you didn’t have that scenario then the ring leader could go through the door at any time and do great harm to its competitors.⁹⁰

Overall, the general support for the removal of the requirement is consistent with the fact that the ACCC is reluctant to put up any barriers that may prevent an applicant applying for immunity.⁹¹ As one interviewee suggested, this may be at the expense of cartel recidivism rates rising.⁹²

For those who opposed the removal of the ringleader requirement, it was felt that as long as it is not acting as a disincentive to immunity applicants, then there is no harm in keeping it. There was also one interviewee who opposed the removal of the requirement on moral grounds:

Interviewee: ... if you go back to sort of all the underlying moral issues about someone being able to escape liability for this sort of conduct, if you’re dealing with a situation where one participant has sort of bullied or coerced other participants into this illegal arrangement then I

⁸⁸ Interviewee 9 (Sydney, 15th July 2013) 11.

⁸⁹ Interviewee 2 (Sydney, 22nd July 2013) 10.

⁹⁰ Interviewee 13 (Sydney, 22nd July 2013) 17.

⁹¹ Interviewee 12 (Sydney, 19th August 2013) 26.

⁹² Interviewee 3 (Melbourne, 26th April 2013) 13.

think morally I would say it's wrong for that person to be able to obtain full immunity for what they've done.⁹³

One of the interviewees also indicated that even though the ringleader requirement may not seem to be enforced seriously by the ACCC, there is a likelihood that the CDPP will take the issue of a ringleader involved in the cartel applying for immunity more seriously, which could potentially affect the CDPP's decision to grant immunity.⁹⁴

The interviewees were also asked whether a 'coercion-style' test, such as that adopted by the Canadian Competition Bureau or the United Kingdom CMA, would provide a more suitable alternative to the ringleader requirement.⁹⁵ From the responses, there were those who felt that the element of 'coercion' was not a distinguishing element, as cartels are by their very nature consensual.⁹⁶ Therefore, it was stated that the coercion test could potentially encounter the same difficulties as the ringleader requirement and thus is not a suitable alternative.

On the other hand, there were interviewees who felt that the coercion test would be more useful as long as it identifies the coercer as the 'driving force in relation to the conduct.'⁹⁷ Another interviewee felt that the Canadian influence in this regard would be positive, and that the ACCC should consider the coercion test in lieu of the ringleader requirement.⁹⁸ Overall, there was no general consensus as to whether coercion is a viable alternative to the ringleader requirement. Despite this lack of consensus, the coercion test replaced the ringleader requirement in the revised Immunity Policy.⁹⁹

⁹³ Interviewee 9 (Sydney, 15th July 2013) 12.

⁹⁴ Interviewee 5 (Sydney, 25th July 2013) 4.

⁹⁵ See, eg, Competition Bureau, 'Adjustments to the Immunity Program and the Bureau's response to consultation submissions' (Discussion Paper, Competition Bureau, 11 May 2011); Competition Bureau Canada 'Immunity Program: Frequently Asked Questions' (Competition Bureau 60784, 7 June 2010); Competition and Markets Authority, 'Applications for Leniency and No-Action in Cartel Cases - Detailed Guidance on the Principles and Process' (Competition and Markets Authority, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf>, s 2.50-2.59.

⁹⁶ Interviewee 8 (Sydney, 15th July 2013) 18.

⁹⁷ Interviewee 9 (Sydney, 15th July 2013) 12.

⁹⁸ Interviewee 13 (Sydney, 22nd July 2013) 18.

⁹⁹ For more on this see Chapter VI, Cartel Coercion, pg 186.

3 *Relationship between the ACCC and the CDPP*

With the introduction of criminal penalties for cartel conduct at the end of 2009, it became apparent that the cartel enforcement regime in Australia would be bifurcated: with the ACCC being required to refer to the CDPP in the event of criminal cartel conduct for the granting of criminal immunity.¹⁰⁰ In light of this, the interviewees were asked about their experience with this new relationship, and the challenges associated with this bifurcated system.

This issue generated an extensive amount of discussion, and the responses were diverse and comprehensive. There was a general sense amongst the interviewees that we must ‘wait and see’ what will happen with this new relationship, as there is yet to be a criminal cartel trial. It was pointed out that the relationship between the two agencies is only relatively new and needs adequate time to develop. The ACCC felt that the relationship between the ACCC and the CDPP was an important part of their recent review of the Immunity Policy but not the most important.¹⁰¹

There was a mixture of positive and negative views of this new relationship. For those who felt positive about the current bifurcated system, one interviewee stated that they were aware of the major criticisms associated with the current process of referring criminal immunity to the CDPP. However, the interviewee felt that in one or two years it will all ‘start to settle down,’ at least when the timing differences are sorted. The interviewee felt confident in the ‘structural design’ of the system, and would prefer this current design over the idea of a ‘one-stop’ shop.¹⁰² There were others who agreed with this perception, believing the bifurcated system to be an ‘efficient allocation of resources.’¹⁰³

The former Chairman of the ACCC, Graeme Samuel, felt that the relationship between the two organisations has always been ‘really good’ from his experience as

¹⁰⁰ Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, 'Memorandum of Understanding Between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct' (15 August 2014 X; Commonwealth Department of Public Prosecutions, 'Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process' (Australia's Federal Prosecution Service, 2014) <<http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>>, Annexure to the Prosecution Policy of the Commonwealth for Immunity from prosecution in Serious Cartel Offences.

¹⁰¹ Interviewee 11 (Sydney, 19th August 2013) 24.

¹⁰² Interviewee 2 (Sydney, 22nd July 2013) 19.

¹⁰³ Interviewee 8 (Sydney, 15th July 2013) 2.

Chairman. According to Samuel, the different enforcement culture of the CDPP had ‘never been a problem’ and that it would be a ‘rare case where the (CDPP) would act contrary to the ACCC in relation to immunity.’¹⁰⁴ He also believes that the ACCC has had sufficient time to prepare for the introduction of criminal immunity and to start working with the CDPP in relation to criminal evidence gathering and investigation. According to Samuel, by the time the legislation was implemented ‘we were ready to go.’¹⁰⁵ Despite these comments, over five years has passed without a criminal cartel case.

There were also compelling negative views of the current relationship, one of the key issues related to the ‘sufficiency of information’ required for the granting of criminal immunity. One of the strongest arguments in this context was that the CDPP requires more information than the ACCC in order to assess and grant a proffer, as the CDPP is ‘coming from an enforcement perspective.’¹⁰⁶ The CDPP may not be satisfied with the information outlined in the proffer and generally requires more specific information than the ACCC in this respect.

One interviewee provided an example in support, where it was stated that for a proffer to be granted by the ACCC, the ACCC generally requests the names of individuals involved in the company, including current and former employees. However, where the CDPP is required to assess this information in order to grant criminal immunity, this initial general information is not sufficiently comprehensive or specific for the CDPP to carry out their assessment. For instance, the CDPP would additionally need to know ‘who they are, over what period and what did they do.’¹⁰⁷ The ACCC also acknowledged that the CDPP may require more information in this context.

Many of the interviewees had also experienced significant delays of ‘many months’¹⁰⁸ whilst awaiting the CDPP’s decision regarding criminal immunity, with back and forth discussions taking place between the ACCC and the CDPP during this deliberation process. Some of the interviewees believed this delay was the direct result of the ‘sufficiency of information’ issue.

¹⁰⁴ Interviewee 7 (Melbourne, 26th April 2013) 36.

¹⁰⁵ Interviewee 7 (Melbourne, 26th April 2013) 37.

¹⁰⁶ Interviewee 4 (Sydney, 17.06.2013) 12.

¹⁰⁷ Ibid.

¹⁰⁸ Interviewee 5 (Sydney, 25th July 2013) 4; Interviewee 9 (Sydney, 15th July 2013) 7-8.

The interviewees acknowledged the inherent difficulties associated with the bifurcated design, where on the one hand the CDPP requires more information initially in order to grant criminal immunity, and on the other, the immunity applicant being reluctant to cooperate and provide that information until such time as criminal immunity is granted, as the CDPP ‘is protective of its discretion.’¹⁰⁹

During this time, some of the interviewees were concerned that the delay may adversely impact upon the investigation:

Interviewee: So in that period, if there’s a delay of a month, 2 months, 6 months, a year, that investigation is basically stalled for that period. Meanwhile, in other countries, it’s proceeding at different paces, things are becoming public, targets of the investigation are becoming aware, people are leaving employment, natural processes of email hygiene are occurring, all that’s happening, so it’s bad for the investigation to be stalled.¹¹⁰

When questioned about this difficulty, the ACCC acknowledged that this delay does create a considerable degree of uncertainty.¹¹¹ Some of the interviewees also pointed to the risk that the CDPP may not accept the ACCC’s recommendation for immunity, which can create an additional level of uncertainty for potential immunity applicants.¹¹² Another interviewee confirmed that sufficiency of information was a ‘significant’ issue but believed that the issue of more importance was the lack of information surrounding the criteria used by the ACCC in order to determine whether they will seek criminal immunity with the CDPP.¹¹³

When prompted for an explanation to explain the delay, there was one suggestion that CDPP personnel may not have the ‘experience to really understand cartel matters.’¹¹⁴ This would be due to the fact that the CDPP has never prosecuted cartel conduct before, and therefore does not have the requisite experience to understand the nature of a proffer, and the role of upfront immunity in this context.

Differences in the enforcement agenda and priorities between the ACCC and the CDPP were thought by some interviewees to contribute to the delay. On the one

¹⁰⁹ Interviewee 5 (Sydney, 25th July 2013) 4.

¹¹⁰ Interviewee 4 (Sydney, 17th June 2013) 13.

¹¹¹ Interviewee 11 (Sydney, 19th August 2013) 20-22; Interviewee 12 (Sydney, 19th August 2013) 20-22. As part of the review, the ACCC now issues a ‘letter of comfort’ and the CDPP grants an undertaking: See Chapter VI, The Relationship between the ACCC and the CDPP, pg 194.

¹¹² Interviewee 5 (Sydney, 25th July 2013) 3-4; Interviewee 9 (Sydney, 15th July 2013) 6-7.

¹¹³ Interviewee 13 (Sydney, 22nd July 2013) 4.

¹¹⁴ Interviewee 9 (Sydney, 15th July 2013) 7.

hand, the ACCC views cartel conduct as a very serious crime, as opposed to the CDPP, who has extensive and varied priorities, along with stretched resources and man power that results in a ‘we’ll get around to it attitude.’¹¹⁵ Other interviewees agreed that the notion of granting criminal immunity ‘upfront’ is antithetical to the traditional enforcement strategies of the CDPP, as the granting of immunity has traditionally been used by the CDPP as a ‘last card’ strategy. At the time of interview, the ACCC itself could not provide an explanation regarding the delay.¹¹⁶

There was a general consensus amongst the interviewees that the process of granting criminal immunity needs to be carried out by the CDPP in a more timely fashion in order to reduce the uncertainty associated with the delay. Many of the interviewees were not able to offer constructive solutions as to how this delay could be reduced, except to put it down to the CDPP’s current lack of experience.

A unique solution put forward by one interviewee was the suggestion that an immunity applicant should be able to directly liaise with the CDPP in the determination of granting criminal immunity. The interviewee was concerned that the information exchanged between the immunity applicants, the ACCC and the CDPP could otherwise become ‘lost in translation.’¹¹⁷ The interviewee felt that it was in the interests of ‘natural justice’ that the immunity applicant be able to make representations to the decision maker (the CDPP), particularly because this is a common practice in all other areas in which a decision maker has the ability to affect an individual’s interest:

Interviewee: If you look at any other area of decision-making on the part of a State or Commonwealth authority, if the decision maker has the ability to affect your interest as an individual, as a citizen, you have the ability to make representations to that decision maker before they make a decision or if a decision has been made which is adverse to your interests, you have a right of appeal.¹¹⁸

The interviewee believes that if the CDPP has the capacity to sue the immunity applicant directly, then this should be met with the opportunity for the immunity applicant to make representations to the CDPP directly. Moreover, the

¹¹⁵ Interviewee 5 (Sydney, 25th July 2013) 3-4.

¹¹⁶ Interviewee 11 (Sydney, 19th August 2013) 21.

¹¹⁷ Interviewee 8 (Sydney, 15th July 2013) 2.

¹¹⁸ Ibid.

interviewee was critical of the fact that there is currently no right of appeal for an immunity applicant if an adverse criminal immunity decision is made. The interviewee did not wish the bifurcated system to be changed, in that the ACCC should still refer the granting of criminal immunity to the CDPP, however, it was asserted that as soon as the decision is referred, this should open a direct line of communication between the CDPP and the immunity applicant.¹¹⁹

4 *Revocation of Immunity*

Pursuant to the Immunity Policy, if an immunity holder breaches one of the conditions stipulated in the policy, the ACCC or the CDPP have the right to revoke immunity.¹²⁰ It is not indicated in the policy what process of review an immunity applicant should take in the event the applicant wishes to appeal the ACCC's or CDPP's final revocation decision.¹²¹ Presumably, an applicant would seek judicial review of the ACCC's and/or the CDPP's decision in the first instance, through the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ('ADJR Act'), or seek an action for breach of contract, or merits review through the Administrative Appeals Tribunal.¹²² The interviewees were questioned about this issue of revocation and the possible avenues for appeal.

Many of the interviewees had experienced instances in which revocation had been threatened.¹²³ One interviewee could envisage a number of situations where the issue of revocation may be prevalent:

Interviewee: One is that the immunity holder just becomes fatigued by the process, so I think the regulator has to be mindful that they can approach this pragmatically to ensure they get what they need. The second is that the immunity holder likely, they could be sold, they could be taken over and there's not the appetite on the enquirer to carry on with it. You know these things come up in due diligence processes before a manager. That's a possibility.¹²⁴

¹¹⁹ Ibid 3.

¹²⁰ Australian Competition and Consumer Commission, above n 27, s F.

¹²¹ To some extent this has been further explained in recently revised version of the policy: Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy: Frequently Asked Questions' (2014) Q 53, 54.

¹²² See Chapter VI, Revocation of Cartel Immunity, pg 205.

¹²³ Interviewee 4 (Sydney, 17th June 2013) 15; Interviewee 3 (Melbourne, 26th April 2013) 22; Interviewee 13 (Sydney, 22nd July 2013) 12-13.

¹²⁴ Interviewee 13 (Sydney, 22nd July 2013) 13.

Although a number of interviewees may have been aware of or experienced instances of threatened revocation, it is important to note that revocation has never occurred in the experience of the interviewees.¹²⁵ One of the interviewees found it particularly difficult to comment on this issue, as they had trust and confidence in the regulator to not make hasty or irrational decisions. It was the interviewees' belief that the client should be aware of all of their rights and obligations under the policy and it would need to be particularly egregious conduct to warrant revocation.¹²⁶

Whilst many of the interviewees recognised the potential for revocation to occur, the main concern was that there was no clear process stipulated in the policy with regards to dispute resolution or a formal appeal process.¹²⁷ As one interviewee stated: 'I think the broader question is not whether or not it allows for dispute resolution but the question of whether there's any scope for an immunity applicant to seek reviewed decisions by way of judicial review, which there doesn't appear to be.'¹²⁸

Many of the interviewees speculated as to what may occur in the event that an immunity applicant sought to appeal an immunity decision made by the ACCC but none were able to provide a definite or clear response, particularly as to whether the decision could be reviewed by a court.¹²⁹ One interviewee believed it would be 'interesting' to see what would come from a review pursuant to the *ADJR Act*.¹³⁰ In light of these vague and varied speculations, there was a general consensus that if a provision were inserted into the policy that outlined the process of dispute resolution or appeal in the event of revocation, that this would increase certainty for potential immunity applicants.¹³¹

Given that revocation of immunity has not yet occurred in Australia, the legal character of the policy has not been formally tested in the Australian court system:

¹²⁵ Interviewee 4 (Sydney, 17th June 2013) 15; Interviewee 3 (Melbourne, 26th April 2013) 22.

¹²⁶ Interviewee 9 (Sydney, 15th July 2013) 13: The opposing argument here is whether the lack of revocation on the ACCC's behalf indicates complacency or overly lenient treatment of immunity applicants.

¹²⁷ The revised draft immunity policy does address revocation but still does not provide a clear process of review, beyond the ACCC. It was even less clear when it came to the situation where the CDPP may revoke its immunity: Australian Competition and Consumer Commission, above n 27, s F.

¹²⁸ Interviewee 3 (Melbourne, 26th April 2013) 22.

¹²⁹ Interviewee 13 (Sydney, 22nd July 2013) 12-13.

¹³⁰ Interviewee 4 (Sydney, 17th June 2013) 15-16.

¹³¹ Interviewee 3 (Melbourne, 26th April 2013) 22: This interviewee was drawing upon recent empirical work, conducted by the interviewee, which indicates a general level of consensus amongst practitioners in Australia that the issue of revocation needs to be clarified but there are various suggestions as to how this could be achieved.

Interviewee: No, I don't think so. It is discretionary. It's an administrative policy; it has no force of law. It's a prosecution discretion whether to grant or not grant and it's a prosecution discretion whether to withdraw it or not, so it's not really enforceable in a sense, it's just a policy, prosecution policy. So it's not a contract. It's not a legislative instrument so what its character is has never been tested in Australia actually.¹³²

This does much to explain why there is such uncertainty about the dispute resolution process and the reviewability of ACCC decisions within this context. This issue brought into question whether the Immunity Policy should be legislated during discussions with one interviewee.¹³³ Although legislating the policy in itself would not resolve the question of what rights or processes of appeal are available, it may strengthen the possibility of review pursuant to the *ADJR Act* or provide a platform for a designated dispute resolution body to be stipulated. The interviewee thought that legislating the Policy would be 'very difficult' politically, as such proposals have been suggested in other areas of competition law, for example merger review, and have not been successful.¹³⁴

C *The Tension between Public and Private Enforcement – Confidentiality and Third Parties*

1 *Confidentiality*

As part of the process of applying for immunity, an immunity applicant will provide evidence, in the form of written statements, witness accounts and various forms of documentation of the conduct to the ACCC, in order to fulfil their ongoing disclosure requirements under the policy and to aid in the prosecution of the other cartel members. As a result of these proceedings, the immunity applicant is exposed to third party litigation, as the applicant has admitted to being involved in cartel activity. In order to commence proceedings against the immunity applicant, a person or corporation who has been adversely affected by the cartel's operation will need evidence to support their case for civil damages.

¹³² Interviewee 4 (Sydney, 17th June 2013) 15.

¹³³ Interviewee 3 (Melbourne, 26th April 2013) 23.

¹³⁴ See Chapter VI, Legislation, pg 210.

Given the covert nature of cartels, the primary source of evidence to support the third party litigant's claim is the immunity applicant's evidence. The third party litigant will need access to this evidence and will seek to obtain it from the ACCC. In 2010, the legislature enacted specific provisions that deal with the confidentiality of cartel information, in s 157 and related provisions of the *Competition and Consumer Act 2010* (Cth) (The 'Protected Cartel Information' or 'PCI' regime). The PCI regime invests the ACCC with broad discretionary powers to prevent the disclosure of immunity information. It outlines a system by which third parties can seek information from an immunity applicant through the ACCC. The interviewees were questioned about their opinions in relation to the current system of granting access to immunity evidence and related confidentiality issues.¹³⁵

Some of the interviewees believed that confidentiality, in the context of cartel immunity, was a particularly interesting and significant issue that strikes at the core of almost all of the issues associated with the policy.¹³⁶ This opinion was not shared by all, as one interviewee felt that the emphasis placed on the importance of confidentiality was overstated, and that other considerations, such as transparency of the ACCC, should trump it.¹³⁷ There was a general consensus that the disclosure of immunised information was a very delicate issue and requires a careful balancing exercise.¹³⁸

Those who were against the disclosure of immunised information to third parties felt that the roles of public and private enforcement should be kept separate; and that the aims of public enforcement should not 'deliberately frustrate the availability of private enforcement.'¹³⁹ There was a sense that a public regulator should not facilitate private enforcement claims because it will act as a disincentive to future immunity applicants. As one interviewee described the issue, 'you're happy to stick your head in one noose but not two.'¹⁴⁰

In stark contrast to this opinion was the view that whilst the ACCC has the power to initiate proceedings on behalf of a whole range of people who have suffered

¹³⁵ See also Chapter VII, Disclosure of Immunity Information to Third Parties – The Australian Position, pg 232.

¹³⁶ Interviewee 3 (Melbourne, 26th April 2013) 5-6; Interviewee 2 (Sydney, 22nd July 2013) 19.

¹³⁷ Interviewee 3 (Melbourne, 26th April 2013) 6.

¹³⁸ See, eg, Interviewee 5 (Sydney, 25th July 2013) 14.

¹³⁹ Interviewee 2 (Sydney, 22nd July 2013) 19.

¹⁴⁰ Ibid 14.

loss, it will not initiate these proceedings in the context of cartel conduct. One interviewee expressed this view: ‘I actually find it quite offensive that basically the regulator is being used as a cloak in the sense that this confidentiality regime, of which the regulator is an intrinsic part, is assisting a cartel from being sued subsequently.’¹⁴¹ Even if the ACCC does not initiate proceedings on behalf of those who have suffered loss as a result of the cartel, this interviewee strongly felt it was ‘repugnant that the ACCC might have a folder of critical information in its possession that a private litigant can’t use.’¹⁴² When the ACCC was questioned about this response and the fact that their role as the ACCC is also for the protection of consumers, the ACCC felt that the policy’s effectiveness outweighed the concerns about access to immunised information for affected third parties:

PM: As the ACCC though, you’re walking a very fine line because your role, your aim as an organisation is for the protection of consumers and then essentially it’s you guys that block the information as well to the so-called, you know, consumers you’re supposed to protect.

ACCC 1: So, I as an officer of the ACCC...I think, you know, the immunity policy is effective because of certain things and applicants need to have confidence in the policy so that they can come in and disclose things with us and I think our view is...

ACCC 2: They need certainty.

ACCC 1: Yeah.¹⁴³

Many of the interviewees agreed with these arguments about certainty, stating that certainty should take precedence over access to information for third party litigants. One interviewee declared that they did not have much sympathy for private litigants in this context; that the private litigants, and presumably those acting for them, should ‘work just as hard as any other litigator’ and that they don’t need a ‘free leg up.’¹⁴⁴ In response to this comment, the interviewee was asked whether the ACCC ‘got a free leg up’ and the interviewee replied that they did, but the immunity regime is a ‘different scheme’ with ‘different objectives.’¹⁴⁵

¹⁴¹ Interviewee 5 (Sydney, 25th July 2013) 14.

¹⁴² Ibid 15.

¹⁴³ Interviewee 11 (Sydney, 19th August 2013) 33-34; Interviewee 12 (Sydney, 19th August 2013) 33-34.

¹⁴⁴ Interviewee 8 (Sydney, 15th July 2013) 19.

¹⁴⁵ Ibid.

Some interviewees felt that third parties will have access to the information that is made publicly available as a result of the proceedings initiated on the basis of the immunised information, such as ‘the benefit of the findings and the agreed statement of facts.’¹⁴⁶ The interviewee asserted that this publicly available information would be enough to initiate proceedings against cartel members, and on this basis the current system strikes the appropriate balance. It was also suggested that there are other ‘practical, forensic ways of getting information’ to aid third party actions, although these methods were never elaborated upon.¹⁴⁷

Other interviewees were concerned that greater access to immunised information by third parties would act as a disincentive to future immunity applicants and result in an overall reduction of immunity applications, ‘if they can’t move on because they’re having to do all these other things I think it’s just another thing to say, oh we might just take our chances.’¹⁴⁸ This disincentive is much greater where the damages paid in third party actions far exceed the penalty imposed, which is ‘probably the biggest disincentive for people to go in.’¹⁴⁹

When asked about the current operation of the PCI scheme, the ACCC stated that the disclosure of immunised information is a decision that ultimately rests with the court, where the court will carry out a careful balancing exercise. The provision relating to the ‘interests of justice’ was discussed, and it was felt that this factor is likely to be interpreted quite broadly by the courts, which would result in the granting of disclosure in more cases.¹⁵⁰ The ACCC was unable to provide a definite view on this point.

The former Chairman of the ACCC, Graeme Samuel, reflected upon the time where the ACCC had to take an ‘extraordinary position’ in siding with *Visy*¹⁵¹ in the resulting third party proceedings, in opposing the disclosure of immunised evidence. The former Chairman was personally uncomfortable with this decision, as his philosophical view was that ‘I would bend over backwards to facilitate a third party action’ but he had to be mindful about setting a precedent for future cartel cases, ‘if

¹⁴⁶ Interviewee 9 (Sydney, 15th July 2013) 19.

¹⁴⁷ Interviewee 2 (Sydney, 22nd July 2013) 14.

¹⁴⁸ Interviewee 8 (Sydney, 15th July 2013) 19.

¹⁴⁹ Interviewee 9 (Sydney, 15th July 2013) 19.

¹⁵⁰ Interviewee 11 (Sydney, 19th August 2013) 32-33; Interviewee 3 (Melbourne, 26th April 2013) 9; See also, Chapter VII, The Legislation: Protected Cartel Information Scheme, pg 237.

¹⁵¹ *Australian Competition and Consumer Commission v Visy Holdings Pty Ltd* (No 3) (2007) FCA 1617.

we'd given up that quickly it would have then been a sign in future cartel prosecutions to witnesses, be very careful of what you say because the evidence will be given up by the ACCC to third parties.¹⁵²

On the other hand, there were many interviewees who felt positively towards allowing third parties access to immunised information but acknowledged that this was a 'very significant challenge.'¹⁵³ There was one interviewee that felt that these challenges were attributed to the fact that the ACCC is not a 'leader' in this area, in terms of being open to critical discussion about the issues associated with disclosure, in contrast to the United States and the European Union.¹⁵⁴ In the interviewee's view these challenges were exacerbated by the fact that in Australia there is no active plaintiff bar, only 'one law firm' that can potentially initiate proceedings on behalf of those who have suffered loss as a result of the cartel.¹⁵⁵ Other interviewees felt that the private enforcement landscape was changing and that in the next 10 years or so, there will be a greater and more active plaintiff bar in Australia.¹⁵⁶

When questioned about the current operation of the PCI scheme, there were many interviewees who felt that the scheme tips in favour of non-disclosure of immunised information and that it had 'gone too far in protecting the cartel member.'¹⁵⁷ One interesting observation in this context was the suggestion that those who are in favour of non-disclosure should be mindful that the 'shoe may be on the other foot someday' and that they may one day find themselves attempting to gain access to immunised information.¹⁵⁸

One of the strongest arguments used by those who support non-disclosure was that it will create a significant disincentive for future immunity applicants, which will result in reduced detection of cartel conduct by means of reduced immunity applications. However, there were many interviewees who plainly did not agree with this argument and felt that the disclosure of immunised information is not likely to adversely affect immunity applications at all. The primary reason for this is that the information is likely to become accessible anyway:

¹⁵² Interviewee 7 (Melbourne, 26th April 2013) 23.

¹⁵³ Interviewee 3 (Melbourne, 26th April 2013) 8.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 9.

¹⁵⁶ Interviewee 8 (Sydney, 15th July 2013) 19.

¹⁵⁷ Interviewee 5 (Sydney, 25th July 2013) 14.

¹⁵⁸ Ibid.

Interviewee: I think the whole argument about exposure to private enforcement and its capacity to deter or disincentify immunity applications is vastly overstated. There is no evidence to support it in the United States because, well there may be several reasons for that but one would be that the severity of the public sanctions are such that there's just very little prospect of an immunity applicant deciding to face the spectre of criminal fines and goal time in order to limit exposure to private follow on actions.¹⁵⁹

Further to this, was the belief that the cartel participants are likely to be aware that the information they provide to the ACCC will eventually surface and thus this factor 'does not weigh heavily in the balance' when deciding whether to come forward for immunity.¹⁶⁰ As one interviewee put it, the follow-on actions are the 'price you pay for the immunity prize.'¹⁶¹

The interviewees were also questioned about the criminal discovery provisions in the *Federal Court Act of Australia Act 1976* (Cth) Part III, Subdivision C. These provisions allow a court to override the PCI scheme in a criminal proceeding through the granting of criminal discovery.¹⁶² One interviewee acknowledged that the PCI scheme has no effect in criminal proceedings but indicated that we must have faith and confidence in the judiciary to make the right decision regarding disclosure, particularly because 'the stakes are much higher.'¹⁶³ In this way, it was implied that the interviewee had full confidence that the court will make the appropriate decision regarding disclosure in the context of criminal proceedings.

When asked about the potential impact these criminal discovery provisions could have on the Immunity Policy, the ACCC were not able to provide an answer at the time of interview. Instead it was suggested that the criminal discovery provisions should form part of a written submission in response to the ACCC's call to revise the policy.¹⁶⁴ Instead, the ACCC emphasised its commitment to ensuring the effectiveness of the Policy with the aim of encouraging people to 'run through the door' for immunity; 'it's not like we are rewarding someone because they've been

¹⁵⁹ Interviewee 3 (Melbourne, 26th April 2013) 10.

¹⁶⁰ Ibid; Interviewee 4 (Sydney, 17th June 2013) 26; Interviewee 5 (Sydney, 25th July 2013) 14.

¹⁶¹ Interviewee 4 (Sydney, 17th June 2013) 26.

¹⁶² *Federal Court Act of Australia Act 1976* (Cth) Part III, Subdivision C. See Chapter VII: The Legislation: Protected Cartel Information Scheme, pg 268.

¹⁶³ Interviewee 6 (Sydney, Unrecorded, 23rd July 2013).

¹⁶⁴ This issue did not publicly appear in the review process and was never addressed in the discussion paper, subsequent drafts or final policy.

caught. We're trading off their immunity for being able to take action and to detect and to deter.'¹⁶⁵

2 *Restitution to Third Parties*

A provision requiring that cartel immunity applicants make restitution to parties affected by the cartel previously existed in the Immunity Policy. The first version of the ACCC Immunity Policy in 2003 required that 'where possible' [the corporation] will make restitution to injured parties.¹⁶⁶ In August 2005, the ACCC removed this requirement for restitution and set out its reasons for its removal in its discussion paper.¹⁶⁷ There is no requirement for corporations to pay restitution under the current Policy. The interviewees were questioned as to whether the requirement for restitution should be re-introduced, meaning that immunity applicants would need to compensate those who were affected by the cartel as a condition of their immunity.

Although many of the interviewees classed the issue of reintroducing restitution as an 'interesting question', there was an overall majority opinion that the provision should not be reintroduced, and these opinions were generally shared by those who act in favour of immunity applicants. In particular, there was one passionate interviewee who responded to the proposition with a straight out 'No!' and simply requested the next interview question.¹⁶⁸ These discussions surrounding restitution called into question the role of public and private enforcement, as one interviewee put it: 'Is the role of the public enforcer to compensate victims or cause the compensation to victims or is it to promote specific and general deterrents? And so what is the purpose of public enforcement?'¹⁶⁹

Some of the interviewees were of the strong belief that the aims of public and private enforcement should be kept separate, as 'we do not need a regulator meddling in private rights of compensation.'¹⁷⁰ Instead, these interviewees felt that the ACCC

¹⁶⁵ Interviewee 11 (Sydney, 19th August 2013) 36.

¹⁶⁶ Australian Competition & Consumer Commission, 'Leniency Policy for Cartel Conduct' (ACCC, 2003) Pt A, [2(e)]; Pt B, [2(e)].

¹⁶⁷ Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law Policy and Practice in an International Context* (Cambridge University Press, 1 ed, 2011) 519.

¹⁶⁸ Interviewee 8 (Sydney, 15th July 2013) 18.

¹⁶⁹ Interviewee 4 (Sydney, 17th June 2013) 27.

¹⁷⁰ Interviewee 2 (Sydney, 22nd July 2013) 13.

should focus on prosecuting offenders and recovering fines instead of ‘bothering’ with compensation, as there is no need to ‘muddy the waters’.¹⁷¹ In the interviewees opinion, if maximising the prospects of public enforcement comes at a cost to private enforcement then it is a ‘fair trade in the overall balance.’¹⁷²

The primary argument against the reintroduction of the restitution requirement related to the difficulty in calculating the restitution amount. Given the complexities involved in determining resultant economic loss, many of the interviewees felt that it would be extremely difficult to determine key questions, such as where the loss lies and who will distribute it.¹⁷³ The former Chairman of the ACCC, Graeme Samuel, stated that these difficulties were one of the main reasons the ACCC decided to abolish the requirement.¹⁷⁴

Many interviewees thus felt that the reintroduction of restitution would act as a significant disincentive to future immunity applications. In the words of one interviewee:

Interviewee: I think where I sort of land on... is it would be a significant disincentive to use the policy if it had a restitution element which as insisted upon rather than, you know, one that’s there but never used. It would be hard for, quite hard for our clients to sort of make an upfront determination of a damages amount and agree to pay that. It might be regarded as a dollars and cents matter, you know, what’s the fine going to be? What’s the restitution going to be? Calculate. OK. Calculate. No.¹⁷⁵

In response to these arguments, the interviewees were asked whether they believed it was possible for restitution to be calculated in the same way that damages are in complex scenarios. One interviewee believed that this was not possible due to the inexact nature of the conduct stating that ‘you could not draw any immediate equals between penalties and damages... damages are purely there, I mean punishment obviously is deterrence but the regime is very different to the civil regime which is to compensate people.’¹⁷⁶

¹⁷¹ Ibid.

¹⁷² Ibid 15.

¹⁷³ Interviewee 10 (Sydney, 29th July 2013) 15; Interviewee 7 (Melbourne, 26th April 2013) 29.

¹⁷⁴ Interviewee 7 (Melbourne, 26th April 2013) 28.

¹⁷⁵ Interviewee 4 (Sydney, 17th June 2013) 28.

¹⁷⁶ Interviewee 13 (Sydney 22nd July 2013) 19.

In contrast, a minority of interviewees felt that these arguments against the restitution requirement were tenuous and that framing the issue in terms of whether or not the ACCC should have a condition of restitution in the immunity is too simplistic an approach.¹⁷⁷ It was suggested that there are other ways that the ACCC could facilitate private enforcement without the introduction of the restitution requirement.

One of the primary ways this could be achieved would be through the introduction of a condition in the Immunity Policy that requires applicants to provide affected third parties with information to help with quantifying their loss.¹⁷⁸ The interviewee felt that any claims that this information condition would create a disincentive to future immunity applicants would need to be tested. Other interviewees believed that introducing a condition that required the immunity applicant's cooperation with third parties would be 'very difficult in practice.'¹⁷⁹

3 *Derivative Immunity for Employees*

Pursuant to the Immunity Policy, if a corporation qualifies for conditional immunity, it may seek derivative immunity for related corporate entities and/or for current and former directors, officers and employees of the corporation who were involved in the cartel conduct, if the corporation provides a list of those who require protection to the ACCC.¹⁸⁰ In this context, the interviewees were asked whether employees, who may not have any knowledge of the cartel's operation, are advised of their rights and obligations in relation to the ACCC's investigation and who has the responsibility to advise them. Secondly, the interviewees were asked about the protections afforded to the employees, or former employees, who may have been deliberately omitted from the derivative immunity application by the corporation. Some of the interviewees felt that the issue of derivative immunity was a 'complex issue'¹⁸¹ that was not well understood in the community.¹⁸²

¹⁷⁷ Interviewee 3 (Melbourne, 24th April 2013) 11.

¹⁷⁸ Ibid.

¹⁷⁹ Interviewee 4 (Sydney, 17th June 2013) 29.

¹⁸⁰ Australian Competition and Consumer Commission, above n 27, s 19 & 20.

¹⁸¹ Interviewee 9 (Sydney, 15th July 2013) 26.

¹⁸² Interviewee 11 (Sydney, 19th August 2013) 40.

In response to the first question, there was a general consensus amongst the interviewees that employees should be advised of their rights and obligations, but there were mixed responses as to who should advise them of this.¹⁸³ One interviewee stated that all employees should get individual legal representation at their own expense in order to understand the nature of their rights and obligations under derivative immunity.¹⁸⁴

Another suggested that the corporation should be required to pay for the employee's representation. The interviewee believed that the cooperation of employees is paramount to the corporate immunity applicant because the employees may possess crucial information related to the ACCC's investigation. The interviewee felt that only if an employee was just 'so rotten' that you would 'send them off to get independent legal advice.'¹⁸⁵ However, another interviewee was of the opinion that legislation¹⁸⁶ prevents a company from indemnifying an employee from costs in this scenario.¹⁸⁷ This interviewee also agreed that employees should be immediately informed of their rights and obligations but indicated that the fact that employees may require separate legal representation needed to be 'observed in the policy.'¹⁸⁸

Representatives of the ACCC indicated that it was not the ACCC's responsibility to ensure that employees were advised accordingly and that there was also no requirement or obligation on the corporation's behalf to ensure it happens; it is 'left to the company to deal with.'¹⁸⁹

In relation to the second issue, many of the interviewees acknowledged that there was a possibility that employees, particularly former employees, could be deliberately left off the immunity application and therefore not covered by derivative immunity. However, there was a general sense that in practice this does not often happen and at the very least, the Immunity Policy could be articulated with a 'bit more precision' as to what the ACCC would do in this situation.¹⁹⁰

¹⁸³ Interviewee 9 (Sydney, 15th July 2013) 26; Interviewee 13 (Sydney, 22nd July 2013) 26.

¹⁸⁴ Interviewee 13 (Sydney, 22nd July 2013) 26.

¹⁸⁵ Interviewee 10 (Sydney, 29th July 2013) 32.

¹⁸⁶ *Competition and Consumer Act 2010* (Cth) Sch 2, Pt 5.2, s 229.

¹⁸⁷ Interviewee 13 (Sydney, 22nd July 2013) 26.

¹⁸⁸ *Ibid.*

¹⁸⁹ Interviewee 9 (Sydney, 15th July 2013) 26-27.

¹⁹⁰ Interviewee 13 (Sydney, 22nd July 2013) 26.

There were other interviewees who could not envisage a situation where a company would deliberately omit someone from derivative immunity but believed this situation is more likely to occur in relation to former employees.¹⁹¹ In fact, the interviewee was aware of cases where former employees had been left off the immunity application but have been extended derivative immunity by the ACCC and felt this scenario was an ‘appropriate’ response.¹⁹²

When questioned about the possibility of companies deliberately omitting individuals from applications, the ACCC responded by emphasising the inherent flexibility of the policy.¹⁹³ In practice if someone is omitted from the Policy, and the company realises this, they have the opportunity to rectify the immunity application and include those employee/s initially omitted. The ACCC believes that an important part of the policy is that it is designed to create tension between corporations and individuals, as well as corporation against corporations, and the current policy accommodates these aims. If an employee is deliberately omitted from the immunity application, the ACCC stated that it would determine each situation on a case by case basis and potentially inform that individual of the cooperation policy, where it was said that it was possible for that individual to be granted full immunity.¹⁹⁴

However, many of the interviewees found it difficult to comment on the more complicated situation where a particularly culpable individual could be ‘carved out’ of an immunity policy, as is the practice in the United States:

Interviewee: ... it’s a tough one because you then get into a question about who is, you know, a particularly, you know, heinous employee and it really, it complicates and I don’t think we’ve ever gone to that. We don’t go to that level of sophistication in the policy itself but it might well occur as a matter of practice.¹⁹⁵

Therefore, it was clear that the cooperation policy could be extended by the ACCC to an employee who was deliberately left off the immunity application. In this case it is unlikely that the employee would be granted immunity. It was not clear

¹⁹¹ Interviewee 9 (Sydney, 15th July 2013) 27.

¹⁹² Ibid 27-28.

¹⁹³ Interviewee 11 (Sydney, 19th August 2013) 40-41.

¹⁹⁴ Interviewee 12 (Sydney, 19th August 2013) 41; The granting of full immunity in accordance with Section H is only granted in rare and exceptional cases: Australian Competition and Consumer Commission, above n 27, [76].

¹⁹⁵ Interviewee 7 (Melbourne, 26th April 2013) 44.

whether the CDDP could extend immunity to an employee who had been deliberately omitted from the application or whether immunity or leniency could be granted pursuant to the *Prosecution Policy* in this situation.¹⁹⁶ The ACCC were unable to offer any further comment on this issue at the time of interview.

One interviewee felt that the concept of derivative immunity should be taken further and that it should run both ways, in the form of ‘vicarious immunity.’¹⁹⁷ On this suggestion, if an employee goes forward to the ACCC to apply for immunity, the corporation should also be granted immunity. The interviewee believed that it is inconsistent that currently an employee can ‘sort of break ranks’ with the company and go forward to the ACCC for immunity and that individual can be granted immunity but the company will be prosecuted.¹⁹⁸

In support of this idea, the interviewee stated: ‘It seems to me an odd result because if the company were to engage in a cartel it might use that same person and that’s it only involvement with the cartel is that one employee.’¹⁹⁹ According to the interviewee, a company is vicariously liable for an employee’s action when they have breached the law, but this is inconsistent with the situation where an employee confesses its participation in a cartel and ‘somehow its precarious relationship with the employee’s severed and the company doesn’t benefit from vicarious [immunity].’²⁰⁰

When this idea was put to other interviewees, one interviewee in particular was against it. It was the interviewee’s belief that if an employee ‘goes running’ to the ACCC without the cooperation or awareness of the company then this reflects poorly on the corporation and its culture and that is just ‘tough for the corporation.’²⁰¹ Instead it would be in everyone’s best interest for the employee to go and liaise with the company before applying for immunity as an individual but if not, and then the corporation should have sought immunity first.²⁰²

¹⁹⁶ Commonwealth Department of Public Prosecutions, above n 100.

¹⁹⁷ Interviewee 8 (Sydney, 15th July 2013) 14.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Interviewee 10 (Sydney, 29th July 2013) 33.

²⁰² Cf Christopher R Leslie, ‘Cartels, Agency Costs, and Finding Virtue in Faithless Agents’ (2008) 49 *William & Mary Law Review* 1621.

D *Alternatives to the Immunity Policy*

1 *Cartel Whistleblower Protection*

This issue was one of the most significant and controversial areas of discussion within the interviews. The interviewees were asked whether cartel whistleblower protections should be introduced for those individuals who may have been unfairly treated or dismissed as a result of revealing unlawful cartel conduct to the ACCC, similar to that proposed in the United States.²⁰³ The interviewees opinions were divided on this issue and various reasons were offered in support of their positions.

For those who supported the introduction of cartel specific whistleblower provisions, these interviewees believed that encouraging employees to reveal unlawful conduct to the authorities is an important component of an enforcement strategy, and is an inherently more reliable strategy than the Immunity Policy, according to one interviewee.²⁰⁴ When prompted for a reason as to why these whistle-blower provisions have not yet been introduced, the interviewee was of the opinion that the provisions are not in the interests of large corporations, thus there is a lack of support for these types of protections. The interviewee felt this was attributed to the larger issue of lack of organisational transparency.²⁰⁵

There were others that agreed with the important role that whistleblower protections could play in Australia, as individuals ‘shouldn’t be penalised as an employee if you did go forward and report a crime if it’s a crime.’²⁰⁶ However, there were some interviewees who believed that there is a cultural resistance to the notion of a whistleblower, as it is another form of ‘dobbing on one’s mate’. In spite of this, one interviewee felt that this cultural resistance could be overcome in time, as these protections ‘are necessary and will progressively be accepted because now we’re talking about crimes I don’t think there’s any alternative available to a

²⁰³ See, eg, United States Government Accountability Office, 'Criminal Cartel Enforcement - Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection' (United States Government Accountability Office, 2011).

²⁰⁴ Interviewee 1 (Sydney, 9th July 2013) 13.

²⁰⁵ Ibid.

²⁰⁶ Interviewee 8 (Sydney, 15th July 2013) 19.

corporation.’²⁰⁷ Another interviewee felt that the introduction of cartel specific whistleblowing protections ‘makes sense’ but such provisions need to be ‘appropriately balanced’ to avoid vexatious or false claims.²⁰⁸

Some interviewees made the distinction between two types of whistleblowers: those who have been involved in the cartel conduct and those who have not. It was generally accepted that individuals who have not been involved in the cartel but have simply come across the conduct need to be ‘protected and looked after and the court needs to make sure that they’re not vilified and their employment terminated and so forth.’²⁰⁹ On the other hand, for those who have been involved in the conduct, it would be a much ‘more difficult question’ as to whether the court would reinstate that particular individual. It would be highly dependent upon the circumstances of each case and the degree of harm that has occurred and one interviewee believed that the court would not sanction that.²¹⁰

The ACCC representatives were asked whether they would consider supporting cartel specific whistleblower protections. They responded that they were open to the possibility of ‘increasing different ways that we can uncover cartels’ and ‘it’s definitely something that we’d look at.’²¹¹ Again, the ACCC invited this issue to be submitted in a discussion paper for consideration by the ACCC in its revision of the Immunity Policy and indicated that this issue could not be discussed any further. Despite the ACCC’s indication of interest in these provisions, there was no discussion of whistleblower protections in the ACCC’s recent review of the Policy, including the discussion paper, draft policies or the most recent revision of the Immunity Policy.²¹²

One of the primary arguments made *against* the introduction of whistleblower protections was that the current system available for unfair dismissal and unfair treatment are already sufficient at providing redress, as there is a ‘perfectly adequate current system that provides opportunities for individuals to

²⁰⁷ Ibid 20.

²⁰⁸ Interviewee 9 (Sydney, 15th July 2013) 25.

²⁰⁹ Interviewee 5 (Sydney, 25th July 2013) 19.

²¹⁰ Ibid.

²¹¹ Interviewee 11 (19th August 2013) 38.

²¹² Australian Competition and Consumer Commission, above n 27; Australian Competition and Consumer Commission, above n 121.

come forward.²¹³ Those who shared this view were sceptical that there would in fact be any individuals who were aware and had knowledge of the conduct *without* being involved. There was further scepticism of the actual need for additional protections above that of ‘witness and citizen’s’ protections and ‘our human resource laws.’²¹⁴ One interviewee went as far as to suggest that it is not ‘like dobbing in the Hell’s angels’ and in the context of cartel conduct, the interviewee did not think that whistleblowers need much in the way of protection.²¹⁵

Those against the introduction of whistleblower protection provisions felt that it would simply complicate the current system where the anti-discrimination laws are operating adequately.²¹⁶ Some interviewees felt that these provisions would need to be carefully drafted to ensure that the scope of complaint is limited if they were ever introduced.²¹⁷ One interviewee was of the opinion that the only available remedy for these whistleblowers should be reinstatement, as the provision for damages may lead to false and vexatious claims by employees who have been dismissed for other reasons, aside from their knowledge of the cartel.²¹⁸

Due to the risk of false and vexatious claims, one interviewee felt that the potential for abuse of these provisions was so high that it should prevent the introduction of cartel specific whistleblower protections altogether.²¹⁹ This interviewee felt that the Immunity Policy is currently effective at encouraging people to reveal cartel conduct and that individuals, especially former employees, should not be allowed to ‘have a crack’ at the former employer in any event.²²⁰

2 *Cartel Informant System*

In addition to whistleblower protection provisions, interviewees were asked whether a cartel informant system should be introduced in Australia. This system offers monetary rewards for those who have cartel information to come forward and reveal

²¹³ Interviewee 2 (Sydney, 22nd July 2013) 17.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Interviewee 10 (Sydney, 29th July 2013) 22.

²¹⁸ Ibid.

²¹⁹ Interviewee 13 (Sydney, 22nd July 2013) 21-22.

²²⁰ Ibid 22.

that information to the competition authority. This idea is currently being experimented in the United Kingdom, South Korea and Hungary.²²¹ Along with cartel recidivism and the whistleblower protections, the discussion surrounding a cartel informant system ranked as one of the most significant and divisive issues.

Those in favour of the introduction of such a system believed that positive rewards should be given for pertinent information. This idea, according to one interviewee, made ‘a lot more sense’ than ‘just relying on people to figure that they might get in trouble and that squealing on themselves and their colleagues will prevent them from getting into trouble.’²²² Many interviewees in favour of the informant system believed this should only be extended to those who were not directly involved in the cartel and this was primarily for ‘moral reasons’.²²³

One interviewee acknowledged that the concept of a paid informant system was derived from American approaches and was supported in the literature.²²⁴ However, there was concern that this system may not ‘sit well’ with Australian culture, in the same way that the Immunity Policy does not. In response to this, one interviewee did make the point of stating that a cartel informant system would be more ethical than the granting of immunity to ‘somebody who could have been really seriously involved (who) gets off Scot free.’²²⁵ The interviewee felt that any cultural resistance to this idea is likely to be gradually accepted and that a cartel informant system may be a necessary component of an anti-cartel enforcement regime. The interviewee believed this even though they personally felt that such a system should not be necessary.²²⁶

One of the strongest arguments made in this context was that cartel informant systems are a commonly accepted practice in other forms of police work and criminal activity and that there is no clear reason that cartels should be treated any differently:

²²¹ See eg, Korean Fair Trade Commission, ‘KFTC’s launch of Reward System for Informants’ Press Release (March 2005). Available: <http://www.ftc.go.kr/data/hwp/rewardsystem.doc>.

²²² Interviewee 1 (Sydney, 9th July 2013) 16.

²²³ Ibid 19.

²²⁴ Ibid 20: For more see Chapter VII, Cartel Informant System – Financial Incentives for Whistleblowers, pg 312.

²²⁵ Ibid.

²²⁶ Ibid.

Interviewee: Well, look, the police give rewards in all sorts of situations, as you know, missing persons or murders, the police offer rewards and rewards have been around for as long as I can remember, hundreds, maybe not hundreds of years but certainly a long time and it's been a very common practice in many jurisdictions to offer rewards for information and I don't see really why this should be treated any differently. And in America they have, whistleblowers are paid 10 per cent of the compensation, which is recovered. There was an extraordinary case just by the by I think a couple of years ago where I think an individual came forward to the Department of Justice in the United States and gave them enough information whereby they were able to uncover a serious fraud involving hundreds and hundreds of millions of dollars, in fact it may have been in the billions, and this person who was, to some extent, involved and had knowledge of it received 10 per cent of the total. So he walked away with about \$150 million this fellow.²²⁷

The interviewee acknowledged the potential for misuse of such a system through false or exaggerated claims but felt that appropriate caveats could be placed within the system to ensure that these are complied with before any money is paid. It was stated that such potential misuse was no different to the problems associated with the Immunity Policy.²²⁸ There was a general feeling shared by those in favour of such a system, that now that cartel conduct is a crime, then it is more acceptable to introduce policies, such as a cartel informant system.²²⁹

The ACCC was questioned about the possibility of introducing such a system, and again it was requested that this issue be written in a submission and submitted to the ACCC. Once again this issue did not appear in any of the subsequent discussion papers or the revised Immunity Policy.²³⁰ The ACCC did say that the idea of a cartel informant system was something that had been 'thrown about' in discussion but nothing has been finalised.²³¹

Many of the interviewees, who were against introducing a cartel informant system, had first reactions relating to their 'gut instincts' and appeared to be against the idea on the basis of moral or ethical reasons. One interviewee stated: 'I don't believe in paying whistleblowers even in tax. My gut reaction is against it in any field.'²³² Many interviewees even felt these 'instinctive' feelings towards to notion of

²²⁷ Interviewee 5 (Sydney 25th July 2013) 18.

²²⁸ Ibid 19.

²²⁹ Ibid 18; Interviewee 8 (Sydney, 15th July 2013) 21.

²³⁰ Interviewee 11 (Sydney, 19th August 2013) 38.

²³¹ Ibid 39.

²³² Interviewee 10 (Sydney, 29th July 2013) 21.

paying people who have *not* been involved in the cartel, as they believed there was a risk of ‘distorting motivations’ as ‘I think you start to distort motivations and you know, positive rewarding rather than not punishing I think you start to qualitatively get into a different arena there....’²³³ There was a sense that the introduction of a cartel informant system is overstepping the mark and that is ‘not where we should go.’²³⁴

The strongest argument put forward by those who were against the system was concerned with credibility. There was a suggestion that there is already sufficient incentive provided for people to come forward and reveal their misconduct, such as the prospect of gaol, and that those who are not involved should simply be ‘good Samaritans’:

Interviewee: (It) encourages exaggerated and overblown claims, allegations and I suppose people should be more abiding anyway when it happens.

PM: ... the idea of a Good Samaritan?

Interviewee: Mmm.²³⁵

There was much scepticism about the quality of evidence that a person will give in exchange for payment, given the unlikelihood that someone with valuable information in relation to a cartel’s operation would not have actually been involved in the cartel themselves.²³⁶ Furthermore, some interviewees argued that there is no demonstrated need for such a system to be introduced, as there have already been a number of cases where people, such as suppliers, have come forward and revealed cartel conduct because they have felt aggrieved. In these situations, there has been no need to pay these people to come forward and thus there is no real need for an additional system to be put in place:

Interviewee: We’ve never had a problem, again it’s this whole problem of 1 out of 7, but we never had a problem with suppliers who felt that they’ve been ripped off coming in when they thought they had some evidence, coming and telling us about it because they felt aggrieved. We didn’t have to pay them. I think it just introduces sort of a notion of, I don’t

²³³ Interviewee 2 (Sydney, 22nd July 2013) 18.

²³⁴ Ibid.

²³⁵ Interviewee 10 (Sydney, 29th July 2013) 21-22.

²³⁶ Interviewee 6 (Sydney, Unrecorded, 23rd July 2013).

know how to describe it but look, you know, you can hear my instinctive reaction which is that it's going too far and if you say that giving immunity some people think it's gone too far because it is freeing people from prosecution who engaged in the activity, then paying people to do it goes even further.²³⁷

3 *The ACCC Cooperation Policy*

As part of the anti-cartel enforcement regime, applicants who do not qualify for immunity will be dealt with by the ACCC pursuant to the Cooperation Policy.²³⁸ This policy sets out the conditions that will need to be fulfilled in order to secure a cooperation agreement, which can result in reduced penalties for those who cooperate with the ACCC. This policy only applies for civil breaches.²³⁹ Criminal cooperation is dealt with by the CDPP separately, pursuant to the Prosecution Policy.²⁴⁰ The Cooperation Policy received more attention by the interviewees than was anticipated. The responses were varied but centred upon the notions of certainty versus flexibility in the ACCC's calculation of the penalty. The ACCC cannot ultimately decide the penalty, as this is a decision made by the court.²⁴¹ Recent court decisions have overturned this position, which will impact upon the way the penalty was previously assessed.²⁴² The interviewees were asked of their opinions in relation to cooperation prior to these cases and therefore their opinions reflect the position at the time of the interviews.

As a result of the policy's operation, one interviewee stated that there can be a number of different outcomes for any given scenario in relation to cooperation and this largely depends upon the quality of evidence provided.²⁴³ The interviewee had experienced situations where an applicant has made it difficult for the ACCC to obtain information because they were not the first or second in. However, it was felt that the ACCC was 'generally good' at determining what they are willing to offer in

²³⁷ Interviewee 7 (Melbourne, 26th April 2013) 41.

²³⁸ This policy is now combined with the ACCC Immunity Policy: Australian Competition and Consumer Commission, above n 27, s H. Full immunity may be pursuant to this section in rare and exceptional circumstances at the ACCC's discretion [76].

²³⁹ For more see Chapter VIII: Subsequent Applications for Immunity: Lenient Treatment of 'Second-in' Cartel Offenders - Australia, pg 277.

²⁴⁰ Commonwealth Department of Public Prosecutions, above n 100.

²⁴¹ This position has been recently overturned by the court: See Chapter VIII, Subsequent Applications for Immunity: Lenient Treatment of 'Second-in' Cartel Offenders - Australia, pg 277.

²⁴² Ibid.

²⁴³ Interviewee 2 (Sydney, 22nd July 2013) 16.

exchange for cooperation. One interviewee reflected upon a positive experience in dealing with the ACCC: '[the] ACCC's pretty good at giving recognition to cooperation and the court's pretty good at accepting it, so I think the system's working pretty well in terms of second order cooperation and discount on penalty.'²⁴⁴

Among those positive comments regarding the cooperation policy, many believed that the flexibility, by way of the ACCC's discretion in determining the reduced penalty for cooperation, was an understandable part of the ACCC's enforcement regime and that generally it was a 'good system.'²⁴⁵ It was felt that there was a sufficient amount of negotiation that needed to take place in order to achieve this workability. Another strong point made by the interviewees was that there is a large amount of precedent relating to the Cooperation Policy and therefore this helps to reduce much of the uncertainty associated with the ACCC's determination of penalty.²⁴⁶ It was conceded that in this situation, generally the clients of the interviewees do prefer certainty in terms of being able to know the potential penalty, before they apply for immunity.²⁴⁷ However, related to this was the acknowledgement that some degree of flexibility can be beneficial in these circumstances:

Interviewee: I suppose one of the issues with us, it could only ever be guidance as to what the ACCC would recommend because obviously in a lot of places overseas the regulator itself actually sets the penalty where here obviously the court does, so it's up to the court to determine whether it's appropriate in the circumstances, so it can only be guidance as to what the ACCC would be prepared to recommend to the court. But I think, you know, what you potentially lose from getting that certainty is the benefit of flexibility where in the particular circumstance of the case, you know, that level of discount may not be appropriate; it may be appropriate to go higher or it may be appropriate to go lower.²⁴⁸

Despite the positive comments made in relation to the inherent flexibility of the cooperation policy, many interviewees still believed that the policy could benefit from some 'firming up' in terms of listing a range of deductions and being more specific about the types of factors the ACCC will take into consideration and how

²⁴⁴ Ibid.

²⁴⁵ Ibid 17; Interviewee 5 (Sydney, 25th July 2013) 10-11.

²⁴⁶ Interviewee 5 (Sydney, 25th July 2013) 11; Interviewee 9 (Sydney, 15th July 2013) 17.

²⁴⁷ Interviewee 9 (Sydney, 15th July 2013) 17.

²⁴⁸ Ibid.

this will affect the ACCC's recommendation of penalty to the court, prior to the recent court decisions.²⁴⁹

When asked about the cooperation policy's current operation, the ACCC indicated that prior to the *Barbaro* decision, they could only make a recommendation to the court and that it was at the court's discretion as to the final determination of the penalty. The ACCC indicated that it cannot be tied to a certain percentage discount for cooperation, as is the case in some overseas jurisdictions.²⁵⁰ The ACCC felt that the spirit of the cooperation policy is 'more principle based than law based' and acknowledged that this lack of clarity may lead to uncertainty for future immunity applicants.²⁵¹

However, the ACCC also recognised the possibility of applicants 'playing the policy' if they were able to determine upfront what their potential discount would be.²⁵² It was said that in this context, flexibility is of paramount importance and that they wished to uphold the current structure of the cooperation policy, in terms of not setting out penalty discount percentages.²⁵³

There was also a more radical suggestion by one interviewee that the cooperation policy should replace the Immunity Policy.²⁵⁴ The interviewee felt that the certainty that is associated with the upfront guarantee of the first-in immunity application leads to people 'playing the policy' and that this is an undesirable consequence.²⁵⁵ Instead, by adopting a cooperation policy as the primary enforcement tool, the interviewee believed this would be more akin to 'responsive regulation' as 'you want it to be a system where it's the spirit and substance of the rules that are important, not the black and white of the rules.'²⁵⁶ The interviewee acknowledged that this view may be against those currently held by the legal profession but felt that the *status quo* was preferred by many lawyers as they can more easily manipulate the outcome for their client as a result:

²⁴⁹ Interviewee 5 (Sydney, 25th July 2013) 13; Interviewee 9 (Sydney, 15th July 2013) 17-18. See Chapter VIII, Subsequent Applications for Immunity: Lenient Treatment of 'Second-in' Cartel Offenders - Australia, pg 277.

²⁵⁰ Interviewee 12 (Sydney, 19th August 2013) 43; Ibid.

²⁵¹ Interviewee 11 (Sydney, 19th August 2013) 42.

²⁵² Ibid 43.

²⁵³ These options are not possible following the *Barbaro* decision, see Chapter VIII, Subsequent Applications for Immunity: Lenient Treatment of 'Second-in' Cartel Offenders - Australia, pg 277.

²⁵⁴ Interviewee 1 (Sydney, 9th July 2013) 9-10.

²⁵⁵ Ibid 10.

²⁵⁶ Ibid.

Interviewee: It's all about the rules. I mean that's what lawyers are interested in, the more rules there are, you know, and they'll talk about it as certainty but really it's about having more rule to play with so that they can bend them to do what their clients wants, it's very rude, but that's what I think, yeah. Whereas if you want to be interested in the substance then you worry about principles and you become less predictable but you have to bring your heart and soul to it...²⁵⁷

The interviewee was of the strong opinion that having a cooperation policy instead of an immunity policy would encourage the regulatory enforcement agency to 'do more work' rather than simply putting out an immunity policy and 'thinking everybody's going to come running to them with the evidence.'²⁵⁸

Several interviewees expressed the view that certainty is paramount in the context of the cooperation policy, and the current design of the policy was 'not working very well.'²⁵⁹ Given the general nature of the cooperation policy, some interviewees felt that this increases the likelihood that potential immunity applicants will take a 'wait and see' approach, which would reduce the very race that the ACCC is seeking to create:

Interviewee: So one of the huge advertised benefits of the immunity policy is up front certainty, right, so when I'm advising a client and the client says to me, should I go in? Then you weigh up the pros and cons of doing so. The pros and cons of immunity first in calculation are easier because the certainty is higher. Pros and cons on a second or later application are very hard because the certainty is much lower and so that lack of certainty acts as a disincentive and you're much more likely to say well - we'll just wait and see what happens, see if anyone else goes in, see how much the evidence is, see if we're implicated, see how bad it gets.²⁶⁰

Those who believed that the current cooperation policy does not offer 'any' level of certainty asserted that there was a strong need for more transparency about its operation. Whilst some interviewees acknowledged it would be too difficult to implement a system that is as accurate as those in other jurisdictions, such as the European Union and Japan, there was a call for more guidance surrounding the

²⁵⁷ Ibid 11.

²⁵⁸ Ibid 12.

²⁵⁹ See, eg, Interviewee 4 (Sydney, 17th June) 20.

²⁶⁰ Ibid 21.

calculation of the penalty to be recommended to the court.²⁶¹ According to one interviewee, this is particularly important ‘because it is a dramatically different experience if you’re second in to what it is if you’re first in terms of the clarity of outcome.’²⁶² These comments are largely redundant following the recent court decisions that will be discussed in Chapter VIII.

In summary, a majority of the interviewees exhibited a positive view of the Immunity Policy and its role in cartel enforcement detection. Many expressed serious doubts as to whether cartel conduct could be detected without the use of an Immunity Policy. From these discussions, it was apparent that most of the interviewees were strongly in favour of the aims and objectives of the Immunity Policy.

However, there was more divisive opinion when it came to discussion of the eligibility and cooperation requirements of the Immunity Policy. Whilst a majority of the interviewees were in favour of the removal of the ringleader exclusion, and many held a positive view of the new relationship between the ACCC and CDPP, there were stark differences in opinion in relation to whether a cartel recidivist should be eligible for immunity and how this would be achieved.

These divisions in opinion were also reflected in the discussions in relation to confidentiality, where opinion was split on whether the ACCC should refuse to disclose pertinent immunity information to third parties in their pursuit of cartel litigation as victims of the cartel. There was also strong opinion on both sides as to whether restitution should be reintroduced as a condition of Immunity.

The most controversial discussions were directed at whether cartel specific whistleblower protection should be introduced in Australia and whether a financial cartel informant system is a viable option to enhance cartel enforcement worldwide. There was also positive discussion in relation to the changes that need to be made to the ACCC Cooperation Policy.

Although no consensus was reached in relation to many issues, the interviews provided valuable empirical data and insight for further development, which was used to scaffold the remaining chapters in the thesis.

²⁶¹ Interviewee 5 (Sydney, 25th July 2013) 13; Interviewee 9 (Sydney, 15th July 2013) 17-18. See Chapter VIII, Subsequent Applications for Immunity: Lenient Treatment of ‘Second-in’ Cartel Offenders - Australia, pg 277.

²⁶² Interviewee 8 (Sydney, 15th July 2013) 11.

The remaining chapters will critically analyse the most controversial and important issues to emerge from the qualitative data in relation to eligibility and cooperation; issues of confidentiality and the impact on third parties; and alternatives to immunity.²⁶³

²⁶³ It is important to note that much of this discussion has changed given recent court decisions in Australia.

VI ELIGIBILITY AND COOPERATION IN CARTEL IMMUNITY

This chapter will critically analyse the empirical findings of the eligibility and cooperation requirements of the Immunity Policy through a cross-comparative analysis of these aspects across the Canadian, United Kingdom and United States policies. It will conclude with a recommendation as to how the Immunity Policy should be adapted to these findings in accordance with the enhanced criteria of transparency, accountability, consistency and proportionality.

A *Recidivism*

As outlined in Chapter IV, the concept of introducing recidivism as an exclusionary provision in the Immunity Policy was the most controversial and divisive issue within the interviewee discussions.¹ There were many arguments put forward in support of its introduction to the policy, but also discussion in relation to the challenges associated with the inclusion of recidivism as an automatic exclusion. This section will first explore the concept of recidivism generally, the difficulties associated with defining recidivism, and how recidivists are currently treated in criminal law before turning to how recidivists are treated within the context of cartel immunity, specifically in Australia, the United States, the United Kingdom and Canada.

This section will then critically analyse the prospect of introducing recidivism as an automatic exclusion for immunity, drawing on the experience of the European Union sentencing of recidivists in cartel matters and the South Korean policy relating to recidivism, giving due consideration to issues of transparency, accountability, consistency and proportionality. Based on this assessment, this section will conclude that recidivism is an important matter that should be included in the criteria for cartel immunity and, if not, what alternative measures should be taken instead.

¹ See Chapter V, Cartel Recidivism, pg 134.

1 *What is Recidivism and Why It Is Significant?*

One of the key points made by all interviewees during the discussions related to the concern as to how recidivism would be defined if it were to be implemented in the policy. This point is reflected most broadly in the literature, where criminologists, policy-makers and commentators have found it difficult to define the concept with any level of precision.² In terms of the research in relation to recidivism, there is no consistent methodology employed in the literature to measure recidivism or the means by which to reduce the rates of such.

The word recidivism is derived from the Latin term, *recidere*, which means to fall back. Although there are many technical variations of the definition of recidivism, the common element is ‘repetitious criminal activity.’³ The historical treatment of recidivists in criminal law is ideologically tied to the notion that repeat offenders deserve greater or more severe punishment because they have already broken the law, and have not rehabilitated themselves by ‘learning their lesson.’⁴ Thus the concept of recidivism is intrinsically tied to the presumed greater culpability of an offender as a result of their repeated criminal behaviour, compared to an offender who has not previously breached the law.

Although a complete or precise definition of recidivism has not been achieved universally, there are several key factors related to the concept. The first is the similarity between two or more offences; if an offender has committed several offences of a similar nature then it will likely be considered recidivism.⁵ Secondly, the time during which the offences were committed is relevant. The question is whether there should be a limitation on the time period that has connected the offences in question, and also a consideration of the minimal period between the commission of two offences, which will distinguish it as a recidivist offence, as

² See eg, Alexis Durham, 'Criminology: Justice in Sentencing: The Role of Prior Record of Criminal Involvement' (1987) 78 *Journal Criminal Law & Criminology* 614; Julian Roberts, 'Punishing Persistence' (2008) 48 *British Journal of Criminology* 468.

³ Jason Payne, 'Recidivism in Australia: Finding and Future Research' (Australian Institute of Criminology, Research and Public Policy Series, 2007) 4.

⁴ Michael O'Neill, Linda Maxfield and Miles Harer, 'Past as Prologue: Reconciling Recidivism and Culpability' (2004) 73 *Fordham Law Review* 245, 247.

⁵ Gabriel Hallevey, 'The Recidivist Wants to Be Punished: Punishment as an Incentive to Reoffend' (2009) 5 *International Journal of Punishment and Sentencing* 120, 122.

opposed to a distinct and separate offence.⁶ There are many issues that flow from each of these factors and they will be discussed in greater detail below.

This perception of recidivists, and how they have been treated in criminal law, is reflective of the forward-looking, utilitarian strategies that seek to prevent and deter crime through the use of ‘carefully designed techniques for the selective incapacitation of high-risk offenders.’⁷ This is opposed to the alternative retributive model of crime known as the ‘justice model,’ which focuses primarily on the seriousness of the offending conduct, rather than the antecedent criminal history of the offender.

There are a number of studies that attempt to measure the level of recidivism in general, across all aspects of crime.⁸ Despite the nuances that exist in the recidivism statistics across countries in the Western world, a cursory view of the research reveals that recidivism does in fact occur, and it is significant. A fundamental principle in nearly every common-law jurisdiction is that an offender’s prior record is central to sentencing.⁹ The prevalence of recidivism does not appear to be debated to a great extent in the literature, as much of the focus tends to be on specific areas of recidivism, and how to reduce the level of recidivism for certain crimes. However, there does not appear to be any consensus reached in relation to which methods are the most effective at reducing the rate of recidivism. That question is beyond the scope of this thesis, which is concerned with recidivism only to the limited extent of examining whether recidivists should be excluded from cartel immunity.

The treatment of recidivists in the criminal justice system has typically been associated with the granting of harsher sentences for repeat offenders. The United

⁶ Ibid.

⁷ Durham, above n 2, 617.

⁸ See, eg, Payne, above n 3; Edward Latessa and Christopher Lowenkamp, 'What Works in Reducing Recidivism?' (2006) 3 *University of St Thomas Law Journal* 521; Kelly Richards, 'Technical and Background Paper: Measuring Juvenile Recidivism in Australia' (Australian Government - Australian Institute of Criminology, 2011); Linda Maxfield, 'Measuring Recidivism under the Federal Sentencing Guidelines' (2005) 17 *Federal Sentencing Reporter* 166; United States Sentencing Commission, 'Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines' (United States Sentencing Commission, 2004); Clare Ringland, 'Measuring Recidivism: Police versus Court Data' (2013) 175 *Crime and Justice Bulletin* .

⁹ See eg, Darryl Plecas et al, 'Do Judges Take Prior Record into Consideration? An Analysis of the Sentencing of Repeat Offenders in British Columbia' (University of Fraser Valley, 2012) <<http://www.ufv.ca/media/assets/criminology/do+judges+consider+prior+record.pdf>> : ‘The importance of previous criminal history should only be surpassed by the seriousness of offence committed.’

States has consistently demonstrated that it will not tolerate recidivism in criminal behaviour. Since the 1970s, there has been a steady move towards mandatory sentencing and presumptive guidelines.¹⁰

The Sentencing Commission in the United States utilises criminal history as a means to measure offender culpability, deter criminal conduct and protect the public from further crimes of the defendant.¹¹ Although these guidelines are not mandatory, in relation to most offences, a defendant's criminal history can approximately double the presumptive sentence, and potentially add on fourteen years to a gaol term.¹² Considerable weight towards criminal history in sentencing is reflected in the 'three strike laws,' which have been adopted in almost 20 states in the United States. These three strike laws in their original form were directed at offenders who have been convicted of any felony and had two or more relevant previous convictions, and as a result, were required to be sentenced to between twenty-five years and life imprisonment, regardless of how minor the third offence was. These laws have since been modified so that the third offence must be a serious or violent offence, although minor offences can still attract a large increase in prison sentences.¹³

The treatment of recidivists in Australia, compared to the United States, is similar but not as harsh. Most jurisdictions in Australia now have statutory provisions that substantially increase the importance of prior convictions in sentencing, where 'the offender has a record of previous convictions,' particularly if the offender is being sentenced for a serious personal violence offence.¹⁴ According to one study, approximately 60 per cent of offenders in Australia are repeat offenders.¹⁵

The United Kingdom adopts a similar approach to Australia in its treatment of recidivists, where nearly 50 per cent of offenders who are released from prison reoffend within a year and almost three quarter of those who were released from

¹⁰ Mirko Bagaric, 'The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing' (2014) 51 *San Diego Law Review* 343, 346.

¹¹ Maxfield, above n 4, 166.

¹² Bagaric, above n 10, 348.

¹³ *Ibid* 349.

¹⁴ See eg, *Crimes (Sentencing Procedure) Act* 1999 (NSW) s21A (d) 'the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences).

¹⁵ Talina Drabsch, 'Reducing the Risk of Recidivism' (NSW Parliamentary Library Research Service 2006) 9.

custody or began a community service order in the first quarter of 2000 were reconvicted of another offence within nine years.¹⁶ The United Kingdom has its own version of the United States' three strikes laws and mandatory sentencing guidelines, particularly for third convictions of domestic burglary and Class A drug trafficking.¹⁷ In a similar vein to Australia, the United Kingdom has specific provisions that are aimed at imposing enhanced imprisonment terms for serious sexual and violent offenders whose prior conviction for serious offences can be taken into account.¹⁸

In contrast, the treatment of repeat offenders in Canada is somewhat less clear than the positions in the United Kingdom, United States and Australia, despite the recidivism rates being similar. According to one study, the reconviction rate in the first year out of prison was 44 per cent, with most of these reconvictions for non-violence offences.¹⁹ Under section 727 (1), (2) and (3) of the *Canadian Criminal Code*,²⁰ the role that prior criminal record plays in sentencing is extremely vague. Essentially, the position is that a more severe sentence may be imposed on the basis of prior record but the details relating to the conditions and the degree to which prior record should affect the severity of a sentence is absent from the legislation.²¹ However, similar dangerous offender provisions exist which increase prison sentences on the basis of a third conviction.²²

The purpose of outlining the treatment of offenders with a prior record in the United States, United Kingdom, Australia and Canada is to show how seriously recidivism is viewed in criminal law in these countries, and how this is reflected in their criminal legislation and sentencing practices. As a general theme, a criminal recidivist is likely to receive a harsher sentence as a result of their prior record than if

¹⁶Ministry of Justice, 'Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders' (UK Ministry of Justice, 2010) <<http://webarchive.nationalarchives.gov.uk/20120119200607/http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf>> Section 7.

¹⁷ Bagaric, above n 10, 351.

¹⁸ Ibid.

¹⁹ J Bonta, T Ruggie and M Dauvergne, 'The Reconviction Rate of Federal Offenders' (Corrections Research - Solicitor General of Canada, 2003) <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rcvd-fdffndr/rcvd-fdffndr-eng.pdf>> The reconviction rate for all the releases in the first year was 44 per cent with the reconviction rate for violence considerably lower (14 per cent). The non-violent reconviction rate was 30 per cent accounting for the majority of reconvictions.

²⁰ *Criminal Code*, RSC 1985, c C-46.

²¹ Plecas et al, above n 9, 4.

²² See eg, Government of Canada, 'Dangerous Offender Legislation' (Government of Canada, 2014) <<http://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/protctn-gnst-hgh-rsk-ffndrs/dngrs-ffndr-dsgntn-eng.aspx>>.

they were a first time offender. This may seem an obvious conclusion, but in the context of criminal cartel conduct, it seems that regardless of an offender's prior record, they may still be eligible for a full grant of immunity. This seems incongruent with the general treatment of criminal recidivists in these countries.

Repeat cartel offenders are not treated as recidivists under the Immunity Policy. This may be due to the fact that cartelists are not deemed to be general criminals, but corporations or 'white collar criminals.' However, researchers have demonstrated a consistent trend amongst corporations or 'white collar criminals' to commit similar offences repeatedly.²³

2 *Cartel Recidivism*

In relation to cartel conduct specifically, there is empirical research that supports the existence of recidivists amongst corporate cartelists. John Connor, a United States economist, has generated some of the primary data relating to cartel recidivism. Connor's study comprises of a market sample of 648 hard-core cartels over a period of 20 years; confined to cartels that have already been discovered by competition authorities.²⁴

Connor acknowledges that his results may be negatively skewed, as his conclusions are derived from data obtained from *discovered* cartels, which he believes only accounts for 10 to 30 percent of all cartel conspiracies.²⁵ Connor's research is comprised of instances of recidivism based on the number of times a company has participated in and been convicted for a unique cartel.²⁶ Connor does not elaborate on this definition. Convictions for cartel offences in multiple jurisdictions, or where a company was granted immunity in one or more jurisdictions

²³ See, eg, Robert Wagner, 'Criminal Corporate Character' (2013) 65 *Florida Law Review* 1293, 1324; David Weisburd, Ellen Chayet and Elin Waring, 'White-Collar Crime and Criminal Careers: Some Preliminary Findings' (1990) 36 *Crime & Delinquency* 342; Dan Dalton and Idalene Kesner, 'On the Dynamics of Corporate Size and Illegal Activity: An Empirical Assessment' (1988) 7 *Journal of Business Ethics* 861; Andrew Hopkins, 'Controlling Corporate Deviance' (1980) 18 *Criminology* 198.

²⁴ John Connor, 'A Symposium on Cartel Sanctions: Recidivism Revealed: Private International Cartels 1990-2009' (2010) 6 *Competition Policy International* 101, 108-109: The data set covered information derived from competition authorities in jurisdictions across the globe, including North America, Europe, Asia, Latin America, Oceania & Africa.

²⁵ *Ibid.*

²⁶ *Ibid.*

for a particular offence were counted as one offence for the purposes of Connor's research.²⁷

Furthermore, in the case of large multinational corporations that have a number of subsidiaries, Connor attempted to trace the controlling parent group of the sanctioned company on the belief that 'punished cartelists are frequently affiliates of larger corporate groups'.²⁸ Thus, in Connor's view, tracing the ownership of these firms provided a more accurate account of rates of corporate recidivism. Connor also acknowledged a number of circumstances that may have affected the sample of this research. These include where competition regulators kept immunity applications confidential or the anonymity of convicted corporations.²⁹

Despite the aforementioned limitations, Connor's research indicates that cartel recidivism is rising. By the end of 2009, the number of cartels detected had risen by 124 percent and leading recidivists tended to be highly diversified multinational corporations.³⁰ One interesting observation by Connor was that 'if sanctions have the power to dissuade companies to engage in repeated violations, one would expect to see a reduction, if not elimination, of such conduct in subsequent periods.'³¹ But instead the data showed that out of the leading recidivists that were sanctioned in 1990-99, not one of those corporations learned to avoid participating in cartel conduct in the 2000s, after being sanctioned for the same conduct discovered by competition-law authorities before 2000. Furthermore, for most of the top recidivist corporations, there is a general trend of *accelerated* recidivism after 1999.³²

Connor's research has been criticised, particularly by the United States DOJ.³³ The DOJ argued that the definition of recidivism employed by Connor in his research was overly broad; a flaw they claim skewed the research results and

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid 39.

³² See also Marc Barennes and Gunnar Wolf, 'Cartel Recidivism in the Mirror of EU Case Law' (2011) 2 *Journal of European Competition Law & Practice* 423. If one takes into consideration the Commission decisions adopted over the past five years alone (between 2006 and June 2011) the rate of cartel recidivism exceeds 40 per cent; Douglas Ginsburg and Joshua Wright, 'Antitrust Sanctions' (2010) 6 *Competition Policy International* 3, 4, 14.

³³ Gregory Werden, Scott Hammond and Belinda Barnett, 'Recidivism Eliminated: Cartel Enforcement in the United States Since 1999' (Department of Justice - Antitrust Division, September 22 2011)

produced misleading results.³⁴ Furthermore, the DOJ asserted that Connor's sample, dating back to 1990, is irrelevant, as they claim much had since changed in the enforcement practices of the DOJ, including the revision of the leniency policy, and increased prison sentences for culpable non-United States citizens. The DOJ states that after reviewing the 'pertinent' records:

No company and no individual convicted in the United States of a cartel offense after July 23, 1999 subsequently joined a cartel prosecuted in the United States. Moreover, no company and no individual granted conditional leniency after July 23, 1999 subsequently joined a cartel prosecuted in the United States.³⁵

Therefore, the DOJ claims that the United States is impervious to the general rates of rising recidivism amongst corporations for cartel conduct, as they assert that cartel recidivism has been eliminated from the United States due to 'meaningful prison terms.'³⁶ There are a number of other studies that acknowledge the existence of cartel recidivism despite the DOJ's claims.³⁷ Recent cases have also put the media focus on the prevalence of white collar recidivism, most notably the *USB case*, which has called into question the effectiveness of deferred prosecution or leniency agreements as enforcement tools.³⁸

If we accept as a general position that recidivism is a feature of human behaviour, and exists to some extent in the context of cartel conduct, then we must see what implications flow from this premise. While much attention has been focused on how recidivists should be sentenced, there is a lack of analysis

³⁴ Ibid 3.

³⁵ Ibid 6.

³⁶ Ibid 7.

³⁷ See, eg, D. Daniel Sokol, 'Policing the Firm' (2014) 89 *Notre Dame Law Review* 785, 792; Martin Carree, Andrea Gunster and Maarten Schinkel, 'European Antitrust Policy 1957-2004: An Analysis of Commission Decisions' (2010) 36 *Review of Industrial Organization* 97; Organisation for Economic Cooperation and Development, 'Promoting Compliance with Competition Law' (Organisation for Economic Cooperation and Development - Policy Roundtables, 2011) 23; Ginsburg and Wright, above n 32; Ron Knox and Morris Schonberg, *Is DG Comp More Likely to Raise a Fine Than to Lower It?* (10 November 2010) *Global Competition Review* <<http://globalcompetitionreview.com/indepth/analysis/29350/is-dg-comp-likely-raise-fine-lower-it/>>: finding that the most common reason DG Comp increased fines between 2005 and 2010 was recidivism.

³⁸ See, eg, Brandon Garrett, *Time to Crack Down on Recidivist Banks Instead of Slapping Wrists* The Conversation <<http://theconversation.com/time-to-crack-down-on-recidivist-banks-instead-of-slapping-wrists-39285>>; James Stewart, *For UBS, a Record of Averting Prosecution* (July 20, 2012) *The New York Times* <http://www.nytimes.com/2012/07/21/business/ubss-track-record-of-averting-prosecution-common-sense.html?_r=0>; Peter Henning, *Guilty Pleas and Heavy Fines Seem to Be Cost of Business for Wall St* (May 20, 2015) *New York Times* <<http://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html>>.

surrounding whether or not recidivists should be entitled to immunity for cartel behaviour.

The immunity policies in the United States, United Kingdom, Canada and Australia do not address the concept of recidivism and allow recidivists to be granted immunity for repeated cartel conduct.³⁹ The ACCC has acknowledged that they would not currently refuse an immunity application on the basis of recidivism.⁴⁰ By contrast, under the 2006 leniency program of the Greek Competition Authority, recidivists could not receive immunity from fines.⁴¹ However, this provision was removed in 2011.⁴²

The South Korean Corporate Leniency Policy is currently the only jurisdiction that prohibits a corporation from receiving immunity more than once in five years.⁴³ According to this policy, a cartel participant will be excluded from leniency where:

1. A person who was ordered to take corrective measures and to pay a penalty surcharge for a violation of Article 19 (1) of the Act conducts any unfair cartel activity again in contravention of the relevant corrective measures within five years from the date on which the person was ordered to take the corrective measures;
2. A person in whose case corrective measures or a penalty surcharge imposed under Article 22-2 for unfair cartel activities conducted in violation of Article 19 (1) of the Act was mitigated or exempted conducts another unfair cartel activity in violation of Article 19 (1) of the Act within five years from the date on which corrective measures or a penalty surcharge was mitigated or exempted.⁴⁴

According to these provisions, a cartel participant who has received immunity in the previous five years or is subject to an existing corrective order will be unable

³⁹ There is potential that a recidivist could be excluded from United States leniency on the basis of the 'fairness' provision pursuant to Section B (7) of the policy: 'The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.' There is no available evidence to suggest that this provision has been used by the DOJ to exclude recidivists from reapplying for leniency.

⁴⁰ Interviewee 11 (Sydney, 19th August 2013) 28.

⁴¹ Decision N° 299/V/2006 of the Plenary of the Hellenic Competition Commission, point A.4(e): 'the undertaking must not have participated in the past in a prohibited collusive practice for which a decision by a National Competition Authority or the European Commission has been issued'.

⁴² The new leniency programme was adopted by Decision 526/VI/2011 of 30 August 2011.

⁴³ Korea Fair Trade Commission, 'Public Notification on Implementation of Leniency Program' (2012) Article 6-3; Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126, 165. 'The previous South Korean leniency policy had been seen as permitting unfair exploitation by large multinational companies operating in multiple markets and repeatedly applying for immunity, leaving domestic companies to 'cop the full brunt of penalties time after time.'

⁴⁴ Korea Fair Trade Commission, above n 43, Article 6-3.

to seek leniency. The purpose of introducing these exclusionary provisions was to discourage habitual offenders from engaging in cartel conduct repeatedly, by making it much more costly to do so.⁴⁵

In contrast, there were concerns that the provisions may drive undetected cartels underground where they will continue to thrive and thus undermine the deterrence and detection goals of the policy.⁴⁶ This concern was reflected in the interviews, where some interviewees believed that the introduction of recidivism as an automatic exclusion would decrease the ‘effectiveness’ of the Immunity Policy.⁴⁷ The basis given for this concern was that such exclusion would result in fewer cartelists coming forward to seek immunity, due to the uncertainty of the concept and how it would be applied.⁴⁸ These arguments are largely overstated. Whilst deterrence and detection are the main aims of the Immunity Policy, allowing a repeat cartel offender to receive immunity repeatedly does not deter that particular corporation from re-offending; on one view, it may even facilitate the misconduct. Thus, allowing recidivists to repeatedly apply for immunity arguably does not achieve specific deterrence.

In terms of its impact on general deterrence, similar provisions currently exist in the policy that exclude cartelists on the basis of coercion or their role as the ringleader.⁴⁹ These conditions exist to prevent particularly unscrupulous cartel members from receiving immunity. The competition regulators have not sought to remove these exclusionary provisions on the basis that they will undermine the detection and deterrence aims of the Immunity Policy.⁵⁰

Moreover, the DOJ will seek to ‘carve-out’ culpable employees from its corporate leniency policy, where these employees will potentially be subject to prosecution and punishment. However, this practice is not perceived by the DOJ as

⁴⁵ Yulchon LLC, *Revamped Korean Leniency Regime: No More Cheap Way Out for Repeat Cartelists and Second-in-Line Confessors* (October 31 2012) Lexology <<http://www.lexology.com/library/detail.aspx?g=43c72699-15cb-4f0a-aa8b-8f39f4c2a37f>>.

⁴⁶ Ibid.

⁴⁷ See Chapter V, *Cartel Recidivism*, pg 134.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ The ACCC had the opportunity to remove this provision in its most recent review of the policy. The ACCC choose to keep the provision but change the ‘ringleader test’ to a ‘coercion test.’ See Chapter VII, *Cartel Coercion*, pg 186.

adversely affecting the aims of the policy.⁵¹ Therefore, on this basis, if the introduction of recidivism as an automatic exclusionary condition would not be dissimilar to the existing provisions in the policy, then it is unlikely to have a significant impact on the detection and deterrence aims of the policy. This is particular the case where there are other considerations that are important to this assessment, aside from its impact on detection and deterrence, such as the argument that recidivists need to be excluded on the basis of moral reasons, given that ‘the visible fact of repeat offending risks weakening the moral commitment to the law of the spontaneous law-abiding.’⁵²

In light of this analysis, the focus instead should be on the way the recidivism condition should be implemented. There was general support amongst the interviewees *in principle* that cartel recidivists should not be entitled to immunity, but many were divided as to how this is could be achieved in practice.⁵³ One concern was the difficulty of defining a ‘recidivist,’ particularly in the context of large, multi-national cartels. For example:

Interviewee: If you have an organisation which has two different business divisions which operate in separate markets, one division may have been involved in cartel conduct and resolved the matter. The other division, which is not in even a related market, why should they not get the benefit of the immunity policy and why should the authorities not get the benefit of the detection of it.⁵⁴

3 *Cartel Recidivism – A Workable Model*

This chapter will now turn to formulating an appropriate model for the purposes of inclusion in immunity policies. As discussed above, there is extensive

⁵¹ Scott Hammond, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations' (U.S Department of Justice, 2006) s D; Department of Justice, 'Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements' (Department of Justice 2013)

<http://www.justice.gov/atr/public/press_releases/2013/295747.htm>.

⁵² Wouter P.J Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 12.

⁵³ See Chapter V, Cartel Recidivism, pg 134.

⁵⁴ Interviewee 4 (Sydney, 17th June 2013) 18: This opinion does not consider that unincorporated business divisions are not subject to liability. The corporation is the entity subject to liability and the corporation is a repeat offender.

literature in relation to how recidivism should be defined, but no consensus on the issue.⁵⁵ In addition to the Korean leniency policy, another model that can provide some limited insight into the way recidivism could be defined in the ACCC Immunity Policy is the European Union Commission's sentencing of repeat cartel offenders.

According to the 2006 Fining Guidelines,⁵⁶ where an undertaking continues or repeats the same or similar infringements after the Commission or a national Competition authority has made a finding that the undertaking infringed Article 101 or 102 TFEU, the basic amount of the fine will be increase up to 100per cent for each such infringement established.⁵⁷ This general definition has been extensively discussed in European Union case law, where 'recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements.'⁵⁸

Therefore, on this basis, the Commission must satisfy three cumulative requirements in order to impose higher fines on the finding of recidivism: (1) the same undertaking (2) must have repeated the same or a similar competition law infringement (3) after a prior infringement decision was adopted.⁵⁹ However, the European Union model is limited in its usefulness as a definition for cartel immunity, as a previous immunity applicant would not have been subject to an infringement decision for its role in the cartel.

⁵⁵ See Chapter V, Cartel Recidivism, pg 134.

⁵⁶ The European Fining Guidelines refine the methodology which has been applied since 1998 to set fines for infringements of the competition rules. They provide a framework for the setting of fines.

⁵⁷ Barennes and Wolf, above n 32, 425; Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, 2-5.

⁵⁸ Wils, above n 52, 6. Wils has cited numerous case examples that discuss the concept of recidivism: *Thyssen Stahl v Commission* (T-141/94) [1999] ECR II-347, [617]; *ICI v Commission* (T-66/01) [2010] ECR, [378]; in other judgments the Court has added that, 'the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement has been made in the past: *Groupe Danone v Commission* (T-38/02) [2005] II-4407, [363] confirmed in *P Danone v Commission* (C-3/06) [2007] ECR I-1331, [41]. The European Union Courts have also clarified that the Commission can take account of recidivism even if the prior decision is still subject to review by the courts; in case of later annulment of the prior decision, the Commission would however be required to amend its second decision: *P Lafarge v Commission* (C-413/08) [2010] ECR I-5361, [81]-[90]. As to the notion of 'similar' infringements, it appears from the case-law that an infringement of Article 101 TFEU and an infringement of Article 102 TFEU cannot be considered as similar: Joined Cases: *BASF v Commission* (T-101/05) [2007] ECR II-4949, [64]; *Imperial Chemical Industries v Commission* (T-66/01) [2010] ECR II-02631, [378]-[381].

⁵⁹ Barennes and Wolf, above n 32, 428.

(a) *Key Considerations In Formulating A Workable Model For Recidivism*

The first question relates to defining the corporation as a recidivist. This can be a complex question. The reason for this is that corporations can merge with other corporations; individuals who controlled a corporation during an initial cartel may not be the same individuals who control the same corporation in a subsequent cartel; and finally, whether subsidiaries of a parent company could be found to be a recidivist when it was another subsidiary or the parent company itself that committed the prior cartel offence. A competition regulator would be faced with these questions when determining whether the corporation applying for immunity is the same corporation who had previously received immunity for a cartel offence.

The European Union courts have discussed some of these issues, particularly relating to the liability of parent companies in relation to their subsidiaries, although they have not been required to make a decision on this basis, specifically in relation to recidivism.⁶⁰

To address these issues, the general rule that a corporation is an entity with separate legal personality should be applied.⁶¹ It is a fundamental principle of corporations' law that a company is a legal entity separate and distinct from its shareholders with its own separate legal rights and obligations. The Australian courts have long held the view that the corporate veil should only be pierced in exceptional cases.⁶² Many leading scholars have written extensively on piercing the corporate veil and the reasons for piercing it.⁶³ It is clear that the circumstances in which the

⁶⁰ Ibid.

⁶¹ *Salomon v Salomon & Co Ltd* [1897] AC 22; *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567; *Walker v Wimborne* (1975-76) 137 CLR 1.

⁶² See, eg, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (Lexis Nexis, 2015) [4.250.12].

⁶³ See, eg, Harvey Gelb, 'Piercing the Corporate Veil - The Undercapitalization Factor' (1982) 59 *Chicago-Kent Law Review* 1; S Ottolenghi, 'From Peeping Behind the Corporate Veil, to Ignoring it Completely' (1990) 53 *The Modern Law Review* 338; Henry Hansmann and Reiner Kraakamn, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879; Robert Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 *Cornell Law Review* 1036; Robert Thompson, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 47 *Vanderbilt Law Review* 1; Franklin Gevertz, 'Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil' (1997) 76 *Oregon Law Review* 853; Jennifer Payne, 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' (1997) 56 *The Cambridge Law Journal* 284; Robert Thompson, 'Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors' (1999) 13 *Connecticut Journal of International Law* 379; Stephen Bainbridge, 'Abolishing Veil Piercing' (2001) 26 *Journal of Corporate Law* 479; Ian Ramsay and Noakesm David, 'Piercing the Corporate Veil in

court has pierced the veil have produced fragmented and inconsistent results.⁶⁴ There are also limited circumstances under the *Corporations Act 2001* (Cth) that allow for the corporate veil to be pierced.⁶⁵

Given the reluctance of courts to pierce the corporate veil, there is no compelling case for piercing the corporate veil in the context of immunity applications. Thus, in the situation where a corporation applies for immunity and that same corporation has previously received immunity, it should not be eligible regardless of the circumstances surrounding the initial application. For example, if a group of employees orchestrated a cartel within a corporation and the corporation received immunity for that conduct, subsequently if a different group of employees from the same corporation engaged in cartel conduct, the corporation would not be eligible for full immunity once again.

Secondly, the corporation must have previously received immunity in accordance with the ACCC Immunity Policy, which applies to cartel conduct in contravention of:

1. (a) Division 1 of Part IV of the CCA which prohibits a corporation from making or giving effect to contracts, arrangements or understandings that contain a cartel provision, and/or
2. (b) Section 45(2) of the CCA.⁶⁶

A corporation that has previously received a penalty discount in exchange for cooperation pursuant to the policy will therefore not be excluded on this basis.⁶⁷ It is important that the exclusionary provisions are not drafted so wide as to significantly diminish the Immunity Policy's operation. Corporate recidivists should be excluded from receiving full immunity multiple times, but applicants who received lenient treatment for past offenses should still be eligible for full immunity.

Australia' (2001) 19 *Company and Securities Law Journal* 250; Kurt Strasser, 'Piercing the Veil in Corporate Groups' (2005) 37 *Connecticut Law Review* 637; Robert Thompson, 'Piercing the Veil: Is Common Law the Problem?' (2005) 37 *Connecticut Law Review* 619.

⁶⁴ See eg, John Farar, 'Piercing the Corporate Veil in Favour of Creditors and Pooling of Groups - A Comparative Study' (2013) 25 *Bond Law Review* 31, 31; Helen Anderson, 'Piercing the Veil on Corporate Groups in Australia: The Case for Reform' (2009) 33 *Melbourne University Law Review* 333, 334.

⁶⁵ *Corporations Act 2001* (Cth) s 588V provides for the lift of the corporate veil of the parent only in the case of insolvency of a subsidiary. The consequence of lifting the veil is that the parent company will be liable for the debt of the subsidiary but there is no criminal penalty involved in the case of insolvent trading of a subsidiary.

⁶⁶ Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014) 2.

⁶⁷ *Ibid* s H.

In cases where the cartel participant has previously received immunity, and is therefore excluded on the basis of recidivism, it would be possible for the immunity applicant to receive lenient treatment in accordance with the cooperation section of the Immunity Policy.⁶⁸ As previously stated, there are concerns that this may adversely impact on the detection and deterrence aims of the policy. These concerns need to be reconciled with the fact that similar exclusionary provisions, such as the coercion condition, currently exist in the policy. The ACCC has not indicated that these provisions reduce the detection or deterrence capability of the policy, which is reflected in their decision to retain these provisions in its most recent review of the policy.⁶⁹

The third consideration relates to the limitation period that should apply when determining whether there is recidivist conduct. This is one of the most controversial issues in the sentencing of cartel recidivists in the European Union. The only guidance offered by the Commission is that recidivism may be taken into consideration if ‘a relatively limited period of time separates one infringement from the next.’⁷⁰ This is determined on a case-by-case basis. 10 years has been treated as a ‘relatively short period of time.’⁷¹ Some Member States specify a limitation period for recidivism in competition law cases.⁷² For example, in Spain the period between the first finding of an infringement to the start of the second infringement is ten years and in France it is fifteen years.⁷³

On the other hand, the Korean Corporate Leniency program stipulates that recidivists may not be eligible for leniency if they have received leniency in the previous five years.⁷⁴

⁶⁸ Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy: Frequently Asked Questions' (2014).

⁶⁹ Australian Competition and Consumer Commission, above n 66, ss 16 (iv), 21 (e), 24 (c), 28 (iv), 77 (e).

⁷⁰ Barennes and Wolf, above n 32, 432.

⁷¹ Ibid 430.

⁷² Kristina Nordlander, 'The Commission's Policy on Recidivism: Legal Certainty for Repeat Offenders?' (2005) 2 *The Competition Law Review* 16.

⁷³ See, eg, the Spanish National Competition Commission's Communication of 6 February 2009 on the quantification of sanctions arising from violations of Articles 1, 2 and 3 of the Spanish Competition Act 15/2007 of 3 July 2007 and Articles 81 and 82 of the European Community Treaty (fine increase by 5 to 15 per cent, and maximum period of ten years between the first finding of infringement and the start of the second infringement), and the French Competition Authority's Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties (fine increase by 15 to 50 per cent, and maximum period of 15 years between the first finding of infringement and the start of the second infringement).

⁷⁴ Korea Fair Trade Commission, above n 43, Art 6.3.

In Australia, the *Competition and Consumer Act 2010* (Cth) sets a limitation period of 6 years for an action for damages.⁷⁵ If this factor is combined with the estimation that the average cartel lasts between 5-7 years,⁷⁶ then this could be a flexible figure that the ACCC could adopt in its assessment of recidivist behaviour. The ACCC should exercise its discretion in determining whether the corporation should be excluded on the basis of recidivism given the facts of each particular application.⁷⁷ In its determination, the ACCC could have regard to the nature of the firm's previous cartel offences, whether the firm has a history of recidivist behaviour, the conduct to which immunity is being sought once again and the time in which the corporation came forward.⁷⁸ The more serious and frequent the recidivistic behaviour, the more likely the ACCC should refuse to grant an application for immunity.

Finally, there was much concern that if recidivism were implemented, as an automatic exclusion, then the definition of recidivism should be clear so that immunity applicants could readily determine their legal position in relation to the Immunity Policy with greater clarity. This is based on the presumption that if an immunity applicant has a greater awareness and ability to determine whether they will be granted full immunity prior to actually making the application, then the more likely the applicant will be to come forward and disclose their misconduct.⁷⁹ However, as this section has demonstrated, it is possible to develop a clear and workable model of recidivism.

4 Recommendation

The purpose of this section was to demonstrate the need for excluding cartel recidivists from repeatedly receiving immunity and to propose a workable model to achieve this. It can be seen from the economic literature and empirical studies that

⁷⁵ *Competition and Consumer Act 2010* (Cth) s 236 (2)(1).

⁷⁶ For an overview of studies regarding cartel duration, see Margaret C Levenstein and Valerie Y Suslow, 'What Determines Cartel Success' (2006) 44 *Journal of Economic Literature* 43.

⁷⁷ Yulchon LLC, above n 45.

⁷⁸ These are similar factors considered by the DOJ in determining whether the granting of leniency would be unfair to others: DOJ Department of Justice, 'Corporate Leniency Policy' (0091, Department of Justice - Antitrust Division, 1993) Section B (7).

⁷⁹ Scott D Hammond, 'Cornerstones of an Effective Leniency Program' (Department of Justice, 2004) s V.

cartel recidivism is an issue that warrants serious consideration, even if the actual number of cartel recidivists remains uncertain.

The arguments against the imposition of cartel recidivism as an automatic exclusion are overstated. There is little, if any evidence, aside from the anecdotal evidence offered by the regulator that suggests this would seriously impact on the ‘effectiveness’ of the Policy. There are currently exclusionary provisions in the Immunity Policy, such as the coercion requirement, that are similarly broad in nature and exist to prevent highly culpable individuals from receiving immunity. Likewise, the recidivism requirement would be aimed at denying immunity to those whose culpability is especially high.

If an individual or a corporation was found to be excluded due to recidivist behaviour, they nonetheless have the opportunity to rely on ACCC Cooperation Policy, and the relevant cooperation policies in the United States, United Kingdom and Canada.

B *Cartel Coercion*

According to s16 (iv) of the Immunity Policy, a corporation will be eligible for conditional immunity from ACCC-initiated proceedings where ‘the corporation has not coerced others to participate in the cartel.’ The coercion test also applies to individuals who have coerced others to participate in the cartel.⁸⁰ This coercion test replaced the previous ringleader requirement where an immunity applicant could be automatically excluded from immunity on the basis that they were the ‘clear leader of the cartel.’⁸¹

The removal of the ringleader requirement was a result of the 2014 ACCC review of the Policy. According to the revised FAQ, there must be ‘clear evidence’ that the party has coerced other members to participate in the cartel and this is

⁸⁰ Australian Competition and Consumer Commission, above n 66, s 28 ss(IV).

⁸¹ Australian Competition and Consumer Commission, 'The ACCC Immunity Policy for Cartel Conduct' (2009)

<<http://www.accc.gov.au/system/files/Immunity%20policy%20for%20cartel%20conduct%20and%20interpretation%20guidelines.pdf>> s 8 (iv); Australian Competition and Consumer Commission, 'ACCC Immunity Policy Interpretation Guidelines' (2009)

<<http://www.accc.gov.au/system/files/Immunity%20policy%20for%20cartel%20conduct%20and%20interpretation%20guidelines.pdf>> s 3.4.

determined on a case-by-case basis in light of the respective roles and positions of each of the cartel members.⁸² The ACCC ‘may’ in some cases require the ‘applicant to demonstrate it has not coerced others’ but does not clearly stipulate that the immunity applicant will have the burden of proof in this respect.⁸³

Furthermore, it is implied that the ACCC would require a high level of information in order to determine that there is ‘clear evidence’ of coercion. This is compounded by the fact that the ACCC is ‘unlikely’ to disqualify an application on the basis of coercion.⁸⁴ The FAQ also outlines a number of scenarios that may illustrate the effect of the coercion requirement.⁸⁵ By providing these examples, the ACCC has attempted to provide further guidance and clarity regarding the operation of the coercion requirement and has gone beyond the information previously provided in relation to the ringleader requirement.

As outlined in Chapter V, there was a general consensus amongst the interviewees for the removal of the ringleader requirement.⁸⁶ The most common arguments in support of this proposition related to the uncertainty surrounding the definition of a ‘ringleader’ as ‘someone may start off as the ringleader and then someone else may assume the captain’s armband and then it moves through a continuum.’⁸⁷

Many of the interviewees pointed to the difficulties the ACCC would face in ascertaining who the ‘clear’ leader of the cartel was, given that cartels are essentially consensual in nature. Caron Beaton-Wells has strongly criticised the ringleader requirement of the Immunity Policy and advocated its removal.⁸⁸ Beaton Wells argued that it is very difficult to envisage a situation where one participant did not coerce another as part of the cartel. Moreover, the ACCC’s decision in relation to whether the applicant is a ringleader is made at the time in which the applicant comes forward for immunity and therefore solely relies on the immunity applicant’s

⁸² Australian Competition and Consumer Commission, above n 68, 12.

⁸³ Contrast the United States Leniency Frequently asked Questions guide, which expressly stipulates that the applicant will have the burden of proof: Scott Hammond and Belinda Barnett, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’ (Department of Justice, November 19 2008) Q13.

⁸⁴ Australian Competition and Consumer Commission, above n 68, Q36.

⁸⁵ Ibid 9-10.

⁸⁶ See Chapter V, Ringleader Exclusion, pg 138.

⁸⁷ Interviewee 2 (Sydney, 22nd July 2013) 10.

⁸⁸ Caron Beaton-Wells, ‘The ACCC Immunity Policy for Cartel Conduct: Due for Review’ (2013) 41 *Australian Business Law Review* 171, 185-187.

evidence that it was not the cartel ringleader. This becomes increasingly difficult in a two party cartel setting, and the *Visy/Amcors*⁸⁹ dispute has been cited in this respect.⁹⁰

Some interviewees indicated that the ACCC generally did not seriously investigate whether or not the applicant is the cartel ringleader and as a result, the interviewees believed that the criterion was unnecessary, as ‘in practice I don’t think there’s any time spent at all beyond a very short time trying to tell who the ring leader is. It’s just not a factor in practice.’⁹¹ Furthermore, there is academic support for the claim by one of the interviewees that the ringleader exclusion requirement can lead to the maintenance of cartels, due to the fact that if the cartel ringleader is excluded, then the other cartel members will have more trust in that leader knowing that the leader is ineligible for immunity. As a result, the cartel may be perpetuated.⁹²

As a result of a number of consultative discussion papers, the ACCC has removed the ringleader requirement and replaced it with the coercion test. The underlying rationale is that a particularly unscrupulous cartel member who coerced others to join a cartel against their will should not be awarded the benefit of immunity.

However, it was also argued within the submissions made to the ACCC in relation to its review of the policy that the difficulties associated with the ringleader requirement also apply to the coercion test. The revised policy does not provide a clear definition of ‘coercion,’ despite providing examples of scenarios that may give rise to coercion.⁹³ Therefore, if the primary criticism levelled at the ringleader requirement is that it is unclear and ambiguous and thus unnecessary, this is difficult to reconcile with the adoption of the coercion test. This is one of the main reasons why the coercion test needs greater clarity.

One interviewee expressed the more extreme belief that the coercion test serves a ‘moral’ purpose, in that it would be against ‘good conscience’ to allow a particularly unscrupulous cartel member to be eligible for immunity:

⁸⁹ See *Australian Competition and Consumer Commission v Visy Holdings Pty Ltd* (No 3) (2007) 244 ALR 673.

⁹⁰ Beaton-Wells, above n 88, 185: ‘Several practitioner interviewees cited the *Visy/Amcors* and airfreight cartel cases as cases in which the immunity applicant may have fit the definition of a “clear leader.”

⁹¹ Interviewee 4 (Sydney, 17th June 2013) 17.

⁹² Interviewee 13 (Sydney, 22nd July 2013) 17; See, eg, Christopher R. Leslie, ‘Antitrust Amnesty, Game Theory, and Cartel Stability’ (2005) 31 *The Journal of Corporation Law* 453.

⁹³ Australian Competition and Consumer Commission, above n 68, Q36.

Interviewee: I think so...if you go back to sort of all the underlying moral issues about someone being able to escape liability for this sort of conduct, if you're dealing with a situation where one participant has sort of bullied or coerced other participants into this illegal arrangement then I think morally I would say it's wrong for that person to be able to obtain full immunity for what they've done.⁹⁴

It was clear that a majority of the interviewees supported the introduction of the coercion test to replace the ringleader requirement. This support for the coercion test is reflected in other jurisdictions, most notably in Canada, the United Kingdom and the United States, which will be analysed below.

According to s15 of the Canadian Competition Bureau Immunity Policy, 'a party must not have coerced others to be party to the illegal activity.'⁹⁵ Similarly, according to Section 3.8 (e) of the CMA policy, 'if the applicant has taken steps to coerce another business to take part in the cartel activity it will be eligible only for a reduction in fine of up to 50 per cent (Type C leniency), even if it is the first to report (although non-coercing employees will still be eligible for criminal immunity).'⁹⁶

In a supporting FAQ document, the Canadian Competition Bureau outlines that a party may be disqualified from immunity where there is clear evidence of coercive behaviour.⁹⁷ It further states that this test may be satisfied where the party pressured unwilling participants to be involved in the offence. This evidence of coercive conduct may be express or implied. When the 'instigator' test was replaced by the coercion test in 2007, the Competition Bureau claimed that this test would provide a 'clearer standard and increased predictability for potential immunity applicants,'⁹⁸ although it did not elaborate as to how or why this is so. This coercion test is therefore very similar to the current revised coercion test found in the ACCC

⁹⁴ Interviewee 9 (Sydney, 15th July 2013) 12.

⁹⁵ Competition Bureau, 'Immunity Program under the Competition Act' (Competition Bureau, 7 June 2010).

⁹⁶ Competition and Markets Authority, 'Applications for Leniency and No-Action in Cartel Cases - Detailed Guidance on the Principles and Process' (Competition and Markets Authority, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf> Footnote 14 of the CMA policy makes the point of saying that as of 2013, no applicants have been refused on the basis the coercer test.

⁹⁷ Competition Bureau, 'Immunity Program: Frequently Asked Questions' (Competition Bureau, 2013)13.

⁹⁸ Competition Bureau, 'Adjustments to the Immunity Program and the Bureau's Response to Consultation Submissions' (Competition Bureau, 11 May 2011) 5.

policy, except that the ACCC has outlined a number of scenarios that may constitute coercion.

The United States DOJ policy is slightly different to the above policies, in that it has retained both the coercion test and the ‘clear leader’ test. According to section A (6), a corporation will be eligible for immunity if it ‘did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of the activity.’ This requirement also applies to individuals who seek leniency.⁹⁹ This policy goes even further than the other comparable jurisdictions, and states pursuant to Section B (7): ‘The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation’s role in it, and when the corporation comes forward.’¹⁰⁰ It also makes clear that the immunity applicant bears the onus of proof in proving the accuracy of the representation.¹⁰¹ This requirement is not apparent in the Canadian, Australian or United Kingdom policies.

On the basis on this provision, the DOJ has discretion to exclude an applicant from leniency on the basis that it would be ‘unfair,’ given the circumstances. This closely resembles a proportionality assessment, where a number of factors are weighed in determining the grant of leniency. The incorporation of ‘fairness’ as a relevant factor allows for a more normative, holistic assessment in the determination of leniency, which moves away from the strict emphasis on the detection and deterrence capabilities of the policy.

The United Kingdom CMA policy is the most comprehensive policy in relation to the coercion test. In contrast to the policies in Australia, Canada and the United States, the CMA policy states that there must have been clear, positive and ultimately successful steps to pressurise an unwilling participant to take part in the cartel.¹⁰² However, unlike the other policies, the CMA policy specifically states the kind of behaviour that may constitute coercive conduct such as actual physical violence, proven threats of violence, blackmail and strong economic pressure and

⁹⁹ DOJ Department of Justice, 'Leniency Policy for Individuals' (0092, Department of Justice - Antitrust Division, 1993) s A(3).

¹⁰⁰ Department of Justice, above n 78.

¹⁰¹ Hammond and Barnett, above n 83, Q13.

¹⁰² Competition and Markets Authority, above n 96, 26.

also clearly states what type of conduct will not constitute coercion.¹⁰³ It also outlines how the test applies to individuals.¹⁰⁴

Each of the aforementioned policies clearly stipulates that the competition authority will construe or interpret the coercion requirement in favour of the immunity applicant and states that no immunity application has been refused on the basis of coercion. This statement likely exists as an enticement to future immunity applicants to help ensure that they are not dissuaded from applying for immunity on the basis that they may have played a coercive role in the cartel.

Australian case law does not provide a settled definition of coercion or duress. The most commonly cited formulation of duress in the context of contract is enunciated by Lord Scarman in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*:

The authorities ...reveal two elements in the wrong of duress:

- (1) pressure amounting to compulsion of the will (impaired consent); and
- (2) the illegitimacy of the pressure exerted.¹⁰⁵

Originally at common law it was thought that duress or coercion would usually require actual or threatened violence.¹⁰⁶ The concept of duress also extends to the threatened detection or seizure of goods, or threatened damage to goods.¹⁰⁷ In recent times, the courts have recognised cases of economic duress, where the defendant threatens to breach a contract unless the plaintiff enters into a modified or new contract on terms more favourable to the defendant.¹⁰⁸

Recommendation

It is apparent from the recent revision of the ACCC Immunity Policy that the introduction of the coercion test in place of the former ringleader requirement is a commendable decision and will lead to greater clarity in this area of the operation of the policy. However, the coercion test is undefined and still creates undue

¹⁰³ Ibid s 2.53.

¹⁰⁴ Ibid s 2.56-2.59.

¹⁰⁵ (1983) AC 366, 400.

¹⁰⁶ *Barton v Armstrong* (1976) AC 104.

¹⁰⁷ *Occidental Worldwide Investments Corp v Skibs A/S Avanti (The 'Siboen and The Siboen')* (1976) 1 Lloyd's Rep 293; *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298.

¹⁰⁸ *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* (1979) 2 WLR 419.

uncertainty. The ACCC have attempted to overcome this by including three hypothetical examples to illustrate how the coercion test may be applied.¹⁰⁹

However, when read carefully, these examples are vague and overgeneralised to the point that they offer no real assistance in determining what amounts to coercion. Therefore, the ACCC Immunity Policy should be revised to reflect the approach taken in the CMA policy. That policy provides a more meaningful list of the factors that may lead to a finding of coercion.

Whilst a degree of discretion is necessary in order to determine whether the conduct amounts to coercion, it is important that a clear and workable definition is formulated. As a result of the cross-comparative analysis conducted in this section, it is apparent that the two most common features of coercion are (1) illegitimate pressure; and (2) an unwillingness of the cartel participant to enter into the cartel (or impaired consent). Given the abstract nature of these terms, the ACCC should translate them into more concrete factors by adopting those factors considered by the CMA. These include:

- actual physical violence or proven threats of violence which have a realistic prospect of being carried out, or blackmail (these would apply equally to cases of horizontal as well as vertical collusion)
- such strong economic pressure as to make market exit a real risk, where, for example, a large player organises a collective boycott of a small player or refuses to supply key inputs to such a small player – these scenarios are more likely to apply in cases where there is at least a significant vertical element and are less likely to be relevant where an arrangement is purely horizontal and there are no significant cross-supplies between competitors.¹¹⁰

The ACCC could then demonstrate how these factors apply in the hypothetical examples they provide in the policy. For example, the first hypothetical example the ACCC provides is:

Example 1: Company A is a retailer of goods and services supplied by producers B, C and D. Company A holds a near monopoly market share in the retail market. Companies B, C and D also retail goods and services through other retail channels including ones that they own. Company A negotiates agreements between itself, B, C and D that they will not offer goods and services below the price that is offered by A. A threatens to no longer acquire goods and services from the company that does not agree. A, B, C and D enter into this price

¹⁰⁹ Australian Competition and Consumer Commission, above n 68, Q 36.

¹¹⁰ Competition and Markets Authority, above n 96, s 2.53.

fixing arrangement. Company A is likely to be disqualified in this scenario on the basis that it has coerced others to participate in the cartel.¹¹¹

In this scenario, the ACCC needs to indicate which factors it considers would amount to coercion. It is likely to include the fact that Company A holds a greater market share and is the dominant player in that market, meaning that the smaller business is likely to suffer economic loss or be forced to leave the market if they do not join the cartel. By listing the relevant factors that may amount to coercion and then demonstrating how these factors could be identified in a hypothetical example gives a much clearer indication of the way the ACCC will interpret coercive conduct.

Likewise, the ACCC should state the factors that are unlikely to amount to coercion such as:

- harmful market pressure which falls short of risking market exit but may reduce profit margins
- mere agreed enforcement or punishment mechanisms to enforce the operation of a cartel, and
- standard term contracts in a resale price maintenance case, even where there is a significant inequality of bargaining power.¹¹²

Therefore, in Example 2, the ACCC should list why the conduct in that scenario does not amount to coercion:

Example 2: Retailers A, B and C enter into a cartel arrangement. Retailer A, the market leader, proposed the cartel arrangement and is the most proactive participant. For example, it organises meetings and is the party that is the most aggressive and vocal in the cartel when it comes to raising prices. The ACCC is unlikely to consider Retailer A to have engaged in coercion in this scenario.¹¹³

It should clearly state that conduct that is indicative of an active and vocal cartel participant who orchestrates cartel meetings does not amount to coercion as there is no evidence that the other cartel participants have unwillingly been forced into the cartel or face economic duress if they do not join the cartel.

¹¹¹ Australian Competition and Consumer Commission, above n 68, Q 36.

¹¹² Competition and Markets Authority, above n 96, s 2.54.

¹¹³ Australian Competition and Consumer Commission, above n 68, Q36.

C *The Relationship between the ACCC and the CDPP*

Structure of The Regulatory Bodies

A key factor governing the eligibility and cooperation of immunity applicants is the way that the applications are processed and by which regulatory body. With the introduction of criminal penalties for cartel conduct in 2009, it was necessary that criminal immunity was available for cartel offenders. The current regulatory structure in Australia is bifurcated. According to the Revised Memorandum of Understanding between the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Director of Public Prosecutions (CDPP) ('Revised MOU') the respective roles of the regulatory bodies are as described below:

The CDPP is responsible for:

- prosecuting offences against Commonwealth law, including serious cartel offences under the *Competition and Consumer Act 2010* and State and Territory Competition Codes, in accordance with the *Prosecution Policy of the Commonwealth*; and
- seeking associated remedies, including by taking certain proceedings under the *Proceeds of Crime Act 1987* and *Proceeds of Crime Act 2002*.

The ACCC is responsible for:

- investigating cartel conduct and gathering evidence;
- managing the immunity process, in consultation with the CDPP; and
- referral of serious cartel conduct to the CDPP for consideration for prosecution.¹¹⁴

Therefore, an immunity applicant will first seek an immunity marker from the ACCC. The applicant will then be required to disclose the relevant cartel information to the ACCC in order to obtain a proffer.¹¹⁵ The ACCC will then determine whether the applicant is eligible for conditional civil immunity based on the criteria outlined in the policy. Where there is 'serious cartel conduct', the ACCC will refer the application for conditional criminal immunity to the CDPP for determination of eligibility.

¹¹⁴ Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, 'Memorandum of Understanding Between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct' (15 August 2014) 1-2.

¹¹⁵ Australian Competition and Consumer Commission, above n 66, 44-47.

In determining what constitutes ‘serious cartel conduct,’ the ACCC will have regard to a number of factors outlined in Section 4.2 of the Revised MOU:

The ACCC is more likely to consider conduct it is investigating to be serious cartel conduct if one or more of the following factors apply:

- the conduct was covert;
- the conduct caused, or could have caused, large scale or serious economic harm;
- the conduct was longstanding or had, or could have had, a significant impact on the market in which the conduct occurred;
- the conduct caused, or could have caused, significant detriment to the public, or a class of the public, or caused, or could have caused, significant loss or damage to one or more customers of the alleged participants;
- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil;
- senior representatives within the relevant corporation(s) were involved in authorising or participating in the conduct;
- the Government and thus, taxpayers, were victims of the conduct -even where the value of affected commerce is relatively low; and
- the conduct involved the obstruction of justice or other collateral crimes committed in connection with the cartel activity.¹¹⁶

According to Section 7 of the Immunity Policy, the CDPP will exercise an independent discretion when considering a recommendation by the ACCC. If the CDPP finds that the applicant meets the criteria outlined in the *Prosecution Policy of the Commonwealth*,¹¹⁷ as a result of the Immunity Policy review, it will ‘ordinarily’ provide a ‘letter of comfort’ to the applicant. Moreover, before a criminal prosecution commences, the Director will issue a written undertaking pursuant to section 9(6D) of the *Director of Public Prosecutions Act 1983 (Cth)* (‘DPP Act’) granting conditional criminal immunity.

¹¹⁶ Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 114, s 4.2.

¹¹⁷ Commonwealth Department of Public Prosecutions, ‘Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process’ (Australia’s Federal Prosecution Service, 2014) <<http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>> Annexure B: Immunity from Prosecution in Serious Cartel Offences.

In Canada, the system of cartel enforcement is also bifurcated between the Competition Bureau and the Director of Public Prosecutions of Canada. Similarly to Australia, the Competition Bureau is the sole investigator of the cartel allegations and will be the point of contact for all cartel immunity applications.¹¹⁸ The DPP will also have the sole authority to grant conditional criminal immunity ‘on the basis of its own independent assessment of the public interest.’¹¹⁹ The DPP’s decision to grant immunity is made pursuant to Section 5.2 (5) of the *Public Prosecution Service of Canada Deskbook*.¹²⁰

The Bureau and the DPP have also entered into a Memorandum of Understanding (‘Canadian MOU’), however the information outlined in this agreement is far more comprehensive than the Australian version.¹²¹ The Canadian MOU clearly outlines in separate sections the roles and responsibilities of the Bureau and the Prosecutors at the investigative and prosecution stages, respectively.¹²² It further indicates the importance of confidentiality and security in the context of immunity and expressly recognises the need for a dispute resolution provision.¹²³ This aspect will be explored further in the next section.¹²⁴

A key difference between the regulatory relationships in Australia and Canada is that in Australia the CDPP will make a decision regarding immunity according to the same considerations as the ACCC, as outlined in Annexure B to the *Prosecution Policy*.¹²⁵ In Canada, on the other hand, there is no such clarification as to what factors the DPP will have regard to in determining criminal immunity, only that it will be made in accordance with the principles encompassed within the *Prosecution Service Deskbook*.¹²⁶ Furthermore, there is no express provision for the

¹¹⁸ Competition Bureau, above n 97, Q8.

¹¹⁹ Competition Bureau, above n 95, s B (9).

¹²⁰ Director of Public Prosecutions, 'Public Prosecution Service of Canada Deskbook' (Director of Public Prosecutions 1 March 2014 2014) <<http://www.ppsc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>> This Service book replaced the previous one on 2nd September 2014.

¹²¹ Competition Bureau and Department of Public Prosecutions, 'Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions' (Competition Bureau Canada, 2010) <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf/$file/Protocole-entente-Memorandum-of-Understanding.pdf)>.

¹²² Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 114, s 2.

¹²³ *Ibid* s 7.

¹²⁴ See Section D, Revocation of Cartel Immunity, pg 205.

¹²⁵ Commonwealth Department of Public Prosecutions, above n 117.

¹²⁶ Competition Bureau and Department of Public Prosecutions, above n 121, s 3 [3.7].

issuing of ‘letters of comfort’ or a formal written undertaking for the granting of conditional criminal immunity in Canada.

In contrast, the cartel regulatory system in the United Kingdom and the United States is not bifurcated: the CMA and the DOJ respectively determine both conditional civil and criminal immunity. This is the well-established practice of the DOJ where the Division’s Deputy Assistant Attorney General for Criminal Enforcement (‘Criminal DAAG’) reviews all leniency requests.¹²⁷ In the same way, the CMA determines all applications for civil and criminal leniency. Therefore, because there is a sole regulatory body in the United States and United Kingdom for the granting of both civil and criminal immunity, there are no issues associated with the relationship in a bifurcated system of the kind that exists in Australia and Canada.

(a) The Relationship In Practice

The relationship between the ACCC and the CDPP received significant attention in the interviews conducted and was identified as a key area of concern. The operation of the relationship also featured in the recent review of the Immunity Policy.¹²⁸ As a result of these discussions, there were three main areas of concern:

1. Timing of the determination of criminal immunity
2. Sufficiency of information for criminal immunity
3. The credibility of accomplice evidence

As a product of the recent review by the ACCC, the Immunity Policy now stipulates that the CDPP will ‘ordinarily’ issue a Letter of Comfort (‘LOC’) where the CDPP considers that the applicant meets the criteria set out in Annexure B to the *Prosecution Policy*.¹²⁹ According to Q35 of the ACCC Immunity FAQ:

The letter of comfort will recognise that the applicant has a marker from the ACCC as the first to apply for immunity for the cartel conduct. The letter will also state that the Director intends

¹²⁷ Hammond and Barnett, above n 83, 2. The FAQ expressly mentions that both the corporate and individual leniency policies were written prior to the establishment of the Criminal DAAG position.

¹²⁸ See: Australian Competition and Consumer Commission, *ACCC Releases Discussion Paper in Cartel Immunity Policy Review* (September 2013) <<https://www.accc.gov.au/media-release/accc-releases-discussion-paper-in-cartel-immunity-policy-review>>.

¹²⁹ Australian Competition and Consumer Commission, above n 66, s B(7).

to grant an undertaking pursuant to section 9(6D) of the DPP Act to the applicant prior to any prosecution being instituted against a cartel participant provided that the applicant:

- (a) maintain eligibility criteria for conditional immunity (as outlined in the Policy in paragraph 16 for corporations and paragraph 28 for individuals)
- (b) provide full, frank and truthful disclosure, and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing litigation, and
- (c) maintain confidentiality regarding its status as an immunity applicant and details of the investigation and any ensuing litigation unless otherwise required by law or with the written consent of the ACCC.

The letter of comfort from the CDPP will generally be provided to the immunity applicant at the same time as the ACCC grants conditional immunity in relation to civil proceedings.

Prior to the commencement of any prosecution, the Director will grant an undertaking pursuant to section 9(6D) of the DPP Act that, subject to fulfilment of on-going obligations and conditions, the applicant will not be prosecuted for the cartel offence for which immunity is sought.¹³⁰

As part of the review, the ACCC and CDPP also released a Revised Memorandum of Understanding ('Revised MOU'), which outlines how the ACCC and CDPP will facilitate a working relationship through 'regular meetings' with established 'relationship managers.'¹³¹ More importantly however, there is no mention of the LOC or undertakings provided by the CDPP within the Revised MOU. Thus, according to Q35 above, the only indication as to what may be within the LOC provided to the applicant, is (1) that the CDPP recognises that the applicant has secured the 'first marker' status with the ACCC in its application for immunity and (2) stipulates that the Director of the CDPP 'intends to grant an undertaking.' This does not resolve the major question of whether or not the LOC will provide the applicant with sufficient certainty to be able to fully cooperate with the CDPP in providing incriminating evidence *before* an undertaking is granted. In its current form, it is unclear what rights and responsibilities an applicant would have in the event that the CDPP decides not to grant an undertaking after it concludes its deliberations.

In contrast, the United States DOJ does not offer 'letters of comfort' to a leniency applicant. The DOJ recognises that an immunity applicant may 'want

¹³⁰ Australian Competition and Consumer Commission, above n 68.

¹³¹ Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 114, s 9: Liaison.

assurances up front’ but believes that ‘conditional leniency letters address that need.’¹³² The DOJ FAQ points to the fact that many other voluntary disclosure regimes of other prosecuting agencies do not provide an upfront guarantee of non-prosecution. The DOJ’s position is that if conditional leniency letters did not exist then the applicant would have no assurances of leniency until the conclusion of the investigation and prosecution of co-conspirators. Therefore, in the DOJ’s view, the conditional leniency letter itself should provide sufficient certainty and transparency to the applicant. This approach is said by the DOJ to have been ‘very effective’.¹³³

The CMA on the other hand, does provide either letters of comfort or no-action letters regarding criminal prosecution. No-action letters or comfort letters are generally issued ‘where the CMA decides only to undertake an investigation under the CA98 or chooses not to investigate at all.’¹³⁴ However, the CMA recognises that a proper determination of whether a no-action letter or comfort letter will be issued is usually at the end or nearing the end of an investigation. At the very minimum, the CMA would need to examine the ‘substantial and most probative elements’ of the immunity application and each substantial witness would need to be interviewed at least once.¹³⁵ In contrast to the ACCC policy, the CMA provides more guidance as to the contents of the comfort letter and provides a template of a standard form ‘No-action letter’.¹³⁶ Although the CMA recognises that comfort letters may not avoid uncertainty regarding criminal prosecution, it considers that the issuing of LOC’s ‘has proven to be effective in achieving its objectives.’¹³⁷

On one view, the LOC provided by the ACCC can be seen as a step towards addressing the uncertainty surrounding the granting of conditional criminal immunity. The Immunity Policy states that the LOC will generally be provided at the same time as the ACCC grants civil conditional immunity.¹³⁸ However, it remains to be seen whether or not this will overcome the significant delay that has been experienced by those awaiting the CDPP to make a decision in relation to conditional criminal immunity.

¹³² Hammond and Barnett, above n 83, s IV, Q25.

¹³³ Ibid.

¹³⁴ Competition and Markets Authority, above n 96, s 2.49.

¹³⁵ Ibid s 6.5.

¹³⁶ Ibid Annex B: Pro Forma Individual No-Action Letter.

¹³⁷ Ibid s 8.15.

¹³⁸ Australian Competition and Consumer Commission, above n 66, s 36.

One of the strongest concerns by the interviewees was the impact that this delay can have on their clients when seeking immunity, on both their emotional state of being and the long period of uncertainty that befalls them whilst awaiting the CDPP's decision. During this time, particularly for large corporations, business may be halted or stalled in order to comply with the immunity requirements, which can incur significant financial costs.

When probed for the reasons that might explain this delay, many different answers were provided. Some believed that the delay was attributed to the alien nature of conditional full immunity to the CDPP, who usually treats accomplices harshly in accordance with its *Prosecution Policy*.¹³⁹ Other explanations suggest that there is a cultural enforcement clash between the ACCC and the CDPP. The significantly divergent enforcement priorities to that of the ACCC may be a cause for delay:

Interviewee: Well, again I suspect that the DPP's agenda is somewhat different to that of the Commission. Like the Commission, as you know, is charged with the protection of the consumer and cartel is a serious problem as far as the Commission is concerned and that's justifiable. One can't really readily imagine a more egregious type of conduct to wreak havoc on the welfare of consumers in the country, especially if it's a major cartel. The DPP, I think, doesn't view that type of conduct as serious compared with some of its other major criminal activities which may be serious crime of which I suspect there is quite a significant amount that the DPP has to deal with given its risk resources and man power. So my belief is that the DPP tends to put that type of conduct not in the serious basket and is more concerned with other conduct and we'll get round to it when it can and I think that results in a significant time lag.¹⁴⁰

It is hoped that the implementation of a letter of comfort may help to overcome the uncertainty associated with the delay in granting conditional criminal immunity, although there is reason to doubt that this hope will be realised. In section 32 of the Immunity Policy, it states that 'the CDPP and the ACCC have agreed to procedures that will facilitate the granting of immunity in relation to cartel offences at the same time as immunity in relation to civil proceedings.'¹⁴¹ It is not clear from this paragraph whether these procedures are new and yet to be published in light of the review, or whether they are referring to the new procedures that are outlined in

¹³⁹ Commonwealth Department of Public Prosecutions, above n 117, s 6.

¹⁴⁰ Interviewee 5 (Sydney, 25th July 2013) 3-4.

¹⁴¹ Australian Competition and Consumer Commission, above n 66.

the Revised MOU, relating to the establishment of relationship managers and regular meetings between the ACCC and CDPP.¹⁴²

Another key point of concern is that it is unclear from the Immunity Policy and FAQ what legal rights an immunity applicant would have if the CDPP were to revoke the letter of comfort. The ACCC needs to publish templates of the LOC, in addition to publishing immunity agreement templates, in order to give applicants and their advisors a clear idea of the nature of the letter, including the rights and obligations incurred within it. This should be published on the ACCC Website.

The DOJ Model Corporate Conditional Leniency Letter provides an appropriate foundational model. It states that compliance with the condition to provide full, continuing, and complete cooperation is subject, but not limited to, a range of obligations, such as providing a full exposition of facts; voluntarily providing all documents in its possession; ensuring the full cooperation of its current (and former) employees, including interviews or testimony; ensuring best efforts are made to ensure that employees are truthful and candid in performing their cooperation obligations; and providing restitution where appropriate.¹⁴³ Most notably, the leniency letter expressly recognises that former directors, officers and employees are not covered by the Leniency Policy, but may be included in the coverage of the conditional leniency letter. However, this is dependent upon a number of factors, including whether the applicant company is 'interested in protecting them.'¹⁴⁴

The Model Corporate Leniency Letter also clearly indicates the position of applicants where immunity is revoked:

If at any time before Applicant is granted unconditional leniency the Antitrust Division determines that Applicant (1) contrary to its representations in paragraph 1 of this Agreement, is not eligible for leniency or (2) has not provided the cooperation required by paragraph 2 of this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of Applicant into the Corporate Leniency Program. Before the Antitrust Division makes a final determination to revoke Applicant's conditional leniency, the Division will notify counsel for Applicant in writing of the recommendation of Division staff to revoke the conditional acceptance of Applicant into the Corporate Leniency

¹⁴² Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 114, s 9.

¹⁴³ Department of Justice, 'Model Corporate Conditional Leniency Letter' (Department of Justice - Antitrust Division, 2008) <<http://www.justice.gov/atr/public/criminal/239524.htm>> s 2.

¹⁴⁴ Ibid Footnote 3.

Program and will provide counsel an opportunity to meet with the Division regarding the potential revocation. Should the Antitrust Division revoke the conditional acceptance of Applicant into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against Applicant, without limitation. Should such a prosecution be initiated, the Antitrust Division may use against Applicant in any such prosecution any documents, statements, or other information provided to the Division at any time pursuant to this Agreement by Applicant or by any of its current [or former] directors, officers, or employees. Applicant understands that the Antitrust Division's Leniency Program is an exercise of the Division's prosecutorial discretion, and Applicant agrees that it may not, and will not, seek judicial review of any Division decision to revoke its conditional leniency unless and until it has been charged by indictment or information for engaging in the anticompetitive activity being reported.¹⁴⁵

This paragraph states clearly the process by which the leniency applicant would need to take in order to address the DOJ's decision to revoke. By signing the leniency letter, the applicant acknowledges that in the event the DOJ decides to revoke the agreement, the DOJ may initiate a criminal prosecution. This will be discussed further in the following section.

The introduction of the LOCs does not directly address the underlying issues associated with the sufficiency of information needed for criminal immunity or the significant cultural differences that exist between the ACCC and the CDPP. These issues were prominent in the discussions with the interviewees who deemed them to be very important to Australia's anti-cartel enforcement regime.¹⁴⁶

In terms of predicting the success of the relationship between the ACCC and CDPP, it is often helpful to analyse relationships of a similar nature. The closest bifurcated model in Australia would be the relationship between the CDPP and the Australian Securities and Investment Commission (ASIC). ASIC is an independent Commonwealth Body responsible for the regulation of Australia's corporate, markets and financial services. ASIC and the CDPP entered into a *Memorandum of Understanding* in 1992 that was updated in 1996.¹⁴⁷

In a similar vein to the ACCC, ASIC will refer criminal prosecution to the CDPP if ASIC deems there to be sufficient evidence to prosecute. In this way, ASIC is the investigatory body and the CDPP is the prosecuting body. The key difference

¹⁴⁵ Ibid s 3.

¹⁴⁶ See Chapter V, Relationship between the ACCC and the CDPP, pg 141.

¹⁴⁷ Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions, 'Memorandum of Understanding' (Australian Securities and Investment Commission, 2006) <http://download.asic.gov.au/files/mou_dpp_mar_2006.pdf>.

is that ASIC does not offer immunity to those who come forward and disclose offences; indemnity can be sought in relation to criminal offences, but indemnity is available in relatively narrow circumstances under Section 6 of the *Prosecution Policy*.

Despite the relationship between the CDPP and ASIC having existed over the past 22 years, ASIC has come under severe scrutiny for its perceived lack of criminal enforcement. The former Chairman of ASIC has been quoted as saying ‘Australia is a paradise for corporate criminals.’¹⁴⁸ However, a number of high profile cases have been prosecuted successfully, for example the *HIH case*.¹⁴⁹ There also exists an important difference between the enforcement regimes of the ACCC and ASIC, as ASIC does not currently have an immunity policy. This may partly explain why ASIC has had difficulties in bringing criminal proceedings. On the other hand, ASIC and the CDPP have had over 20 years to perfect their working relationship, which casts doubt on the presumption by some interviewees that the relationship between the ACCC and the CDPP simply needs time to develop. Thus far, the ACCC and CDPP have had five years to bring a criminal cartel case, but no prosecution has yet resulted.

(b) The Credibility Of Accomplice Evidence

One central concern for the ACCC and CDPP gearing up for the first contested criminal trial is the likelihood that the immunity applicant’s evidence will be challenged on the ground of lack of credibility. It is a long held tradition that the prosecution will seek the testimony of an accomplice to prove its criminal case and this practice is widely accepted.¹⁵⁰ Generally this involves the prosecution offering a

¹⁴⁸ See eg Vicky Comino, 'The Challenge of Corporate Law Enforcement in Australia' (2009) 23 *Australian Journal of Corporate Law* 233; Michelle Gordon, 'Criminalisation of Cartel Conduct' (2010); Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908; Wilkins & Glenda and Georgia Kwek, 'Penalties Not Tough Enough for White-Collar Crime: ASIC', *Sydney Morning Herald* 2014 <<http://www.smh.com.au/business/penalties-not-tough-enough-for-whitecollar-crime-asic-20140219-3312i.html>>.

¹⁴⁹ See *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253; *Re HIH Insurance Ltd* (2002) 42 ACSR 80; *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1.

¹⁵⁰ See, eg Yvette Beeman, 'Accomplice Testimony Under Contingent Plea Agreements' (1987) 72 *Cornell Law Review* 800; James C Steffes, 'Immunity Given to The Accomplice Witness' (1971-1972)

‘reward’ in the form of lenient treatment or immunity for a crime, in exchange for the accomplice agreeing to cooperate and testify for the prosecution in a criminal trial.

Although the courts may recognise that the accomplice may have the incentive to perjure or embellish its role in the offence, they deem that the value of the information obtained through such agreements outweighs the danger of its potential unreliability.¹⁵¹ Moreover, the prosecutor will argue that the accomplice should be believed because they will lose the benefits of the agreement should they fail to tell the truth.¹⁵²

On the other hand, the defence is likely to argue that the accomplice will say anything in order to reap the benefits of the agreement. In this way, the defence will seek to discredit the accomplice in order to persuade the jury that the evidence provided by the accomplice is self-interested and unreliable. Given that cartel conduct is now an offence in Australia, it is anticipated that there may be a contested criminal case in the future. If Australia adopts the United States approach, the instances of a contested criminal case are likely to be rare, given that 90 per cent of criminal convictions in the United States are obtained by guilty plea.¹⁵³ Moreover, the United States DOJ rarely goes to trial for corporate price-fixing, especially where there are large corporate defendants involved.¹⁵⁴

21 *Drake Law Review* 331 ; Christine Saverda, 'Accomplices in Federal Court: A Case for Increased Evidentiary Standards' (1990) 100 *Yale Law Journal* 785; Stephen S Trott, 'Words of Warning for Prosecutors Using Criminals as Witnesses' (1996) 47 *Hastings Law Journal* 1381; Spencer Martinez, 'Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency' (1999) 47 *Cleveland State Law Review* 141; George C Harris, 'Testimony for Sale: The Law and Ethics of Snitches and Experts' (2000) 28 *Pepperdine Law Review* 1; Steven Skurka, 'Perspectives on the Role of Cooperators and Informants: A Canadian Perspective On The Role of Cooperators and Informants' (2002) 23 *Cardozo Law Review* 759; Eli Paul Mazur, 'Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice' (2002) 51 *Duke Law Journal* 1333; C. Blaine Elliott, 'Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches' (2003) 16 *Washington & Lee University School of Law Capital Defense Journal* ; Clifford S Fishman, 'Criminal Law: Defense Witness as "Accomplice" Should the Trial Judge Give A "Care and Caution" Instruction?' (2005) 96 *Journal Criminal Law & Criminology* ; Rajan Trehan, 'An Unfortunate Bit of Legal Jargon': Prosecutorial Vouching Applied to Cooperating Witnesses' (2014) 114 *Columbia Law Review* 997.

¹⁵¹ Beeman, above n 150, 801-803.

¹⁵² Note, 'Accomplice Testimony and Credibility: "Vouching" and Prosecutorial Abuse of Agreements to Testify Truthfully' (1980-1981) 65 *Minnesota Law Review* 1169, 1170.

¹⁵³ John Connor, 'Anti-Cartel Enforcement by the DOJ: An Appraisal' (2008) 5 *The Competition Law Review* 89, 101; Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law Policy and Practice in an International Context* (Cambridge University Press, 1 ed, 2011) 401.

¹⁵⁴ Connor, above n 153, 103.

However, the ACCC and CDPP need to prepare for the possibility that the immunity applicant's evidence is likely to be challenged on the ground of lack of credibility, leading to possible acquittal of the defendant. Many defence lawyers in the United States have used this strategy in criminal cartel trials, which has resulted in acquittals of the defendant based on the unreliability of the immunised witness.¹⁵⁵ The Australian Courts have found many accomplice witnesses to be unreliable, which has resulted in judges instructing the jury to deem to evidence as a category that is inherently unreliable.¹⁵⁶ In the United States, there are specific jury warnings that the court must provide the jury in cases of criminal cartel trials.¹⁵⁷ In Australia, the court must instruct the jury to deem the evidence of an accomplice as unreliable:

- (2) If there is a jury and a party so requests, the judge is to:
 - (a) warn the jury that the evidence may be unreliable; and
 - (b) inform the jury of matters that may cause it to be unreliable; and
 - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.¹⁵⁸

The court is not required to give this instruction if 'there are good reasons for not doing it.'¹⁵⁹ This contrasts to the position in the United States, where there are specific rules in criminal cartel cases that require a separate jury instruction for witnesses who have received immunity and testify pursuant to the DOJ leniency policy. The instruction states: '[y]ou should bear in mind that testimony from such a witness is always to be received with caution and weighed with great care.'¹⁶⁰

Given the strong possibility that the immunised testimony is likely to be attacked for its lack of credibility, the ACCC and CDPP should consider the potential consequences of this, and ensure that the evidence is sufficiently corroborated with information independent of the accomplice.

¹⁵⁵ See, eg, H Bunzel and Howard Miller, 'Defending 'The Last Man Standing' - Trench Lessons From the 2008 Criminal Antitrust Trial United States v Swanson' (2008) 7 *Antitrust Source* 1; Niall Lynch, 'Immunity in Criminal Cartel Investigations: A US Perspective' (Latham & Watkins, 2011) 5.

¹⁵⁶ See, eg, *R v Baker* (2000) 78 SASR 103; *R v Chai* 27 NSWLR 153; *Conway v R* 172 ALR 185.

¹⁵⁷ ABA Section of Antitrust Law, 'Model Jury Instructions in Criminal Antitrust Cases - Alternative Instruction for 4.C.3 - C. 7' (ABA Section of Antitrust Law, 2009) 126.

¹⁵⁸ *Evidence Act 1995* (Cth) s 165 (2).

¹⁵⁹ *Ibid* s 165 (3).

¹⁶⁰ ABA Section of Antitrust Law, above n 157.

D Revocation of Cartel Immunity

If the situation were to arise where the ACCC or CDPP revoked immunity, the consequences for the immunity applicant would be serious. This is due to the fact that the immunity applicant would have provided incriminating evidence in relation to its involvement in the cartel conduct as a result of fulfilling its obligations pursuant to the policy. If the circumstances and consequences of revocation are not clearly outlined, this dilutes the transparency of the policy and could potentially hinder future immunity applications, which rely on the certainty of guaranteed upfront immunity. Most importantly, if immunity were revoked, the ACCC or CDPP may take legal action against the former applicant using the incriminating evidence the applicant provided in their immunity application.¹⁶¹

According to one interviewee, there have been some instances where an immunity applicant was allegedly not complying with its immunity obligations and the ACCC contemplated revocation of the applicant's immunity.¹⁶² Aside from this situation, there has never been a formal revocation of immunity in Australia. Nor has there been an instance of revocation of immunity in the United Kingdom and Canada. The respective policies make it clear that revocation is an option of last resort and that the decision to revoke is taken very seriously.¹⁶³

In contrast, the United States DOJ has revoked its leniency policy in one instance, resulting in the *Stolt-Nielsen* case.¹⁶⁴ The consequences of this case potentially undermine the operation of the immunity policy, as it vests sole discretion in the DOJ relating to its leniency decisions, leaving no room for judicial review.¹⁶⁵ Even if the case itself did not adversely impact the operation of the DOJ's leniency policy, it provides some useful lessons for the ACCC. The consequences of this decision will be explored further in this section. Although the instances of revocation may be rare, the serious consequences of revocation warrant that this issue be given careful attention and clarification.

¹⁶¹ Australian Competition and Consumer Commission, above n 68, Q 52.

¹⁶² Interviewee 4 (Sydney, 17th July, 2013) 15.

¹⁶³ Hammond and Barnett, above n 83, Q23; Competition and Markets Authority, above n 96, s 10.6.

¹⁶⁴ *Stolt-Nielsen S.A. v. United States*, 352 F. Supp. 2d 553, 568 (E.D. Pa. 2005).

¹⁶⁵ *Contra* Donald Klawaiter and J. Clayton Everett, 'The Legacy of Stolt-Neilsen: A New Approach to The Corporate Leniency Program' (2006) The Antitrust Source 1.

1 *The ACCC's Position*

Prior to the review of the policy, the process by which the ACCC would undertake in the event of revocation was not stated in any detail.¹⁶⁶ Thus, it was not clear what would occur in the event that one of the requirements of the Immunity Policy was not met, or what would happen in the event there were issues of non-compliance with the Immunity Policy criteria. It was sufficiently certain that the ACCC had a right to revoke immunity, but it was not clear whether the applicant would be entitled to seek reasons from the ACCC regarding its decision to revoke, or what process of review would likely be available to an applicant seeking to appeal the ACCC's decision to revoke.¹⁶⁷

Pursuant to the ACCC review, the ACCC asked for comments in relation to its decision to 'withdraw' immunity.¹⁶⁸ In these consultations, it was submitted that the current process was unclear and that further detail was needed surrounding the process of appealing an ACCC decision to revoke immunity and the reasons for such a decision.

In response to these consultations, the Draft Immunity Policy issued by the ACCC stated in Section F that if the ACCC had concerns about the applicant's compliance with the Immunity Policy then it would issue a written caution; if the dispute could not be resolved informally.¹⁶⁹ If the ACCC was not satisfied with the applicant's response, it would then request the applicant provide an explanation as to why their conditional immunity should not be revoked.¹⁷⁰ If the ACCC was not satisfied with the applicant's response, then it would advise them in writing that 'they no longer qualify for immunity.' The only mention of the revocation of conditional criminal immunity was in the last line of Section F that stated: that in the event the ACCC revokes conditional civil immunity, it will also recommend to the

¹⁶⁶ Australian Competition and Consumer Commission, above n 81, s 21.

¹⁶⁷ Australian Competition and Consumer Commission, above n 81, s 3.5 (90).

¹⁶⁸ Australian Competition & Consumer Commission, 'Review of the ACCC Immunity Policy for Cartel Conduct' (Discussion Paper, ACCC, 2013) s 4.5.

¹⁶⁹ Australian Competition and Consumer Commission, 'Draft ACCC Immunity and Cooperation Policy for Cartel Conduct' (April 2014 2014) <https://consultation.accc.gov.au/compliance-enforcement/draft-immunity-and-cooperation-policy/supporting_documents/DRAFT%20ACCC%20immunity%20and%20cooperation%20policy%2009%20April%202014%202.pdf> s F, ss 60 & 61.

¹⁷⁰ *Ibid* s F, [62].

CDPP that conditional criminal immunity be revoked. This position in relation to revocation did not change in the final release of the Immunity Policy.

In the interviews, the former Chairman of the ACCC stated that it simply sought to clarify in the policy what was already the well-established process for resolving non-compliance disputes and that an explicit revocation provision was not necessary.¹⁷¹ However, it was also submitted in the response to the Draft Policy that the reviewability of the ACCC's decision to revoke was also a serious issue that needed clarification. Once again, this issue was not addressed in the final release of the Immunity Policy. The reviewability of ACCC's decisions has featured in many of the discussions with the interviewees, particularly the legal character of the immunity policy. One interviewee questioned whether a court could review the policy:

Interviewee: It is discretionary. It's an administrative policy, it has no force of law. It's a prosecution discretion whether to grant or not grant and it's a prosecution discretion whether to withdraw it or not, so it's not really enforceable in a sense, it's just a policy, prosecution policy. So it's not a contract. It's not a legislative instrument so what its character is has never been tested in Australia actually.¹⁷²

Despite the submission, the reviewability of an ACCC immunity-related decision was not incorporated into the final Immunity Policy, which remains unclear in this respect. If an immunity applicant wishes to appeal a final revocation decision by the ACCC, there is no prescribed process of appeal in the policy nor is there a body of review specified to review the decision by the ACCC. Thus, the ACCC cannot be held accountable for any of its decisions relating to the Immunity Policy. This infringes upon one of the fundamental precepts of public policy of ensuring that government decisions are accountable.¹⁷³ The applicant would have provided incriminating evidence of their involvement in the cartel conduct to the ACCC and CDPP¹⁷⁴ pursuant to their immunity cooperation and disclosure obligations¹⁷⁵ and

¹⁷¹ Interviewee 7 (Melbourne, 26th April 2013) 10.

¹⁷² Interviewee 4 (Sydney, 17th June 2013) 15.

¹⁷³ See, eg, John Goldring, 'Accountability of Commonwealth Statutory Authorities and "Responsible Government"' (1980) 11 *Federal Law Review* 353.

¹⁷⁴ Australian Competition and Consumer Commission, above n 68, Q 52: Under what circumstances can the ACCC use the information I provide (after conditional immunity is granted) in civil or criminal proceedings against me?

If an applicant fails to comply with the conditions set out in its grant of conditional immunity and conditional immunity is subsequently revoked, the ACCC and/or CDPP may use such

would have no clear indication of the appeal process nor does the ACCC have any obligation to provide reasons for its decisions.

The potential consequences of a decision to revoke immunity are even more serious in the context of conditional criminal immunity. It was submitted to the ACCC that the position regarding the decision to revoke by the CDPP is even more uncertain than that of the ACCC. This uncertainty may be justified provided that the CDPP's discretion is exercised consistently and fairly and is accountable to some extent. On the other hand, a regulator having a wide discretion to initiate proceedings also serves the public interest. Thus, judicial review of prosecutorial discretion could potentially result in multiple review claims, which could place strain on the court's resources. To strike the appropriate balance, it is important that clarification is provided in the Immunity Policy, or in a revised Memorandum of Understanding between the ACCC and the CDPP, stating that the revocation of criminal immunity is not subject to judicial review, if that is the position the CDPP wishes to adopt. At present, the CDPP *Prosecution Policy* states that the DPP may withdraw a letter of comfort or revoke a written undertaking provided under section 9(6D) of the *DPP Act*:

‘at any time during the investigation and prior to the conclusion of criminal proceedings if:
5.1.2 the ACCC makes a recommendation to withdraw the letter of comfort or revoke the undertaking, and the DPP or Director, exercising an independent discretion, agrees with that recommendation; or 5.1.3 the DPP or Director believes on reasonable grounds that: (i) the recipient of the letter of comfort or undertaking has provided information to the DPP that is false or misleading in a relevant matter; and/or (ii) the recipient of the letter of comfort or undertaking has not fulfilled any condition(s) of the letter of comfort or undertaking.

5.2 The DPP will notify the recipient in writing if a letter of comfort is to be withdrawn or an undertaking is to be revoked, and the recipient will be afforded a reasonable opportunity to make representations.¹⁷⁶

Essentially, the CDPP's process of revocation mirrors that of the ACCC and does not prescribe a method of dispute resolution in the event an applicant seeks to appeal

information against the immunity applicant (and any related corporate entities and any directors, officers or employees of the applicant whose immunity has also been revoked) in any:

- (a) civil and/or criminal proceedings for a substantive contravention of the CCA, and/or
- (b) any proceedings in respect of s. 155(5) of the CCA and/or proceedings relating to ss. 137.1, 137.2 or 149.1 of the Criminal Code.

¹⁷⁵ Australian Competition and Consumer Commission, above n 66, s C ss16 (a) iv, 28 (a) vi.

¹⁷⁶ Commonwealth Department of Public Prosecutions, above n 117, s 5.1.

the final decision to revoke by the CPPP. The Revised MOU does not offer any guidance in relation to the issue; it does not even mention the possibility of revocation.¹⁷⁷ The revocation of conditional criminal immunity carries with it the potential for imprisonment and is therefore an area that needs to be transparent.

Two important related questions arise in this context:

(1) What is the process for review of an ACCC decision to revoke once a final decision has been made?

(2) Is there a process for review of a CDPP decision to revoke once a final decision has been made?

In order to answer these two questions, it is necessary to examine the legal character of the Immunity Policy by reference to: (a) Legislation (b) Administrative Review (c) Contract.

This section will provide a brief analysis of the different intersections of the policy in relation to its legal character to highlight how unsatisfactory the current position is and reinforce the need for further development and transparency in this area.¹⁷⁸ This section will conclude with a call for further clarification as to the legal character and reviewability of an ACCC and CDPP decision to revoke immunity, as well as an argument for the best avenue of redress.

(a) Legislation

Whilst the ACCC and the CDPP form part of the Executive branch of the government, the legal basis of the Immunity Policy is currently derived from public policy statements. The policy is not currently legislated. The policy itself simply states that it is a 'policy document.'¹⁷⁹ It was suggested by some of the interviewees that if the policy were legislated it would clarify the legal character of the policy and

¹⁷⁷ Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 114.

¹⁷⁸ It is beyond the scope of this thesis to provide a detailed analysis of each of the potential avenues of appeal discussed in this section. Instead, the aim is to shed light of the limitations that currently exist in the event that an immunity applicant seeks to review the final decision of either the ACCC or CDPP and propose a recommendation to overcome these limitations.

¹⁷⁹ Australian Competition and Consumer Commission, above n 66, 1.

set out the rights and obligations of an immunity applicant in the event of revocation.¹⁸⁰

There is some support for the proposal that the policy should be legislated. This approach could be achieved in a few ways. For instance, the firm Arnold Bloch Lieber, in its submission to the ACCC's review of the policy, put forward that the conditions for immunity should be set out in legislation and this could be achieved in the following ways:

- a statutory defence to cartel proceedings of having made an immunity application that satisfied the relevant conditions; or
- a statutory power given to the ACCC to grant immunity from cartel proceedings (similar to the ACCC's power to authorise anticompetitive conduct prospectively).¹⁸¹

In relation to these two options, the second option is preferable because it directly invests the ACCC with the power to grant immunity and makes it clear that the ACCC has this authority.

There are two main reasons why the Immunity Policy should be legislated. The first is that, despite being a policy document, the decisions related to the granting or revocation of immunity affects the legal rights and obligations of the immunity applicants and therefore it should be clear where the power to affect these legal rights and obligations is derived from. Secondly, if the policy were to be legislated, it could make clear that the decision to revoke immunity is subject to independent judicial or merits review. This would overcome the difficulties associated with the current position where an applicant is left without any formal direction as to how to proceed with an appeal of an ACCC's final decision to revoke immunity. More importantly, the ACCC could make it clear that the applicant may have no such right of review.

However, as with any call for legislation there needs to be political support for its introduction. Despite the calls for clarification of the appeal process of ACCC decisions in submissions to the ACCC, the regulator has not currently shown any interest in legislating the policy. Instead, the ACCC chose to set out the revocation procedures outlined above and remained silent in relation to any right or process of appeal of its revocation decisions.

¹⁸⁰ See Chapter V, Revocation of Immunity, pg145.

¹⁸¹ Arnold Bloch Liebler, 'Submission on the ACCC's Immunity Policy for Cartel conduct' (Arnold Bloch Liebler, 2013) 3; Iris Tilley, 'A Sour Carrot and a Big Stick: Reviving Antitrust Enforcement After Stolt-Nielsen' (2007) 6 *Seattle Journal for Social Justice* 391, 402-406.

Therefore it is unlikely that there will be sufficient political support to lead to the introduction of a legislated Immunity Policy. This doubt was also expressed by some of the interviewees.¹⁸² Canada, the United Kingdom and the United States have also not implemented the policy into legislation.

(b) *Administrative Review*

Judicial review of an administrative decision in Australia is made pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'). Section 3 states that a decision will be capable of judicial review pursuant to the act where the decision was made:

- (a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of *enactment* ;or
- (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of *enactment* ; other than:
- (c) a decision by the Governor-General; or
- (d) a decision included in any of the classes of decisions set out in Schedule 1.

An "enactment" according to this section is defined as:

- (a) an Act, other than:
 - (i) the *Commonwealth Places (Application of Laws) Act 1970* ; or
 - (ii) the *Northern Territory (Self-Government) Act 1978* ; or
 - (iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or
- (b) an Ordinance of a Territory other than the Australian Capital Territory or the Northern Territory; or]
- (c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A; or
 - (ab) an Act of a State, the Australian Capital Territory or the Northern Territory, or a part of such an Act, described in Schedule 3; or
 - (ac) an instrument (including rules, regulations or by-laws) made under an Act or part of an Act covered by paragraph (ca); or
- (d) any other law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act; and, for the

¹⁸² See Chapter V, Revocation of Immunity, pg 145.

purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment.¹⁸³

Whether the decision by the ACCC to revoke the Immunity Policy is open to judicial review turns on the definition of a ‘decision made under an enactment.’ This definition appears to be broad and all encompassing, but its interpretation is complex and vexed and the Australian courts are yet to reach a definitive view.¹⁸⁴ This section will briefly analyse the case-law that has had the most significant impact on the interpretation of what constitutes a ‘decision made under an enactment’ to determine whether the Immunity Policy would fall under this interpretation and thus be capable of review pursuant to the *ADJR Act*.

The case of *Australian Broadcasting Tribunal v Bond* (1990) concerned the fitness of license-holders to hold broadcasting licenses, which required a determination as to whether that license holder was a fit and proper person to hold the license. This was a preliminary determination prior to the decision as to whether to revoke or suspend the licenses.¹⁸⁵ This called into question the definition of what constitutes a ‘decision’ for the purposes of review under the *ADJR Act*.

Chief Justice Mason decided that a decision must be of a ‘final or operative and determinative’ quality and that it must be a decision ‘authorised or required’ by statute in order to be subject to review pursuant to the *ADJR Act*.¹⁸⁶ This interpretation significantly narrowed the scope of review pursuant to the Act.¹⁸⁷ Applying this decision to the ACCC’s decision to revoke, the question would be whether the decision could be deemed to be ‘final and determinative.’ The court has been required to interpret the meaning of ‘final, operative or determinative’, in relation to the reviewability of decisions to initiate proceedings in *Re Toll and Australian Securities Commission*.¹⁸⁸ The court held that a series of administrative steps could not be regarded as a decision that is capable of review:

¹⁸³ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3 (1).

¹⁸⁴ See, eg, P Keane, 'Judicial Review: The Courts and the Academy' (2008) 82 *Australian Law Journal* 623.

¹⁸⁵ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 321-325, Daniel Stewart, 'Griffith University v Tang, 'Under an Enactment' and Limiting Access to Judicial Review' (2005) 33 *Federal Law Review* 525, 544.

¹⁸⁶ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 321-325.

¹⁸⁷ Matthew Groves, 'Should we Follow the Gospel of the ADJR Act?' (2010) 34 *Melbourne University Law Review* 736, 742; Stewart, above n 185, 543.

¹⁸⁸ (1993) 29 ALD 412.

Until guilt or innocence is determined, all acts done leading up to the court's findings, cannot be regarded as anything other than acts done preparatory to the making of a decision which will be reviewable in accordance with appropriate law at an appropriate time.¹⁸⁹

On this interpretation, the decision to revoke immunity may also be seen as an 'administrative step' that is preparatory to the making of the ACCC's decision to initiate proceedings and is therefore not 'final or determinative.' The Administrative Review Council has also held that decisions to initiate proceedings are inappropriate for merits review.¹⁹⁰

Thus, on the basis of the *Bond* decision, it is unlikely that the ACCC's decision to revoke immunity would be capable of review pursuant to the *ADJR Act*. This is compounded by the fact that it is unlikely that a decision to revoke immunity could be 'authorised or required' by statute, as the Immunity Policy is not a legislated policy.

In *NEAT Domestic v Australian Wheat Board (AWBI)*¹⁹¹ the definition was again called into question when AWBI, a company that occupied a legislative monopoly as the sole exporter of bulk quantities of wheat, denied consent to the NEAT company of an exemption to that monopoly. NEAT appealed this decision by seeking judicial review. The majority of the High Court analysed the respective statutory roles of the claimants in the relevant provisions, and found that AWBI drew power to grant or refuse consent by its incorporation rather than its wider statutory framework within which wheat export decisions were made.¹⁹²

Therefore the refusal to give consent by AWBI was not made 'under an enactment' within the meaning of the Act. The argument could be made that the ACCC occupies a similar position to that of the AWBI in that the ACCC does not draw its power to make revocation decisions from any specific statutory power. The *Competition and Consumer Act 2010* (Cth) establishes the ACCC but does not prescribe any specific powers or functions of the ACCC, except broadly to enforce the Act itself.¹⁹³ Furthermore, there was wide criticism of the *NEAT* decision,

¹⁸⁹ Ibid 415–416, [16].

¹⁹⁰ Administrative Review Council, 'What Decisions Should Be Subject to Merit Review?' (Administrative Review Council, Commonwealth of Australia, 1999) s 4.8.

¹⁹¹ (2003) 216 CLR 277.

¹⁹² Groves, above n 187, 745.

¹⁹³ Part II, s 6a.

asserting that it further restricted the scope of the *ADJR Act* since the *Bond* decision and impacted on public accountability of administrative decisions more generally.¹⁹⁴

However, the most recent significant decision relating to the definition of a ‘decision made under an enactment’ was *Griffith University v Tang*.¹⁹⁵ This case concerned a PhD student enrolled at Griffith University, whose candidature was revoked as a result of academic misconduct. The student sought to appeal the decision pursuant to the *ADJR Act*. The University argued that the decision to expel the student was made pursuant to an administrative code, and therefore did not come within the ambit of a ‘decision made under an enactment.’ The majority of the court endorsed a two-pronged test for the determination of whether a decision is made under an enactment:

The determination of whether a decision is ‘made ... under an enactment’ involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment.¹⁹⁶

The student’s claim satisfied the first limb but failed on the second as it was found by the court that the relationship between the student and the University was based on ‘mutual consent’ and therefore did not affect legal rights and obligations.¹⁹⁷ As a result of this case, there has been academic comment surrounding the position of decisions made under ‘soft law,’ such as guidelines, policies and manuals that are commonly utilised in the public sector.¹⁹⁸ According to Groves, this is due to the

¹⁹⁴ Groves, above n 187, 785: Groves provides an extensive literature review on this aspect: Christos Mantziaris, ‘A “Wrong Turn” on the Public/Private Distinction: NEAT Domestic Trading Pty Ltd v AWB Ltd’ (2003) 14 *Public Law Review* 197; Graeme Hill, ‘The Administrative Decisions (Judicial Review) Act and “Under an Enactment”: Can NEAT Domestic Be Reconciled with Glasson?’ (2004) 11 *Australian Journal of Administrative Law* 135; Neil Arora, ‘Not So Neat: Non-Statutory Corporations and the Reach of the Administrative Decisions (Judicial Review) Act 1977’ (2004) 32 *Federal Law Review* 141; Margaret Allars, ‘Public Administration in Private Hands’ (2005) 12 *Australian Journal of Administrative Law* 126. Rare defences of NEAT Domestic are provided in Caspar Conde, ‘Accountability for the Exercise of “Public” Power: A Defence of NEAT Domestic’ (2005) 46 *AIAL Forum* 1 and P A Keane, ‘Judicial Review: The Courts and the Academy’ (2008) 82 *Australian Law Journal* 623. Keane appeared as counsel for Griffith University in *Tang*. The apparent narrowing of accountability which many argued NEAT Domestic caused proved especially ironic when it was later discovered that AWBI was heavily involved in dubious and almost certainly illegal activities: see Linda Courtenay Botterill, ‘Doing It for the Growers in Iraq?: The AWB, Oil-for-Food and the Cole Inquiry’ (2007) 66 *Australian Journal of Public Administration* 4.

¹⁹⁵ (2005) 221 CLR 99.

¹⁹⁶ *Ibid* 130–131, [89].

¹⁹⁷ Melissa Gangemi, ‘Griffith University v Tang: Review of University Decisions Made ‘Under an Enactment’ ’ (2005) 27 *Sydney Law Review* 567, s A (i).

¹⁹⁸ Groves, above n 187, 747.

distinction that the majority drew in *Tang* between the statute that established the University and the administrative rules under which the expulsion decision was made.¹⁹⁹

The Immunity Policy is also a ‘soft law’ decision, as it is a public policy document that has not been legislated. It could be argued that it is implied under the *Competition and Consumer Act 2010* (Cth) that the ACCC has the power to make decisions in relation to the enforcement of the Act, which could include the development of enforcement policies that assist in achieving the aims of the Act. This would potentially satisfy the first limb on the *Tang* test. A decision to revoke immunity could likely be seen as affecting legal rights and obligations, pursuant to the second limb in *Tang*. However, arguably there is a distinction between the *Competition Act* establishing the ACCC and the enforcement tools that the ACCC chooses to utilise in enforcing its powers. This distinction is not as clear as that in the *Tang* case, thus there is likely to be a stronger case for *ADJR* review of the Immunity Policy than the administrative code in *Tang*.

Of particular importance to the analysis of the Immunity Policy is the long-standing exemption of judicial review for decisions made as a result of ‘prosecutorial discretion.’ According to the Australian Law Reform Commission (ALRC), ‘prosecutorial discretion’ refers to the choice, by the regulator or the DPP, whether or not to impose an administrative penalty, to commence penalty proceedings or to target a particular person for investigation that may ultimately lead to the imposition of penalties. The exercise of this discretion may be guided by formal or informal agency guidelines.²⁰⁰ The decisions of both the ACCC and the CDPP relating to immunity would be a result of an exercise of prosecutorial discretion and hence within the exemption of prosecutorial discretion from judicial review.

The common law position states that decisions made pursuant to prosecutorial discretion are not subject to judicial review:

It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, unsusceptible of judicial review. They include decisions whether or not to prosecute, to enter a *nolle prosequi*, to proceed *ex officio*, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to

¹⁹⁹ *Ibid.*

²⁰⁰ Australian Law Reform Commission, ‘Principled Regulation: Federal Civil and Administrative Penalties in Australia’, Report 95’ (Australian Law Reform Commission, 2003) s 23.2-23.36.

the particular charge to be laid or prosecuted. The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.²⁰¹

Whether decisions made as a result of prosecutorial discretion will be subject to judicial review under the *ADJR Act* is not certain. There is some precedent that supports judicial review of prosecutorial decisions relating to civil penalties but the court has held that these must satisfy the test enunciated in *Bond* where the Act will only apply to decisions that are ultimate or operative determinations and not expressions of opinion.²⁰² As indicated above, the *Bond* decision provides a very narrow interpretation of ‘under an enactment.’ Given that the Immunity Policy is not expressly stated in the *Competition and Consumer Act 2010* (Cth) nor it is expressly or even indirectly referenced as a function or power of the ACCC then it is unlikely to satisfy the *Bond* test.

In a report by the ALRC into the scope of judicial review in Australia, there were a number of submissions relating to whether decisions made in the exercise of prosecutorial discretion should be subject to judicial review.²⁰³ According to the report, there were mixed responses in relation to this question. ASIC in particular was against the position that the decision to initiate criminal, civil and administrative action should be subject to judicial review as ASIC believes it is not a ‘substantive decision because it was not final, operative and determinative’ and that allowing judicial review in this respect ‘might encourage a proliferation of actions that could delay or frustrate the process of justice.’²⁰⁴

Therefore, the key argument that would need to be made by an immunity applicant seeking judicial review of a decision to revoke by the ACCC would be to show that the decision regarding revocation is ‘final, operative and determinative’ in accordance with the relevant case law tests. As evidenced by this discussion, it is unlikely that the ACCC’s decision to revoke immunity would satisfy this test, as it is an administrative step that could lead to the commencement of legal proceedings.

²⁰¹ *Maxwell v The Queen* (1996) 184 CLR 501, 534.

²⁰² *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337–338; see also George Gilligan, Helen Bird and Ian Ramsay, ‘Regulating Directors’ Duties How Effective Are The Civil Penalty Sanctions In The Australian Corporations Law’ (Centre for Corporate Law and Securities Regulation - The University of Melbourne, 1999) 44.

²⁰³ Australian Law Reform Commission, above n 200, 754.

²⁰⁴ *Ibid* s 23.28.

The path to proving the decision is ‘final or determinative’ is thus very complex and it is uncertain which view the courts will adopt. The situation is even more precarious in the context of the decision to revoke immunity by the CDPP as decisions relating to the criminal process are specifically excluded from the purview of the *ADJR Act* and also the *Judiciary Act*.²⁰⁵ On this basis, an immunity applicant would unlikely be able to seek judicial review of a decision to revoke by the CDPP. If this is the position that the ACCC and CDPP wish to adopt, then this should be expressly incorporated in the Immunity Policy, for the sake of clarity and transparency.

(c) *Contract*

(i) Is There A Binding Contract Between The ACCC/CDPP And The Immunity Applicant?

The question of whether the ACCC enters into a contractual relationship with an immunity applicant was not addressed in the ACCC’s recent review of the policy. If the immunity agreement is a contract in law then a breach of that contract would be actionable in the Federal Court.

In contrast to the other comparable regulators, the ACCC does not publish Model Immunity Agreements that list the standard terms of the agreement with an immunity applicant.²⁰⁶ Therefore it is likely that the ACCC’s Immunity Policy would be seen as an invitation to the whole world, in which the offeree accepts the offer by performing his or her side of the bargain.²⁰⁷ In the context of immunity, this means the ACCC and/or the CDPP is bound to perform the obligations pursuant to the Immunity Policy at the point that the immunity applicant undertakes its performance of its immunity obligations. The acceptance of this agreement will occur where the acts required for acceptance are performed on the basis of the offer.²⁰⁸

²⁰⁵ *Administrative Decisions (Judicial Review) Act 1977* (Cth) Schedule 1; and *Judiciary Act 1903* (Cth) s 9B.

²⁰⁶ See, eg, Competition Bureau, 'Corporate Immunity - Agreement' (Competition Bureau, 2011) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02479.html>>; Department of Justice, above n 143; Competition and Markets Authority, above n 96.

²⁰⁷ *Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256.

²⁰⁸ *Crown v Clarke* (1927) 40 CLR 227.

The consideration in this context would be an exchange of promises, whereby the immunity applicant agrees to fulfil the terms of the agreement, by providing information and assistance to the ACCC/CDPP in relation to the cartel investigation, and in return, the ACCC/CDPP promises to immunise the applicant from civil or criminal proceedings.²⁰⁹ On this basis, the ACCC's immunity agreement would likely create a binding contractual agreement with the first applicant who performs the obligations listed in the policy on the basis of that offer. There is academic and judicial support for the view that plea agreements and non-prosecution agreements constitute contractual agreements.²¹⁰

If the ACCC enters into an agreement that is similar to those published by regulators in the United States, United Kingdom and Canada, this agreement would be a bilateral contract.²¹¹

(ii) If The Immunity Policy Does Create a Contract, What Conduct Would Constitute A Breach?

In order to establish whether there has been a breach of contract, it is important to look at the terms of the agreement to ascertain whether they create the right to terminate (or revoke) the policy. Essential conditions, or conditions that strike at the heart of a contract, give rise to an automatic right to terminate, even for a minor breach of these terms.²¹² The key question in ascertaining an essential condition would be: have the parties only entered into the contract on the understanding that there would be a strict compliance with the particular term.²¹³ This question is determined objectively, having regard to the terms of the contract and the surrounding circumstances.²¹⁴

²⁰⁹ *Australian Woollen Mills v Commonwealth* (1954) 92 CLR 424, [457]-[458].

²¹⁰ See, eg, Sarah Baumgartel, 'Nonprosecution Agreements as Contracts: Stolt-Nielson and the Question of Remedy for a Prosecutor's Breach' (2008) (1) *Wisconsin Law Review* 25; Michael Cicchini, 'Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains' (2008) 38 *New Mexico Law Review* 159; Ross Galin, 'Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements' (2000) 68 *Fordham Law Review* 1245.

²¹¹ *Gibson v Manchester City Council* (1979) 1 WLR 294.

²¹² Paterson Robertson, Duke & Andrew, Jeannie & Arlen, *Principles of Contract Law 4th Edition* (ThomsonReuters, 4th ed, 2011) 430.

²¹³ *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, 641.

²¹⁴ *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 431.

The criteria stipulated in the ACCC policy indicate that strict compliance with those terms will lead to the granting of civil conditional immunity. Given the importance of the offer, in terms of offering upfront, complete immunity from prosecution, each of the criteria listed is likely to be viewed objectively by both parties as being essential terms of the contract.²¹⁵ Therefore, a breach of any of these terms could give rise to the right to terminate (or revoke) the immunity agreement.

Alternatively, the actions by the ACCC or CDPP could be seen as a repudiation of the immunity contract. Repudiation refers to the situation where one party manifests an unwillingness or inability to perform his or her obligations under the contract, in which event; the other party will have the right to terminate.²¹⁶ Repudiatory conduct must be fundamental to the contract.²¹⁷ It can be found by a prosecutor's express statement that they will revoke immunity or their conduct showing an inability or unwillingness to perform.²¹⁸

In the context of immunity, if the ACCC or the CDPP decide to revoke immunity, this could constitute repudiatory conduct. For example, consider the situation where the ACCC or CDPP write to the applicant stating that the applicant is in breach of an immunity obligation because there is evidence to suggest that an employee of the applicant is still in contact with the former cartel participants. If the immunity applicant addresses this issue, by reprimanding the employee or by producing proof that it is a false allegation, the applicant would then contact the ACCC to inform them of this. If the ACCC did not respond to the applicant within a reasonable timeframe, despite the applicant's numerous attempts to contact the ACCC, then this may show an unwillingness to perform on the ACCC's behalf.

If the ACCC or CDPP take steps toward prosecuting the immunity applicant, by issuing a letter indicating that the applicant's immunity has been revoked, then this conduct could also constitute repudiation.

(iii) Remedy for Breach

²¹⁵ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962) 2 QB 26; *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632.

²¹⁶ *Progressive Mailing House v Tabali* (1985) 157 CLR 17.

²¹⁷ *Ibid* [31].

²¹⁸ *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327.

In the context of immunity, breach of contract by the ACCC or CDPP would lead to the revocation of the policy and the prosecution of the applicant civilly or criminally, depending on the case against the applicant. The most common remedy for a breach of contract is a claim for damages: ‘Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.’²¹⁹

In the context of the revocation of immunity, it is the threat or actual prosecution of the corporation that will cause the most damage to the applicant. It is well documented that the threat of civil or criminal proceedings can cause significant economic loss to a company in terms of the time and resources necessary to defend a case but also the publicity associated with a potential finding of guilt, which can also lead to significant financial loss.²²⁰ Moreover, relationships with suppliers and business partners may be adversely impacted where people are dissociating themselves from a corporation, particularly if the prosecution results in a criminal conviction.²²¹ Arguably, these consequences cannot be accurately or sufficiently quantified, as in some cases, damage to reputation is irreparable. Nonetheless, the courts will strive to quantify these losses, even where the calculations are complex.²²²

If an award of damages is deemed to be inadequate, an aggrieved applicant may wish to appeal to the Courts discretion for an equitable award of specific performance or an injunction. An award of specific performance would essentially compel the ACCC/CDPP to continue with the immunity agreement by not prosecuting the applicant.²²³ Alternatively, an injunction would prevent the ACCC/CDPP from initiating proceedings against the former immunity applicant.

The former immunity applicant would need to show the Court that an award of damages would be inadequate to prevent the irreparable harm caused by civil or criminal prosecution and that an award of specific performance or an injunction would be the more equitable and just remedy in the circumstances.²²⁴

²¹⁹ *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363.

²²⁰ See, eg, Thomas McGarity, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival* (Yale University Press, 1st ed, 2013) 276; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Cambridge University Press, 2003) 52.

²²¹ Baumgartel, above n 210, 50.

²²² *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355.

²²³ See, eg, *Dougan v Ley* (1946) CLR 142.

²²⁴ *Schutz DSL (Aust) Pty Ltd v VIP Plastic Packaging Pty Ltd* (2009) 82 IPR 477; [2009] FCA 1049 at [44].

The remedy of specific performance is not granted readily and is subject to a number of discretionary factors, especially where the decision may involve the continued supervision by the court.²²⁵ Given the serious consequences associated with the threat of prosecution, the court may find that this is enough to warrant a grant of specific performance or alternatively an injunction. However, this decision would be made in the exercise of the court's discretion.

2 Recommendation

(a) *Alternative Solution: Insert Provision into Immunity Policy*

As discussed above, construing the immunity agreement in accordance with contractual principles provides the clearest and most easily attainable method of review of a decision to revoke compared to the unlikelihood that the policy will be legislated or the difficulties associated with seeking review via the *ADJR Act*. However, the simplest and most effective way to make a revocation decision reviewable would be to insert an express provision into the Immunity Policy that clearly stipulates who the arbitrator or mediator of an immunity dispute is to be. If not the court, then the ACCC/CDPP could stipulate an independent and impartial body or person to review the decision.

The Administrative Appeals Tribunal ('AAT') could serve as an appropriate avenue for ACCC's decisions made pursuant to the Immunity Policy to be reviewed on its merits. The question in merits review is whether the decision is substantively correct.²²⁶ Should the AAT disagree with the decision that was reached, it can ordinarily substitute a new decision.²²⁷ Section 63 of the *Administrative Decisions Review Act 1997* (NSW) sets out the powers of the Tribunal:

63 Determination of administrative review by Tribunal

(1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:

(a) any relevant factual material,

²²⁵ Robertson, above n 212, 563.

²²⁶ *Re Staffieri and Commonwealth* (1986) 10 ALDN36.

²²⁷ Robyn Creyke, 'Administrative Tribunals' in Matthew Groves and HP Lee (eds), *Australian Administrative Law - Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 83.

- (b) any applicable written or unwritten law.
- (2) For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed by any relevant legislation on the administrator who made the decision.
- (3) In determining an application for the administrative review of an administratively reviewable decision, the Tribunal may decide:
 - (a) to affirm the administratively reviewable decision, or
 - (b) to vary the administratively reviewable decision, or
 - (c) to set aside the administratively reviewable decision and make a decision in substitution for the administratively reviewable decision it set aside, or
 - (d) to set aside the administratively reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal.

Alternatively, the decision could be remitted to the original decision maker (the ACCC) for reconsideration of the decision, subject to the directions or recommendations made by the AAT or another appropriate arbitrator.

The AAT is vested with the same powers and discretions as the original decision-maker, the ACCC, so that the tribunal can ‘stand in the shoes’ of the ACCC when determining what was the correct or preferable decision based on a thorough consideration of the evidence.²²⁸ The ACCC currently utilises a similar process of review for its authorisation decisions through the Australian Competition Tribunal (‘ACT’).²²⁹ Similarly to the AAT, the ACT is tasked with a re-hearing of the application where the ACT is vested with the same functions and powers as the ACCC.²³⁰ Given that the ACCC is familiar with this process of review, the jurisdiction of the ACT could be extended to include ACCC decisions made pursuant to the Immunity Policy.

Alternatively, it has been suggested that a retired judge could perform this function.²³¹ Inserting an express dispute resolution provision into the Immunity Policy would provide for the most efficient use of time and resources in the event of revocation, especially when compared to the alternative avenues discussed in this section. Therefore, it would not only be for the benefit of the applicants but also for the ACCC and CDPP that they clarify the avenue for review in the Immunity Policy, if one does exist at all.

²²⁸ Ibid 85.

²²⁹ Australian Competition & Consumer Commission, 'Authorisation Guidelines' (ACCC, 2013) 84.

²³⁰ Ibid.

²³¹ Michael Corrigan, 'Submission in Response to Consultation on Review of the ACCC Immunity Policy for Cartel Conduct' (Law Council of Australia - Competition and Consumer Committee, 2013) s 6.12.

3 *The Position Overseas*

The guidance offered by the CMA and the Competition Bureau in relation to a decision to revoke immunity is similar to that of the ACCC. Essentially, the regulator will provide the applicant with notice that they may be in breach of the Immunity Policy and the applicant is given time to respond to this notice.²³² In the case of criminal immunity, the CMA may revoke leniency subject to the following conditions:

- the recipient of a letter ceases to satisfy in whole or in part any of the relevant conditions ...or
- the recipient of a letter has knowingly or recklessly provided information that is false or misleading in a material particular.²³³

The Competition Bureau refers to the *Federal Prosecution Handbook* in relation to the DPP's decision to revoke conditional criminal immunity. Under s 35.8:

It may become necessary to seek a remedy against a person previously granted immunity where that person:

- withdraws promised co-operation with the Crown;
- fails to be truthful when testifying;
- has wilfully or recklessly misled the investigating agency or Crown counsel about material facts concerning the case including factors relevant to that person's reliability and credibility as a witness; or
- has sought immunity by conduct amounting to a fraud or an obstruction of justice.

Whether the person should be indicted if this occurs, either for the offence for which he or she sought immunity or for some other offence, will depend on the circumstances of each case. However, the terms of the agreement with the person and the manner in which it was breached will be important considerations.²³⁴

Whilst the criteria relating to the revocation of conditional criminal immunity are more detailed than those in the ACCC policy, both of these policies do not stipulate an appeal process in the case where immunity is revoked and an applicant seeks to appeal the final decision. The position in the United States prior to the *Stolt-*

²³² Competition Bureau, above n 95, s F; Australian Competition and Consumer Commission, above n 68, Q 36; Competition and Markets Authority, above n 96, s 10.6-10.13.

²³³ Competition and Markets Authority, above n 96, s 10.10.

²³⁴ Director of Public Prosecutions, above n 120.

Nielsen decision was similar to that currently stipulated in the immunity policies of the ACCC, CMA and Competition Bureau. The United States policy previously stated that in the event that immunity was revoked, the applicant would be afforded the opportunity to make representations in relation to the potential decision to revoke.²³⁵

(a) *The Consequences Of Stolt Nielsen*

This section will provide a brief overview of the case that resulted from the DOJ's first revocation of its leniency policy: The *Stolt Neilson* case. It will then analyse the consequences of the decision with a view to formulating lessons for the Australian context. The case involved an immunity applicant, Samuel Cooperman, an executive of SNTG (Stolt-Neilson Transportation Group), requesting an immunity marker based on limited information about the company's involvement in cartel conduct. Counsel for the applicant immediately contacted the Division (DOJ) to establish a marker before an internal investigation was conducted. SNTG was granted a marker despite the fact that the company's internal investigation had not yet commenced but at that time the DOJ's own investigation failed to turn up any misrepresentations by SNTG.²³⁶ However, the DOJ then sought to revoke the marker and leniency based on an alleged misrepresentation made at a meeting before the internal investigation had commenced.²³⁷ SNTG argued that the decision to revoke immunity should be subject to pre-indictment review.

The Third Circuit Court of Appeals agreed with SNTG's argument but this decision was overturned in the Appellate courts. The consequence of this was that those who enter into an immunity agreement with the DOJ are not entitled to a pre-indictment review, meaning that the DOJ can indict an immunity applicant without first establishing that the applicant is actually in breach of the agreement.²³⁸ As a result of the decision, the DOJ inserted the following provision into the standard immunity agreements in order to preclude immunity decisions from judicial review:

²³⁵ Hammond and Barnett, above n 83, Q27.

²³⁶ *Stolt-Nielsen S.A. v. United States*, 352 F. Supp. 2d 553, 568 (E.D. Pa. 2005).

²³⁷ Ryan Williams, 'The Devil They Know: The DOJ's Flawed Antitrust Leniency Program and Its Curious Pursuit of Stolt-Nielsen' (2007) 85 *North Carolina Law Review* 974, 984.

²³⁸ Tilley, above n 181, 1.

28. When can an applicant or its employees judicially challenge a Division decision to revoke conditional leniency?

Paragraph #3 of the model corporate and individual conditional leniency letters states that the applicant "understands that the Antitrust Division's Leniency Program is an exercise of the Division's prosecutorial discretion, and [it/he/she] agrees that [it/he/she] may not, and will not, seek judicial review of any Division decision to revoke [its/his/her] conditional leniency unless and until [it/he/she] has been charged by indictment or information for engaging in the anticompetitive activity being reported." Paragraph #4 of the model corporate conditional leniency letter also notes that "[j]udicial review of any Antitrust Division decision to revoke [an individual's] conditional non-prosecution protection granted [under the corporate conditional leniency letter] is not available unless and until the individual has been charged by indictment or information." The Division's leniency program is an exercise of prosecutorial discretion generally not subject to judicial review. Accordingly, the proper avenue to challenge a revocation of a leniency letter is to raise the letter as a defense post-indictment. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 183-187 (3d Cir. 2006).²³⁹

The DOJ has clearly expressed within the FAQ and the model leniency letters that decision to revoke is not subject to judicial review. This stands in contrast to the ACCC, Competition Bureau and CMA policies that do not contain such a provision. Therefore, the DOJ has the unilateral discretion to revoke its Immunity Policy and indict an applicant previously protected by the agreement's terms.²⁴⁰ This approach has been criticised for failing to provide a check on the prosecutorial discretion of the DOJ: immunity can now be revoked at any time without an avenue of appeal or review process available to the previous immunity holder.²⁴¹ Those applicants who have already provided incriminating information in relation to their involvement in the cartel conduct will be in a particularly precarious situation if the decision is revoked.²⁴²

As a result of this case, the DOJ FAQ now states that the 'proper avenue' to challenge a revocation of a leniency letter is to raise the letter as a defense post-indictment.²⁴³ The FAQ does not provide any further detail in relation to this. On the one hand, this could be seen to provide an adequate safeguard for an unjustified revocation of the DOJ leniency policy. On the other hand though, if the revocation was unjustified then the corporation would need to incur significant time and

²³⁹ Hammond and Barnett, above n 83, Q28.

²⁴⁰ Tilley, above n 181, 1.

²⁴¹ Williams, above n 237, 986.

²⁴² Tilley, above n 181, 401.

²⁴³ Hammond and Barnett, above n 83, Q 28.

resources defending a criminal case that may have been avoided if there was another process of independent review of the DOJ's initial revocation decision.

Regardless of this issue, the position in the United States in relation to revocation is at least clear that it is not subject to judicial review. This provides much needed clarity that is currently absent from the ACCC, Competition Bureau and CMA policies. There has been further suggestion that the *Stolt Nielsen* case has improved other aspects of the United States leniency policy in terms of placing stricter requirements on the marker process.²⁴⁴ Instead of granting the leniency marker based on incomplete information, post *Stolt Nielsen*, the DOJ will require a comprehensive investigation of the alleged cartel conduct by the company seeking a marker.²⁴⁵ This is likely to prevent the situation that led to the *Stolt Nielsen* case, and ensure that the DOJ is able to grant conditional leniency based on more thorough and full information.²⁴⁶

Despite the potential adverse consequences highlighted by the *Stolt-Nielsen* decision and the DOJ's leniency letters, the ACCC has yet to clarify or explain in its own policy whether its immunity decisions should be or can be subject to judicial review. The ACCC should heed the *Stolt Nielsen* decision and pay close attention to the information provided in the marker process to ensure that the company has undertaken a proper investigation into the corporate misconduct *prior* to the grant of conditional immunity.

E *Concluding Remarks on the Eligibility and Cooperation Elements of the Immunity Policy – Applying the Enhanced Criteria*

The eligibility and cooperation requirements analysed in this chapter are fundamental to the design and operation of the Immunity Policy. The recommendations outlined in this chapter are aimed at providing greater clarity and coherence in the Immunity Policy and shifting the focus from the orthodox neo-classical framework view of 'effectiveness' to wider considerations.

In terms of transparency, this chapter has identified a number of areas that are currently lacking clear and detailed information in relation to the Policy's operation.

²⁴⁴ See Klawaiter and Everett, above n 165.

²⁴⁵ *Ibid* 7.

²⁴⁶ *Ibid*.

Most notably, the Immunity Policy is not clear on whether recidivists should be eligible for Immunity for a second or subsequent time or the process of appeal that an Immunity applicant would seek for judicial or merits review of an ACCC's decision to revoke Immunity. Furthermore, there is no indicative criterion that clarifies how the coercion test is to be applied. These issues were submitted to the ACCC in its recent review of the policy; they are not addressed in the final revised Policy. In accordance with general principles of transparency,²⁴⁷ the ACCC needs to provide reasons for its decisions regarding the inclusion/exclusion of the recommendations but it has failed to do so. The recommendations in this chapter are aimed at enhancing the transparency of the Immunity Policy's operation and, it is submitted, should be adopted by the ACCC.

This consideration overlaps with the need for accountability of government decision-making. At present, it is not clear whether a decision made by the ACCC or the CDPP in relation to revoking the Immunity Policy is reviewable. Therefore, the ACCC cannot be held accountable for its decisions, which is a violation of a fundamental precept of responsible government. It is recommended that the ACCC insert a dispute resolution provision into the Immunity Policy to ensure that there is an effective accountability mechanism for its decisions.

The principle of consistency requires that the justice system is consistent in the application of laws and in practice.²⁴⁸ This chapter has demonstrated that there are issues of consistency between the ACCC and CDPP's administration of the Immunity Policy, particularly in relation to the timing of the grant of conditional criminal immunity and the sufficiency of information needed to grant such immunity. Whilst the ACCC and CDPP are entrusted with discretion in the exercise of their decision-making powers, the recommendations in this chapter need careful consideration to ensure that the ACCC and CDPP act consistently in the interests of fair administration. This includes reducing the levels of uncertainty surrounding the different approaches the two agencies adopt in immunity related decisions.

In relation to the cooperation and eligibility requirements, the question is whether the current Immunity Policy adopts the most reasonable and proportionate means to achieving its aims of detection and deterrence. It is clear that the Immunity

²⁴⁷ As outlined in Chapter III, Transparency, pg 89.

²⁴⁸ Ibid Consistency, pg 93.

Policy is ‘rationally related’ to achieving cartel detection and deterrence, and therefore satisfies the first test. The second question is directed at whether the measures adopted are the ‘least-restrictive’ to achieve the aims of the Immunity Policy. The recommendations formulated in this chapter are designed to ensure that the Immunity Policy is still aimed at detection and deterrence, but ensures that the measures taken to achieve this are weighed against competing considerations. For instance, on one view the exclusion of recidivists from the Immunity Policy may adversely impact on the deterrence capabilities of the Policy. However, this factor needs to be weighed against the argument that allowing recidivists to continuously apply for immunity may facilitate cartel conduct. The exclusion of recidivists would thus bring the policy in line with other exclusion criteria within the policy, such as the coercion test, which also prevents culpable corporations from manipulating the policy.

The recommendations in this chapter are therefore arguably equally effective in achieving the Immunity Policy’s aim, but bring the Policy in line with other important public policy considerations of transparency, accountability and consistency. In this way, the recommendations are proportionate means to achieving the aims of the Immunity Policy in a more comprehensive and justified way.

VII THE ROLE OF PRIVATE AND PUBLIC ENFORCEMENT – CONFIDENTIALITY AND THIRD PARTIES

In the context of anti-cartel enforcement, there is an inherent tension between the role of public and private enforcement. Public enforcement efforts are claimed to be highly successful in the deterrence of cartel conduct by competition regulators internationally. At the forefront of the public enforcement regime has been the immunity policy, which has largely been proclaimed as the success story of public enforcement, given its claims of achieving cartel detection and deterrence.

In contrast, the key aim of private enforcement is to seek compensation for those who have been adversely affected by cartel conduct and who seek this compensation through private actions for damages against the former cartel members. In order to successfully pursue an action in damages, third party claimants encounter the same evidentiary difficulties as competition regulators in attempting to prove the existence of the cartel. However, unlike the regulators, the third party claimants generally do not have access to the immunity documents that enabled the regulators to successfully prosecute the cartel members nor do they have the same investigative powers of the ACCC, such as those under s 155.¹

At the heart of the intersection of public and private enforcement is the issue of confidentiality. The issues associated with confidentiality emerge as two-fold:

- A Disclosure of Immunity Information to third party claimants;
- B Disclosure of Immunity Information to other regulators, pursuant to international agreements and waivers of confidentiality.

At the most basic level, these issues require weighing the net benefits of disclosure against the costs of non-disclosure. The disclosure of immunity information, particularly to third party claimants, will assist them in generating a case against the former cartel members in order to seek compensation for the harm incurred as a result of the cartel.

¹ *Competition and Competition Act 2010* (Cth) s 155.

There is much support for the role that private enforcement plays in the anti-cartel enforcement regime, with some suggestion that private enforcement plays an even greater role in deterrence than that of the public enforcement regime.² In contrast, one of the central tenets of the immunity policy is an upfront assurance of confidentiality of all information provided to the regulator, in order to entice the immunity applicants to come forward and cooperate with the competition authorities.³ Confidentiality, in this context, is particularly important as the immunity applicant is providing self-incriminating evidence of its involvement in the cartel, which puts them in a vulnerable position in relation to third party actions vis-à-vis the other cartel participants. If this confidential information is disclosed to third party claimants or disclosed in a foreign jurisdiction where the cartel participant has not yet sought or been granted immunity, this has the potential to undermine the very operation of the immunity policy.

In essence, there is growing recognition of the importance of private enforcement, and with it, the perception that the roles of private and public enforcement should be seen as complementary, as opposed to conflicting.⁴ However, there are delicate issues associated with this interaction, of which this chapter will seek to analyse in order to determine where the balance should lie.

The first section of this chapter will analyse the position in Australia regarding the disclosure of immunity information, before turning to the recent developments in the United States, the United Kingdom and Canada, which have significantly impacted upon the issue of disclosure of immunity information on a global scale and pose a threat to the effective operation of immunity policies. The

² See eg, Robert Landes and Joshua Davis, 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the US' (2011) ((2)) *Brigham Young University Law Review* 315; Robert Landes and Joshua Davis, 'Defying Conventional Wisdom: The Case for Private Antitrust Enforcement' (2013) 48 *Georgia Law Review* 1; Robert Landes and Joshua Davis, 'Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement' (2013) 36 *Seattle University Law Review* 1269.

³ See eg, Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014) s H.

⁴ See eg, Sarah Lynch, 'The Case for Increased Private Enforcement of Cartel Laws in Australia' (2011) 39 *Australian Business Law Review* 385; Stephen Kon and Amy Barcroft, 'Aspects of the Complementary Roles of Public and Private Enforcement of UK and EU Antitrust Law: An Enforcement Deficit?' (2008) 1 *Global Competition Litigation Review* 11; Micheal Sanders et al, 'Disclosure of Leniency Materials in Follow-on Damages Actions: Striking "The Right Balance" Between the Interests of Leniency Applicants and Private Claimants?' (2013) 34 *European Competition Law Review* 174.

analysis will then focus on restitution as a potential solution to balance the competing interests of public and private enforcement.

The second section of this chapter will focus on the information provided to foreign regulatory agencies pursuant to international formal and informal information-sharing mechanisms. The focal point of this section will be upon the waiver of confidentiality agreements in Australia and the aforementioned jurisdictions and its impact on the confidentiality assurances of an immunity policy. The chapter will then advocate for a more streamlined approach to international immunity applications and briefly analyse the proposed avenues for this to be achieved.

A *Disclosure of Immunity Information to Third Parties – The Australian Position*

The ACCC has always maintained that they will use their ‘best endeavours’ to protect the confidentiality of immunity information; their stated position is *against* the disclosure of immunity information to third party claimants, except as required by law.⁵ The FAQ does not elaborate on this position. In particular, there is insufficient guidance in respect of the criminal discovery provisions⁶ that may compel the ACCC to disclose immunity information.⁷ The Policy only refers to the ‘Protected Cartel Information’ provisions set out in the *Competition and Consumer Act 2010* (Cth), as well as the common law arguments that the ACCC may use to protect immunity information, namely legal professional privilege and public interest immunity.⁸

This section will first analyse the previous case law arguments put forward by the ACCC to protect the confidentiality of immunity information to demonstrate that these arguments have produced inconsistent and unpredictable results. This analysis will show how difficult it is to rely on common law arguments to guarantee to potential immunity applicants that the information they provide to the ACCC will be kept confidential and not used against them in ancillary proceedings. This creates a

⁵ Australian Competition and Consumer Commission, above n 3, Step 4: Confidentiality.

⁶ *Federal Court Act of Australia Act 1976* (Cth) Part III, Subdivision C.

⁷ Australian Competition and Consumer Commission, above n 3, s 50.

⁸ *Ibid*; *Competition and Consumer Act 2010* (Cth) s 157.

high level of uncertainty in relation to the operation of the ACCC Immunity Policy, which according to the ACCC, undermines the policy's effectiveness in achieving cartel detection and deterrence.

As a result of the inconsistency in judicial interpretation, the legislature has attempted to address this uncertainty by introducing the 'Protected Cartel Information' ('PCI') scheme that is designed to give the ACCC, as opposed to a court, the power to determine whether immunity information should be disclosed.⁹ These provisions have not yet been judicially interpreted but an analysis of the *Prysmian*¹⁰ case provides some insight into the way the court is likely to interpret these provisions.

1 *The Case Law*

Prior to the implementation of the PCI regime, the ACCC sought to withhold cartel information in judicial proceedings by claiming the information was protected by primarily two privileges, (a) public interest immunity and; (b) legal professional privilege.¹¹ These legal arguments have been put forward by the ACCC in three significant cases, with differing results.

(a) *Legal Professional Privilege*

This common law privilege refers to the right of a client to the protection from disclosure of confidential information and advice passing between lawyer and client.¹² Where information is confidential information contained in a verbal or written communication made with the 'dominant purpose' of obtaining, or giving, legal advice then it will be protected by legal professional privilege.¹³ The ACCC bears the onus of proof in this respect and the purpose of the communication is determined primarily from the document on a case-by-case basis.¹⁴

⁹ *Competition and Consumer Act 2010* (Cth) ss 157B, 157C.

¹⁰ *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL* (2011) FCA 938. ('*Prysmian*')

¹¹ Australian Competition and Consumer Commission, above n s 51.

¹² Ainslie Lamb and John Litrich, *Lawyers in Australian Society* (Federation Press, 2007) 258.

¹³ *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *ibid* 258-259.

¹⁴ *Ibid* 259; Ysaiah Ross and Peter MacFarlane, *Lawyers' Responsibility & Accountability - Cases, Problems & Commentary* (LexisNexis Butterworths, 3rd ed, 2007) 414-415.

In *ACCC v Visy (No 2)*,¹⁵ concerning cartel conduct in the Australian cardboard box industry, the ACCC successfully claimed professional legal privilege over a number of documents created soon after the applicant had applied for immunity.¹⁶ It was held that these documents had been received at a time where litigation had been ‘reasonably anticipated’, even though the actual commencement of legal proceedings was not until a year later.¹⁷ Therefore, pursuant to this analysis, information provided by the immunity applicant brought into existence by the ACCC for the ‘dominant purpose’ of use in those proceedings will be protected by legal professional privilege.¹⁸

However, in the situation where the ACCC does not ‘reasonably anticipate’ legal proceedings, the ACCC must prove that the documents were brought into existence for the dominant purpose of obtaining legal advice, and not some other purpose.¹⁹ This is a very important distinction, as documents brought into existence by the ACCC for some other purpose, such as for the purpose of taking a record of the statement in performance of an ACCC officer's duties, are at risk of not being protected by legal professional privilege.²⁰

(b) *Public Interest Immunity*

Public interest immunity refers to the situation where a court will not order the production of a document, even if it may be relevant or admissible, because it would be injurious to the public interest to do so.²¹ The ACCC has sought to protect immunity information on these grounds, with inconsistent results:

¹⁵ *Australian Competition and Consumer Commission v Visy (No 2)* (2007) 239 ALR 762.

¹⁶ Ayman Guirguis, 'Risk of Disclosure of Immunity Applicant Confidential Information and Documents – The Position in Australia' (Corrs Chambers Westgrath, 2012) <<http://www.corrs.com.au/assets/thinking/downloads/Cartel-Paper-Ayman-Guirguis-IBA-Annual-Conference-Dublin.pdf>>7; *Australian Competition and Consumer Commission v Visy Holdings Pty Ltd (No 3)* (2007) FCA 1617.

¹⁷ *Australian Competition and Consumer Commission v Visy (No 2)* (2007) 239 ALR 762, 777 [62]-[65].

¹⁸ Guirguis, above n 16, 7.

¹⁹ *Ibid*; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

²⁰ *Ibid* 8.

²¹ See Australian Law Reform Commission ALRC, 'Uniform Evidence Law (ALRC Report 102)' (Australian Law Reform Commission ALRC, 2006) <<http://www.alrc.gov.au/publications/report-102>> Section 15: Privilege – Other Privileges; *Sankey v Whitlam* (1978) 142 CLR 1.

(i) *Cadbury Schweppes v Amcor*²²

The claim for both public interest immunity and legal professional privilege failed in *Cadbury Schweppes v Amcor*. This case concerned an ancillary proceeding to the *Visy* case in relation to allegations of similar cartel conduct, namely price-fixing. The central issue arose in the context of an interlocutory dispute within the damages proceedings brought by Cadbury against Amcor; the issue concerned specified documents created in connection with the ACCC proceeding that may be produced to Cadbury.²³

The ACCC argued that it was in the public interest to ensure that the greatest incentive is afforded to immunity applicants, such as Amcor, by ensuring the confidentiality of immunity information, as well as providing finality and certainty in respect of cartel proceedings.²⁴ The Court did not accept this argument. Justice Gordon stated that it is both inevitable and self-evident that statements made by a cooperating criminal conspirator will be used against the non-cooperating conspirators and that these statements may be used in court proceedings.²⁵ The claim for public interest immunity therefore failed.

(ii) *Korean Air Lines Co Ltd v Australian Competition and Consumer Commission*²⁶

Similar issues in relation to the confidentiality of immunity information arose in the course of an ACCC investigation into allegations of price fixing by Korean Air Lines ('KAL') and other international carriers that had occurred since mid-2006. The central issue concerned a challenge by KAL in relation to the validity of the section 155 ACL notice, who sought internal ACCC documents to support its argument that the notice had been issued for an improper purpose.²⁷

In contrast to the decision in *Cadbury*, the court held that disclosure of internal ACCC documents would be contrary to the public interest, given that it 'entailed a serious risk of adversely affecting the Commission's ongoing investigation into

²² *Cadbury Schweppes Pty Ltd v Amcor Limited* (2008) FCA 88.

²³ *Ibid* [1]-[2].

²⁴ *Ibid* [27].

²⁵ *Ibid* [30].

²⁶ *Korean Airways Co Ltd v Australian Competition and Consumer Commission* (2008) FCA 265.

²⁷ *Ibid* [1]-[9].

conduct suspected to have been carried out by the applicant and other carriers,' as well as adversely affecting 'the Commission's ability to investigate other past and future suspected cartel activity.'²⁸ The Court in *Korean Airways* acknowledged the importance of immunity policies in creating incentives for participants to reveal cartel information, and gave this factor significant weight in its assessment of public interest immunity.

(iii) *ACCC v Prysmian Cavi E Sistemi Energia SRL*²⁹

This case concerned an interlocutory application by the ACCC to protect the identity of a cartel informer, Mr. 'A,' as well as affidavit evidence by Ms Jacquir. The principle proceeding concerned an alleged cartel arrangement in relation to land-based and electrical cables and accessories supplied to customers in Australia and throughout the world.³⁰

The court held that the public interest in preventing disclosure in order to protect informers and encourage future immunity applications must be weighed against the public interest in ensuring that the Court has access to all relevant evidence; this balancing exercise is therefore decided on a case by case basis.³¹ Ultimately, the court found that the public interest was in favour of disclosure. Although the court recognised the effect that disclosure could have on deterring future cartel participants from coming forward and giving information about cartel conduct,³² it rejected the fact that the disclosure of the identity of 'Mr A' may result in his prosecution in other jurisdictions as a relevant factor in the Court's assessment:³³

'It is not the role of this Court ... to protect Mr A from lawful prosecution in other jurisdictions. The adverse consequences that he might suffer in other jurisdictions for conduct that may be unlawful in those jurisdictions are not matters of public interest in this jurisdiction.'

Therefore the claim for public interest immunity failed, with the court holding

²⁸ Ibid [66].

²⁹ *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL* (2011) FCA 938; See also, Laura Guttuso, 'A View of the Macrocism of International Cartel Enforcement: How the Boomerang of Cross-Border Disclosure Springs Back to its Domestic Context' (2015) 43 *Australian Business Law Review* 27, 35.

³⁰ Ibid [1]-[2].

³¹ Ibid [185].

³² Ibid [195].

³³ Ibid [190].

that a claim pursuant to s 50 had also failed for substantially similar reasons.³⁴

There are significant implications that arise from this decision. The first relates to the fact that this order of disclosure was upheld by the court before the full proceedings had commenced. A second related factor is that the respondents had not yet submitted to the court's jurisdiction. Although the court did recognise that the respondent's agents may be bound by an implied undertaking to the court,³⁵ this does not alter the fact that disclosure of confidential information, such as the identity of an informant, may be ordered by a court at a very early stage of proceedings.

This is likely to adversely impact on future cartel immunity applications because, as a result of the *Prysmian* decision, the ACCC cannot guarantee with any level of certainty that the information provided by an immunity applicant, or the applicant's identity, will be protected, even in preliminary proceedings. The PCI regime was introduced to address this uncertainty. This chapter will now turn to analysing the PCI regime in order to determine whether it will overcome the uncertainty that permeates this area of the law.

2 *The Legislation: Protected Cartel Information Scheme*

In light of the uncertainty of the case law, the legislature enacted specific provisions that deal with the confidentiality of cartel informers, encompassed within s 157 of the *Competition and Consumer Act 2010* (Cth) (The 'PCI' regime). The PCI regime essentially invests the ACCC with broad discretionary powers to prevent the disclosure of immunity information.

Section 157B requires that the Commission will not be bound to produce protected cartel information to the Court, unless the Court grants leave. However, in determining whether leave should be granted, the Court must have regard to the same considerations as the Commission, and must not have regard to any other matters. Moreover, if leave is granted by the court for disclosure of protected cartel information in one proceeding, the use of that information in another proceeding is strictly prohibited, except with the leave of the court.

Section 157C mandates that the Commission is not required to disclose

³⁴ Ibid [240].

³⁵ Ibid [213].

protected cartel information to a party when the Commission itself is not a party to the proceedings. However, the Commission can grant disclosure, after taking account of each of the outlined factors.³⁶ Essentially, the PCI regime invests wide powers in the Commission to prevent disclosure of cartel information. These provisions have not yet been interpreted by the courts.

(a) *How Will the PCI Regime be Interpreted: An Analysis of Prysmian*

Many of the factors in s 157C were considered by the court in the case of *Prysmian*, in the context of the public interest immunity arguments. However, despite the fact that many similar factors were considered by Justice Lander, the disclosure of protected cartel information was still granted. Although the court recognised that the information was given to the ACCC in confidence³⁷ and also considered the effect that the disclosure of the identity of Mr. ‘A’ may have on potential prosecutions overseas, namely in the United States and Brazil, it ultimately held that the right to a fair trial outweighed these considerations. Moreover, the court found that Mr. A himself would have known that his involvement with the competition authorities may have meant that his identity would be disclosed in the proceedings.³⁸

The court recognised the potential harm that may be caused to cartel informers, but distinguished this harm from the type of harm that may occur in the case of a police informer.³⁹ In the court’s opinion, the most likely ‘harm’ caused to cartel informers as a result of the disclosure of one’s identity would be the risk of prosecution in another jurisdiction and this factor was not considered significant in the court’s assessment.⁴⁰

As this case analysis has demonstrated, despite the implementation of the PCI regime, there is still significant uncertainty as to how these provisions will be interpreted by the courts. In the case of *ACCC v Prysmian*, it is unlikely that the application of the PCI provisions would have altered the decision, as the court considered many of the same factors required by the PCI legislation but still found in

³⁶ *Competition and Consumer Act 2010* (Cth) S 157C (5).

³⁷ *Ibid* [195].

³⁸ *Ibid* [191]-[192].

³⁹ *Ibid* [188].

⁴⁰ *Ibid* [190].

favour of disclosure of the cartel information. Concerns regarding this uncertainty have been reflected in submissions made to Treasury in its cartel consultation process. In particular, the Business Council of Australia expressed concern that the provisions were not wide enough and could result in the disclosure of commercially sensitive information, which would then become available to competitors.⁴¹

In contrast, there has been strong criticism of the PCI regime by the firm Maurice Blackburn in relation to the application of s 157C.⁴² The criticism is primarily directed at the situation where the ACCC is not a party to a proceeding and another party requests disclosure of any documents containing cartel protected information. The firm is concerned that the ACCC has the final decision in relation to this disclosure and that such a decision is not subject to the purview of the court. Within this context, Maurice Blackburn asserts that the cartel protection provisions essentially attempt to fetter judicial discretion and circumvent the public interest immunity privilege, so that the factors to be considered are geared in favour of non-disclosure.⁴³ Moreover, it is not clear whether the ACCC is required to disclose the reasons for its decisions and whether these reasons must be disclosed publicly.⁴⁴

3 *Criminal Discovery of Immunity Information in Australia*

Whilst the Immunity Policy acknowledges that information provided by an immunity applicant will be confidential, it also states that 'disclosure obligations may require the CDPP to disclose such information.'⁴⁵ Thus, in criminal proceedings, although the PCI⁴⁶ scheme (above) is intended to protect confidential immunity information, there is a strong likelihood that the ACCC will be required to disclose this information pursuant to the *Federal Court Act of Australia Act 1976* (Cth).

It appears that the general powers of a court to control the conduct of criminal or civil proceedings, in particular with respect to abuse of process, is not affected by

⁴¹ Business Council of Australia, Submission No 21 to the Competition and Consumer Policy Division, The Treasury, *Criminal Penalties for Serious Cartel Conduct*, 7 March 2008, 16.

⁴² *Competition and Consumer Act 2010* (Cth) s 157 C.

⁴³ Maurice Blackburn Pty Ltd, Submission No 13 to the Competition and Consumer Policy Division, The Treasury, *Criminal Penalties for Serious Cartel Conduct*, 4 March 2008, 10 [62].

⁴⁴ See also, Guttuso, above n 29, 33.

⁴⁵ Australian Competition and Consumer Commission, 'ACCC Immunity policy interpretation guidelines,' (ACCC 06/2010_38013, July 2009) [63]–[65].

⁴⁶ *Competition and Consumer Act 2010* (Cth) s 157.

ss 157B-157C 'except so far as that section does not expressly or impliedly provide otherwise'.⁴⁷ Furthermore, a refusal to grant leave under s 157B of the PCI legislation does not prevent a court from later ordering that a criminal proceeding be stayed on the grounds that the refusal would have a substantial adverse effect on the defendant's right to receive a fair hearing.⁴⁸

The Immunity Policy and the FAQ do not mention the potential interaction between the PCI scheme and the criminal discovery provisions outlined in the *Federal Court Act* or how this may adversely impact on the ACCC's disclosure obligations. The discovery requirements in a criminal proceeding are far more onerous than that in a civil proceeding and this very significant risk of disclosure of an applicant's immunity information is not addressed in the Immunity Policy. Section 23CE of the *Federal Court of Australia Act* outlines the broad nature of the criminal discovery obligations that must be adhered to by the prosecution:

The notice of the prosecution's case must include the following:

- (a) an outline of the prosecution's case that sets out the facts, matters and circumstances on which the prosecution's case is based;
- (b) for each witness the prosecutor proposes to call at the trial:
 - i. a copy of a signed statement by the witness that sets out the evidence the witness is to give at the trial; or
 - ii. a written summary of the evidence the witness is to give at the trial;
- (c) for each witness:
 - i. the prosecutor does not propose to call at the trial; but
 - ii. who has signed a statement that sets out the evidence the witness could give at the trial;
 - iii. a copy of the signed statement;
- (d) copies of any documents the prosecutor proposes to tender at the trial;
- (e) copies of, or an invitation to inspect, any other exhibits the prosecutor proposes to tender at the trial;
- (f) a copy of any report, relevant to the trial, that has been prepared by an expert witness whom the prosecutor proposes to call at the trial;
- (g) a copy or details of any information in the prosecutor's possession that might adversely affect the reliability or credibility of a prosecution witness;
- (h) a copy or details of any information, document or other thing in the prosecutor's possession that the prosecutor reasonably believes contains evidence that may be relevant to the accused's case;
- (i) if the prosecutor reasonably believes information in the prosecutor's possession suggests the existence of evidence that may be relevant to the accused's case--a copy or details of so much of that information as is necessary to suggest that existence;
- (j) a list identifying:
 - i. any information, document or other thing not in the prosecutor's possession that the prosecutor reasonably believes contains evidence that may be relevant to the accused's case; and
 - ii. for each item of information, and each document or other thing, a place where the prosecutor reasonably believes the item, document or thing to be;

⁴⁷ s 157D(1).

⁴⁸ s 157D(2).

- (k) a copy or details of any information, document or other thing in the prosecutor's possession that is adverse to the accused's credit or credibility; and may include other matters.

In particular, subsections (g) and (h) are wide-reaching provisions that may require the prosecution to disclose immunity information, especially if that immunity information may 'adversely affect' the prosecution witness's reliability and credibility. As was demonstrated in the previous chapter, in the context of contested cartel cases, the defence often attacks an immunity applicant's credibility. This is due to the fact that immunised witnesses are deemed to be equally culpable as the defendant in the eyes of the jury. Furthermore, juries will often perceive informer evidence as self-serving and prejudiced by bias as a result of obtaining immunity.⁴⁹

The Law Council was also critical of these provisions and the meaning of 'prosecutor's possession.' As this term is undefined, it is unclear whether this provision extends to documents in the prosecuting agencies' possession, such as the ACCC or ASIC.⁵⁰ Furthermore, the Law Council asserted that the requirement for the prosecutor to disclose where the prosecutor 'reasonably believes' that such material may be located does not meet duty of disclosure requirements if the prosecutor indicates that the prosecuting authority (ACCC/ASIC) has relevant material but no steps are taken to make it available to the defence.⁵¹

As there has not yet been a contested criminal trial in Australia, it is useful to draw upon the experiences of comparable jurisdictions to analyse the cases that have led to the disclosure of immunity information in criminal proceedings. This will be discussed in the next section.

4 *The Position Overseas*

This section will analyse the general provisions relating to the protection of confidential immunity information in the United States, United Kingdom and Canada, before turning to the recent developments in each jurisdiction that have significantly impacted upon the level of information that is being disclosed,

⁴⁹ See Chapter VI, *The Credibility Of Accomplice Evidence*, pg 203.

⁵⁰ Law Council of Australia, 'Law Council comments and queries regarding the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008' (2008) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCACommentsOntheDraftFedCourtAmendment%28CriminalJurisdiction%29Bill.pdf>> s11.

⁵¹ *Ibid.*

specifically in the context of criminal discovery. This should serve as a sharp warning to the ACCC as it approaches its first contested criminal cartel case.

(a) *The United States*

The United States is generally lauded as the ‘success story’ of private cartel enforcement, as private actions for damages are thriving and robust.⁵² It has been argued that private cartel enforcement in the United States is more effective at deterrence of cartel activity than public enforcement efforts,⁵³ although this claim has been disputed.⁵⁴ Section 4 of the *Clayton Act* allows the recovery of damages by ‘any person injured in his business or property by reason of anything prohibited in the antitrust laws.’⁵⁵ The Act allows a private claimant to recover treble damages and costs, including reasonable legal fees.⁵⁶ One of the main draw-cards of the leniency policy in the United States is the provision that allows for the de-trebling of damages for leniency applicants.⁵⁷

Pursuant to this provision, leniency applicants are only required to pay ‘actual damages’ in a follow-on damages claim.⁵⁸ In addition to its obligations under the leniency policy, to be eligible for the de-trebling of damages, applicants must also provide ‘satisfactory cooperation’ to private plaintiffs in their civil damages claim. This disclosure provision will be further discussed in the section relating to Restitution.⁵⁹

Within the context of active private enforcement, the DOJ has sought to maintain the confidentiality of leniency information by holding ‘the identity of leniency applicants and the information they provide in strict confidence, much like

⁵² Roger Gamble, 'The Cartel Penumbra: Where Public and Private Enforcement Policies Intersect' (2013) 42 *Common Law World Review* 23, 34.

⁵³ See Robert & Joshua Landes & Davis, 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S.' (2011) *Brigham Young University Law Review*; 315.

⁵⁴ Gregory Werden, Scott Hammond and Belinda Barnett, 'Deterrence and Detection of Cartels: Using all the Tools and Sanctions' (2011) 56 *The Antitrust Bulletin* 207, 227-233; Daniel Crane, *The Institutional Structure of Antitrust Enforcement* (2011) 168-72.

⁵⁵ *Clayton Antitrust Act of 1914* 15 U.S.C. § 15a, s 4.

⁵⁶ *Ibid.*

⁵⁷ *Antitrust Criminal Penalty Enhancement and Reform Act of 2004* Pub L No 108-237, tit II, 118 Stat 661, 665 (2004) (codified as amended at 15 USC §1 note) ('ACPERA').

⁵⁸ See also, Guttuso, above n 29, 40.

⁵⁹ See below, Restitution, pg 254.

the treatment afforded to confidential informants.’⁶⁰ Furthermore, the DOJ advocates that it will not publically disclose such leniency information, unless in the case of prior disclosure, by agreement with the applicant or by court order in connection with court proceedings.⁶¹

According to the DOJ, the regulator has generally been successful in upholding these assurances of confidentiality, with most leniency information remaining outside the public domain.⁶² This is arguably due to the fact that most cartel proceedings are settled by way of plea agreement, with limited information being provided to pleading defendants or in an open court.⁶³

In the context of contested criminal cartel cases, the DOJ regularly seeks protective orders to ensure that criminal discovery is not publicly disclosed. However, a significant amount of leniency information will be inevitably disclosed in an open court setting during the course of a trial.⁶⁴ These inherent risks of disclosure are not explicitly mentioned in the DOJ’s leniency policy or FAQ guidelines.

Discovery obligations in criminal cases are framed in the United States by Supreme Court precedent, the Federal Rules of Criminal Procedure, and the United States Attorneys Manual (USAM). According to United States case law, the general principles of disclosure in a criminal case mandate that the government has a duty to disclose all material evidence favourable to a criminal defendant.⁶⁵ A violation of this duty that results in a conviction deprives the defendant of his or her liberty without due process of law.⁶⁶ These principles were at the centre of a judicial discussion relating to the disclosure requirements of the prosecution in *United States of America v Triumph Capital Group Inc.*⁶⁷ This high profile case, along with a number of

⁶⁰ Scott & Belinda Hammond & Barnett, 'Frequently asked Questions regarding the Antitrust Division's Leniency Program and Model Leniency Letters ' (Department of Justice, November 19 2008) 27, Q 32.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Marc Hansen, Luca Crocco and Susan Kennedy, 'Challenges to International Cartel Enforcement and Multi-Jurisdictional Leniency Applications – Disclosure of Leniency Applicant Statements and Materials' (Latham & Watkins, 2012) 13.

⁶⁴ Ibid 14.

⁶⁵ See eg, *United States v. Madori*, 419 F.3d 159, 169 (2d Cir.2005) (citing *Brady v. Maryland*, 373 United States. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)); see also *Giglio v. United States*, 405 United States. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (applying *Brady* to material that can be used to impeach prosecution witnesses).

⁶⁶ See eg, *Rivas*, 377 F.3d at 199.

⁶⁷ *United States v. Triumph Capital Group*, 544 F.3d 149 (2nd Cir. 2008)) s C.

others, led to a growing recognition of the failure of the prosecution to disclose certain exculpatory material in criminal proceedings.⁶⁸

As a result, in January 2010, the Deputy Attorney General of the DOJ announced the new *Guidance for Prosecutors Regarding Criminal Discovery*.⁶⁹ This memorandum was generated by a working group established by the DOJ to investigate the various practices in each judicial district and to develop guidance for prosecutors in relation to their discovery obligations and practices. The aim of the memorandum was to harmonise the inconsistent discovery provisions in each district and to establish a uniform code by which prosecutors would follow.⁷⁰

One particular area of relevance to cartel cases is the requirement that DOJ prosecutors review and produce 'prior inconsistent statements' which could possibly include inconsistent attorney proffers.⁷¹ These provisions could adversely impact upon the operation of the DOJ's leniency policy, as the DOJ will no longer be able to assure confidentiality to leniency applicants of statements made in the very early stages of the investigation, potentially before the full extent of the cartel conduct is even known to the applicant. For example, a witness's initial statements to company counsel may be incomplete at the early stages of the investigation and these statements may be admitted as prior inconsistent statements if the witness' statements have changed with the benefit of full information and review of the relevant documentation.⁷²

The DOJ will seek protective orders of the leniency information that it provides pursuant to the discovery obligations to ensure that the information is not disclosed in the public domain. However, in the case where there is a large amount of

⁶⁸ Hansen, Crocco and Kennedy, above n 63, 14.

⁶⁹ David Ogden, '165 Guidance for Prosecutors Regarding Criminal Discovery' (Offices of the United States Attorneys, 2010)

<http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm>.

⁷⁰ Jeffrey Bornstein, Laura Brevetti and Leanne Hartmann, 'DOJ's New Guidance on Criminal Discovery Practices: How Much Has Changed?' (K&L Gates, 2010) <<http://www.klgates.com/dojs-new-guidance-on-criminal-discovery-practices-how-much-has-changed-01-27-2010/>>; Solomon Wisenberg and George Horn, 'Department of Justice Issues Guidance for Prosecutors Regarding Criminal Discovery' (Barnes & Thornburg LLP, 2010)

<<http://www.lexology.com/library/detail.aspx?g=7ea984d3-566d-402d-902e-4478bba0ffe7>>.

⁷¹ Ogden, above n 69, s 7.

⁷² Hansen, Crocco and Kennedy, above n 63, 14.

information that is generated for the purposes of discovery in an open court setting, the risks of disclosure are inevitable.⁷³

The tension between the rights of a defendant to a fair trial against that of maintaining the confidentiality of leniency information is well demonstrated in this situation and it appears the courts, at least in the *Optronics* case, have leant towards the disclosure of leniency information in preference to confidentiality.⁷⁴ On the one hand, this may seem to undermine the incentive to come forward and apply for leniency in the United States, but on the other, a leniency applicant needs to be aware that it is inevitable that their information will be disclosed at some point during the investigation or trial, despite the best efforts of the DOJ.

(b) The United Kingdom

In contrast to the United States, the United Kingdom has not been at the forefront of private cartel enforcement, although recent legislative initiatives indicate that the United Kingdom government is considering the issue more seriously.⁷⁵ Pursuant to section 47A of the *Competition Act*⁷⁶ any person who has suffered loss or damage as a result of an infringement of either a United Kingdom or European Union competition law may bring a claim for damages before the Competition Appeals Tribunal (CAT) in respect of that loss or damage.

The CMA policy in relation to the disclosure of leniency information is significantly more elaborate and comprehensive than that of the DOJ. Although the CMA recognises the importance of confidentiality for leniency applicants, it also acknowledges the ‘risk that parties will conclude that the information has been

⁷³ See, eg, *United States v. AU Optronics Corp.*, No. CR-09-0110 (N.D. Cal. Mar. 13, 2012), 2012 WL 889874.

⁷⁴ Hansen, Crocco and Kennedy, above n 63.

⁷⁵ Kon and Barcroft, above n 4, 11-14. Specifically, the *Consumer Rights Act 2015* (United Kingdom) came into effect on the 1st of October 2015 and seeks to amend the regime for private competition actions in the UK. The two primary developments include the expansion of the types of competition cases that the Competition Appeal Tribunal (CAT) hears, including both ‘follow on’ claims and standalone actions. Secondly, Part 1 of Schedule 8 of the Act also introduces ‘opt-out’ collective actions, which allow for a case to be brought on behalf of a group of claimants to obtain compensation for their losses. This is a positive development for private competition actions in the UK, and these changes are likely to increase the number of private actions taken by parties affected by cartel conduct who seek redress. See eg, Department for Business Innovation and Skills, ‘Policy Paper Consumer Rights Act 2015’ (United Kingdom Government, 14 August 2015) <<https://www.gov.uk/government/publications/consumer-rights-act-2015>>.

⁷⁶ Competition Act, RSC 1985, c C-34 (‘Competition Act’).

supplied by a leniency applicant, which may in turn reveal the identity of the applicant.⁷⁷ The CMA has dedicated a section of the policy to disclosure considerations in relation to a statement of objections, infringement decision and as part of the access to file process.⁷⁸ This section acknowledges the disclosure risks associated with discovery provisions, and notes that these obligations may still apply even where proceedings are not initiated against the leniency applicant or where their leniency application is withdrawn.⁷⁹

As a consequence of the *BA* case,⁸⁰ the CMA used to require that applicants waive legal professional privilege as a condition of immunity.⁸¹ However, the 2013 guidance indicates that the CMA no longer requires waivers of legal professional privilege over any relevant information in either civil or criminal investigations as a condition of leniency.⁸² Instead, the CMA will ordinarily require a review of any relevant information in respect of which privilege is claimed by independent counsel ('IC').⁸³ Where the IC deems the information to be covered by privilege then it will not be disclosed as part of a condition of leniency, but if it is not covered by privilege then it will be required to be disclosed.⁸⁴ This vetting system is unique to the CMA policy and this is probably due to the failure of the first contested criminal cartel case in the United Kingdom. The reason for this is that the former OFT faced difficulties in obtaining earlier accounts of witnesses that were prepared by Virgin's lawyers and thus privileged.⁸⁵ There was also no requirement in the leniency policy that compelled the applicant to waive privilege as a condition of leniency.⁸⁶

In contrast to the ACCC and DOJ policies, the CMA policy specifically refers to the disclosure obligations in criminal prosecutions and states that 'full disclosure

⁷⁷ Competition and Markets Authority, 'Applications for Leniency and No-Action in Cartel Cases - Detailed Guidance on the Principles and Process' (Competition and Markets Authority, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf> 66, s 7.1.

⁷⁸ Ibid s 7.4.

⁷⁹ Ibid s 7.8.

⁸⁰ See *R v George, Burns, Burnett and Crawley* (unreported) 7 December 2009; (2010) 174 JP 313; (2010) EWCA Crim 1148.

⁸¹ Leniency and No-Action Guidance (OFT 803, December 2008); Hansen, Crocco and Kennedy, above n 63, 9.

⁸² Competition and Markets Authority, above n 77, s 3.15.

⁸³ Ibid s 3.16.

⁸⁴ Ibid ss 3.19, 3.20.

⁸⁵ Michael O'Kane, 'International Cartel Criminalisation and Leniency: Recent Lessons from the UK and Global Comparisons' (2012) 8 *Competition Law International* 55, 56.

⁸⁶ Ibid.

of ‘used’ and relevant ‘unused’ material must be made to defendants, to comply with requirements under the *Criminal Procedure and Investigations Act 1996* as amended by the *Criminal Justice Act 2003*, and the associated Code of Practice.⁸⁷ In this respect, the CMA is open and transparent in relation to its limited ability to withhold relevant material from a defendant in a criminal prosecution compared to that in civil investigations.⁸⁸

In relation to information disclosure to support private civil proceedings, the position of the CMA is that it will ‘firmly resist’ requests for disclosure of leniency material, except where compelled by court order.⁸⁹ However, the court order of disclosure of leniency information has been a point of contention in the European Union, which has arguably led to the higher likelihood of disclosure of immunity information in the European Union, and potentially the United Kingdom.

The key case in this respect is that of *Pfleiderer*⁹⁰ which concerned a customer (Pfleiderer) of the companies involved in a cartel found by the German National Competition Authority in the décor paper industry, who sought disclosure of leniency documentation pursuant to the German criminal procedural rules to prepare a follow-on damages action.⁹¹ Access to the entire file was rejected and Pfleiderer appealed to the Amtsgericht (Local Court) in Bonn who granted full access to the file but sought a preliminary ruling from the European Court of Justice (‘ECJ’) as to whether European Union law prevents parties adversely affected by a cartel, and seeking damages, from being granted access to leniency applications and associated documentation provided pursuant to a leniency agreement.⁹²

The ECJ ultimately decided that the disclosure of such information requires a balancing of the various competing factors on a case-by-case basis, including weighing the impact of disclosure on the operation of leniency regimes against that of the rights of private claimants to seek damages, to ensure that the rules governing

⁸⁷ Competition and Markets Authority, above n 77, s 7.11; *Criminal Procedure and Investigations Act 1996* (United Kingdom) c.25; *Criminal Justice Act 2003* (United Kingdom) c.44.

⁸⁸ *Ibid* s 7.12.

⁸⁹ *Ibid* s 7.14.

⁹⁰ *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011] All E.R. (EC) 979 (ECJ (Grand Chamber)) (‘*Pfleiderer*’).

⁹¹ *Pfleiderer* [10]; Gianni De Stefano, ‘Access of Damage Claimants to Evidence Arising Out of EU Cartel Investigations: A Fast Evolving Scenario’ (2012) 5 *Global Competition Litigation Review* 95,102.

⁹² *Pfleiderer* [19]-[32].

the right to seek access are not unduly oppressive or excessively difficult.⁹³ However, the ECJ did not elaborate on the criteria to be used in this ‘balancing exercise.’ The *Pfleiderer* case confirmed that there is no over-arching rule in the European Union that prevents the disclosure of leniency documents. Thus, leniency applicants will not be able to predict with any degree of certainty whether the information they disclose pursuant to the leniency agreement will be disclosed in the context of private follow-on actions for damages. The case has generated much discussion in relation to information disclosure and has been heavily criticised as undermining the effectiveness of the leniency regime due to the case-by-case basis nature of the assessment.⁹⁴

The *Pfleiderer* precedent has recently been judicially applied in the *National Grid*⁹⁵ case in the United Kingdom, where the United Kingdom High Court sought to limit the application of the *Pfleiderer* principle by introducing two factors to be considered before disclosure is granted: (1) whether in the circumstances of the case, disclosure of leniency evidence would expose the leniency applicants to greater liability than those parties that have not sought leniency with the Commission and (2) whether disclosure would be proportionate in light of its potential impact on the leniency program by considering the relevancy of the documents to be disclosed and whether there are other available sources of evidence that are equally effective.⁹⁶

As a result of the unsatisfactory and inconsistent positions relating to the disclosure of leniency documentation, the European Union Commission issued a ‘Directive on antitrust damages actions,’ which was signed into law on the 26th November 2014.⁹⁷ The European Union member states have two years to implement the directives.⁹⁸

⁹³ *Pfleiderer* [30]-[32]; De Stefano, above n 91, 112.

⁹⁴ See eg, Charles & Vera Balmain & Coughlan, 'More Haste Less Speed: the Evolving Practice in Competition Damages Actions in the UK' (2011) 4 *Global Competition Litigation Review* 147; The Commission submitted observations on the claimant’s application to the High Court regarding the importance of safeguarding the operation of the leniency program against disclosure; Laura Guttuso, 'The Enduring Question of Access to Leniency Materials in Private Proceedings: One Draft Directive and Several Court Rulings' (2014) 7 *Global Competition Litigation Review* 10; Natalie Harsdorf Enderndorf, 'The Road After *Pfleiderer*: Austrian Preliminary Reference Raises New Questions on Access to File by Third Parties in Cartel Proceedings' (2013) 34 *European Competition Law Review* 78; Piet Jan Slot, 'Does the *Pfleiderer* Judgment Make the Fight Against International Cartels More Difficult?' (2013) 34 *European Competition Law Review* 197.

⁹⁵ *National Grid Electricity Transmission Plc v ABB Ltd* (2012) EWHC 869. (*‘National Grid’*)

⁹⁶ De Stefano, above n 91, 104. *National Grid* [30]-[55].

⁹⁷ European Parliament and of the Council, 'Directive Of the European Parliament and Of the Council Of On Certain Rules Governing Actions for Damages Under National Law for Infringements of the

Articles 6-8 now govern the disclosure of leniency documents and prevent the disclosure of a leniency or immunity statement or settlement agreement from being disclosed to third parties, otherwise known as the ‘black-list.’⁹⁹ The Directive recognises the important role that leniency policies play in anti-cartel enforcement and acknowledge that the disclosure of self-incriminating leniency statements may create a disincentive to cooperate with competition authorities.¹⁰⁰ However, the Directive also recognises that the exemption from disclosure should not unduly interfere with injured parties’ rights to compensation, and therefore certain categories of evidence included in the file of a competition authority *may* be disclosed after the competition authority has closed its proceedings.¹⁰¹ This includes documents such as requests for information, statement of objectives or settlement submissions that have been withdrawn. Any documents that fall outside the above categories, including pre-existing documents that could be attached or referred to in a leniency submission, can be disclosed by a court order at any time.¹⁰²

It is clear that the intention of the Directive was to reverse the uncertain position laid down by the ECJ in the *Pfleiderer* case, which is why the Directive now provides for a total exemption of leniency or settlement statements. However, in an attempt to balance the delicate needs of both private and public enforcement, any other documents not covered under this exemption could potentially be disclosed.

It is likely that the impact of the Directive will differ across the European Union Member States depending on the interpretation that each member state adopts before implementing the provisions into domestic law. In adopting these Directives, the EU Member States must give effect to the aims pursued by the rules of the Directive, or risk infringement proceedings before the Court of Justice. However, there will still remain differences in the context of EU competition law in each of the EU member states in areas that the Directive does not seek to harmonise, such as causation and collective action.

Competition Law Provisions of the Member States and Of the European Union' (2014)
<http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf>.

⁹⁸ See also, Guttuso, above n 29, 41-43.

⁹⁹ European Parliament and of the Council, above n 97, Art 6-8.

¹⁰⁰ *Ibid* [26].

¹⁰¹ *Ibid* [14].

¹⁰² *Ibid* Art 6, s 5.

On its face, the Directive strikes a more appropriate balance between the needs of third parties obtaining access to information to pursue compensation on the one hand and recognising the importance of maintaining confidentiality for leniency applicants on the other. It does this by ensuring that disclosure is possible but subject to certain safeguards. Whilst the Directive ensures that corporate leniency statement and settlement submissions are not to be disclosed, it requires the court to assess requests for other documents on a case-by-case basis, having regard to the scope, cost and proportionality of the request. This is a more appropriate response to address the tension between public and private enforcement then exists in Australia.

It now remains to be seen how the other European Union member states will legislate this Directive and whether it will overcome the uncertainty that has permeated this area of the law.

(c) *Canada*

The history of private cartel enforcement in Canada is similar to that of the United Kingdom where private enforcement has been plagued by legislative hurdles that have made these actions more difficult.¹⁰³ There is a limited statutory right to private action pursuant to s36 of the *Competition Act* which states that any person who has suffered loss or damage as a result of (1) conduct contrary to any of the criminal offenses under the Act or (2) the failure of any person to comply with an order made under the Act, may bring a civil action against the person who engaged in the conduct or failed to comply with the order.¹⁰⁴

The Competition Bureau clearly states that it will treat the identity of a party requesting immunity as confidential, subject to the following exceptions:

- (a) disclosure is required by law;
- (b) disclosure is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers;
- (c) disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- (d) the party has agreed to disclosure;
- (e) there has been public disclosure by the party; or

¹⁰³ See eg, Lori Cornwall, Sandra Forbes and Mark Katz, 'Canada: Recent Developments in Private Antitrust Litigation' (Private Antitrust Litigation News, 2002)

<<http://www.dwpv.com/images/canadarecentdevelopmentsinprivateantitrustlitigation.pdf>> .

¹⁰⁴ *Competition Act* R.S.C. c. C-34 (1985) s 36.

(f) disclosure is necessary to prevent the commission of a serious criminal offence.¹⁰⁵

The policy states that it will only provide confidential information with respect to private actions in response to a court order.¹⁰⁶ In these situations, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking protective court orders.¹⁰⁷ The FAQ document does not elaborate on this provision. To date, there have not been any price-fixing cartel cases that have gone to trial in Canada; instead most of the claims have been dealt with by way of settlement.¹⁰⁸

Whilst the Bureau will strive to protect the confidentiality of immunity applicants, for instance by sealing the applicant's identity, information provided to the Bureau has been made publicly available in the court file once the Bureau has executed the search or obtained the civil production order.¹⁰⁹ Private litigants have used this information to commence civil proceedings against cartel participants, including the immunity applicant, including that from affidavits. The Bureau has recently indicated that it will seek sealing orders to prevent the early disclosure of this information in appropriate cases.¹¹⁰

Recent court decisions could also impact on the disclosure requirements of wiretap information obtained by the Bureau as part of its investigations.¹¹¹ While this may not be a direct concern for immunity applicants, the decision did leave open the possibility that non-wiretap evidence may also be subject to disclosure.¹¹² This is because the court relied on s29 of the *Competition Act*, which provides for an exemption for disclosure where the disclosure is 'for the purposes of the

¹⁰⁵ Competition Bureau, 'Immunity Program under the Competition Act' (Competition Bureau, 7 June 2010) s H [31].

¹⁰⁶ Ibid [34].

¹⁰⁷ Ibid.

¹⁰⁸ Michael Osborne and Michael Binetti, *International Comparative Legal Guides: Canada - Cartels & Leniency 2015*, International Comparative Legal Guides (2015) s 8.6.

¹⁰⁹ See *R. v. Nestlé Canada Inc* 2015 ONSC 810 'Nestlé'.

¹¹⁰ Randal Hughes and Emrys Davis, 'Immunity, Sanctions & Settlements: Canada' (Bennett Jones LLP, 2014) <<http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/7/canada/>> s14.

¹¹¹ See *Imperial Oil v Jacques*, 2014 SCC 66; Vincent Rochette, *Supreme Court Allows Wiretap Evidence to be Disclosed for Purposes of a Class Action Alleging Anticompetitive Practices* (October 2014) NortonRoseFulbright <<http://www.nortonrosefulbright.com/knowledge/publications/122399/supreme-court-allows-wiretap-evidence-to-be-disclosed-for-purposes-of-a-class-action-alleging-anticompetitive->>; Borden Ladner Gervais LLP, *Use of Information from Regulatory Investigations in Civil Litigation* (21 January 2015) Lexology <<http://www.lexology.com/library/detail.aspx?g=0ebe4691-a89d-422c-b560-8f3c4de7cc41>>.

¹¹² Rochette, above n 111.

administration or enforcement of the Act,' to permit the disclosure of the wiretap evidence. Arguably, this exemption could be used to permit the disclosure of voluntarily submitted information pursuant to the immunity policy and therefore erode the confidentiality afforded by the Competition Bureau.

Issues of disclosure have also arisen in the context of criminal cartel proceedings, where it was held by the Ontario Superior Court of Justice that relevant factual information proffered to the Crown in order to qualify for immunity is not protected from disclosure to accused persons by either solicitor-client or settlement privilege.¹¹³

The case concerned chocolate manufacturer Canada-Cadbury ('Cadbury') which entered into an immunity agreement with the Competition Bureau on October 19, 2007, as a result of admitting its involvement in the price-fixing of chocolate confectionary. Another cartel participant, Hershey, came forward to cooperate with the Bureau on a 'second-in' basis and received lenient treatment by way of a plea agreement and was also granted an immunity agreement for its senior officers and employees.

Pursuant to the Crown's disclosure obligations to the accused, the Crown sought to make disclosure of all required documentation. During this process, the Crown provided information to the accused, which should have been protected by settlement privilege, seeing as no waiver had been provided in relation to that information.¹¹⁴ The Crown asked that the records that were subject to privilege be destroyed or returned but the accused refused. The accused argued that they were entitled to these privileged documents, and also other material held back by the Crown on the basis of privilege.¹¹⁵

The central issue was whether settlement privilege applied to the information in question. If settlement privilege did apply, then the secondary issues to be addressed by the court were (i) had the settlement privilege been waived or (ii) was there an exception to the settlement privilege such that the accused was entitled to the otherwise privileged information.¹¹⁶

¹¹³ *Nestlé* 2015 ONSC 810.

¹¹⁴ *Ibid* [19].

¹¹⁵ *Ibid* [20].

¹¹⁶ *Ibid* [28].

The court reiterated the common law position in relation to disclosure in Canada as set out in *R. v. Stinchcombe*¹¹⁷ that the Crown must disclose to an accused person all information in its possession, whether exculpatory or inculpatory, unless the information is ‘clearly irrelevant’ or is protected from disclosure by privilege.¹¹⁸

The court ultimately held that both arguments in relation to solicitor-client privilege and settlement privilege failed. In relation to Hershey’s claim for solicitor-client privilege, the court considered that any such privilege would have been waived when Hershey provided that information to the Bureau in order to obtain leniency. In the court’s view:

Hershey knew that a fundamental purpose of the Leniency Program was to obtain information from it that the Crown could use in prosecuting the accused. With that knowledge, Hershey provided this information to the Crown. That act would suggest either that Hershey did not view the information as privileged, or that it was content to waive the privilege in order to achieve its goal of receiving lenient treatment.¹¹⁹

In relation to the arguments regarding settlement privilege, the court could find no rationale for the protection of the information provided on this basis. The court considered that the purpose of settlement privilege is to encourage parties to enter into settlement discussions without fear that their communications could be used against them in subsequent litigation. However, in the present case, the information in question was sought in the context of criminal proceedings against third parties, not Cadbury or Hershey themselves. Therefore, the court could not find that the disclosure of such information would result in any prejudice to Cadbury or Hershey.

The court again relied on its previous assertions regarding the aim of immunity and leniency policies in general; stating that Cadbury and Hershey would have knowledge that any information provided pursuant to their immunity/leniency obligations would not be protected from disclosure. This, the court found, was evident throughout the entire wording of the immunity and leniency policies and therefore there could be no ‘reasonable expectation’ that such information would not be disclosed.¹²⁰

The court also relied on these arguments to find that even if settlement

¹¹⁷ 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326.

¹¹⁸ *Nestle* [30].

¹¹⁹ *Nestle* [38].

¹²⁰ *Nestle* [66].

privilege were to be made out, the disclosure of this information pursuant to the immunity and leniency policies would constitute a waiver of this privilege.¹²¹ The court also considered a second exception to the claim of settlement privilege and found that disclosure was necessary to accommodate the rights of the accused to make full answer and defence, where such rights are protected under the Charter of Rights and Freedoms and must trump the interest in encouraging settlement.

5 *Concluding Remarks on Confidentiality in Multi-jurisdictional Immunity Applications*

The above analysis in relation to the disclosure of confidential information has revealed that the competition regulators in Australia, Canada, the United Kingdom and the United States will endeavour to keep information provided by immunity applicants confidential. However, the ability of the regulators to protect immunity information has recently been tested by the courts in a number of jurisdictions, which has created a considerable amount of uncertainty in relation to this issue.

Most evidently, it appears that the rights of disclosure of an accused in a criminal cartel trial take precedence over the potential impact that such disclosure may have on the incentive to apply for immunity policies. It is important that the courts do recognise these important rights and grant disclosure in these cases. As demonstrated by the recent Canadian judgment, immunity and leniency applicants are fully aware that the information they provide to the competition authorities is for the purpose of assisting with the prosecution of those allegedly involved in the conduct. By agreeing to the terms of immunity, these applicants cannot have any reasonable expectation that the information they provide will not be disclosed at some point during the proceedings.

Moreover, there are those individuals and corporations who have been adversely affected by the conduct of the cartel participants and who face significant challenges in accessing information to seek compensation for the harm caused to them. At present, the ACCC PCI regime, whilst untested, does not seem to offer any opportunity for third party access to this information and thus the balance is firmly

¹²¹ *Nestle* [83]-[84].

planted in favour of the cartel participants. The next section will look at ways in which the ACCC could seek to rectify the balance by introducing a provision into the Immunity Policy that requires that the applicant must make some form of restitution to injured parties.

(a) *Restitution*

As has been demonstrated in the previous section, access of third parties to immunity information at least in Australia is plagued with difficulties that ultimately rest with the Court's interpretation of the new PCI scheme. The ACCC have made it clear that it will not disclose immunity documents to enable third parties to sue for compensation, nor do they indicate any intention of initiating proceedings on behalf of these third parties who have been adversely affected by cartel conduct. This is compounded by the fact that the ACCC recently had an opportunity to publicly discuss the merits of restitution in its most recent review of the policy, but the issue was not presented, even within the discussion paper.¹²²

Therefore, under the current system, immunity applicants will receive the extraordinary benefits of immunity, without any requirement to compensate victims for the harm they have caused them. This arguably runs counter to the philosophy expected of the ACCC by Parliament when the criminal cartel legislation was introduced to 'disgorge' cartel members of their 'ill-gotten' gains:

Ordinary consumers can't afford expensive lawyers to ensure that competition is working in their interest. That's the job of the ACCC. When this legislation passes the Parliament, the commission will have the tools it needs to stand up for consumers against this type of theft.¹²³

The first version of the ACCC Immunity Policy in 2003 required that 'where possible' [the corporation] will make restitution to injured parties.' In August 2005, the ACCC set out its reasons for the removal for the requirement of restitution in its

¹²² Australian Competition and Consumer Commission, *ACCC Releases Discussion Paper in Cartel Immunity Policy Review* (September 2013) <<https://www.accc.gov.au/media-release/accc-releases-discussion-paper-in-cartel-immunity-policy-review>>.

¹²³ Chris Bowen, *Making Jail as Real for Cartels As the Temptation To Steal* (November 5 2008) Sydney Morning Herald <<http://www.smh.com.au/news/opinion/making-jail-as-real-for-cartels-as-the-temptation-to-steal/2008/11/04/1225560833543.html>>.

discussion paper.¹²⁴ The interviewees were asked whether the requirement for restitution should be reintroduced as a condition of Immunity. A majority of the respondents were thoroughly against this proposition.¹²⁵

It is important to note though, out of the participants who were against reintroducing the provision, almost all of those generally act in favour of immunity applicants and therefore the requirement to pay restitution would come at a cost to their clients. This is arguably an important factor in the formulation of their opinion on the matter.

The central arguments against the requirement of restitution as a condition of immunity were as follows and each will be addressed in turn:

1. That the introduction of restitution would create a significant disincentive to future immunity applicants and therefore undermine the Immunity Policy;
2. That is not the role of ACCC to impose restitution upon immunity applicants, as civil actions serve that purpose;
3. That the calculation of restitution is too difficult to quantify.

Firstly, one of the primary concerns expressed by the interviewees was that introducing the requirement of restitution would simply add to the cost-benefit analysis of coming forward for immunity and essentially ‘tip the balance’ in favour of cost:

Interviewee: We do have that in our system and we also have representative actions which can be by the Commission or on a class action basis. I think where I sort of land on that is it would be a significant disincentive to use the policy if it had a restitution element which was insisted upon rather than, you know, one that’s there but never used. It would be hard for, quite hard for our clients to sort of make an upfront determination of a damages amount and agree to pay that. It might be regarded as a dollars and cents matter, you know, what’s the fine going to be? What’s the restitution going to be? Calculate. OK. Calculate. No.¹²⁶

This argument is based on the assumption that the added financial burden of restitution would dissuade ‘would-be’ applicants from applying for Immunity and instead these cartel participants would rather risk the prospect of an action being brought against them. Aside from these statements that the immunity applicants

¹²⁴ Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law Policy and Practice in an International Context* (Cambridge University Press, 1 ed, 2011) 519.

¹²⁵ See Chapter V, Restitution to Third Parties, pg 153.

¹²⁶ Interviewee 4 (Sydney, 17th June 2013) 28.

‘might be’ deterred from applying, there is no empirical evidence to show that immunity applicants ‘have been’ deterred from applying on this basis.

There currently exists a requirement for restitution in the DOJ's corporate leniency program, whereby if it is 'possible, the corporation must make restitution to third parties.'¹²⁷ This requirement is elaborated upon in the FAQ, as it states that, where practicable, restitution is required to be paid where conditional criminal immunity is granted. According to the FAQ, the requirement for restitution does not include foreign effects independent of and not proximately caused by any adverse domestic effect.¹²⁸

The DOJ has not expressed any concern that the requirement of restitution is adversely affecting the operation of their leniency policy; rather the DOJ consistently maintains that the leniency policy is ‘the most effective tool in anti-cartel enforcement in the world’. It is important to note that the DOJ does not actively enforce its restitution requirement; it will accept as a suitable alternative if the applicant can show it has made restitution through private litigation.¹²⁹ Therefore, the DOJ does not actively supervise its restitutionary requirement; instead it will take it on the faith of the applicant that they have met their obligations by providing that affirmation to the DOJ prior to the granting of final immunity. There are no publicised cases where the DOJ has refused or withdrawn immunity due to a lack of restitution, although there have been instances in high profile cases where the company has publicly disclosed its restitutionary amount.¹³⁰ Clearly, the DOJ could enforce this provision more aggressively; particularly because there is no substantial evidence that its current requirement for restitution is deterring future leniency applicants. This argument is strengthened by the fact that most competition regulators in the world have publicly asserted that criminal sanctions are by far the most effective deterrent of cartel activity, and is the most significant draw-card for

¹²⁷ Hammond & Barnett, above n 60, Q 3 s 5.

¹²⁸ Ibid s 22.

¹²⁹ American Bar Association, 'Comments of the American Bar Association Section of Antitrust Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review' (2006) <http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_canadian-leniency.authcheckdam.pdf> s 6.1.

¹³⁰ See, eg, Department of Justice, *Bank of America Agrees to Pay \$137.3 Million in Restitution to Federal and State Agencies as a Condition of the Justice Department's Antitrust Corporate Leniency Program* (December 7 2010) US Department of Justice <<http://www.justice.gov/opa/pr/bank-america-agrees-pay-1373-million-restitution-federal-and-state-pay-1373-million-restitution-federal-and-state-agencies-condition-justice>>.

Immunity Policies with an active cartel enforcement regime, where criminal penalties form part of that regime.¹³¹ The ACCC heavily relied on this line of argument to support the introduction of a criminal penalty regime for cartel conduct in Australia.¹³²

If these arguments were true, then the introduction of the requirement for restitution would not deter immunity applicants from applying, as the predominant risk and therefore motivation for seeking immunity is imprisonment. This was confirmed by a number of the interviewees.¹³³ These arguments may have been valid at the time but arguably the position has since changed materially, given that there has yet to be any prosecution for a cartel offence in Australia.

Secondly, another argument that extenuates the tension between public and private enforcement, is that is not the *role* of the ACCC to facilitate restitution, when those who have been adversely affected by cartel conduct can sue for compensation by means of private civil actions for damages. This was one of the primary arguments put forward by the Canadian Competition Bureau for its removal of the requirement in 2006 and supported by the American Bar Association.¹³⁴

However, as demonstrated at the beginning of this chapter, the private action landscape in the United States and Canada is significantly different from that in Australia and although the right to private action does exist, its usefulness is currently undermined by the challenges associated with bringing those claims, particularly in relation to disclosure.¹³⁵ As there is no reasonable expectation that this position will change in the short term, there is less force to the argument that civil damages actions are a sufficient means of cartel compensation.

¹³¹ See eg, Scott D Hammond, 'Cornerstones of an Effective Leniency Program' (Department of Justice, 2004); Scott Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (Department of Justice - ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, 2010); Gregory C. Shaffer and Nathaniel H. Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) 12 *Sedona Conference Journal* 1; Julie Clarke, 'The Increasing Criminalization of Economic Law – A Competition Law Perspective' (2012) 19 *Journal of Financial Crime* 76.

¹³² See eg, Australian Competition and Consumer Commission, 'Review of the ACCC's Leniency Policy for Cartel Conduct' (2005); Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009).

¹³³ Interviewee 7 (Melbourne, 26th April 2013) 18; Interviewee 2 (Sydney, 22nd July 2013) 5; Interviewee 9 (Sydney, 15th July 2013) 23.

¹³⁴ American Bar Association, above n 129, s 61: 'Restitution to victims is not an appropriate function of a public enforcement agency, in legal systems like Canada's, where legal procedures for redress through civil action are available.'

¹³⁵ See eg, Stuart Clark and Christina Harris, 'Class Actions in Australia: (Still) A Work in Progress' (2008) 31 *Australian Bar Review* 63.

Finally, the argument that holds the most significant weight relates to the difficulties associated with the calculation of the restitution amount in terms of identifying those adversely affected by cartel conduct and how their loss will be calculated.¹³⁶ Presumably, in Australia, the court would ultimately determine the amount of restitution to be imposed. Courts have often been tasked with determining definitive amounts of money for conduct of an indeterminate nature, particularly in contract and tort law.¹³⁷ If the loss is quantifiable, then an amount is able to be calculated even if the process would be difficult.¹³⁸ It has been asserted that assigning this task to the ACCC would overburden an agency already subject to financial restraints and finite resources; however the restitutionary requirement could be qualified to only providing restitution only ‘where possible,’ as was done previously.¹³⁹

Alternatively, the ACCC could consider adopting an information sharing condition in the Immunity Policy to overcome the difficulties associated with calculating restitution and to give third parties a reasonable opportunity to recover compensation through damages actions. This information could be in the form of identifying or acknowledging any harm caused by the cartel and help with the identification of those likely to have suffered loss as a result of the conduct.¹⁴⁰ The United States has adopted a similar policy in terms of making it a requirement of leniency to cooperate with civil plaintiffs in order to have their liability limited to ‘actual damage’ caused, as opposed to treble damages. Pursuant to the *Antitrust Criminal Penalty Enhancement and Reform Act 2004* leniency applicants must provide a full account of the relevant facts and provide reasonable access to documents and witnesses:

(b) Requirements.- Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after

¹³⁶ See Chapter V, Restitution to Third Parties, pg 153; ACCC, *ACCC Position Paper, Review of ACCC’s Leniency Policy for Cartel Conduct*, 26 August 2005, [87], [97].

¹³⁷ See eg, case examples where the courts have determined damages for an indeterminate nature such as wrongful life: *Harriton v Stevens* (2002) NSWSC 461; *Edwards v Blomley* (2002) NSWSC 460 (Unreported, Studdert J, 12 June 2002); *Waller v James* (2002) NSWSC 42.

¹³⁸ The mere difficulty of estimating damages does not relieve a court of the responsibility of placing a value on what has been lost: See *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 88.

¹³⁹ Beaton-Wells and Fisse, above n 124, 521.

¹⁴⁰ Caron Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171, 210; Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126, 157.

considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include--

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

(3)(A) in the case of a cooperating individual--

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require;

and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).¹⁴¹

This is an example of a comprehensive information sharing provision that does place a significant burden on the immunity applicant to comply.¹⁴² However, there are less onerous conditions that have been explored.¹⁴³ The basic premise of the proposition is to draft a requirement that would enable civil plaintiffs at least the key information available to successfully initiate proceedings for cartel compensation. The introduction of such a condition would then remove any obligation on behalf of the ACCC to calculate restitution, provided the ACCC was satisfied that the applicant had provided 'satisfactory cooperation' to civil plaintiffs.

Given that the ACCC has not expressed any desire to reintroduce monetary restitution as a requirement for Immunity,¹⁴⁴ the implementation of an information sharing condition would overcome the difficulties associated with cartel victims

¹⁴¹ *Antitrust Criminal Penalty Enhancement and Reform Act* 2004 Pub L No 108-237, tit II, 118 Stat 661, 665 [[Page 118 STAT. 667]].

¹⁴² See Eric Mahr and Sarah Licht, 'Making ACPERA Work' (2015) 29 *Antitrust* 31; Bonny Sweeney, 'Earning ACPERA's Civil Benefits: What Constitutes "Timely" and "Satisfactory" Cooperation?' (2015) 29 *Antitrust* 37.

¹⁴³ Maurice Blackburn, Position Paper for Melbourne Law School Roundtable on Private Enforcement of Competition Law, 12 November 2010, [5.9].

¹⁴⁴ The issue of restitution did not feature in the recent review of the policy.

gaining access to compensation and therefore strike a more appropriate balance in the role of public and private enforcement. This is also due to the fact that the introduction of such a condition could be seen as ‘morally significant’ in terms of remedying the harm caused by cartel participants and demonstrating an acceptance of responsibility.¹⁴⁵ This is a consideration currently missing from the debate surrounding restitution and the importance of offsetting the extraordinary benefit of immunity by at least ensuring that victims have access to compensation. This is especially the case where the ACCC has the power to seek damages for victims pursuant to the *Competition Act*, but does not utilise this power often.¹⁴⁶

B Confidentiality Across Borders

In order to combat the global reach of cartel conduct there has been a need for increased international cooperation in anti-cartel enforcement. This is well-recognised in the international community and has been met with strategies to harmonise the enforcement efforts across each jurisdiction, reflected in initiatives set up by working groups such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD).

An integral aspect of increased international enforcement is the importance of information-sharing between competition regulatory bodies that can assist with cartel investigations in the affected jurisdictions. Given the multi-national nature of most cartels, this international cooperation is increasingly important and has seen with it the proliferation of immunity policies worldwide. The sharing of information provided by immunity applicants in the form of waivers has largely been deemed to be an effective tool in allowing for the cooperation of the disclosure of information between competition agencies.

However, there remains the risk that increased disclosure on an international scale will also increase the risks associated with such disclosure and potentially

¹⁴⁵ Daniel Faichney, 'Autocorrect? A Proposal to Encourage Voluntary Restitution through the White-Collar Sentencing Calculus' (2014) 104 *The Journal of Criminal Law & Criminology* 389, 430.

¹⁴⁶ *Competition and Consumer Act 2010* (Cth) ss 87(1A)(b), s 87(1B): this provision allows the ACCC to bring a representative action with a view to seeking broad relief under s 87(1) for persons who are, or are likely to be, affected by anticompetitive conduct. See Guttuso, above n 29, 46; Beaton-Wells and Fisse, above n 124, 523.

adversely affect the incentives provided pursuant to immunity policies. There is a real possibility that multi-jurisdictional information sharing could undermine the confidentiality assurances provided to immunity applicants and reduce its overall appeal for future applicants. The risks are even greater when considered alongside the difficulties associated with multi-jurisdictional applications, potential third party damages actions, and the differences in disclosure requirements that could increase the liability of immunity applicants across a number of jurisdictions.

This section will first briefly analyse the primary information-sharing arrangements for cartel investigations available on an international scale, namely: (1) formal agreements, such as Mutual Legal Assistance Treaties, Bilateral Competition Agreements, and the waiver requirement in Immunity Policies and (2) informal arrangements, such as OECD guidelines and ICN working groups.

This section will focus on the issue most closely related to immunity policies, that being the requirement of a confidentiality waiver. The utility of waivers as an information sharing mechanism will first be analysed before turning to the risks associated with the increased use of waivers in international cooperation. This section will conclude that while information-sharing is necessary for coordinated global cartel enforcement, the current patchwork approach is exposing immunity applicants to risks that may outweigh the current benefits and that the international community should seriously consider a more harmonised system.

1 *International Information Sharing Frameworks*

(a) *Formal Mechanisms – Mutual Legal Assistance Treaties (MILATS)*¹⁴⁷

An example of a formal mechanism for international information sharing is through the use of MILATS. MILATS are commonly used to compel parties to assist others through the provision of obtaining evidence in the possession of the requested jurisdiction's territory for the purposes of assisting with an investigation of the

¹⁴⁷ For a list of Mutual Legal Assistance Treaties with Australia see Attorney-General's Department, 'Australia's Bilateral Mutual Assistance Arrangements' (Commonwealth of Australia, <<https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Documents/bilateral%20treaties%20on%20mutual%20assistance%20in%20criminal%20matters.doc>>).

requesting jurisdiction. Although MILATS are generally drafted individually between the respective jurisdictions, there are some common features that include:

- (a) taking testimony and statements in the requested jurisdiction;
- (b) serving process;
- (c) providing documents or records located in the requested jurisdiction;
- (d) executing requests for searches and seizure;
- (e) in some cases, giving any other form of assistance 'not prohibited by the law of the requested jurisdiction' or 'consistent with the objects of the treaty'.¹⁴⁸

Although MILATS are an effective way of assisting with information sharing given they essentially compel a jurisdiction to provide the assistance required, their usefulness is subject to limitations. Most notably, MILATS can only be used in criminal investigations, and therefore in the context of cartel investigations, can only be used where cartel conduct is an offence. Moreover, MILATS are not specific to competition law and therefore the information requests must go through formal processes, rather than through the competition agencies themselves.¹⁴⁹ This can lead to significant time delays where information may be needed quickly, such as in the situation where an immunity applicant is simultaneously applying for immunity in several jurisdictions.

The OECD has recognised the usefulness of investigative assistance by way of MILAT between the United States and Canada in the *Plastic Dinnerware* and *Thermal Fax Paper* cases.¹⁵⁰ In both cases, the agencies were able to coordinate search warrants, share documents obtained by subpoenas, jointly interview witnesses and analyse documents, which led to the successful prosecution of these cartels.¹⁵¹

(b) *Competition-Specific Bilateral Agreements Between Jurisdictions*

¹⁴⁸ International Competition Network, 'Cooperation Between Competition Agencies in Cartel Investigations' (International Competition Network - Cartels Working Group - Subgroup 1 - General Framework, 2006) 16.

¹⁴⁹ OECD, 'Improving International Cooperation in Cartel Investigations' (Organisation for Economic Cooperation and Development, 2012) 31; For a discussion of some of the formal processes that an information request must go through in Australia see, Michael Pryse, 'Handbook on Multijurisdictional Competition Law Investigations: Australia' (<<http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/treatises/australia.pdf>> 15).

¹⁵⁰ OECD, above n 149, 30.

¹⁵¹ Ibid 31.

There are two types of bilateral agreements in this section, that being ‘first generation’ bilateral agreements and ‘second-generation’ bilateral agreements. Essentially, the key difference between the two is that first generation agreements are those in which the parties agree to cooperate in relation to competition investigations, however there will exist a provision that excludes the disclosure of confidential information. Second-generation agreements, on the other hand, will allow for the sharing of such confidential information. These agreements are binding at international law and have become an established practice between agencies for the sharing of non-confidential in relation to cartel investigations.¹⁵² Due to the nature of international law however, the cooperation afforded by these agreements is largely at the discretion of the regulatory agency, who can choose the level of information sharing and cooperation they provide.

A more integrated approach has been adopted by Australia and the United States who have entered into an Antitrust Mutual Assistance Agreement,¹⁵³ which is enabled by domestic law and permits information to be provided that would not ordinarily be shared by regulatory agencies.¹⁵⁴ This is one of the few agreements of its kind and allows for the ‘broad assistance in criminal and civil non-merger antitrust matters, including the exercise of compulsory power to obtain testimony and documentary information.’¹⁵⁵ The agreement allows for the sharing of confidential information, provided that that information is not disclosed, particularly to third parties for the purpose of private actions.¹⁵⁶

(c) *Informal Information Sharing Frameworks*

Although informal information sharing frameworks may not be binding, they serve as a vital platform for the sharing of non-confidential information and the development of strategies that can lead to more effective harmonisation of information sharing processes in general. They offer the opportunity for regulatory

¹⁵² Ibid 34, s 4.31.

¹⁵³ *Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance* [1999] ATS 22.

¹⁵⁴ OECD, above n 149, 36.

¹⁵⁵ Ibid 36.

¹⁵⁶ *Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance* [1999] ATS 22 Article VI: Confidentiality (2).

agencies, government officials and competition law practitioners to discuss key issues relating to cartel investigations and work closely to implement these ideas into policy, otherwise known as ‘soft law.’

A number of international bodies serve this function, such as the OECD, United Nations Conference on Trade and Development (UNCTAD), International Competition Network (ICN), Association of South East Asian Nations (ASEAN) and Asia Pacific Economic Cooperation (APEC). These types of platforms can help foster trust between regulatory agencies and lead to better processes of informal information sharing between jurisdictions, including providing an opportunity for certain jurisdictions to overcome any challenges they may be experiencing.

One of the key developments in this area has been the drafting of the OECD’s *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*¹⁵⁷ in 2005. The aim of these guidelines was to ‘simplify and expedite’ the process for exchanging information to allow for the most effective and timely information exchange.¹⁵⁸ Most significantly, these guidelines recognise the importance of implementing safeguards into information sharing frameworks to protect the integrity of these regimes.

Section B of the guidelines specifically relates to the provision of confidentiality, use and disclosure in the requesting jurisdiction, and requires that a requesting jurisdiction be aware of the capability of the requested jurisdiction to maintain confidentiality in relation to the information.¹⁵⁹ The requesting jurisdiction must ensure that the privilege against self-incrimination is respected¹⁶⁰ and that all necessary measures are taken to ensure that unauthorised disclosure does not occur.¹⁶¹ There is also a specific provision for the protection of legal professional privilege.¹⁶² All of these safeguards are integral to ensuring the confidentiality of information exchanged between regulatory agencies and as has been shown, is particularly pertinent to the operation of immunity policies worldwide.

¹⁵⁷ OECD, 'Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations' (Organisation for Economic Cooperation and Development, 2005) ('OECD Best Practices').

¹⁵⁸ *Ibid* s 4.

¹⁵⁹ *Ibid* s B (1)-(3).

¹⁶⁰ *Ibid* s B (4).

¹⁶¹ *Ibid* s B (5).

¹⁶² *Ibid* s C.

2 *The Requirement of Confidentiality Waivers*

Over the past decade, the use of waivers of confidentiality in immunity policies has largely been deemed a successful information sharing arrangement. In contrast to other formal and informal information sharing frameworks discussed above, the waiver is specifically used for the sharing of *confidential* information provided by the immunity applicant to other investigating agencies, with the applicant's express consent.¹⁶³ The scope of the information to be disclosed will depend upon the way the waiver is drafted but generally allows for the sharing of confidential information obtained from the parties following their immunity application and enables free communication of this information between the competent authorities dealing with the same cartel.¹⁶⁴

According to the ACCC Immunity Policy, applicants will generally be required to provide consent to allow for the sharing of confidential information in international matters.¹⁶⁵ The ACCC will require the applicant to grant a waiver to any jurisdiction where it has *or intends to* seek immunity in that jurisdiction. Whilst a refusal to grant a waiver will not affect the granting of immunity, failure to provide a satisfactory explanation may constitute a breach of the cooperation condition of immunity, presumably leading to a possible revocation of the Policy.¹⁶⁶ The FAQ elaborates on some possible situations where an immunity applicant's refusal to grant a waiver may be held to be 'satisfactory' which includes: where an immunity applicant is not eligible for immunity in those particular jurisdictions;¹⁶⁷ or where an immunity applicant may be compelled by a law enforcement agency or court of law to maintain confidentiality.¹⁶⁸

The Competition Bureau's requirement for waiver is similar to that of the ACCC, by requiring the consent of the applicant before any information is provided to a foreign law enforcement agency.¹⁶⁹ The Bureau also requires that a refusal to

¹⁶³ International Competition Network, above n 148, s 4.5.

¹⁶⁴ Ibid 12.

¹⁶⁵ Australian Competition and Consumer Commission ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014) [48].

¹⁶⁶ Ibid [49].

¹⁶⁷ Australian Competition and Consumer Commission ACCC, 'ACCC Immunity and Cooperation Policy: Frequently Asked Questions' (2014) Q 28, Example 1.

¹⁶⁸ Ibid Example 2.

¹⁶⁹ Competition Bureau, above n 105, s H [33].

grant a waiver must be met with ‘compelling reasons,’ which is seemingly a higher threshold requirement than that of the ACCC.¹⁷⁰ In contrast to the ACCC, the Bureau outlines the scope of the waiver and expects it to ‘cover both substantive and procedural information.’¹⁷¹ Moreover, there is an expectation that the waiver is to be provided immediately.

In contrast to the ACCC and the Competition Bureau’s policies, the DOJ’s waiver requirement is not outlined in the policy itself; rather it is described in greater detail in the FAQ.¹⁷² The DOJ reconfirms its commitment to confidentiality in the context of its leniency applications and acknowledges the potential disincentive that would ensue if an applicant believed the information they provide could potentially be used against them in foreign jurisdictions.¹⁷³ The crux of the provision is essentially the same as the ACCC and the Competition Bureau in that confidential information will not be disclosed without the consent of the applicant, however it does not expressly mention the consequences of an applicant’s refusal to grant a waiver.¹⁷⁴

The Competition and Markets Authority (CMA) does not expressly state that it will seek the consent of a leniency applicant before disclosing information to foreign enforcement agencies. Instead, it states that the (CMA) will ‘expect to be given ‘waivers’ of confidentiality so as to be able to discuss appropriate matters with those other jurisdiction(s).’¹⁷⁵ Similarly to the DOJ, the CMA policy does not state what will happen in the event of an applicant’s refusal to grant a waiver but it does state that the waiver will generally be ‘limited’ to ‘information that is necessary to coordinate planned concerted action such as on-site investigations.’¹⁷⁶ There is no further elaboration as to what kind of information is generally classified as necessary in this scenario.

The international competition law community has praised the utility of waivers of confidentiality in assisting with the timely coordination of cartel

¹⁷⁰ Competition Bureau, 'Immunity Program: Frequently Asked Questions' (Competition Bureau, 2013) Q 46.

¹⁷¹ Ibid.

¹⁷² Hammond & Barnett, above n 60, Q 33.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Competition and Markets Authority, above n 77, s 4.40.

¹⁷⁶ Ibid 4.40.

investigations between jurisdictions.¹⁷⁷ This is particularly the case in the context of increased multi-jurisdictional applications for immunity. This praise has been met with the development of Waiver Templates by the ICN that serve as a best practice model for jurisdictions wishing to introduce the waiver requirement or update their existing requirement/s.¹⁷⁸ It is believed that the introduction of these waivers has saved competition agencies considerable time and resources and will continue to do so.¹⁷⁹ In a survey conducted by the ICN, one agency stated that the exchanged information provided pursuant to the waiver requirement was used for reasons including:

- developing the background, theory and strategy for the case;
- judging the value and credibility of witnesses;
- preparing for witness interviews; and
- support for a court order for a search or document production.¹⁸⁰

Therefore, there is clear support for the use of waivers as a tool for international cartel enforcement. However, the risks associated with the increased use of waivers and the impact this may have on future immunity applications has received far less attention. First and foremost, is the possibility that an immunity applicant may refuse to grant a waiver. It is not clear what the consequences of this decision would be. Both the ACCC and Competition Bureau recognise this possibility and the ACCC Policy states that a refusal to grant a waiver may constitute a breach of the cooperation condition of immunity.

Whilst the waiver requirement is framed as a ‘voluntary’ commitment to provide information to foreign authorities, essentially failure to do so could constitute a breach of an Immunity Policy. Whilst confidentiality is seen as the bedrock of immunity policies in terms of ensuring that applicants have full confidence that their confidential information will not be disclosed, it has been asserted that the waiver

¹⁷⁷ OECD, above n 157, s 4.5; International Competition Network, above n 148, s 2.

¹⁷⁸ International Competition Network, 'Waivers of Confidentiality in Cartel Investigations— Explanatory Note' (International Competition Network, 2009) <<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/waiver.aspx>>.

¹⁷⁹ OECD, above n 157, s 4.5.

¹⁸⁰ International Competition Network, above n 148, 12.

requirement could potentially 'swallow' confidentiality by compelling the disclosure of confidential information to foreign authorities.¹⁸¹

There is a real risk that the information that is shared with a foreign regulatory agency will be subject to the discovery requirements in that foreign jurisdiction/s. As has been demonstrated in the previous section, such confidential information has increasingly been exposed in the context of cartel cases, despite the best efforts of the regulatory agency to prevent that disclosure. This is occurring even in the jurisdictions thought to have the most protected disclosure regimes, such as the United States.

Therefore, if an immunity applicant is required to grant waivers in multiple jurisdictions, there is an increased risk that this information will be publicly disclosed in the foreign jurisdiction, which could expose the applicant to third party damages actions in multiple jurisdictions.¹⁸² This could serve to undermine the incentives to apply for immunity in the first place and adversely impact on international cartel enforcement.¹⁸³

These issues must also be viewed in the context of other international enforcement issues, namely the varied and inconsistent immunity policy requirements that exist across the globe and the resultant challenges associated with simultaneous immunity applications. Although much work has been done at the international level to harmonise immunity policies worldwide, there are still significant differences in terms of proffer requirements, timelines for the establishment of a marker and immunity conditions that an immunity applicant must have knowledge of when determining which jurisdiction/s to apply for immunity.¹⁸⁴ This could result in an applicant being granted immunity in one jurisdiction but not in another, which makes information sharing between foreign regulatory agencies in this context difficult.

The ICN has recognised that this situation may also discourage the granting of waivers, 'as an undertaking may have to submit more information in one jurisdiction

¹⁸¹ Stephen Fishbein, Kafele Heather and Casey O'Neill, 'Confidentiality Waivers in Global Cartel Investigations' (Shearman & Sterling LLP, <<http://www.carteldigest.com/siteFiles/Anti%20Cartel%20Headlines/Confidentiality%20Waivers%20in%20Global%20Cartel%20Investigations1.pdf>>).

¹⁸² OECD, above n 149, 44

¹⁸³ Fishbein, Heather and O'Neill, above n 181, 14.

¹⁸⁴ See also, Guttuso, above n 29, 44.

than in another in order to benefit from the respective leniency programmes, and may not want this additional information to be revealed to other agencies with less demanding leniency programmes.¹⁸⁵ This is exacerbated by the fact that there is no universally agreed upon definition of what constitutes ‘confidential information.’¹⁸⁶ Therefore information classified in one jurisdiction as confidential may not be deemed confidential in another, leading to the disclosure of that information in the foreign jurisdiction.

Many of the interviewees recognised these difficulties in international cartel enforcement and the problems caused by inconsistent immunity policies.¹⁸⁷ Some interviewees believed that these problems could be overcome by a ‘global immunity strategy’ where large multinational law firms coordinate to simultaneously apply for immunity in several jurisdictions.¹⁸⁸ Some interviewees were of the belief that if you hired a ‘good lawyer’ in a large-multinational firm then this is an effective way to overcome the difficulties associated with multi-jurisdictional applications.¹⁸⁹ When questioned further in relation to this, these interviewees acknowledged that smaller, or purely domestic firms, would have much more difficulty with this process.¹⁹⁰

The interviewees were also asked whether they believed it was feasible that a ‘supra-national body’ could be established that would act as the global body for immunity marker applications.¹⁹¹ John Taladay suggested that either the European Union or United States competition agencies could act as a body for applicants to submit a marker for a particular cartel and this marker would recognise their ‘first in’ status in all subsequent jurisdictions the applicant applied in by alerting the jurisdictions to the fact that a marker had been placed.¹⁹² This marker system would provide an ‘opt-in’ mechanism for agencies that wished to be included in the global

¹⁸⁵ International Competition Network, above n 148, 24.

¹⁸⁶ OECD, above n 149, 45.

¹⁸⁷ See Chapter V, The Tension between Public and Private Enforcement – Confidentiality and Third Parties, pg 147.

¹⁸⁸ Interviewee 2 (Sydney, 22nd July 2013) 18-19.

¹⁸⁹ Interviewee 7 (Melbourne, 26th April 2013) 39.

¹⁹⁰ Interviewee 9 (Sydney, 15th July 2013) 22.

¹⁹¹ See Chapter V, The Tension between Public and Private Enforcement – Confidentiality and Third Parties, pg 147; Competition policy, including antitrust provisions were originally within the scope of the World Trade Organisation. Due to the lack of consensus in 2004, negotiations in this area were suspended. Countries now negotiate issues related to competition within the Free Trade Agreements Framework. See, eg, *Free Trade Agreement*, Australia-United States, signed 18th May 2004, [2005] ATS 1 (entered into force 1 January 2005) Article 14.2; *Japan-Australia Economic Partnership Agreement*, signed 8th July 2014, [2015] ATS 2 (entered into force 15 January 2015) Article 15.8.

¹⁹² John Taladay, ‘Time for a Global “One-Stop Shop” For Leniency Markers’ (2012) 27 *Antitrust* 43.

marker system and also provide applicants with the opportunity to select which jurisdiction/s they wished to apply for a marker. An applicant would then seek immunity in each jurisdiction where it had applied for a marker by the normal processes of that jurisdiction. Therefore, there would be no change to the immunity requirements in each jurisdiction.

The notion of establishing a global marker system, like most agreements at an international level, has been met with arguments in relation to the protection of sovereignty.¹⁹³ In response to this argument, Taladay asserts that such a ‘marker clearinghouse’ would not impede on sovereignty, as it is merely a ‘convergence of process, not of legal substance or enforcement prerogative.’¹⁹⁴ As a result, the discretion as to whether or not to grant immunity or the determination as to which cartel to prosecute will still rest firmly with the independent jurisdictions, akin to a plurilateral initiative.

In response to the growing importance of these issues, the OECD established a *Working Group* in December 2014 that discussed the feasibility of implementing a ‘one-stop shop’ for leniency markers pursuant to Taladay’s model.¹⁹⁵ The Working Group recognised that it would be necessary for participating agencies to reach an agreement on the information required to be submitted by the applicant to secure the marker. At present, marker requirements can vary from jurisdiction to jurisdiction. Taladay suggests that the ICN ‘Model Leniency Programme’ should act as the proposed model for the marker system, with the following information to be provided to secure a marker:

- The Applicant’s name and address;
- The basis for the concern which led to the leniency approach;
- The parties to the alleged cartel;
- The affected product(s);
- The affected territory (-ies);
- The duration of the alleged cartel; and
- The nature of the alleged cartel conduct.¹⁹⁶

¹⁹³ Interviewee 10 (Sydney, 29th July 2013) 27.

¹⁹⁴ Taladay, above n 192, 46.

¹⁹⁵ OECD, ‘Working Party No. 3 on Co-operation and Enforcement - Use of Markers in Leniency Programs’ (Organisation for Economic Cooperation and Development, 2014).

¹⁹⁶ Taladay, above n 192, 48.

Another suggestion that has been put forward states that the ICN could act as the body to take immunity applications by way of international agreement, in a similar framework as that adopted by the patent wide application process in the European Union.¹⁹⁷ Some interviewees felt that it would be more likely for the ICN to take on this role, as many of the jurisdictions that have immunity policies are already members.

In lieu of creating a universal immunity policy, the ICN could act as a body to request a marker, in the same way Taladay has suggested, which would recognise the ‘first-in’ status of the immunity applicant. Once the marker had been recognised, the ICN would notify the selected jurisdictions of the applicant’s ‘first in’ status and the immunity applicant would seek to submit immunity applications in all of the selected jurisdictions. In this model, there would be no need for the development of a universal immunity policy, which could be fraught with political difficulties, as the applications would proceed as per the normal processes in that jurisdiction. It would essentially act as an international marker queue for immunity applications. Although this would not overcome the difficulties associated with globally inconsistent immunity requirements, it would act as a positive first step towards harmonisation of the policies and overcome some of the difficulties of simultaneous immunity applications in multiple jurisdictions.

At a global level, it seems the momentum is growing for the implementation of a global marker system and the OECD working group is of the belief that it will provide a ‘a more efficient, more effective and more complete approach to seeking leniency in multiple jurisdictions for international cartels.’¹⁹⁸ However, many of the interviewees believed that although this idea may be plausible in theory, in reality the political environment would not permit its implementation. As one interviewee put it:

Interviewee: Again, just looking at the experience in relation to other aspect of competition law, adjudication enforcement, I think it’s unlikely. Take for example the experience in relation to notification of mergers. In that context I think there’s an even stronger argument because we’re trying to facilitate, you know, conduct that is essentially efficiency and welfare and I’m seeing, you know, engenders greater investment in global trade and so on and yet there are these very significant regulatory impediments associated with the fact that international mergers or

¹⁹⁷ Interviewee 8 (Sydney, 15th July 2013) 21-22.

¹⁹⁸ OECD, above n 195, s 18.

acquisitions will involve parties having to meet different thresholds, different notification requirements in multiple jurisdictions. My work in merger control in the South East Asia region we're now heading towards an economic blueprint in 2015 trying to put together a harmonised system competition law in the 10 ASEAN countries suggests that it's just fanciful that these countries with very significant legal, political and economic landscapes are going to be able to agree on a uniform notification threshold and requirements. If it's so difficult in the context of mergers, as I say, where there are clear public benefits associated with having greater uniformity and consistency in approaches. In the context of immunity policies where you are immunising self-confessed cartelists from penalties and proceedings, the prospect is even slimmer I think of reaching across jurisdictions on those things.¹⁹⁹

The OECD working group felt that the practical implementation measures, such as the development of procedures, guidelines and requirements should fall to the competition agencies and that the OECD's role would be to assist agencies in understanding the implications of these structures.²⁰⁰ Therefore, the real risk to the implementation of a global marker system is the lack of political will from the regulatory agencies and/or jurisdictions.

In light of this, most interviewees were of the consensus that immunity policies need to move towards harmonisation by means of 'natural progression' in the form of continued international discussion and development of best practice frameworks.²⁰¹ This may well be the most likely scenario to occur at this point in time. It is important that regulatory agencies take the initiative to discuss a strategy to implement the global marker system; as such a step is necessary for the next phase of international cartel cooperation.

C Concluding Remarks on Confidentiality and Third Parties: Application of the Enhanced Criteria

The role of public and private enforcement in Australian competition law is delicate and complex. Clearly, the issues relating the Immunity Policy in this context require a considerable degree of consideration in formulating where the balance should lie. A strict application of the orthodox DOJ effectiveness criteria fails to appreciate the complexity of the issues that arise when public and private enforcement roles

¹⁹⁹ Interviewee 3 (Melbourne, 26th April 2013) 24.

²⁰⁰ OECD, above n 195, s 18.

²⁰¹ Interviewee 4 (Sydney, 17th June 2013) 23.

intersect. Whilst the non-disclosure of immunity application may lead to greater certainty for immunity applicants, and therefore encourage applications, the impact that this policy has on the rights of third parties is also significant. Similarly, ensuring each domestic immunity regime is serving the needs of the competition regulator in that particular country needs to be observed in the greater global enforcement context in which it operates. Thus observing the policy in isolation fails to appreciate these complex intersections of the law.

This chapter has demonstrated that there is a greater need for transparency in the context of third party access to immunity information. Whilst this requires a delicate weighing of competing factors, this chapter has shown that the balance is currently weighed in favour of the immunity applicant over that of cartel victims. Given the judicial uncertainty in this area, it is recommended that an information sharing provision be implemented into the policy to provide a form of restitution to third parties. This element of transparency will provide a more appropriate balance, whilst still preserving the detection and deterrence aims of the Immunity Policy. The United States provides a useful example of this.

Similarly, the confidentiality of immunity applications in a multi-jurisdictional context needs to be weighed against the requirement for a coordinated global approach to immunity applications. The regulators need to be explicit about the risks of disclosure in multi-jurisdictional immunity applications, given the recent developments in this area creating uncertainty. Guttuso suggests these measures could include ex post evaluations of the ACCC's handling of investigation, including questions such as data handling and document disclosure processes, and being clear on the extent to which the ACCC can guarantee the immunity applicant's confidentiality.²⁰²

The ACCC, as an independent statutory authority, needs to be held accountable to the public for its decision-making. There are currently no published rights of review in relation to the sharing of confidential immunity information with other regulators. The sharing of information process is unclear and hence difficult to measure. There are no accountability mechanisms in place to prevent the ACCC from sharing information with a regulator in which the immunity applicant has not been granted immunity. Accountability is intrinsically tied to the notion of

²⁰² Guttuso, above n 29, 45.

transparency. Therefore, the ACCC needs to increase its levels of transparency, as outlined above, in order to be held to account for its decisions in relation to confidentiality.

Moreover, the current treatment of third parties seeking immunity applicant information for the harm caused by the cartel conduct is inconsistent with the role of the ACCC as an institution designed to protect consumers from anti-competitive conduct. This is especially due to the fact that the ACCC rarely exercises its power to bring proceedings on behalf of those third parties who seek compensation. This is inconsistent with the role entrusted to the ACCC.

Inconsistency in the context of multi-jurisdictional applications is also causing a considerable degree of uncertainty for the global anti-cartel enforcement scheme. The current patchwork immunity approach results in both immunity applicants and third parties unable to effectively navigate the different immunity requirements in each jurisdiction. This uncertainty can be overcome with a considered, harmonised approach to multi-jurisdictional immunity applications, as outlined in this chapter.

In relation to third party access to immunity information, the ACCC needs to ensure that providing such confidential information does not adversely affect the aims of cartel detection and deterrence. Thus, its current approach is rationally connected to its overall enforcement aims. However, this chapter has demonstrated that the ACCC can implement processes to facilitate third party actions without compromising its enforcement objectives. This has been shown to work in the United States, with the information-sharing requirement.²⁰³ This method strikes a more appropriate balance of ensuring the enforcement needs of the ACCC are met, but also recognising that the rights of third parties to have access to this information is an important component of the public enforcement agenda, in terms of rectifying the harms caused to consumers at the hand of anti-competitive conduct.

Similarly, the disclosure of immunity information to overseas regulators is a necessary component of a coordinated global anti-cartel enforcement strategy. Every immunity applicant must recognise the inherent risks associated with these information-sharing mechanisms. However, this chapter has demonstrated that there are other measures that are likely to reduce the inconsistencies of the current

²⁰³ See above, Restitution, pg 254.

approach and are arguably more effective at achieving cartel deterrence and detection on a global scale. These recommendations are the result of analysing the Immunity Policy as part of the wider enforcement context in which it operates with the aim of strengthening its current design and operation and should be adopted as a result.

VIII ALTERNATIVES TO IMMUNITY

This thesis has thus far demonstrated that the current methodological approach and criteria most commonly used to assess the effectiveness of the immunity policy has produced a very narrow view of the operation of the policy in reality. By viewing the immunity policy in isolation, as one of the ‘single most effective’ methods of cartel detection and deterrence, fails to adequately take account of other viable methods to achieve these aims.

Given the number of limitations of the ACCC Immunity Policy that has been exposed throughout this research, it is pertinent to analyse other key enforcement tools that may serve to complement the existing Policy. As part of the overall assessment of the immunity policy, according to the enhanced criteria, it is necessary to examine whether these alternative methods are likely to be at least equally effective at achieving cartel detection and deterrence as part of the proportionality assessment.

This chapter will first analyse the position of cartel participants who are unable to secure immunity, by way of not being the first eligible applicant. The ACCC deals with these applicants by way of the Cooperation section of the Immunity Policy.¹ This approach will be compared to the respective policies in Canada, the United Kingdom and the United States to reveal that the current method is unsatisfactory and in need of further clarification by the ACCC, especially in light of recent case law developments.

Secondly, this chapter will outline the current whistleblower protection provisions that exist in Australia pursuant to the *Corporations Act 2001* (Cth) and analyse its effectiveness in providing protection for private corporate whistleblowers. Given that this Act does not apply directly to cartel conduct, these provisions will be compared to the whistleblower protection frameworks that exist in the above jurisdictions. This comparative analysis will demonstrate that these whistleblower protection frameworks are generally insufficient in providing adequate protection for corporate whistleblowers.

¹ Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014) s H.

Given these inadequacies, this chapter will analyse the more controversial approach of introducing a cartel informant scheme aimed at encouraging third parties who are not directly involved in the cartel to reveal pertinent information to the regulator in exchange for financial incentives. This analysis will draw upon the extensive experience of the United States in relation to these bounty-type arrangements and will also focus on the specific cartel informant systems in the United Kingdom, South Korea and Hungary in order to formulate a workable model for Australia.

A *Subsequent Applications for Immunity: Lenient Treatment of 'Second-in' Cartel Offenders - Australia*

Prior to the recent review of the ACCC policy, the treatment of subsequent applicants was dealt with pursuant to the ACCC Cooperation Policy ('2002 Cooperation Policy').² The 2002 Cooperation Policy was intended to provide a flexible approach to the treatment of subsequent immunity applicants, that is, any person who did not qualify for 'first in' immunity. There are a number of factors the Commission would have regard to when assessing the appropriate penalty for 'second-in' individuals, namely:

- The probative value of the evidence provided by the applicant, particularly where the Commission was either otherwise unaware or had insufficient evidence to initiate proceedings;
- The willingness of the applicant to provide the Commission with full and frank disclosure of the relevant Contravention, and evidence in support of this, and cooperate with the Commission's investigation;
- A requirement that the applicant did not use the same legal representation as the firm by which they were employed; and
- The applicant was not the originator or ringleader of the cartel.³

The Commission would consider the same factors in its assessment of a subsequent corporate applicant, except for three key points of difference. Firstly, upon discovery of the cartel, the corporation was required to take prompt and

²Australian Competition and Consumer Commission, 'Cooperation Policy for Enforcement Matters' (ACCC, 2002).

³Ibid 3.

effective action to terminate its participation in the cartel.⁴ This included taking steps to rectify the situation by providing an undertaking of compliance. Secondly, the corporation must have been prepared to make restitution, where restitution was possible.⁵ And finally, the corporation must not have had a prior record of breaches of the former *Trade Practices Act*,⁶ or any related offences.⁷

As part of the recent review of the Policy, the ACCC fused the Immunity Policy and the Cooperation Policy into a single document, in an attempt to streamline the immunity application process.⁸ Section H of the Immunity Policy essentially reiterates the prior position adopted by the ACCC in relation to the treatment of subsequent applicants, where the ACCC will make joint submissions to the Court based on the cooperation of a party who is not first in.⁹ Recent case law has overturned this practice, which will be discussed below.

Pursuant to section H, it is not a compulsory requirement that the party seeking lenient treatment make an admission of guilt in order to receive lenient treatment; instead there 'may' be a requirement to make admissions, agree to a statement of facts and/or provide evidence in proceedings in respect of the cartel conduct.¹⁰ This aspect of the policy is not in line with the treatment of subsequent immunity applicants in Canada and the United States, where there is a requirement that these parties admit their wrongdoing in order to receive lenient treatment.¹¹ A subsequent immunity applicant should not be permitted to bypass this requirement, as this goes against the spirit of full cooperation in exchange for lenient treatment. Failure to admit wrongdoing can also potentially cause difficulties for third parties in their action for damages claims.

As part of the Cooperation policy, it is also possible for the ACCC in 'rare and exceptional circumstances' to grant full immunity to a subsequent leniency

⁴ Ibid 2.

⁵ Ibid.

⁶ *Trade Practices Act 1974* (Cth).

⁷ Australian Competition and Consumer Commission, above n 2, 2.

⁸ Australian Competition and Consumer Commission, above n 1.

⁹ Australian Competition and Consumer Commission ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (2014) s H [73]-[76].

¹⁰ Ibid s H [74].

¹¹ Competition Bureau, 'Leniency Program' (Competition Bureau, 2010) s3[3.1],[9]; Scott Hammond, 'The US Model of Negotiated Plea Agreements' (OECD Competition Committee Working Party No.3, 2006) 1.

applicant.¹² This is also a unique feature of the ACCC's treatment of subsequent applicants. For example, the Canadian policy makes it clear that full immunity will only apply to the 'first-in' applicant.¹³ According to the Bureau, this practice encourages parties to apply for immunity as soon as possible and not wait for other cartel participants, to gauge what they may do, before reporting cartel conduct to the Bureau.¹⁴ According to this view, granting multiple cartelists full immunity will dilute the incentive of applying first and adversely impact on the 'race' for immunity. Another view would be that it would not be in the interests of fairness and justice to allow two parties to a cartel to secure the extraordinary benefit of immunity and this should be opposed on moral grounds.¹⁵

The factors that the ACCC will use to assess the extent and value of the cooperation provided by the cartelist remained largely unchanged from that under the 2002 Cooperation Policy. The only additions included a consideration of the timeliness of the party seeking to cooperate¹⁶ and whether the party had acted in 'good faith' in its dealings with the ACCC.¹⁷ Most notably, the assessment as to whether the party has sought to provide restitution has been removed.¹⁸

The Cooperation Policy also incorporated a new section that outlines the factors that the ACCC would take into account in determining whether to reach an agreement on civil penalties to submit to the court, banning orders or other relief and the terms of any such agreement:

- (a) the extent and value of the party's cooperation with the ACCC by reference to the factors set out in paragraph 77;
- (b) (for corporate cooperating party) whether the contravention arose out of the conduct of senior management, or at a lower level;
- (c) (for corporate cooperating party) whether the corporation has a corporate culture conducive to compliance with the law;
- (d) the nature and extent of the party's contravening conduct;
- (e) whether the conduct has ceased;
- (f) the amount of loss or damage caused;
- (g) the circumstances in which the conduct took place;
- (h) (for corporate cooperating party) the size and power of the corporation, and

¹² ACCC, above n 1, [76].

¹³ Competition Bureau, 'Immunity Program: Frequently Asked Questions' (Competition Bureau, 2013) Q9.

¹⁴ Ibid.

¹⁵ OECD, 'Leniency for Subsequent Applicants' (Organisation for Economic Cooperation and Development- Working Party No.3 on Cooperation and Enforcement, 2012)154.

¹⁶ ACCC, above n 1, s 77[A].

¹⁷ Ibid s 77[F].

¹⁸ For a more detailed discussion in relation to the requirement for restitution, see Chapter VII, Restitution, pg 254.

(i) whether the contravention was deliberate and the period over which it extended.¹⁹

In submissions to the ACCC, it was recommended that the ACCC outline how a cooperating party would be treated in relation to criminal cartel conduct. As a result, Section H subsections 80-84 were implemented to clarify this position. As is the case with immunity, prior to recent case law, the CDPP would make a recommendation for a reduced penalty for criminal cartel conduct in accordance with the *Prosecution Policy*²⁰ and not Annexure B (which relates solely to the granting of immunity for cartel conduct). Similarly to the ACCC, the CDPP had the power to make recommendations to the Court who would determine the final penalty in accordance with Section 16A(2) of the *Crimes Act 1914* (Cth). As the CDPP made their recommendations based on the *Prosecution Policy*, the CDPP was required to have regard to whether the evidence the party gave was ‘considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and the evidence is not available from other sources’ and the party ‘can reasonably be regarded as significantly less culpable than the defendant.’²¹

In Australia, the determination of penalties ultimately rests with the court. Therefore, prior to recent case law, the lenient treatment of offenders was dealt with by way of joint submissions to the court, which either the ACCC or the CDPP and the relevant leniency parties had agreed to. In determining whether to reach an agreement on penalties, and the terms of such agreement, the ACCC specifically would take into consideration a combination of factors listed in the 2002 Cooperation Policy on a case-by-case basis.²² Although the court had discretion as to whether to accept these joint submissions and the agreed penalty, it was common practice that the court would generally accept these agreed penalties.²³

¹⁹ ACCC, above n 1, s 78; recent case law has changed the way the Court will determine penalties for cooperating parties (see below).

²⁰ Commonwealth Department of Public Prosecutions, 'Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process' (Australia's Federal Prosecution Service, 2014) <<http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>>.

²¹ Ibid [6.6]; Australian Competition and Consumer Commission ACCC, 'ACCC Immunity and Cooperation Policy: Frequently Asked Questions' (2014) Q 41.

²² Australian Competition and Consumer Commission ACCC, 'Cooperation Policy for Enforcement Matters' (ACCC, 2002)2, 3.

²³ See *R v MacNeil-Brown* (2008) 20 VR 677, 678-701: a majority of the Court of Appeal held that the ‘making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court.’ This case stands as authority supporting the practice of the prosecution providing a submission about the bounds of the available range of sentences.

However, recent case law overturns this long established practice; two cases are significant in this respect. The first relates to the High Court decision in *Barbaro* that held that the prosecution was not permitted or required to provide to a sentencing judge its view as to the bounds of the range of sentences to be imposed.²⁴ The court also held that such a penalty submission was not a submission of law, but a statement of opinion.²⁵

The case concerned two appellants who had pleaded guilty to serious drug-related offences. At the sentencing hearing, the trial judge made it clear that she did not wish to hear a submission from any party regarding the sentencing range. As a result, the prosecution did not make a submission regarding the range of sentences that it considered might be imposed, which was against usual practice.²⁶ The court stated:

The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge.²⁷

The principles in *Barbaro* have been confirmed in a number of cases following the decision²⁸ with widespread concern that the certainty of agreed penalty processes had been undermined or diminished.²⁹ Further, it was uncertain whether judges would continue to hear submissions from civil regulators on the appropriate penalty, given that *Barbaro* was a criminal case.

²⁴ *Barbaro v The Queen, Zirilli v The Queen* (2014) 253 CLR 58 [6]. ('*Barbaro*')

²⁵ *Ibid* [7].

²⁶ This practice was developed predominantly in *R v MacNeil Brown* (2008) 20 VR 677.

²⁷ *Barbaro v The Queen, Zirilli v The Queen* (2014) 253 CLR 58 [7].

²⁸ See, eg, *Commissioner for Consumer Protection v Susilo* (2014) WASC 50; *Australian Competition and Consumer Commission v Flight Centre Limited (No 3)* (2014) FCA 292; *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* (2014) FCA 336 (distinguishing *Barbaro*).

²⁹ See eg, Mirko Bagaric, 'Bad Law Inevitably Leading to Confused Jurisprudence - The Inevitable, Regrettable Fallout From *Barbaro v The Queen*' (2015) 39 *Criminal Law Journal* 3, Andrew West, 'Impermissible Submissions on Sentence' (2014) 34 *Queensland Lawyer* 11; Phillip Priest, 'Crime and Justice: Prosecutors' Duties in the Wake of *Barbaro*' (2014) 88 *Australian Law Journal* 386; Samantha Teong, 'Stamping Out Rubber-Stamped Penalties? Determining an Appropriate Judicial Response to Agreed Penalties in Civil Penalty Settlements' (2015) 43 *The Australian Business Law Review* 48; Ayman Guirguis, Richard Flitcroft and Asa Lam, *Where to Now for Agreed Civil Penalty Outcomes Following the CFMEU and Barbaro Decisions?* (May 8 2015)

<[274](http://www.lexology.com/library/detail.aspx?g=4c985974-d688-471b-8f1a-2f66fec07159&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Australian+IHL+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2015-05-11&utm_term=.:></p></div><div data-bbox=)

This issue was addressed by the court in the *CFMEU*³⁰ decision, where the Full Court held unanimously that *Barbaro* applied in relation to pecuniary penalties under the *Building and Construction Industry Improvement Act 2005* (Cth), and more broadly, in other proceedings where pecuniary penalties are sought by the regulator.³¹ The full court in *CFMEU* confirmed the decision in *Barbaro*, stating that courts should have: ‘no regard to the agreed figures in fixing the amounts of the penalties to be imposed, other than to the extent that the agreement demonstrates a degree of remorse and/or cooperation on the part of each respondent.’³²

To this end, the court supported its reasoning by emphasising its unfettered discretion in determining pecuniary penalties in both the civil and criminal context and that any agreements or submissions as to the quantum or range of penalties was no more than an expression of opinion.³³ The court also heard evidence from a number of Commonwealth regulators, including the ACCC, regarding concerns about the uncertainty that will befall regulators who seek to negotiate penalty outcomes with applicants via cooperation agreements, such as those dealt with pursuant to section H of the ACCC Immunity Policy. It has been suggested that parties would be less willing to agree to resolve matters if the regulator cannot assure them of any certainty in relation to their potential penalty outcome.³⁴ In response, the Court held that these concerns are considerably overstated, and that ‘it is to be the inevitable consequence of entrusting the pecuniary penalty process to the judiciary.’³⁵ Further, the court did not believe that the consequences of the decision would be as ‘dire’ as the regulators suggested and that, if anything, there may be some short term expense incurred in cases where the regulators and respondent have already identified agreed penalties or agreed ranges.³⁶

It remains to be seen the effect that these decisions will have on the processes adopted by the ACCC to determine the appropriate penalty for subsequent leniency

³⁰ *Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 320 ALR 631 at 633. (*‘CFMEU’*)

³¹ Peter Renehan and Peta Stevenson, 'Purity but at What Price: the Application of Barbaro Principles to Pecuniary Penalty Proceedings' (Paper presented at the Competition Law Conference, Sydney, 30 May 2015) 10.

³² *Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 320 ALR 631 at 633, [3].

³³ *Ibid* [241].

³⁴ Renehan and Stevenson, above n 31, 22-23.

³⁵ *Ibid* 701, [242].

³⁶ *Ibid* [239].

applicants. It is likely to create considerable difficulty for any cartel participant to ascertain their potential penalty before approaching the ACCC, or even after discussions with the ACCC. The leniency applicant will not have the same level of certainty that the ACCC was able to offer in the past and any discount they may receive as a result of their cooperation will rest firmly with the court. As will be demonstrated below, this practice is out of line with the treatment of leniency applicants in Canada, the United Kingdom and the United States. In particular, this decision may adversely impact on the Immunity Policy, as there will be an even stronger incentive to be the 'first-in' applicant if leniency applicants decide to contest facts rather than cooperate with the ACCC. This may lead to an even greater reliance on the immunity applicant's evidence, which has been shown in Chapter VI to be problematic.³⁷

The Commonwealth applied to the High Court for special leave to appeal the *CFMEU* decision. Special leave was granted to the Commonwealth on 18 June 2015 and the appeal is likely to be heard in October 2015. Thus, it is too early to tell what the full implications will be for the ACCC Immunity Policy. There is some suggestion that the parliament may seek to intervene by way of a legislation solution, which could address the procedure as to how regulators seek pecuniary penalties.³⁸ Alternatively, it may be more suitable to implement delegated legislation that could introduce guidelines for the assessment of pecuniary penalties, which seeks to 'provide parties and the Court with a common starting point for assessment, thereby potentially reintroducing a degree of certainty to the resolution of pecuniary penalty proceedings.'³⁹ This process would not be far from the process that existed prior to the *CMFEU* decision, where the ACCC would consider a number of factors in its assessment of the penalty to recommend to the court. Thus, this solution may serve as an appropriate middle ground. An analysis of the treatment of second and subsequent immunity applicants in Canada, the United Kingdom and the United

³⁷ See Chapter VI, The Credibility Of Accomplice Evidence, pg 203. See also Ayman Guirguis, Sarah Godden and Asa Lam, *ACCC v Chopra: Penalty Submissions in the Aftermath of CFMEU and Barbaro* (25 July 2015) Lexology <http://www.lexology.com/library/detail.aspx?g=c501c886-f1f7-4a2f-b37d-4a5740d73d3f&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Australian+IHL+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2015-07-28&utm_term=>>.

³⁸ Renehan and Stevenson, above n 31, 27; Mirko Bagaric, 'The Need for Legislative Action to Negate the Impact of *Barbaro v The Queen*' (2014) 38 *Criminal Law Journal* 133.

³⁹ Renehan and Stevenson, above n 31, 27.

States will reveal the starkly different position in Australia as a result of these recent court decisions. This will exacerbate the uncertainty that permeates this area of competition practice.

1 *Lenient Treatment of Subsequent Applicants Abroad*

This section will outline the position of subsequent immunity applicants in Canada, the United States and the United Kingdom before turning to an analysis of the key similarities and differences between the regimes, namely (1) the timeliness of a leniency application versus its probative evidence (2) the calculation of the discount afforded to those not ‘first-in’ and (3) flexibility v fixed cooperation discounts.

(a) *Canada*

There are three primary conditions of eligibility for leniency in Canada, where the Bureau will make a recommendation for leniency in sentencing to the Public Prosecution Service of Canada (‘PPSC’) for an individual or business organisation that agrees to:

- (a) terminate its participation in the cartel;
- (b) agrees to cooperate fully and in a timely manner, at its own expense, with the Bureau’s investigation and any subsequent prosecution of the other cartel participants by the PPSC;
- (c) Agrees to plead guilty.⁴⁰

The first step in the process for determining the appropriate penalty to recommend to the Court will be to formulate a ‘leniency discount.’ The Court determines the final penalty for leniency applicants but, unlike the position in Australia post-*Barbaro*, the Competition Bureau provides a comprehensive breakdown of the process by which it undertakes in formulating its sentencing submission to the Court, which the court will generally accept.⁴¹ The Bureau will determine the leniency discount by ascertaining ‘a proxy of 20 percent of the cartel

⁴⁰ Competition Bureau, above n 11, s 3[3.1][9].

⁴¹ *Ibid* s 2.3(7): ‘The determination of the sentence to be imposed is at the sole discretion of the court, and a judge is not bound by a joint sentencing submission.’

participant's affected volume of commerce in Canada.⁴² The determination of the proxy amount is supplemented in the FAQ document.⁴³

The discount that an applicant may be eligible for is tiered: with the first leniency applicant being eligible for a 50 per cent reduction of the fine that would have otherwise been recommended; the second is eligible for a 30 per cent reduction and any subsequent applicants after the second will be determined on a case-by-case basis and this will significantly depend on the timeliness of the application.⁴⁴ The Policy also clearly outlines that the PPSC will have regard to mitigating and aggravating factors when determining the base level fine proxy in accordance with the *Criminal Code*.⁴⁵

Most importantly, when determining whether to charge a participant, the Bureau will have regard to the individual's role and extent of involvement in the offence (as a cartel instigator or coercer); the degree to which the participant benefited from the offence; and whether the individual is a recidivist or has a criminal record.⁴⁶ The policy also states that the aforementioned factors will be considered when recommending imprisonment and notes that the recommendation of prison sentences for subsequent applicants is increasing.⁴⁷ These are significant considerations pertaining to the culpability of the cartel participant that expressly recognise the possibility of imprisonment for subsequent applicants.

The Policy comprehensively outlines the step-by-step approach taken by the Bureau to process a leniency application, commencing with an initial contact or marker request, through to the conclusion of Court proceedings.⁴⁸ Importantly, the Policy indicates what will occur in the event that an applicant seeks to withdraw from the leniency program and states that any information provided to the Bureau up until that point 'will not be used directly against it (the leniency applicant) and will be treated as either confidential or settlement privileged.'⁴⁹ The Bureau provides the same level of detail for its leniency applicants as it does for immunity applicants and

⁴² Ibid s 3.3.

⁴³ Competition Bureau, 'Leniency Program: Frequently Asked Questions' (Competition Bureau, 2010) Q 24.

⁴⁴ Ibid s 303 [15].

⁴⁵ *Criminal Code*, RSC, 1985, c C-46, s 718, 718.1, 718.2.

⁴⁶ Competition Bureau, above n 43, Q 30.

⁴⁷ Ibid.

⁴⁸ Competition Bureau, above n 11, s 3.7.

⁴⁹ Ibid s 4 [34].

therefore the process for the determination of penalty for subsequent applicants is transparent. Despite the fact that the determination of penalty still rests with the court in Canada, the treatment of subsequent immunity applicants by the Bureau is far more predictable than the position in Australia post-*Barbaro*.

(b) *The United Kingdom*

In contrast to the Competition Bureau, the CMA does not have a separate policy for the lenient treatment of subsequent immunity applicants. Instead, an applicant will be eligible for ‘Type C leniency’, which may include:

- (a) Discretionary reductions in corporate penalties of up to 50 per cent; and/or
- (b) Discretionary criminal immunity to specific individuals; and
- (c) Protection from director disqualification proceedings for all directors of the undertaking (if a reduction in corporate penalty is granted).⁵⁰

In order to be afforded lenient treatment by the CMA, an applicant must show that the information they have provided will ‘add significant value to the CMA’s investigation;’ meaning that it must ‘genuinely advance the investigation.’⁵¹ Contrary to the ACCC and the Competition Bureau, the CMA expressly recognises that a delicate consideration of two competing factors needs to be undertaken when considering the grant of lenient treatment, that being: the value of gaining additional information versus the consequences of granting leniency to multiple parties in a single investigation.⁵²

In this vein, the Policy states that where the CMA already has sufficient evidence to establish the existence of the reported cartel activity, it is ‘highly unlikely’ that leniency will be granted, unless it is in the public interest to do so.⁵³ As a result, a subsequent applicant may not be informed of whether they will be treated leniently until much further along in the investigation, or may in fact, not be granted leniency at all.⁵⁴

⁵⁰ Competition and Markets Authority, ‘Applications for Leniency and No-Action in Cartel Cases - Detailed Guidance on the Principles and Process’ (Competition and Markets Authority, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf> s 2.25.

⁵¹ *Ibid* s 2.26.

⁵² *Ibid* s 2.27.

⁵³ *Ibid* s 2.31.

⁵⁴ *Ibid* s 2.42, 2.43; OECD, above n 15, 8.

Thus, there is clearly less certainty that a subsequent leniency applicant will be afforded any lenient treatment at all by the CMA, in comparison to the practice of the ACCC and the Competition Bureau. However, at the expense of certainty, the CMA has established an important threshold: that leniency applicants should at a minimum, provide evidence that will advance the cartel investigation, not simply act as a method by which all cartel participants receive discounted sentences regardless of the evidence they provide.

Whilst the CMA policy is not as specific as the Bureau's, it states that Type C applicants can generally expect to receive discounts in the 25-50 per cent range.⁵⁵ The CMA policy also states that the queue position of leniency applications is not decisive. Thus, an applicant who is third in the queue may receive a discount greater than an applicant who was second to apply.

In contrast to the ACCC and Competition Bureau policies, the CMA policy does not list the factors relevant to the assessment of a leniency discount, except for the overall guiding principle that the evidence adds significant value to the CMA's investigation. This provides little guidance as to the other mitigating and aggravating factors that should be pertinent to this assessment. Further to this and similarly to the ACCC, there is a general lack of information regarding the process by which a leniency application will be dealt with.⁵⁶

(c) *The United States*

The United States does not have a formalised leniency policy for subsequent applicants. In contrast to the aforementioned policies, the method by which subsequent immunity applicants are dealt with by the DOJ is entirely absent from its policy and FAQ document. Instead, the approach taken can be pieced together with the aid of other DOJ documents, namely '*Measuring the Value of Second-In Cooperation in Corporate Plea Agreements*'⁵⁷ and '*The United States Model of Negotiated Plea Agreements: A Good Deal with Benefits for all.*'⁵⁸ The DOJ leniency policy or the FAQ should at least reference these articles, or they should be

⁵⁵ Competition and Markets Authority, above n 50, s 6.9.

⁵⁶ The ACCC will need to rethink its handling of leniency applications post *Barbaro*.

⁵⁷ Scott Hammond, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations' (U.S Department of Justice, 2006).

⁵⁸ Hammond, above n 11.

incorporated/annexed onto these documents to help improve the process by which subsequent applicants are dealt with by the DOJ.

In a similar vein to the CMA Policy, the DOJ acknowledges the criticisms that have been levelled at the concept of ‘plea bargaining’ and asserts that in the context of corporate plea agreements, the benefits outweigh the potential negative consequences of such a practice.⁵⁹ Furthermore, the DOJ makes it clear that its position is not to outline fixed discounts for lenient treatment, as this would serve to undermine the need for proportionality in the assessment of lenient treatment for subsequent offenders.⁶⁰

Similarly to the Competition Bureau, the DOJ is willing to adjust the fixed amount of commerce affected to set a base rate for the determination of a penalty. The base rate will differ depending on whether the applicant was first-in or approached the DOJ subsequently. However, if the leniency applicant provides information that indicates the cartel conduct was broader than initially anticipated, a leniency applicant’s fine will not be increased as a result of this new information.⁶¹

In addition to this, the DOJ will generally offer a ‘cooperation discount’ that seeks to reflect the overall value of the cooperation provided by the subsequent applicant.⁶² On average, the second-in applicant can expect to receive a discount in the range of 30-35 per cent from the bottom of the Guidelines fine range. Subsequent applicants can expect to receive a substantially smaller discount.

The two primary considerations the DOJ will take into account when determining the ‘cooperation discount’ will be related to the timing of the application and the significance of the evidence provided by the applicant. To help practically illustrate how the DOJ considers these key factors, the DOJ provides a relevant case example of a leniency applicant who provided ‘extraordinary cooperation’ and secured a 59 per cent discount as a result. In this respect, the DOJ’s aim is to increase the awareness of how it will consider the timing and significance of the evidence when assessing the cooperation discount, which is pertinent to the transparent operation of the policy.

⁵⁹ Ibid 3.

⁶⁰ Hammond, above n 57, 3. ‘Measuring the value’

⁶¹ Ibid 5.

⁶² Ibid 6.

Further to this, the DOJ has provided *Model Plea Agreement Templates* that outline the standard form and terms that a leniency applicant will be required to agree to, even prior to approaching the DOJ.⁶³ This model agreement is a unique feature of the United States plea negotiation system. Although a potential subsequent applicant may not be able to ascertain with certainty the level of base rate fine or cooperation discount they may receive, the DOJ document provides a detailed breakdown of how the process is likely to proceed. As a result of the *Barbaro/CFMEU* decisions, the process of dealing with subsequent leniency applicants by the ACCC is now starkly different. It would not be possible for the ACCC to seek to design and implement a *Model Cooperation Agreement* to ensure that the rights and obligations pursuant to a cooperation agreement are fair and transparent. The ACCC is thus out of step with international practice in its treatment of subsequent immunity applicants. It remains to be seen whether this will reduce the number of immunity/leniency applications in Australia.

2 *An Assessment of the Key Components of Cooperation for Subsequent Applicants*

Pursuant to the preceding analysis of the treatment of subsequent applicants in Canada, United Kingdom and United States, there are three primary components of a leniency regime, which each jurisdiction has adopted to differing extents. In contrast, as a result of recent case law, the process in Australia stands in stark contrast. Given the widely different approach the ACCC will need to adopt in its treatment of second and subsequent applicants, it is out of line with current international practice. Cooperating parties in Australia have been stripped of the certainty that competition regulators claim is crucial to the operation of the Immunity Policy. As a result, the ACCC may find that parties who are not ‘first-in’ and granted full immunity, may not come forward at all, adopting a ‘wait and see’ approach. This will make it more difficult for the ACCC to gather evidence in relation to the cartel’s operation, as the

⁶³ See, Department of Justice, 'Model Corporate Conditional Leniency Letter' (Department of Justice - Antitrust Division, 2008) <<http://www.justice.gov/atr/public/criminal/239524.htm>>; Department of Justice, 'Model Individual Conditional Leniency Letter' (Department of Justice - Antitrust Division, 2008) <<http://www.justice.gov/atr/public/criminal/239526.htm>>.

ACCC heavily relies on evidence gathered by way of cooperation to support its cases.

The first component of leniency policies abroad relates to the key considerations of leniency, namely the timeliness of the application versus the probative value of the evidence provided by the applicant. In Canada and the United States, the emphasis is seemingly weighed in favour of the timeliness of the application, where the first-in applicant will generally be granted the highest eligible discount; with a tiered discount determination based on a queue. This is particularly emphasised in Canada, whereby the marker system acts as an indicator of the queue by which leniency is sought. These jurisdictions justify this approach by emphasising the need for timely action on behalf of leniency applicants in cartel investigations.

In contrast, Australia and the United Kingdom place more emphasis on the probative value of the evidence provided by the applicant and recognise that a ‘third-in’ applicant may provide more significant evidence than a ‘second-in’ applicant and this should be reflected in a greater discount recommendation. The ACCC has acknowledged that potential immunity or leniency applicants may continue to engage in beneficial cartel conduct for as long as possible on the expectation that they will be able to obtain a reduced penalty pursuant to the leniency program if the cartel is reported.⁶⁴ The ACCC believes that ‘by basing the degree of leniency upon the level of cooperation provided by the cooperating party rather than order of application, this risk is minimised,’⁶⁵ however it is unclear whether the court will adopt the same position.

In this respect, it is important that competition regulators recognise that both the timeliness of the application and its probative value are equally important considerations, and that both carry with them the risk of strategic manipulation. The regulators should question the motivations for seeking leniency and the surrounding circumstances that led to a granting of leniency to ascertain whether there was any intention, or possible attempt, at strategically manipulating the leniency policy in this regard.

The second component relates to the provision of an Amnesty Plus regime, where leniency applicants will be granted immunity, subject to conditions, for a new

⁶⁴ OECD, above n 15, 13.

⁶⁵ Ibid 24.

and undisclosed cartel offence, in addition to lenient treatment for the existing cartel offence. All of the relevant jurisdictions have adopted a similar Amnesty Plus program. The Amnesty Plus regime is perceived as a resource efficient way of securing information for a new offence and thereby aiding in the detection of cartel conduct.⁶⁶

The final component relates to the discount stipulated for lenient treatment. Canada and the United States provide a discount range for leniency applications. Whilst the United Kingdom is less clear about the discount range, Australia does not stipulate a discount range at all. Post-*Barbaro* this may not even be a possibility for the ACCC. There are those jurisdictions, such as Japan and the European Commission that provide a very specific calculation of penalty regime for leniency.⁶⁷ Whilst Canada and the United States do not go this far, these jurisdictions assert that the stipulation of penalty amount or a discount range provides the requisite transparency and predictability necessary for the 'optimal functioning' of leniency programs.⁶⁸ For instance, the DOJ utilises the *Crompton* case to illustrate the operation of the plea agreement system.⁶⁹

In contrast, jurisdictions such as the United Kingdom, emphasise that the 'uncertainty' associated with an undisclosed discount amount extenuates the 'race for leniency;' thus the cooperation discount can be tailored to the particular facts of a case.

The stipulation of discount ranges would strike a more appropriate balance by ensuring that the process by which leniency is determined is transparent, but not so predictable so as to undermine the operation of immunity policies or allow for strategic manipulation of the policy. The ability to exercise discretion in this sense should be allowed, but the competition regulators should also remain vigilant of the fact that providing significant penalties for *all* cartel participants means that cartelists will essentially know that they can engage in cartel conduct and can expect a reduced sentence in return, if not full immunity.

⁶⁶ International Competition Network, 'Anti-Cartel Enforcement Manual: Chapter 2: Drafting and Implementing an Effective Leniency Policy' (International Competition Network, May 2009) s 2.5.2.

⁶⁷ OECD, above n 15, 7.

⁶⁸ *Ibid.*

⁶⁹ *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1048 (N.D. Cal. 2005).

Most importantly, the recent court decisions in relation to the calculation of penalty discounts in *Barbaro* and *CFMEU* marks a new challenge for the ACCC in the determination of penalty amounts. The long held process of the court accepting the ACCC agreed penalty amount has now been overturned. It is possible that there will now be inconsistency, and therefore great uncertainty, as to whether the court will accept the ACCC or CDPP's penalty recommendations. This may have an adverse impact on the ability of cartel participants to assess their position in relation to cooperation, which may result in the adoption of a 'wait and see' approach. It remains to be seen whether the court will continue to disregard the agreed penalty outcomes when the decision goes to the High Court in October. The position of subsequent immunity applicants in Australia is thus in a state of flux.

B *Whistleblower Protection*

Whistleblowers have been an integral part of the detection of misconduct throughout history. It is said to be the internal position of the individual in the organisation that generally leads them to become aware of internal wrongdoing. However, it is this very position that can expose them to unfair outcomes or immense pressure to remain silent.⁷⁰ Although there is no universally accepted definition of a 'whistleblower,' one widely held view in Australia is that it relates to 'the disclosure by an organisation's members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons that may be able to effect action'.⁷¹ Generally, the misconduct relates to serious wrongdoing, such as fraud, health and safety violations and corruption. Since cartel conduct is also serious wrongdoing, it is important that whistleblower protection is considered as another enforcement strategy, in addition to immunity.

In the wake of large corporate collapses, such as Enron in 2001, and more recently the corporate misconduct that led to the Global Financial Crisis, there has been a greater focus on the role of the whistleblower in the detection of such

⁷⁰ A J Brown, 'Towards 'Ideal' Whistleblowing Legislation? Some lessons from Recent Australian Experience' (2013) 2 *E-Journal of International and Comparative Labour Studies* 4, 6.

⁷¹ Janine Pascoe, 'Corporate Sector Whistleblower Protection in Australia - Some Regulatory Problems and Issues' (2008) 22 *Australian Journal of Corporate Law* 82, 82.

misconduct.⁷² The value of the whistleblower in the detection of corporate wrongdoing is reflected in a number of studies that indicate that whistleblowers are a significant source of fraud detection.⁷³

The importance of whistleblowers has also been recognised by the OECD in its revised (2004) Principles of Corporate Governance, which states that:

Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this.⁷⁴

This OECD statement also reflects the inherent risks faced by whistleblowers in attempting to reveal corporate wrongdoing. Absent protection, whistleblowers are faced with the prospect of heavy employer retaliation, leading to the loss of their jobs, immense distress and possibly even resulting in being blacklisted from the industry. These are real risks that whistleblowers must consider when deciding whether to reveal the corporate misconduct they have discovered. This can often lead to whistleblowers being deemed to be ‘traitors’ or ‘rats’ which brands them as dishonest or disloyal employees.

Recognising the value of corporate whistleblowers and these inherent risks, governments around the world have sought to protect whistleblowers by enacting legislation, to differing degrees, that is aimed at preventing or compensating the whistleblower for the retaliation they may face after they have blown the whistle. This chapter will outline the whistleblower protection frameworks for corporate whistleblowers that exist in Australia, the United States, the United Kingdom and

⁷² See, eg, Peter Yeoh, 'Whistleblowing: Motivations, Corporate Self-Regulation, and the Law' (2014) 56 *International Journal of Law and Management* 459, 460-461; Stijn Claessens and Laura Kodres, 'The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions' (International Monetary Fund - Research Department and Institute for Capacity Development, 2014) 11-12.

⁷³ See eg, Matt Vega, 'Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Bounty Hunting' (2012) 45 *Connecticut Law Review* 483, 489; Geoffrey Christopher Rapp, 'Four Signal Moments in Whistleblower Law: 1983-2013' (2013) 30 *Hofstra Labor and Employment Law Journal* 389, 389; William E Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels' (2000-2001) 69 *George Washington Law Review* 766, 774; Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 *Common Law World Review* 144, 145; Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, 'Bounty Hunters, Whistleblowers and a New Regulatory Paradigm' (2013) 41 *Australian Business Law Review* 292, 292-293.

⁷⁴ Pascoe, above n 71, 2; OECD, 'OECD Principles of Corporate Governance' (Organisation for Economic Cooperation and Development, 2004) <<http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf>> s IV(e); See also OECD, 'Whistleblower Protection: Encouraging Reporting' (Organisation for Economic Cooperation and Development, 2012) <<http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>>.

Canada to demonstrate how these protections have largely been deemed ineffective at protecting whistleblowers. It is important to note that this chapter will focus on the protection afforded to private or corporate whistleblower provisions, as these protections are most relevant to the context of cartel whistleblowers.

This analysis will also reveal that there is a lack of specific whistleblower protection for the detection of cartel conduct by third parties, particularly in Australia. Much of the scholarly attention has been focused on the role of immunity and leniency policies in anti-cartel enforcement, without recognising the important role that third party whistleblowers can also play, given that whistleblowers are a significant source of detection of corporate misconduct. Arguably, those who have not been involved in the cartel should be afforded greater protection than those who are granted immunity, as third party whistleblowers have generally not committed any wrongdoing.

This section will conclude by outlining the steps that need to be taken by the Australian Government to legislate for the protection of cartel whistleblowers before proceeding to a more controversial analysis of the value of implementing a financial incentive or ‘bounty system’ in Australia, to further aid in the detection of cartel conduct.

3 *The Position in Australia*

As part of the Corporate Law Economic Reform Program 9 (‘CLERP 9’) reforms, specific whistleblowing provisions were introduced into the *Corporations Act 2001* (Cth) in 2004, with the insertion of Part 9.4AAA entitled ‘Protection for Whistleblowers’. Section 1317 AA stipulates that protection will be extended to:

- (i) an officer of a company; or
- (ii) an employee of a company; or
- (iii) a person who has a contract for the supply of services or goods to a company; or
- (iv) an employee of a person who has a contract for the supply of services or goods to a company.

Pursuant to this provision, a ‘discloser’ will only receive protection where the disclosure is made to either:⁷⁵

- (i) ASIC; or

⁷⁵ *Corporations Act 2001* (Cth) s 1317AA(b).

- (ii) the company's auditor or a member of an audit team conducting an audit of the company;
or
- (iii) a director, secretary or senior manager of the company; or
- (iv) a person authorised by the company to receive disclosures of that kind.

Subsection C stipulates that a discloser is required to disclose their identity prior to revealing the disclosure. Subsection D requires that the discloser must have 'reasonable grounds' to believe that the company, or officer or employee of that company, has, or may have, contravened a provision of the Corporations Legislation. Subsection E requires that the disclosure must have been made in 'good faith'.

The proceeding sections in the Act outline the protections that are afforded to the informant in the form of: being exempt from civil and criminal liability,⁷⁶ being able to be reinstated if the discloser's employer terminates the employment on the basis of the disclosure⁷⁷ and also prohibits the victimisation of the discloser.⁷⁸ If the court is satisfied that the person has contravened these provisions and the victim has suffered detriment then that person is liable to compensate the victim for the damage.⁷⁹

These whistleblower provisions have attracted widespread criticism, particularly due to their narrow application. The primary criticisms are as follows:

(a) The Application of the Act – Who the Provisions Protect

Most notably, the definition encompassed within the section does not extend to former employees, whom can provide vital information in relation to the corporate misconduct.⁸⁰ The fact that they are no longer employed by the organisation may very well be due to the employee's attempts to reveal or resolve the misconduct, which is why protection should be extended to former employees. This definition sits in direct contrast to the recently enacted *Public Disclosure Act 2013* (Cth), relating to the disclosure of public wrongdoing, where the definition does extend to former public officials.⁸¹

⁷⁶ Ibid s 1317AB(1)(a).

⁷⁷ Ibid s 1317AB(3).

⁷⁸ Ibid s 1317AC.

⁷⁹ Ibid s 1317AD.

⁸⁰ Sulette Lombard and Vivienne Brand, 'Corporate Whistleblowing: Public Lessons for Private Disclosure' (2014) 42 *Australian Business Law Review* 351, 355.

⁸¹ s 7(1)(a).

(b) *The Scope of the Conduct to Which the Provisions Relate*

One of the most significant criticisms of the whistleblower provisions is that the nature of the disclosure can only relate to a contravention of the *Corporations Act 2001* (Cth). For the purposes of this thesis, this means that a third party whistleblower that detects cartel conduct within a corporation will not be protected by these provisions, due to their extremely narrow application. As will be discussed below, this narrow definition is not in line with other international standards, particularly that in the *Sarbanes-Oxley Act*⁸²; an Act that extends to cases of corporate fraud, or the Bill currently before the United States legislature that specifically includes disclosure of cartel conduct.⁸³ The public disclosure provisions in Australia have a wider application, and extend, for example, to the contravention of any law; conduct that perverts the course of justice; conduct that constitutes maladministration; and conduct that unreasonably results in a danger to the health or safety of one or more persons or the environment.⁸⁴

(c) *No Positive Duty to Investigate*

Pursuant to the provisions, the Australian Securities and Investment Commission (ASIC) is the primary designated investigatory body for the disclosed misconduct. However, Part 9.4AAA does not place any obligation on the person or agency who 'receives' the disclosure to conduct an investigation. Whistleblowers Australia was strongly critical of this issue in a submission to the Treasury, as part of an Options Paper released by the Government in 2009.⁸⁵ They argue that the provisions do not

⁸² *Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act)* Pub L No 107-204, 116 Stat 745.

⁸³ *Criminal Antitrust Anti-Retaliation Act of 2013*, S 42, 113th Congress 2013 at <http://www.gpo.gov/fdsys/pkg/BILLS-113s42es/pdf/BILLS-113s42es.pdf>. The bill was passed by the Senate in November 4, 2013 but has not been passed by the House of Representatives. On 17th June 2015 the Bill was reintroduced and passed the Senate on the 22nd of June 2015. The Bill awaits approval from the House of Representatives: Steven Pearlman and Rachel Fischer, *Antitrust Whistleblower Protection Bill Introduced in Senate (Again)* (July 14 2015) *The National Law Review* <file:///C:/Users/pl490/Downloads/Antitrust%20Whistleblower%20Protection%20Bill%20Introduced%20In%20Senate%20(Again)%20_%20The%20N.pdf>.

⁸⁴ Lombard and Brand, above n 80, 355; See *Public Interest Disclosure Act 2013* (Cth).

⁸⁵ Peter Bennett, 'Submission to the Australian Treasury, Australian Securities and Investment Commission (ASIC) Improving Protections for Corporate Whistleblowers' (Whistleblowers Australia, 2010) 7.

oblige the 'receiver' to conduct a proper investigation, nor does it require that the whistleblower be informed of the progress or outcome of the investigation.

Most significantly, the failure of ASIC to properly investigate whistleblower claims in relation to the misconduct of Commonwealth Financial Planning Limited and the Commonwealth Bank of Australia featured prominently in the Senate Committee's recent review into ASIC's performance.⁸⁶ It was claimed that ASIC's inadequate investigation of the misconduct resulted in, among other things, further losses to 'unsuspecting clients and enabling CFPL/the CBA to cover-up the extent of the misconduct at CFPL and thereby deny fair and reasonable compensation to victims.'⁸⁷

ASIC itself admitted that the *Corporations Act* does not mandate or enable ASIC to act on behalf of whistleblowers to ensure their rights as whistleblowers are protected. As ASIC noted, 'where a whistleblower...seeks to rely on the statutory protections against third parties, they will generally have to enforce their own rights or bring their own proceedings under the relevant legislation to access any remedy. The legislation does not provide ASIC with a direct power to commence court proceedings on a whistleblower's behalf.'⁸⁸

(d) The Bona Fide Requirement Should be Removed

The bona fide requirement is another primary criticism of the current Part 9.4AAA whistleblower provisions. It is presumably aimed at preventing whistleblowers from revealing conduct based on mixed motives, such as malice or revenge. However, the

⁸⁶ Senate Economics References Committee, 'Performance of the Australian Securities and Investments Commission' (Australian Government, 2014)X, Ch 9: the committee examined misconduct that occurred between 2006 and 2010 by financial advisers and other staff at Commonwealth Financial Planning Limited (CFPL), part of the Commonwealth Bank of Australia Group (CBA). Advisers deliberately neglected their duties and placed their personal interests far above the interests of their clients. The assets of clients with conservative risk positions, such as retirees, were allocated into high-risk products without their knowledge to the financial benefit of the adviser, who received significant bonuses and recognition within CFPL as a 'high performer'. There was forgery and dishonest concealment of material facts. Clients lost substantial amounts of their savings when the global financial crisis hit; the crisis was also used to explain away the poor performance of portfolios. Meanwhile, it is alleged that within CFPL there was a management conspiracy that, perversely, resulted in one of the most serious offenders, Mr Don Nguyen, being promoted.

⁸⁷ Ibid 161.

⁸⁸ Ibid 235.

motives of the whistleblower should not be relevant to their entitlement to protection; rather the focus should be on the strength of the allegations and the evidence the whistleblower supplies.

Arguably, there will always be mixed motives in the context of whistleblowing and this requirement could unfairly lead to whistleblowers being unprotected from reprisals, even when part of their intention was to 'do the right thing' and report the misconduct. More importantly, this takes the focus away from the fact that the corporation has engaged in misconduct, which is the more significant factor. As a result of these criticisms, there have been calls to remove the Bona Fide requirement and replace it with a 'reasonably held, honest belief' test to be determined on an objective basis. This test would largely overcome the difficulties associated with the bona fide requirement and lead to greater protection for whistleblowers.

As a result of these criticisms, the Federal Government released an Options Paper in 2009, which was aimed at improving the legislative protections for corporate sector whistleblowers.⁸⁹ The Options paper revealed that only four whistleblowers had ever used the protection of the Part 9.4AAA provisions to provide information to ASIC, since the provisions were introduced in 2004.⁹⁰ Moreover, further studies up until 2010, revealed there had been no reported cases of any person seeking compensation or damages caused by a contravention of the anti-retaliation provisions, or any reported cases of criminal prosecutions alleging a contravention of either the confidentiality or anti-retaliation provisions.⁹¹ Furthermore, there was no evidence of any enforcement activity of the whistleblower protection provisions by ASIC.⁹² These studies also revealed that only 31.5 per cent of the companies in the data set had whistleblower policies and procedures in place.⁹³

More recently, in the Senate Committee's investigation into ASIC's performance in June 2014, the Committee noted that there was a general consensus amongst the submissions that the current whistleblower provisions in the private

⁸⁹ See Corporations and Financial Services Division, 'Improving Protections for Corporate Whistleblowers - Options Paper' (Australian Treasury, 2009).

⁹⁰ Pascoe and Welsh, above n 73, 152.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid 161. This study may also indicate that Australia is lagging behind countries, such as the United States, in terms of detecting corporate misconduct through whistleblower channels.

sector are out-of-date, largely inadequate and lagging behind international standards.⁹⁴ As a result of these criticisms, ASIC have outlined a number of changes that have been undertaken in order to improve the regulator's role in whistleblower protection, which includes providing a more centralised system for the handling of whistleblowing complaints; providing prompt and clear communication to whistleblowers in the assessment and handling of the disclosure and providing confidentiality within the applicable legal framework.⁹⁵

The ACCC has also called for greater protection for cartel whistleblowers in the context of the Competition Law Review (Harper Review).⁹⁶ The ACCC recognises the limited protection afforded to whistleblowers within the *Competition and Consumer Act 2010* (Cth) pursuant to section 162A, in respect of intimidation or other coercive conduct as a result of the informant's cooperation with the ACCC. The ACCC is of the view that improved protection for cartel whistleblowers will result in greater quality of material provided to aid in the detection of misconduct, such as cartel conduct.⁹⁷

This section has demonstrated that the corporate whistleblower protections in Australia are insufficient and in need of reform. This is particularly in the context of cartel whistleblowing, where there is no protection for those third parties who wish to come forward with information to the ACCC in relation to cartel conduct. This section will now turn to a brief comparative analysis before concluding with the recommendations needed to extend this protection adequately.

4 *The United States*

In the wake of the collapse of Enron and the surrounding corporate scandals, the United States Congress held hearings to investigate how the country's corporate governance system and law enforcement agencies failed to detect the widespread misconduct.⁹⁸ Their investigations found that a number of employees knew about the

⁹⁴ Senate Economics References Committee, above n 86, 236.

⁹⁵ Ibid 242.

⁹⁶ Australian Competition and Consumer Commission, 'Submission to the Competition Policy Review - Response to the Draft Report' (Australian Competition and Consumer Commission, 2014) 78. 'Harper Review'

⁹⁷ Ibid. Despite these comments, the Final Harper Report did not address this issue: Ian Harper et al, 'Competition Policy Review - Final Report' (Commonwealth of Australia, 2015).

⁹⁸ See, Library of Congress, *Guide to Law Online: Enron Hearings* Law Library of Congress

corporate misconduct but chose to remain silent. It was within this context that the *Sarbanes-Oxley Act of 2002*⁹⁹ (*'Sarbanes-Oxley'*) was enacted to implement whistleblower protection mechanisms for corporate whistleblowers.

Specifically, *Sarbanes-Oxley* prohibits employers from discharging, demoting, suspending, threatening, harassing, or discriminating against an employee of a publicly traded company who provides information about any act that the employee 'reasonably believes constitutes a violation of . . . (statutes prohibiting mail fraud; wire, radio, or television fraud; or commodities fraud), any rule or regulation of the Securities and Exchange Commission ('SEC'), or any provision of Federal law relating to fraud against shareholders.'¹⁰⁰ A whistleblower may report this misconduct externally, to a regulatory agency, primarily the Occupational Safety and Health Administration (OSHA), to Congress or internally, to a supervisor.¹⁰¹

If a whistleblower demonstrates that they have suffered retaliation, the employee is entitled to reinstatement;¹⁰² back pay with interest;¹⁰³ and compensation for legal fees, including court costs.¹⁰⁴ These provisions are broadly similar to the anti-retaliation provisions in Australia, although they have a much wider application to corporate misconduct, as they are not tied to a contravention of any particular Act.

However, in contrast to ASIC's position, *Sarbanes-Oxley* prevents the OSHA from dismissing a complaint if the employee meets the low burden of making a prima facie case of retaliation showing that '[t]he employee engaged in a protected activity;' (2) the employer 'knew or suspected that the employee engaged in the protected activity,' (3) '[t]he employee suffered an adverse action,' and (4) '[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.'¹⁰⁵ OSHA need only find reasonable cause to believe that the employee was retaliated against and it can issue relief.

Due to the wide applicability of the Act, the low burden of proof for

<<http://www.loc.gov/law/help/guide/federal/enronhrqs.php>>; See, eg, Committee of Financial Services, 'Wrong Numbers: The Accounting Problems at WorldCom' (US House of Representatives, 2002) <<http://www.gpo.gov/fdsys/pkg/CHRG-107hhr83079/html/CHRG-107hhr83079.htm>>.

⁹⁹ *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745. (*'Sarbanes Oxley'*)

¹⁰⁰ SOX Id. § 1514A(a)(1).

¹⁰¹ Id. § 1514A(a)(1)(A)-(C); 29 C.F.R. § 1980.103(a)-(c) (2014); Jeff Vogt, 'Don't Tell Your Boss? Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank' (2015) 67 *Oklahoma Law Review* 353, 355.

¹⁰² *Ibid* § 1514A(c)(2)(A).

¹⁰³ *Ibid* § 1514A(c)(2)(B).

¹⁰⁴ *Ibid* § 1514A(c)(2)(C).

¹⁰⁵ *Ibid* § 1980.104(e)(2); Vogt, above n 101, 3.

employees and the procedural protections afforded under the Act, many believed that *Sarbanes-Oxley* had significantly improved whistleblower protections in the United States, with Taxpayers Against Fraud deeming it to be ‘the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets.’¹⁰⁶

However, one of the greatest perceived failures of the Act is that it did not prevent the corporate misconduct that led to the Global Financial Crisis in 2008, where ‘corporate officers, government regulators, and law enforcement agencies ignored the warnings of employees who tried to report problems in the subprime mortgage industry.’¹⁰⁷

Despite the high expectations of *Sarbanes-Oxley*, the Act has been subject to wide criticisms in its failure to protect corporate whistleblowers. It is important to note within this context that the empirical studies that have been undertaken to date that attempt to measure the effectiveness of the *Sarbanes-Oxley* provisions show an incomplete, if not, inconsistent picture. One of the more reliable indicators of the success of the Act can be garnered from an analysis of whether the Act protected employees from reprisals and compensated them for the retaliation they had suffered and this can be largely determined by examining the outcomes of Sarbanes-Oxley retaliation cases filed with OSHA.

An empirical study of this nature conducted by Professor Richard E. Moberly revealed that from the *Sarbanes-Oxley* Act’s effective date until the end of 2011, employees won 1.8 per cent of the 1260 cases OSHA decided.¹⁰⁸ Significantly, OSHA did not decide a single case in favour of *Sarbanes-Oxley* claimants and found for employers in 488 straight decisions.¹⁰⁹

There are many reasons cited for these perceived failures of *Sarbanes-Oxley*, that range from: criticisms relating to the limited time period in which to file a retaliation claim;¹¹⁰ that OSHA was inexperienced in dealing with security laws claims, did not possess the technical knowledge required and were overburdened,

¹⁰⁶ Richard Moberly, 'Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later' (2012) 64 *South Carolina Law Review* 1, 5.

¹⁰⁷ Ibid 3, 6-9.

¹⁰⁸ Ibid 12.

¹⁰⁹ Ibid.

¹¹⁰ Ibid; Chelsea Hunt Overhuls, 'Unfinished Business: Dodd-Frank's Whistleblower Anti-Retaliation Protections Fall Short for Private Companies and their Employees' (2012) 6 *Journal of Business, Entrepreneurship and the Law* 1, 7.

with no additional resources or personnel allocated to the whistleblower investigations;¹¹¹ and a narrow interpretation of the *Sarbanes-Oxley* provisions by the Administrative Review Board.¹¹²

In light of these criticisms, and the consequences of the Global Financial Crisis, a number of changes were implemented in an attempt to reform whistleblower protection in the United States. Most notably, the implementation of the *Dodd-Frank Act* provided enhanced protection amendments to Section 806 of *Sarbanes-Oxley* in two primary ways.

The first relates to the increase in the time that a whistleblower can lodge a complaint, from ninety days to one hundred and eighty days.¹¹³ Secondly, retaliation protection was extended to protect employees of any subsidiary or affiliate of a public company whose financial information is included in the consolidated financial statements of company, or in a nationally recognised statistical rating organisation.¹¹⁴ Additionally, other positive initiatives included:

- Implementing more training and providing more resources to OSHA;
- Providing further education in relation to whistleblower investigations and the creation of the revised Whistleblower Investigation Manual; and;
- Changes in the Administrative Review Boards composition and approach to its interpretation of *Sarbanes-Oxley*.¹¹⁵

(e) Introduction of Specific Cartel Whistleblower Protections

In July 2011, the United States Government Accountability Office (GAO) conducted an investigative analysis into the effects of the *Antitrust Criminal Penalty Enhancement and Reform Act*¹¹⁶ (ACPERA) based on a reauthorisation mandate. As part of this process, GAO analysed Department of Justice (DOJ) data on criminal

¹¹¹ Overhuls, above n 110, 7; Samuel Leifer, 'Protecting Whistleblower Protections in the Dodd-Frank Act' (2014) 113 *Michigan Law Review* 121, 126.

¹¹² Moberly, above n 106, 13.

¹¹³ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 922(c), 124 Stat. 1376, 1871 (2010).

¹¹⁴ *Ibid* § 929A.

¹¹⁵ Moberly, above n 106, 13.

¹¹⁶ *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub. L. No. 108-237, 118 Stat. 661.

cases between 1993-2010, interviewed DOJ officials and also interviewed a sample of plaintiffs, defence attorneys from 17 civil cases and key stakeholders.¹¹⁷

One of the issues discussed within the GAO interviews was whether there should be protection for whistleblowers that report criminal antitrust violations and experience retaliation from their employees as a result of this disclosure. According to the study, all 16 key stakeholders who provided a response in relation to this issue generally supported the addition of civil whistleblower protection, although senior DOJ Antitrust Division officials stated they neither support nor oppose the idea.¹¹⁸ As a result, the GAO recommended that Congress consider implementing cartel whistleblower protection specifically.

To this end, Senators Patrick J. Leahy (D-VT), Chairman of the Senate Judiciary Committee, and Ranking Member Chuck Grassley (R-IA) jointly introduced legislation that would provide anti-retaliatory protections for price-fixing cartel whistleblowers. On November 4, 2013, the Senate unanimously passed this bill, after its reintroduction.¹¹⁹ The *Leahy-Grassley Criminal Antitrust Anti-Retaliation Act of 2013* amends *ACPERA* by adding civil whistleblower protections for covered individuals who provide the Federal Government information regarding or otherwise assisting an investigation or a proceeding relating to:

(a) Any violation of or any act or omission the covered individual reasonably believes to be a violation of the antitrust laws, or

(b) Any violation of or any act or omission the covered individual reasonably believes to be a violation of another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an investigation by the DOJ of a potential violation of the antitrust laws.¹²⁰

The protection does not extend to a covered individual who violates or attempts to violate the antitrust laws, or obstructs or attempts to obstruct the DOJ's investigation of any violation of the antitrust laws.¹²¹ Relief pursuant to the Act includes:

¹¹⁷ See, United States Government Accountability Office, 'Criminal Cartel Enforcement - Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection' (United States Government Accountability Office, 2011) <http://www.gao.gov/assets/330/321794.pdf>.

¹¹⁸ Ibid 46.

¹¹⁹ *Criminal Antitrust Anti-Retaliation Act of 2013*, S 42, 113th Congress 2013 at <http://www.gpo.gov/fdsys/pkg/BILLS-113s42es/pdf/BILLS-113s42es.pdf>. The bill was passed by the Senate on 4 November, 2013 but has not been passed by the House of Representatives. On 17 June 2015 the Bill was reintroduced and passed the Senate on the 22 June 2015. The Bill awaits approval from the House of Representatives: Pearlman and Fischer, above n 83.

¹²⁰ Ibid § 216(a)(1).

¹²¹ Ibid § 216 (a)(2).

- (a) reinstatement with the same seniority status that the covered individual would have had, but for the discrimination;
- (b) the amount of back pay, with interest; and
- (c) compensation for any special damages sustained as a result of the discrimination including litigation costs, expert witness fees, and reasonable attorney's fees.¹²²

Although the Act has passed the Senate, the House of Representatives never approved it.¹²³ It has recently been reintroduced and the Senate has passed the Act once more.¹²⁴

5 *United Kingdom*

In comparison to Australia and the United States, the United Kingdom provides a more comprehensive legal framework for the protection of whistleblowers, as the Act encompasses both public and private disclosures. It has been noted that it is the *Public Interest Disclosure Act 1998* (United Kingdom) ('PIDA'), rather than the United States provisions, which have been substantively replicated around the world.¹²⁵

PIDA sets forth a wide definition of what constitutes a 'worker' for the purposes of the Act and extends to employees, workers, contractors, trainees, agency staff, homeworkers, police officers and every professional in the National Health Service ('NHS').¹²⁶ The only exceptions to this definition are those who are genuinely self-employed, volunteers, the intelligence services or the armed forces.

The conduct that constitutes a 'qualifying disclosure' is also much wider than the provisions in Australia and the United States, as it is necessary to show that 'in the reasonable belief of the worker making the disclosure, the information tends to show one or more of the following':

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,

¹²² Ibid § 216 (c).

¹²³ The bill was passed by the Senate on 4 November, 2013 but has not been passed by the House of Representatives. It has recently been reintroduced: See, eg, Pearlman and Fischer, above n 83.

¹²⁴ Paul Saint-Antoine et al, *Senate Passes Another Criminal Antitrust Anti-Retaliation Act* (31 July 2015) Lexology

<file:///C:/Users/pl490/Downloads/Senate%20passes%20another%20Criminal%20Antitrust%20Anti-Retaliation%20Act%20-%20Lexology%20(1).pdf>.

¹²⁵ Jeanette Ashton, '15 Years Of Whistleblowing Protection Under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?' (2015) 44 *Industrial Law Journal* 29, 30.

¹²⁶ *Public Interest Disclosure Act 1998* (United Kingdom) c 23, s 43(K).

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.¹²⁷

For the purposes of this section, whether the discloser ‘reasonably believes’ that the information tends to show one of the above factors, will be determined objectively, having regard to the discloser’s personal circumstances.¹²⁸

Given that cartel conduct is now criminalised in the United Kingdom, it would follow that an employee who reports cartel conduct to one of the prescribed persons would be likely be ‘protected,’ pursuant to these provisions. This demonstrates the much wider application that these provisions have in comparison to Australia and the United States.

Disclosure can be made to a wide range of internal and external persons and/or bodies that range from: the employer; in the course of seeking legal advice; to a Minister of the Crown; to prescribed persons;¹²⁹ disclosure that meets the conditions of section 43G;¹³⁰ and disclosure of an exceptionally serious failure.¹³¹ Similarly to Australia, the United Kingdom protections do not impose a positive duty to investigate upon the prescribed persons receiving the disclosure. This means that the prescribed person has absolute discretion as to whether or not to investigate the claim and furthermore, the prescribed person is not required to keep the whistleblower informed of the progress or outcome of their claim. This factor can significantly reduce the effectiveness of a whistleblower protection system.

Based on widespread consultation in relation to this issue, the United Kingdom government proposes to introduce a duty on prescribed persons to report

¹²⁷ Ibid s 43B(1).

¹²⁸ Doug Pyper, 'Whistleblowing and Gagging Clauses: the Public Interest Disclosure Act 1998' (House of Commons Library - Business and Transport Section, 2014)

<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00248>> 6.

¹²⁹ *Public Interest Disclosure Act 1998* (United Kingdom) c 23, s 43(F): This section protects disclosures made to a person prescribed by an order made by the Secretary of State; *ibid* 7.

¹³⁰ This may allow an employee to report the misconduct to the press, subject to the conditions listed within the section.

¹³¹ The rationale behind this protection appears to be that, where a matter is exceptionally serious, it is in the public interest that its disclosure should not be delayed. Disclosures under this section are subject to similar conditions to disclosure under Section 43G, including the requirement of reasonableness.

annually.¹³² In its most recent report, the Government has stated that it will seek further consultation in relation to finalising the details of the matter, including detailed consideration as to what should be included within the annual report that prescribed persons will be required to submit. The Government expects that it should include matters such as the number of disclosures received; numbers of claims investigated; and of those claims investigated, the number of organisations which had a whistleblowing policy in place.¹³³

If an employee suffers detriment by his or her employer for having made a protected disclosure, that employee may enforce their rights by presenting a complaint to an employment tribunal.¹³⁴ Where an employee is dismissed for having made a protected disclosure, the employee will be regarded as having been unfairly dismissed.¹³⁵ Furthermore, there is no upper limit on the amount of financial compensation obtainable in a whistleblowing-based unfair dismissal claim.¹³⁶

Prior to the reforms of 2013, the definition of ‘qualifying disclosure’ used to require that the disclosure was made in ‘good faith,’ similar to the current Australian provisions.¹³⁷ This requirement was criticised for substantially the same reasons as the Australian equivalent, given there was concern that the requirement would shift the focus away from the nature of the disclosure, toward the motivations of the person disclosing.

As a result of these criticisms, the *Enterprise and Regulatory Reform Act 2013* was enacted to introduce a number of changes into United Kingdom’s whistleblowing laws.¹³⁸ One of the primary changes was the introduction of the requirement that the disclosure ‘is made in the public interest’ after ‘in the reasonable belief of the worker making the disclosure’¹³⁹ to replace the good faith requirement. Instead, there now exists a provision that allows for the amount of compensation owed to the employee to be reduced where the disclosure is not made in good

¹³² UK Department for Business Innovation & Skills, 'Whistleblowing Framework Call for Evidence - Government Response' (UK Department for Business Innovation & Skills, 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323399/bis-14-914-whistleblowing-framework-call-for-evidence-government-response.pdf> 23.

¹³³ Ibid.

¹³⁴ *Employment Rights Act 1996* (United Kingdom) c18, s 48(1A).

¹³⁵ Ibid s 103A.

¹³⁶ Ibid s124(1A).

¹³⁷ *Corporations Act 2001* (Cth) s 1317AA(1)(e).

¹³⁸ *Enterprise and Regulatory Reform Act 2013* (United Kingdom) c 24.

¹³⁹ See *Employment Rights Act 1996* (United Kingdom) c 18, s43B.

faith.¹⁴⁰

Essentially, the introduction of a ‘public interest’ test was an attempt to narrow the wide application of the Act, as personal disputes would no longer be covered under the provisions, such as a dispute over an employment contract.¹⁴¹ However, the definition of ‘public interest’ is not provided in the Act and thus the interpretation of this provision by the Tribunal remains to be seen. Furthermore, there is concern that this provision will simply act as another hurdle to be overcome in order for a ‘worker’ to be afforded protection pursuant to PIDA.¹⁴²

Pursuant to wide spread scrutiny of PIDA’s provisions and the wide interpretation adopted by the Tribunals, the United Kingdom Government released a consultation entitled ‘The Whistleblower Framework: call for evidence’ in July 2013.¹⁴³ On the back of this consultation, the charity Public Concern at Work (pcaW) set up the Whistleblowing Commission to examine the effectiveness of existing arrangements for workplace whistleblowing in the United Kingdom and to make recommendations for change.¹⁴⁴ The final consultation report, released by the Commission, reveals that the vast majority of respondents were of the view that PIDA was not working as intended, largely due to the aforementioned criticisms.¹⁴⁵

The United Kingdom Government has recently released its Government Response paper after its review of the consultation submissions and is considering further changes in order to protect whistleblowers.¹⁴⁶ The report identified five important themes that emerged from the submissions that informed the Government’s recommendations for reform: (1) the balance of power between the whistleblower and the employer and the support both parties receive; (2) the level of

¹⁴⁰ *Enterprise and Regulatory Reform Act 2013* (United Kingdom) c 24, s 18.

¹⁴¹ Adam Lambert and Ruth Bonino, 'Changes to Protection for Whistleblowers' (Clyde & Co, 2013) <http://www.clydeco.com/uploads/Files/Publications/2013/CC003455_Changes_to_Protection_for_Whistleblowers_25_06_13.pdf> 1.

¹⁴² Ashton, above n 125, 34.

¹⁴³ See, UK Department for Business Innovation & Skills, 'The Whistleblowing Framework: Call for Evidence' (UK Department for Business Innovation & Skills, 2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212076/bis-13-953-whistleblowing-framework-call-for-evidence.pdf>The Whistleblower Framework: call for evidence' in July 2013:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323399/bis-14-914-whistleblowing-framework-call-for-evidence-government-response.pdf

¹⁴⁴ See The Whistleblowing Commission UK, 'Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK' (Public Concern at Work - The Whistleblowing Charity, 2013) <<http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf>>

¹⁴⁵ Ibid 26.

¹⁴⁶ UK Department for Business Innovation & Skills, above n 132, 22.

protection the whistleblower receives and how this will impact of the effectiveness of the provisions; (3) the roles that the regulators and prescribed persons play in the whistleblowing process and analysing how these bodies respond to whistleblower complaints and how this can have a significant impact on the confidence that whistleblowers have in the provisions; (4) the categories of worker covered by the provisions and who qualifies for the protections to identify groups who may witness malpractice but are currently not afforded a remedy and; (5) the need for cultural change for perceptions of the role of whistleblowers.

The effectiveness of United Kingdom's whistleblowing laws will be subject to the success of the proposed reforms. However, in comparison to the Australia and United States provisions, a cartel whistleblower is likely to be protected by these laws without the need to implement specific cartel whistleblower provisions. This reflects a more uniform and harmonised whistleblower framework that should be seriously considered by Australia.

6 Canada

In contrast to the aforementioned jurisdictions, Canada lacks adequate whistleblower protections in the private sector, although there are indicators of a growing trend towards greater protection. In a 2014 study into the whistleblower laws in the G20 countries, the results for Canada show that whistleblower protection was 'absent' or 'not at all comprehensive' in relation to all of the established criteria, except for breadth of retaliation.¹⁴⁷

The report states that the only provision relating to whistleblower protection of employees of private companies is encompassed within the *Criminal Code* RSC 1985, c C-46 ('*Criminal Code*'). Section 425.1 prohibits employers from retaliating or threatening to retaliate against employees who provide information to law enforcement officials. A violation of this section could result in up to 5 years imprisonment.¹⁴⁸

¹⁴⁷ Simon Wolfe et al, 'Whistleblower Protection Rules in G20 Countries: The Next Action Plan - Public Consultation Draft' (Blueprint for Free Speech; The University of Melbourne; Griffith University & Transparency International Australia, 2014) <<http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf>> 32.

¹⁴⁸ *Criminal Code*, s 425.1(2).

However, the scope of this provision is limited, as it only applies to employer wrongdoing that constitutes a criminal offence or is otherwise unlawful, and only protects employees who report to law enforcement officials. The *Criminal Code* does not protect employees who report wrongdoing, such as misappropriation of funds, internally within a company.¹⁴⁹ Significantly, the G20 Whistleblower report indicates that there is no evidence or known examples where the provision has ever been used.¹⁵⁰

However, there are specific cartel whistleblower provisions that exist pursuant to the *Competition Act*, RSC 1985, c C-34. Section 66.2 provides that:

(1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

(a) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has committed or intends to commit an offence under this Act;

(b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under this Act;

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order that an offence not be committed under this Act; or

(d) the employer believes that the employee will do anything referred to in paragraph (a) or (c) or will refuse to do anything referred to in paragraph (b).

These provisions have existed since 1999 but there is no evidence to suggest that they have ever been used. Interestingly, the Competition Bureau did not advocate their introduction into the Competition Act when the bill was passed.¹⁵¹ Until recently, these provisions have largely been considered dormant, until in 2013, the Interim Commissioner of Competition, John Pecman, announced the launch of the Bureau's new Whistleblowing Initiative.¹⁵²

The initiative does not involve introducing further whistleblowing protections into the Act but instead is directed towards educating members of the 'public to

¹⁴⁹ George Avraam and Cherrine Chow, *Whistleblower Protection: The Importance of Internal Policies* (May 12 2014) Baker & McKenzie - Canadian Fraud Law <<http://www.canadianfraudlaw.com/2014/05/whistleblower-protection-the-importance-of-internal-policies/>>.

¹⁵⁰ Wolfe et al, above n 147, 33.

¹⁵¹ See, Mark Katz, Erika Douglas and Megan Cheerma, 'Blowing the Whistle on Cartels in Canada' (Canadian Bar Association, 2013) <<http://www.cba.org/CBA/PracticeLink/2013-08-biz/cartels-e.aspx>>.

¹⁵² Competition Bureau, 'Competition Bureau Launches Whistleblowing Initiative' (Competition Bureau, 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03573.html>>.

provide information to the Bureau regarding possible violations of the criminal cartel provisions of the Act.¹⁵³ The initiative includes the establishment of a Whistleblower Hotline and the assurances of confidentiality if an employee seeks these protections.¹⁵⁴

Whilst this initiative may signal a move towards greater protection for whistleblowers, as has been demonstrated in this section, the effectiveness of a whistleblower protection framework is truly tested by how it is administered. Canada has not demonstrated any success in its past performance of protecting corporate whistleblowers, categorised primarily by the patchwork whistleblower protection framework and the lack of utilisation of existing provisions. Additionally, the requirement that the disclosure be made in ‘good faith’ is another hurdle that a whistleblower must overcome in order to receive protection. As discussed above, that approach is problematic.

7 Conclusion

The analysis of corporate whistleblower protections in Australia, the United States, the United Kingdom and Canada have revealed that whistleblower protection is limited in many respects, or is still in the process of development. This is particularly the case for cartel whistleblower protection in Australia. One of the key lessons to be drawn from this analysis is that despite the establishment of a comprehensive whistleblower protection regime, a framework cannot be successful without effective administration and enforcement as support.

The ACCC has recently recognised the lack of protection that currently exists in Australia and has called for the government to introduce cartel whistleblower protections.¹⁵⁵ However, the ACCC asserts that these protections should be modeled upon those in the *Corporations Act 2001* (Cth) Part 9AAA.¹⁵⁶ Although, this is a positive development and reform in this respect is much needed, this chapter has

¹⁵³ John Pecman, 'Remarks by John Pecman, Interim Commission of Competition' (Canadian Competition Bureau - Canadian Bar Association Spring Speech, 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03571.html#Initiative>>.

¹⁵⁴ Competition Bureau, 'Whistleblowing Initiative - Criminal Cartel Whistleblowing Initiative' (Competition Bureau, 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html>>.

¹⁵⁵ Australian Competition and Consumer Commission, above n 96, 78.

¹⁵⁶ Ibid. The Final Harper Report did not address this issue.

demonstrated the problems apparent in Part 9AAA. There are four key components to be considered if the *Corporations Act* approach is to be taken. These components draw upon the public policy principles of transparency, accountability, consistency and proportionality to inform the model. These are:

- (1) There must be no requirement that the discloser ‘acts in good faith.’ Instead, a ‘reasonable, honestly held belief’ will be sufficient, as the focus must remain on the content of the disclosure, rather than the motives of the employee;
- (2) The definition should apply to a wide range of disclosers, modeled upon the definition of ‘worker’ in the *PIDA Act*. This requirement would increase the transparency of the provisions, leading to greater clarity of the framework’s applicability;
- (3) If a *Corporations Act* model is introduced and the ACCC is the regulator upon which disclosure can be made, then there must be a positive duty upon the ACCC to investigate the claim and provide the whistleblower with updated information on the progress/outcome of the investigation. This measure of accountability is necessary to ensure that whistleblowers have confidence that their complaints will be seriously investigated;
- (4) If the ACCC duties are to be increased in this respect, then the ACCC should also be provided with additional resources to compensate for the increased workload, so that the ACCC is not overburdened as the Occupational Safety Health Administration was in the United States with its handling of whistleblowing claims pursuant to the *Sarbanes Oxley Act*.

Ideally, the government would seek to implement a comprehensive public and private whistleblower framework, modeled on the United Kingdom approach, for a more uniform and harmonised whistleblower system. This may be more difficult in Australia as the Federal Government is constitutionally restricted in this respect.¹⁵⁷ If a complete system were not achievable in the near future, specific cartel

¹⁵⁷ Pascoe, above n 71, 90: Australia's Federal Parliament lacks a general power to implement comprehensive whistleblower legislation covering the public and private sectors, but has used its constitutional powers to provide for protection in specific areas. For example, under its corporation's

whistleblower protection would be achievable in the short term. In addition to ensuring that the whistleblower protection framework is transparent and accountable, the approach should also be consistent with the developments in the public sector, which has recently been reformed.¹⁵⁸ Clearly, these are complex issues that demand a comprehensive consultative approach. Much can be learned already from the consultations that have taken place in the aforementioned jurisdictions.¹⁵⁹

Whistleblower protection provisions can enhance the prospect that whistleblowers will come forward and reveal information related to undisclosed cartel conduct to the regulator. The ACCC could rely less on cartel investigations generated by immunity applications, as this information could be derived more often from whistleblowers. Thus, instead of overreliance on a single enforcement tool, the adoption of stronger whistleblower protection could provide a viable and proportionate alternative to immunity.

C *Cartel Informant System – Financial Incentives for Whistleblowers*

The concept of implementing financial incentives for whistleblowers, or ‘bounty systems,’ is controversial.¹⁶⁰ This holds true even in jurisdictions that currently utilise financial incentives, particularly the United States.¹⁶¹ The concept refers to the payment of money in exchange for information related to illegal conduct to the authorities. In this way, the payment of financial incentives goes one step further than simply providing protection to whistleblowers, as it seeks to entice informants to come forward and be ‘rewarded’ for their information.¹⁶²

power, pursuant to paragraph 51(xx) of the Australian Constitution, specific whistleblowing provisions were introduced for the first time in Australia in 2004.

¹⁵⁸ *Public Interest Disclosure Act 2013* (Cth).

¹⁵⁹ There is empirical support for such protections, which was also reflected in the interview data: See Chapter V, Cartel Whistleblower Protection, pg 159.

¹⁶⁰ For example, this issue was one of the most divisive issues in the discussions with the interviewees. See Chapter V, Cartel Informant System, 161.

¹⁶¹ See, eg, Heidi Hansberry, 'In Spite of Its Good Intentions, The Dodd-Frank Act Has Created An FCPA Monster' (2012) 102 *Journal Criminal Law & Criminology* 195; Jenny Lee, 'Corporate Corruption & the New Gold Mine: How the Dodd-Frank Act Overincentivizes Whistleblowing' (2012) 77 *Brooklyn Law Review* 303; Jennifer Pacella, 'Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code' (2015) 17 *University of Pennsylvania Journal of Business Law* 345.

¹⁶² Gordon Schnell, 'Bring In the Whistleblowers and Pay Them—The Next Logical Step in Advancing Antitrust Enforcement' (2013) (2) *CPI Antitrust Chronicle* 1.

As the previous section has demonstrated, historically whistleblowers have been crucial in revealing large-scale fraudulent and corrupt conduct that would have otherwise remained undetected and thus play a pivotal role in exposing illegal activities.¹⁶³ However, the personal and financial risks faced by whistleblowers currently exceed the protections afforded to them pursuant to current whistleblower protection regimes around the world. This is especially the case in jurisdictions such as Australia, which does not have adequate whistleblower protections, and further cannot provide *any* protection to cartel whistleblowers that come forward to reveal cartel conduct and are not directly involved in the offence.

The United States has been the frontrunner in recognising the benefits of implementing a financial reward system.¹⁶⁴ This chapter will demonstrate how these frameworks have operated successfully in many respects. A number of lessons can be drawn from these experiences to aid in the development of such a system in the Australian context. More specifically, there are jurisdictions, namely the United Kingdom, South Korea and Hungary that have implemented specific cartel informant systems to aid in the detection of cartel conduct. These provide a model framework for an Australian cartel informant incentive system.¹⁶⁵

This section will argue that the many criticisms levelled at the introduction of a financial reward system are largely overstated and can essentially be offset by implementing appropriate safeguards to address these issues. Moreover, many of these criticisms could also be directed at the immunity policy, yet the policy is seen to be the most effective anti-cartel enforcement tool in the world. These incongruent positions need to be reconciled in order to aid in the realisation that one tool should not dominate the entire enforcement agenda, but instead, there needs to be more serious consideration of adopting alternate means of detecting cartel conduct, such as the introduction of a financial rewards system for cartel behaviour.

¹⁶³ See above, Whistleblower Protection, pg 292.

¹⁶⁴ For instance there are a number of financial incentive systems in the United States such as that pursuant to the *False Claims Act* and the schemes created by the Securities Exchange Commission, Internal Revenue Service, and United States Customs Service: See, eg, Marsha Ferziger and Daniel Currell, 'Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs' (1999) *University of Illinois Law Review* 1141.

¹⁶⁵ These jurisdictions were chosen for this section only, as these are the only jurisdictions with specific cartel financial rewards systems in place.

This section will first provide an overview of the United States bounty systems, primarily those under the *False Claims Act*¹⁶⁶ and the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ('*Dodd-Frank Act*').¹⁶⁷ This overview will analyse the key differences between the models upon which the bounty systems are structured and briefly consider the utility and criticisms directed at these models. The section will then turn to an analysis of the specific cartel informant systems that exist in the United Kingdom, South Korea and Hungary before discussing the primary criticisms aimed at the implementation of financial incentive systems.

This section will systematically review these arguments and show that they hold relatively little weight. It will then conclude by joining the call from the Senate Committee that Australia should seriously consider implementing financial incentives for whistleblowers in order to aid in greater cartel detection and prosecution. These conclusions will be supported by outlining a framework for the introduction of such a system in Australia, with appropriate safeguards in place to offset any significant negative consequences.¹⁶⁸

1 *The United States: Evidence of Informant Systems*

The United States has incorporated many bounty systems into its enforcement regimes over time and is consequently deemed to be one of the most active jurisdictions in utilising financial rewards to bolster enforcement efforts. The United States experience demonstrates that there are primarily two different types of bounty systems. The first relates to a typical 'reward-for-information' bounty system, where an informant with pertinent information will come forward to a relevant authority to seek a financial reward in exchange for the provision of information to that authority.

In contrast, the second type, is more unique, and refers to a system by which an informant will seek a percentage of a penalty amount imposed by that authority as a result of the information they have provided. However, if that authority chooses not to proceed with the investigation/prosecution, then the individual informant can choose to sue the wrongdoer on behalf of the government and as a result receive a

¹⁶⁶ *False Claims Act*, 31 United States.C, §§ 3729 – 3733. ('*False Claims Act*')

¹⁶⁷ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010). ('*Dodd-Frank Act*')

¹⁶⁸ Senate Economics References Committee, above n 86, 26, Recommendation 16.

greater percentage of the penalty outcome. This is referred to as ‘*qui tam*’ style litigation. Whilst the United States has adopted numerous bounty programs, such as that for tax evasion¹⁶⁹ and insider trading,¹⁷⁰ the focus of this section will be on the recently enacted *Dodd-Frank Act* and the long standing *False Claims Act*. Both of these statutes are significant and illustrate how both types of financial incentive schemes operate.

(a) *An Overview of Dodd-Frank*

As outlined in the previous section related to whistleblower protection, the *Dodd-Frank Act* was enacted in response to the supposed failure of the *Sarbanes Oxley* provisions and the resultant Global Financial Crisis.¹⁷¹ In one of the most controversial reforms, the Act sought to implement financial incentives for any informant who voluntarily provides the Securities Exchange Commission (‘SEC’) with original information relating to a violation of securities laws that result in penalties of over \$1 million dollars.

Pursuant to the Act, original information refers to information that:

- is derived from the independent knowledge or analysis of a whistleblower;
- is not known to the SEC from any other source, unless the whistleblower is the original source of the information; and
- is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.¹⁷²

The payment of an award will be determined within the range of 10 per cent-30 per cent.¹⁷³ In determining the award amount, the SEC must consider:

- the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
- the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
- the programmatic interest of the SEC in deterring violations of the securities laws by making

¹⁶⁹ *Tax Relief and Health Care Act of 2006* § 406(a)(1)(D), Pub. L. No. 109-432, 120 Stat. 2922.

¹⁷⁰ *Securities Exchange Act of 1934* §21 A 48 Stat. 881, 15 USC.

¹⁷¹ Housing and Urban Affairs Senate Committee on Banking, 'Report on the Restoring American Financial Stability Act of 2010' (Senate Committee on Banking, Housing and Urban Affairs - Senate Report 111–176 2010) <<http://www.gpo.gov/fdsys/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf>> 110-112.

¹⁷² *Dodd-Frank Act*, 1871.

¹⁷³ *Ibid* § 922(6)(1).

awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

- such additional relevant factors as the SEC may establish by rule or regulation.¹⁷⁴

Awards cannot be made to a whistleblower who:

- was a member, officer or employee of an appropriate regulatory agency, Department of Justice (DOJ), self-regulatory organisation, Public Company Accounting Oversight Board or a law enforcement organisation;
- is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;
- gains the information through the performance of an audit of financial statements required under the securities laws; or
- who fails to submit information to the SEC in such form as the SEC may, by rule, require.¹⁷⁵

Importantly, the provisions provide an express right to review the Commission's decision to grant an award by the appropriate Court of Appeals in the United States.¹⁷⁶

The SEC Final rules implementing the Whistleblower Program were approved by the SEC on 25 May 2011 and serve to supplement the existing provisions in relation to matters such as: the definition of a whistleblower; what constitutes 'original information'; and the criteria for determining an award.¹⁷⁷

Since the inception of the *Dodd-Frank Act*, the SEC has awarded fourteen whistleblowers, with nine of these awards being made in the 2014 Fiscal year.¹⁷⁸ This could indicate that the provisions are beginning to take effect after an initial grace period, which is evidenced by the steady increase of whistleblower tips received by the SEC over the four-year period.¹⁷⁹ The largest award granted at the time of writing was in September 2014, where a whistleblower was granted USD30 million dollars for providing original information that led to a successful enforcement action; an award amount that is double any previous award made by the SEC.¹⁸⁰

¹⁷⁴ Ibid § 922 (6)(C)(1).

¹⁷⁵ Ibid § 922(6)(C)(2)(A).

¹⁷⁶ Ibid § 922 (6)(C)(2)(F).

¹⁷⁷ See, Securities and Exchange Commission, 'SEC Adopts Rules to Establish Whistleblower Program' (United States Securities and Exchange Commission, 2011) <<https://www.sec.gov/rules/final/2011/34-64545.pdf>>.

¹⁷⁸ Securities and Exchange Commission, '2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program' (US Securities and Exchange Commission, 2014) <<http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>> 10.

¹⁷⁹ Ibid 20.

¹⁸⁰ Ibid 10.

Given the controversial nature of these provisions, there have been a number of criticisms levelled at the introduction of a financial incentive scheme, namely the following:

- (1) the credibility of the informant as a witness;
- (2) the risk of frivolous or vexatious claims;
- (3) the resultant harm to internal compliance systems;
- (4) the resultant administrative burden and resource constraints; and
- (5) morality issues.

These criticisms will be discussed at length in the concluding section of this chapter.

(b) An Overview of the False Claims Act

The preceding overview of the *Dodd-Frank* provisions provides an illustration of the first type of financial incentive systems that exists in the United States. In contrast, the *False Claims Act* (FCA) is an example of a ‘*qui tam*’ style of financial incentive system.¹⁸¹ The *False Claims Act* was enacted in 1863 as a result of Congress’ concern that suppliers of goods to the Union Army during the Civil War were defrauding the government.¹⁸² It seeks to enable informants (‘relators’) to sue on behalf of the government (‘*qui tam*’ action) when they detect a fraud that is not already the subject of a federal enforcement action.¹⁸³ In order to compensate relators for successful *qui tam* actions, the Act grants an award of a share of the damages recovered from the defrauding parties.¹⁸⁴ There have been a number of significant changes to the FCA since its inception, including increasing damages from double damages to treble damages and raising the penalties from USD2000 to a range of USD5000 to USD10 000.¹⁸⁵

Pursuant to the FCA, any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the

¹⁸¹ *False Claims Act*, 31 United States.C.

¹⁸² Department of Justice, 'The False Claims Act: A Primer' (U.S Department of Justice, 2011) <http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf> 1.

¹⁸³ *False Claims Act*, 31 United States.C, §3730(b)(e)(3).

¹⁸⁴ *Ibid* § 3730(d).

¹⁸⁵ Department of Justice, above n 182, 1.

government will be held liable.¹⁸⁶ A person will also be held liable where they avoid paying money to the government¹⁸⁷ or if they conspire to violate the FCA.¹⁸⁸

Most importantly for the purposes of this chapter, are the provisions related to filing a *qui tam* complaint.¹⁸⁹ After a *qui tam* complaint is filed, it is initially sealed for 60 days where the government is required to investigate the allegation in the complaint. Upon conclusion of this period, the government must then notify the court that it is either intervening in the action or declining to take over the action, in which case the relator can proceed with the action.

If the government decides to intervene in the *qui tam* action, it will have primary responsibility for prosecuting the action,¹⁹⁰ dismissing the action, providing the relator with a hearing,¹⁹¹ or settling the action, if the court determines this is fair after the relator's hearing.¹⁹² The award to be granted will be dependent upon whether the government decides to intervene. If the government does intervene, then the relator is entitled to an award between 15 and 25 per cent of the amount recovered by the government. If the government declines to intervene in the action, the relator's share increases to 25 to 30 per cent.¹⁹³ If the court deems that the relator planned or initiated the fraud, the court may reduce the award without limitation. If a *qui tam* action is successful, the relator is also entitled to legal fees and other expenses of the action by the defendant.¹⁹⁴ There are several exceptions to those who can initiate a *qui tam* action;¹⁹⁵ most significantly, the relator will be barred where they are convicted of a criminal offense arising from their role in the FCA violation.¹⁹⁶

The *qui tam* provisions have been deemed to be successful in aiding the detection and prosecution of fraud in the United States. Awards have increased from USD2.3 million in 1998 to nearly USD2.8 billion in 2011.¹⁹⁷ The reasons for its

¹⁸⁶ See generally, *False Claims Act*, § 3729.

¹⁸⁷ *Ibid* § 3729(a)(1)(G).

¹⁸⁸ *Ibid* § 3729(a)(1)(C).

¹⁸⁹ The *qui tam* provisions begin at § 3730(b) of the *False Claims Act*; § 3730(b)(1) states that a person may file a *qui tam* action.

¹⁹⁰ *Ibid* § 3730(c)(1).

¹⁹¹ *Ibid* § 3730(c)(2)(A).

¹⁹² *Ibid* § 3730(c)(2)(B).

¹⁹³ *Ibid* § 3730(d).

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid* § 3730.

¹⁹⁶ *Ibid* § 3730(d)(3).

¹⁹⁷ In a study of more than 4000 *qui tam* cases from 1986-2011, 84 per cent of all relators were 'one-

success could be attributed to the valuable information that relators can provide, due to their relative proximity to information about fraudulent misconduct, compared to misconduct discovered externally, such as part of an annual audit process.

Advocates of the *qui tam* provisions also believe that such actions decrease the likelihood that meritorious cases will remain unenforced due to the DOJ's lack of awareness, negligence or deliberate policy choices.¹⁹⁸ Furthermore, the *qui tam* provisions can also aid in conserving limited public enforcement resources, as the increased monitoring of fraudulent misconduct by third parties does not require significant additional resources.¹⁹⁹

One of the most notable omissions from the FCA, compared to that of *Sarbanes Oxley* provisions and Dodd-Frank, is that there are no anti-retaliation provisions for the whistleblower should they suffer employment retaliation. However, it has been suggested that the recovery available to the whistleblower as a result of the *qui tam* action may be able to offset any negative consequences that may result from retaliation, such as a loss of employment.²⁰⁰

There is also criticism relating to the DOJ's decision to intervene in *qui tam* cases. According to one study, the DOJ intervenes in approximately 20 percent of all *qui tam* cases²⁰¹ and of these cases; the DOJ wins judgement or settles ninety-five percent of these.²⁰² This finding suggests that the DOJ will decide to intervene in cases only where the DOJ deems the case to be likely to succeed. It is asserted that this can have the potential impact of creating the assumption that if the DOJ decides not to intervene, then the case must not be capable of or likely to succeed. Therefore,

shot' relators who had only filed one action in twenty-five years: David Freeman Engstrom, 'Harnessing the Private Attorney General: Evidence from Qui Tam Litigation' (2013) 112 *Columbia Law Review* 1244; The DOJ has recently indicated that it will increase its review of complaints for potential criminal prosecution under the *False Claims Act*: Leslie Caldwell, 'Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference' (US Department of Justice, 2014).

¹⁹⁸ William E Kovacic, 'Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting' (1996) 29 *Loyola of Los Angeles Law Review* 1799, 1809.

¹⁹⁹ Ni Qian, 'Necessary Evils: How to Stop Worrying and Love Qui Tam' (2013) *Columbia Business Law Review* 594, 598; *Contra* Kovacic, above n 198, 1809.

²⁰⁰ Nicholas Macrakis and Michael Legg, 'The Dodd-Frank Act whistleblower Reforms Put Bounty on Corporate Non-Compliance: Ramifications and Lessons for Australia' (2012) 40 *Australian Business Law Review* 26, 29.

²⁰¹ Only six to ten *qui tam* cases were brought each year from 1943-86: House of Representatives, 'False Claims Act Correction Act of 2009' (US House of Representatives - House Report 111-97, 2009) <<http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt97/html/CRPT-111hrpt97.htm>>

²⁰² See, Department of Justice, 'Fraud Statistics - Overview' (Civil Division, US Department of Justice, 2013) <http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf> (Statistics derived from 2011 Data).

it is asserted that the DOJ should intervene in more cases in order to avoid this assumption and more effectively utilise the *qui tam* provisions.

2 *Cartel-Specific Financial Reward Systems*

(a) *United Kingdom*

The CMA informant policy states that the CMA will offer financial rewards of up to £100 000 (in exceptional) cases for information in relation to cartel activity.²⁰³ The CMA justifies their policy by outlining how difficult cartels are to detect and even more difficult to prove.²⁰⁴ The policy lists a hotline number that enables those with cartel information to consult with the CMA in confidence. The policy states that the identity of the informant will be kept in strict confidence and that the informant will deal with ‘specially trained officers.’²⁰⁵

In terms of calculating the reward, the policy clearly states that the granting of any financial reward is entirely at the discretion of the CMA and there is no requirement that the CMA gives reasons for its decision in relation to payment.²⁰⁶ Furthermore, the CMA is still vested with discretion to grant any reward where the ‘CMA has agreed to accept some information from a person and the information provides a credible basis for further investigation, the CMA is still free to decide, on the basis of other more pressing priorities, that it will not use the information given and will not therefore give a financial reward.’²⁰⁷

Therefore, a cartel informant will have no assurance that the information they provide will result in any payment, despite the fact that the informant may have incurred significant risks in providing assistance to the CMA. This stands in stark contrast to the CMA’s position in relation to the granting of full immunity, where the CMA asserts that ‘certainty’ is paramount to the effective operation of its leniency

²⁰³ See generally, Competition and Markets Authority, 'Rewards for Information about Cartels' (UK Competition and Markets Authority, 2008)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf>.

²⁰⁴ Ibid 1.

²⁰⁵ Ibid 3.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

policy for cartel members, as it encourages the members to come forward and reveal the misconduct.²⁰⁸

These positions are inconsistent, especially where the certainty of outcome is only assured to those who have committed wrongdoing and sought immunity. Furthermore, as outlined in the previous section, blowing the whistle on an employer can incur significant career and financial risks, even where anti-retaliation provisions do exist. As the CMA sets the maximum reward at £100 000, it is likely that the rewards actually provided are significantly less than this figure and are thus remarkably different to the amount an informant would likely receive in relation to the United States Dodd-Frank or FCA claim. One hypothetical estimate aimed at effectively encouraging cartel informants set the bar at USD4-5 million.²⁰⁹ On this basis, the CMA threshold falls well below an amount that will readily entice an informant to risk their job and reputation to report to the CMA.

In the event that the CMA does decide to grant an award, the calculation of the amount is determined on a case-by-case basis, taking account of the following factors:

- the value of the information in terms of what the CMA is able to achieve from it;
- the amount of harm caused to the economy and consumers where the CMA believes that the information provided by the informant has helped to put a stop to and/or has helped to disclose;
- the effort the informant had to invest in order to provide the CMA with the information; and
- the risk the informant had to take in order to provide the CMA with the information.²¹⁰

As evident from the above factors, there is no established threshold or minimum standard of information the informant needs to provide in order for a reward to be granted. This stands in contrast to the CMA's treatment of subsequent leniency applications, where the information provided must 'add significant value to the CMA's investigation' meaning that it must 'genuinely advance the investigation.'²¹¹ This further compounds the uncertainty as to how a reward, if any, would be calculated by the CMA.

²⁰⁸ Competition and Markets Authority, above n 50, s 1.9.

²⁰⁹ See Andreas Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool? CCP Working Paper 14-3' (ESRC Centre for Competition Policy & Norwich Law School, University of East Anglia, 2014).

²¹⁰ Competition and Markets Authority, above n 203, 4.

²¹¹ Competition and Markets Authority, above n 50, s 2.26.

Another key component of the policy relates to whether a cartel member who is granted leniency can also claim a financial reward. Whilst the CMA states that ordinarily informants of this kind will not be granted a reward, it also indicates that there may be circumstances ‘where the CMA will consider a reward in addition to immunity from sanction under the leniency policy.’²¹² It claims that the circumstances in which this would occur would be in cases where the involvement of the informant was ‘relatively peripheral.’ However, the policy is not clear whether a cartel member who did not receive immunity, as they were not the first to reveal the conduct, will be eligible for a reward.

(b) South Korea

The Korea Fair Trade Commission (KFTC) introduced its first informant reward system in February 2002, where the reward was set at 20 million won (approximately AUD23 000). According to the KFTC, the low reward amount did not generate sufficient informant interest, as there were only five cases where information was reported pursuant to the policy.²¹³ As a result, the KFTC increased the reward amount to 100 million won (about AUD115 000).²¹⁴

The policy was further revised in 2004, which clarified the violations that the policy will apply to; the way in which the reward amount is calculated; and stipulated that the reward will only apply to the first informant to provide relevant evidence to the KFTC.²¹⁵ Similarly to the CMA policy, there is no fixed reward amount, as a ‘Reward Review Committee’ determines the amount.²¹⁶ The award is determined having regard to the level of sanction and the quality of evidence provided. The Committee will first determine a ‘standard amount’ calculated with reference to the level of sanction²¹⁷ (see Table 2).

²¹² Competition and Markets Authority, above n 203, 5.

²¹³ Korea Fair Trade Commission, 'Recent Changes to Korea's Cartel Enforcement Regime' (Korean Fair Trade Commission, 2005) <http://www.ftc.go.kr/data/hwp/room_docu.doc> 5.

²¹⁴ Korea Fair Trade Commission, 'Annual Report' (Korean Fair Trade Commission, 2003) <file:///C:/Users/pl490/Downloads/Annual%20Report_2003.pdf> 6; Korea Fair Trade Commission, 'Annual Report on Competition Policy Developments in Korea' (Organisation for Economic Cooperation and Development, 2003) <<http://www.oecd.org/korea/34720758.pdf>> s2(5).

²¹⁵ Korea Fair Trade Commission, 'KFTC's Launch of Reward System for Informants - Press Release' (Korean Fair Trade Commission, 2005) <<http://www.ftc.go.kr/data/hwp/rewardssystem.doc>>.

²¹⁶ Ibid.

²¹⁷ Korea Fair Trade Commission, above n 213, 5.

Table 2: Calculating Standard Amount for Reward 1

Seriousness	Standard Amount
Case with More than Surcharge	a) Surcharge less than 500 mil won : 5 per cent b) Surcharge between 500 mil won~50 bil won : 1 per cent c) Surcharge over 50 bil won : 0.5per cent * Standard Amount is a) + b) + c) * Minimum amount is 5 mil won
Corrective Order or Warning	○ 2 million won per types of violation □ 1 million won for warning

Once the standard amount has been determined, the final amount will be calculated on the basis of the quality of evidence provided by the informant, which is divided into three grades²¹⁸ (see Table 3).

Table 3: Calculating the Reward Amount 1

Quality of Evidence	Final Amount
Top Quality	80 per cent-100 per cent of 'Standard Amount'
Medium Quality	60 per cent-80 per cent of 'Standard Amount'
Low Quality	40 per cent-60 per cent of 'Standard Amount'

In stark contrast to the CMA policy, the calculation of the penalty amount in South Korea is assessed against set criteria, which ensures that the policy operates in a predictable and transparent manner.

(c) *Hungary*

The Hungarian Competition Authority introduced a ‘Cartel Informant Reward’ system in April 2010.²¹⁹ In contrast to the CMA and Korean policies, the policy is set out in the *Hungarian Competition Act*²²⁰ and is also comprehensively

²¹⁸ Ibid.

²¹⁹ Hungarian Competition Authority, 'Regular Questions about the Cartel Informant Reward' (Hungarian Competition Authority, 2010)

<http://www.gvh.hu/en/other/6429_en_regular_questions_about_the_cartel_informant_reward.html>.

²²⁰ Act No. LVII/1996 on the Prohibition of Unfair and Restrictive Market Practices. ('*Hungarian Competition Act*')

supplemented by the HCA's Frequently Asked Questions document.²²¹ This FAQ document provides detailed information related to the processes and procedures that an informant will need to undertake in order to be granted a reward.

Article 79/A of the *Hungarian Competition Act* states that any natural person who provides 'indispensable' information to the Hungarian Competition Authority (HCA) for an European Union Competition infringement will be entitled to obtain an informant reward. The Act states that evidence can still be classified as 'indispensable' even where the HCA has obtained other indispensable evidence prior to the informant.²²² Thus, in contrast to the CMA, the granting of the award is not discretionary, as the HCA will grant an award where an informant meets the 'indispensable' evidence threshold. What qualifies as 'indispensable' is further elaborated upon by the HCA in its FAQ document, which states that:

As a main rule, a reward may be offered if the informant reveals evidence that can be related to the elements of the statement of facts concerning the hardcore cartel (e.g. the undertakings being parties to the cartel, the restrictive practice); it is not sufficient providing evidence that may facilitate the identification of the aspects relevant for sanctioning the infringement concerned.²²³

Furthermore, the amount of award is clearly stipulated as 'one percent of the fine imposed by the Competition Council proceeding in the case, but maximum HUF50 million.'²²⁴ This calculation method represents an approach adopted from the United States style of financial reward systems, where the informant receives a percentage of fines imposed, except that the HCA has legislatively capped the amount that can be recovered. Whilst this approach may be clearer than that adopted in the United Kingdom, it has been asserted that this maximum amount is not sufficient to entice informants to report to the HCA for the reasons described above.²²⁵

The Act also states that multiple informants can receive an award, provided they meet the indispensable evidence threshold, and that the evidence is not derived from a single source.²²⁶ This contrasts to the position adopted in South Korea, where

²²¹ See generally, Hungarian Competition Authority, above n 219.

²²² *Hungarian Competition Act*, Art 79/A(2).

²²³ Hungarian Competition Authority, above n 219, Q3.

²²⁴ *Hungarian Competition Act*, Art 79/A(3).

²²⁵ Jan Palanski, 'Informant Reward Schemes in Competition Enforcement - Working Paper' (2014) <<http://ssrn.com/abstract=2457450>>18-19.

²²⁶ *Hungarian Competition Act*, Art 79/A(6).

only the first informant who provides relevant evidence will receive a reward. Most notably, the HCA is precluded from granting financial rewards to those informants who have obtained evidence as a result of a crime or an offence.²²⁷ Consequently, it would seem that cartel participants would be ineligible to receive an informant award, in addition to obtaining immunity. This is confirmed in the HCA's FAQ document.²²⁸

This position more appropriately reflects the view that criminals should not be entitled to benefit from their crimes, especially in addition to obtaining immunity for their misconduct. However, the FAQ document states that any person who was involved in the conduct but does not seek immunity will be entitled to the reward, such as former employees.²²⁹

The Act further sets a timeframe of 30 days in which an informant will be paid after a resolution is made²³⁰ and provides an avenue for judicial review of the HCA's decision regarding the financial reward payment.²³¹ This is an important aspect in ensuring the policy is delivered in a fair and transparent manner and that informants have a right to seek review, particularly if the decision was unfair or unjust. This right of review is absent from the CMA and the South Korean policies, which increases the uncertainty surrounding the operation of these policies.

3 *Key Criticisms of Financial Informant Systems – A Rebuttal*

After outlining a number of jurisdictions that have adopted financial informant systems, there is clearly established precedent demonstrating that the implementation of such systems is a viable option. Further proof lies in the fact that there are a growing number of jurisdictions that are moving toward adopting such a model, such as Slovakia²³² and Pakistan.²³³

²²⁷ Ibid Art 79/A(5).

²²⁸ Hungarian Competition Authority, above n 219, Q5.

²²⁹ Ibid Q6.

²³⁰ *Hungarian Competition Act*, Art 79/A(5).

²³¹ Ibid Art79/A(4).

²³² Antimonopoly Office of the Slovak Republic, 'Cartel Informant Reward' (Antimonopoly Office of the Slovak Republic, 2013) <<http://www.antimon.gov.sk/cartel-informant-reward/>>.

²³³ Competition Commission of Pakistan, 'Revised Guidelines on "Reward Payment to Informants Scheme"' (Competition Commission of Pakistan, <http://www.cc.gov.pk/images/Downloads/guidelines/reward_paymentannexure_ii.pdf>).

One of the more difficult questions to arise in this context is determining whether these policies aid in the detection and prosecution of cartels. The KFTC has stated that they have provided AUD 400 000 in 46 cases between 2002 and 2011, with the biggest reward being AUD 200 000 in 2007 for information in relation to a sugar cartel.²³⁴ These statistics do not take into account the 2012 reforms, which have increased the maximum reward to 3 billion won. In Hungary, even though the policy was enacted in 2010, the HCA have claimed to receive approximately 40 approaches in 2011 and 2012. Although many of these approaches did not meet the requirement of 'indispensable evidence,' the HCA believes the information provided has still helped with their investigations.²³⁵

One of the greatest empirical difficulties faced in attempting to assess the effectiveness of these programs is surrounding the lack of data available, due to each jurisdiction adhering to strict confidentiality assurances.²³⁶ In this respect, authorities could potentially publish the reward amount but at some time after the case has been finalised to ensure that confidentiality is still maintained.

Despite these statistics, financial reward systems are a relatively new phenomenon in the context of cartels, and require adequate time to develop. This has been illustrated by the history of immunity policies, which have steadily grown in popularity after the initial slow-start in the United States at its inception. This section will now turn to a critical analysis of the key criticisms levelled at financial informant systems in order to demonstrate that these arguments are largely inadequate and overstated.

(a) Credibility of Informants

As part of the reauthorisation mandate for the *Antitrust Criminal Penalty Enhancement and Reform Act* (ACPERA),²³⁷ the Government Accountability Office

²³⁴ Jae-Shin Kim, 'Cartel Regulation in Korea' (Korea Fair Trade Commission - Director, Cartel Policy Division, 2012) <<http://www.adbi.org/files/2012.05.02.cpp.sess3.3.kim.cartel.regulation.korea.pdf>> 11.

²³⁵ Palanski, above n 225, 19.

²³⁶ Kevin Sullivan, Kate Ball and Sarah Klebolt, 'The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA' (2011) 11 *American Bar Association Antitrust Source* 5, 9.

²³⁷ *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub. L. No. 108-237, 118 Stat. 661.

(GAO) was commissioned to study ACPERA's effect.²³⁸ The report addresses key stakeholder perspectives on rewards and anti-retaliatory protection for whistleblowers reporting criminal antitrust offenses.

One of the key concerns emanating from those who opposed the introduction of financial rewards, particularly from senior officials of the DOJ, was that the payment of rewards would serve to 'jeopardise' the credibility of a potential witness, if the case were to go before a jury.²³⁹ In support of this argument, it is asserted that the jurors will not believe a witness who stands to 'benefit financially from successful enforcement action against those he implicated.'²⁴⁰ The DOJ believes that these issues are compounded in the context of a criminal cartel case, where the burden of proof is higher and the need for 'insider information' is crucial.

Furthermore, there is concern that this lack of credibility will adversely affect leverage the DOJ has in obtaining plea agreements. However, one of the key considerations that have been overlooked in the context of these arguments is that these credibility issues are very similar to those that currently exist with immunised witnesses. As demonstrated in Chapter VI, the credibility of immunised witnesses can also be jeopardised by the fact that they are implicating other people in a crime they also committed.²⁴¹ The DOJ has found ways to overcome these credibility issues by processes, such as corroborating evidence. Arguably, the DOJ could use these same practices to overcome the associated credibility issues with informant credibility. Either way, it would be severely incongruent to allow one policy to stand that has inherent credibility issues and reject introducing a new policy on the very same grounds.

Moreover, as most cartel cases proceed by way of settlement, the issue of credibility before a jury diminishes.²⁴² In the model that will be proposed in the concluding section, the informant reward system would operate concurrently with an immunity policy, and therefore the regulators would still have access to the crucial 'insider information' needed for leverage in plea negotiations and to substantiate the evidence gathered.

²³⁸ See generally, United States Government Accountability Office, above n 117.

²³⁹ Ibid 43.

²⁴⁰ Ibid.

²⁴¹ See Chapter VI, The Credibility Of Accomplice Evidence, pg 203.

²⁴² Macrakis and Legg, above n 200, 36; Stephan, above n 209, 21.

(b) *The Prospect of Frivolous and Vexatious Claims*

This concern was of paramount importance when the interviewees of this study were questioned over the prospect of introducing financial rewards. As the empirical chapter demonstrates, most of these concerns were directed at the situation where informants would come forward to reveal claims that were baseless, misguided or designed with an ulterior motive, such as revenge or simply to make some extra money.²⁴³ These are valid concerns with any policy that seeks to introduce financial rewards, as these situations can and do arise. However, this factor alone cannot be seen as a bar to introducing such a policy. Rather, there is a need to implement appropriate safeguards in order to minimise these risks. In fact, the very same risks can arise in the context of immunity, where an immunity applicant can downplay the role they have played in the cartel and exaggerate the roles played by others. These safeguards exist in other financial incentive schemes around the world, namely the United States. These include:

- i. Processes to corroborate evidence;
- ii. Ensuring the reward is not paid until successful prosecution, such as *qui tam* style litigation;
- iii. A requirement that the informant declare, under the penalty of perjury, that the information they submit is true and correct to the best of their knowledge and belief;²⁴⁴
- iv. Threshold of evidence to apply: The regulator could introduce a threshold of evidence, such as the SEC's 'original information' requirement to filter out frivolous or misguided claims;²⁴⁵ and

²⁴³ See Chapter V, Alternatives to the Immunity Policy, pg 159.

²⁴⁴ Macrakis and Legg, above n 200, 32.

²⁴⁵ Securities and Exchange Commission, above n 177, rule 21F-4(b)(1); Securities and Exchange Commission, 'Frequently Asked Questions' (U.S Securities and Exchange Commission - Office of the Whistleblower, 2010) <https://www.sec.gov/about/offices/owb/owb-faq.shtml#P9_2483> Q4.

- v. A more onerous suggestion has been to require that in the event of a frivolous claim, the court costs would revert back to the informant.²⁴⁶

(c) *Harm Internal Compliance Systems*

Opponents of the financial rewards system claim that such payments essentially encourage informants to bypass internal compliance and reporting systems, to report directly to the regulator to obtain an award.²⁴⁷ These opponents also argue that the rewards, particularly those based on a percentage amount, act as an incentive for the informant to intentionally delay reporting to the regulator in order for their reward amount to increase as the scale of the misconduct grows larger.²⁴⁸ These are valid concerns that should not be overlooked. However, proponents have argued that where informants bypass internal reporting systems, this is simply evidence of an ineffective compliance system or corporate culture that is not conducive to reporting.²⁴⁹ In this vein, proponents assert that the introduction of financial rewards can have the effect of creating an incentive for companies to improve their internal reporting systems and build a better corporate culture surrounding reporting.

The introduction of financial rewards could also have the effect of increasing the costs associated with operating a cartel, as its members would need to ‘pay more people off’ in order to keep employee informants from reporting, which can help increase cartel instability.²⁵⁰ Moreover, there are appropriate safeguards that can be implemented in order to minimise the risks associated with this issue. In the United

²⁴⁶ Dave Ebersole, 'Blowing the Whistle on the Dodd-Frank Whistleblower Provisions' (2011) 6 *Ohio State Entrepreneurial Business Law Journal* 123, 139.

²⁴⁷ See generally, Justin Blount and Spencer Markel, 'The End of the Internal Compliance as We Know it, Or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblowing Provisions' (2012) 17 *Fordham Journal of Corporate & Financial Law* 1023; Geoffrey Christopher Rapp, 'Mutiny by the Bounties? The Attempt to Reform Wall Street By the New Whistleblower Provisions of the Dodd-Frank Act' (2012) ((1)) *Brigham Young University Law Review* 73, 84.

²⁴⁸ Paul Latimer and A J Brown, 'Whistleblower Laws: International Best Practice' (2008) 31 *University of New South Wales Law Journal* 766, 777; See generally, Overhuls, above n 110; Vogt, above n 101, 364; Blount and Markel, above n 247; Macrakis and Legg, above n 200, 36-38; Kovacic, above n 198, 1812-1813.

²⁴⁹ Stephan, above n 209, 22.

²⁵⁰ William E Kovacic, 'Bounties as Inducement to Identify Cartels' (British Institute of International and Comparative law, 2006) <http://www.biicl.org/files/1211_eui_fiosele_june_2006_kovacic_paper.pdf> 3; Macrakis and Legg, above n 200, 36.

States, the SEC has introduced incentives to encourage informants to first report the misconduct to the company. Firstly, those informants who do report to the company before turning to the SEC will receive an increase in their reward.²⁵¹ Secondly, if the employee first reports to the company, from the date in which they report, the SEC will classify the informant's evidence as 'original evidence,' even if the SEC has received evidence pertaining to the misconduct after this date.²⁵² Thirdly, in the event that the employee first reports to the company and the company then reports to the SEC, the employee is still eligible for the reward.²⁵³ Finally, a more controversial suggestion has been to introduce penalties for those employees who intentionally delay the reporting of the misconduct.²⁵⁴ However, it would seem that any employee who does intentionally delay reporting in the United States may be at risk of not meeting the 'original evidence' requirement of the SEC and thus be ineligible for a reward.

(d) Administrative Burden

Opponents of financial reward systems have consistently argued that the introduction of such a system would overburden the resources of regulatory agencies, as the regulator would need to invest additional time and resources in order to investigate the increased number of claims.²⁵⁵ This is an important consideration for any jurisdiction that intends to introduce such a system, as the system is unlikely to be successful where adequate administrative support does not exist. In order to accommodate for this, the SEC final rules introduced a range of measures to improve information management, such as the establishment of the Office of the Whistleblower and a dedicated web page with standardised forms and communication procedures.²⁵⁶ Moreover, it is asserted that the costs associated with the introduction of the financial rewards system could reduce the need to grant high leniency reductions to obtain evidence, which could help offset these costs.²⁵⁷

²⁵¹ Macrakis and Legg, above n 200, 36; Securities and Exchange Commission, above n 177, Rules 21F-4(b)(7) and 21F-4(c). ('SEC Final Rules')

²⁵² Securities and Exchange Commission, above n 177, Rule 240.21F-4(b)(7).

²⁵³ Ibid Rule 240.21F-4(c)(3).

²⁵⁴ Lee, above n 161, 338.

²⁵⁵ Ebersole, above n 246, 125-126.

²⁵⁶ Macrakis and Legg, above n 200, 36.

²⁵⁷ Palanski, above n 225, 10.

(e) *Morality issues*

This was another key argument advocated by the interviewees when questioned about financial reward systems. There were claims that payment in exchange for money was ‘against good conscience’ and that people should instead just be ‘good Samaritans.’²⁵⁸ Many opponents find support in a study conducted by Yuval Feldman and Orly Lobel in 2010, which examined the role incentives play in whistleblower’s decisions to report illegal activity.²⁵⁹ The study found that in cases where an informant has a ‘greater ethical stake in the outcome’ monetary incentives might be unnecessary and counterproductive because they may offset the whistleblower’s internal ethical motivations.²⁶⁰

Essentially, this research points to the suggestion that where the misconduct has significant ethical and moral implications, an informant does not need monetary incentives to induce them to report the misconduct, but with less severe misconduct, financial incentives could encourage reporting. Whilst this research may have adverse implications for fraudulent misconduct, a recent Australian study has shown that the Australian public does not deem cartel conduct to be ‘morally wrong.’ The results of this study may suggest that financial incentives *can* act as an incentive in the cartel context.²⁶¹

Moreover, whilst the interviewees of this study were quick to identify the moral ambiguities that surround the introduction of a financial rewards system, many of these same interviewees could not perceive the requisite moral ambiguity in relation to immunity policies. This is despite the fact that at the crux of both of these policies, the idea is the same: an incentive, either money or immunity, in exchange for information.²⁶² Arguably, these two policies sit on the same moral grounds and it is difficult to reconcile how the immunity policy can be held in such high regard by

²⁵⁸ See, eg, Interviewee 10 (Sydney, 29th July 2013) 21-22.

²⁵⁹ See generally, Yuval Feldman and Orly Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality' (2010) 88 *Texas Law Review* 1151.

²⁶⁰ *Ibid* 1207.

²⁶¹ See, Caron Beaton-Wells et al, 'Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement' (The University of Melbourne, 2010) <<http://cartel.law.unimelb.edu.au/go/project-news/project-survey>>.

²⁶² Richard Miller, 'Price Fixing and Whistleblowing: A 'Bounty' for A Mutiny on the Good Ship Collusion?' (1978) 10 *Antitrust Law & Economics Review* 87, 92.

authorities worldwide, whilst a policy based on a very similar idea, can cause such controversy and opposition. These policies are complementary incentive schemes designed to improve the enforcement efforts of competition regulators and should be recognised as such.

D *Key Recommendations for a Financial Rewards Model*

The preceding analysis has demonstrated that opposition to a financial rewards system is largely overstated and does not constitute a sufficient basis to prevent its implementation. Whilst some of the criticisms may be valid, as has been asserted, the associated risks can be minimised through the introduction of appropriate safeguards. This section will conclude by outlining the key recommendations for such a model in Australia, which would require careful consideration and consultation by the legislature in order to be successfully implemented. It is important to note that this model should be introduced in addition to the introduction of cartel-specific whistleblower protection provisions. This model will be informed by the public policy principles of transparency, accountability, consistency and proportionality.

1 *Administration*

If the Parliament envisages a cartel specific rewards system, then presumably the ACCC would oversee the administration of the system. A key component of the success of the model would be attributed to ensuring there is sufficient and appropriate administrative support to deal with an increase in informant tips. This would require an increase in resources to the ACCC to account for the additional time and costs associated with investigating informant tips. By its very nature, the ACCC already receives a number of tips regarding competition and consumer matters and may well have processes that have been adopted to accommodate this purpose. However, as the SEC and ASIC have done, it is important to establish a Whistleblower Office whose role would be to oversee the handling and investigation of the informant tips.²⁶³ This would need to be met with appropriate training and the

²⁶³ See, eg, Securities and Exchange Commission, 'Office of the Whistleblower' (US Securities and Exchange Commission, 2010) <<https://www.sec.gov/whistleblower>>; Senate Economics References Committee, above n 86, s 14.44-14.52.

introduction of information management processes, including a dedicated online portal for such tips. There have also recently been developments of an App that allows for the confidential disclosure of corporate misconduct.²⁶⁴

2 *Reward Amount*

This is a key consideration that will strike at the heart of the program's success and it is important that this aspect is transparent. As demonstrated, the threshold reward amount needs to be an amount that will offset the risks associated with reporting.²⁶⁵ At present, the amounts in the United Kingdom, South Korea and Hungary are arguably not sufficient, as the low maximum threshold have resulted in relatively small rewards provided. Furthermore, like the FCA and Dodd-Frank, Australia should adopt a percentage range *qui tam* style of reward system, where the scope can be adjusted dependent on the quality of information provided. As Australia does not currently have treble damages, the fines imposed and therefore the reward is likely to be significantly lower than in the United States. There have been a number of calls for Australia to consider implementing treble damages and this could form part of the review.²⁶⁶ The Harper Review was intended as a comprehensive review of Australian competition policy and practice. The final report was released in March 2015 and did not address the issue of treble damages. Thus, it is unlikely such a proposal will be implemented in Australia in the near future.

3 *Evidence Threshold*

The ACCC should establish a minimum threshold of evidence to apply to ensure that the quality of evidence that is provided is high and to minimise the risks of frivolous or vexatious claims. The SEC's 'original information' requirement is a lower threshold requirement than HCA's 'indispensable evidence' and strikes a more

²⁶⁴ See eg, Liam Tung, *Whistleblower App FraudSec Features Anonymising Encrypted Messaging* (May 15 2015) The Age <<http://www.theage.com.au/it-pro/business-it/whistleblower-app-fraudsec-features-anonymising-encrypted-messaging-20150511-1mzc51.html>>.

²⁶⁵ Stephan, above n 209, 15-18; Kovacic, above n 250, 9-10; Kovacic, above n 198, 1819.

²⁶⁶ See eg, Australian Securities & Investment Commission, 'Penalties for Corporate Wrongdoing - Report 387' (Australian Securities & Investment Commission, 2014) <<http://download.asic.gov.au/media/1344548/rep387-published-20-March-2014.pdf>>; R Tomasic, *Casino Capitalism? Insider Trading in Australia* (Australian Institute of Criminology, 1 ed, 1991) Chapter 9.

appropriate balance between securing quality evidence and ensuring that the informant program can successfully generate rewards.

The informant will need to show that there is a ‘reasonable belief’ that their claim is sound and must sign a document to attest to this, with the penalty being perjury. Once the threshold has been met, the ACCC could develop criteria in order to determine where the reward lies in the percentage range, in a similar fashion to the SEC. Factors such as the value of evidence provided, the role in the offence (if any), and the promptness in disclosure could be included. This could be conducted in similar way to the way in which the ACCC currently administers its Cooperation Policy, with many of these existing factors being relevant to the assessment. The criteria should be clear and published in order to increase its transparent operation.

4 *Eligibility*

The policy should be open to anyone who can meet the minimum threshold requirement, in order to encourage wide reporting. The main exceptions to this would be: (1) Any person who qualifies for immunity (2) Any person who had a legal duty to report or the misconduct is discovered as part of their employment role, such as auditors (3) Any person who coerced or orchestrated the cartel or those who are found guilty of an offence or breach of the *Competition and Consumer Act 2010* (Cth). These exclusions are necessary safeguards to ensure that those who have committed wrongdoing are not rewarded for their misconduct, especially in addition to receiving immunity.²⁶⁷ In this way, the informant model would be designed to complement the Immunity Policy, as opposed to undermining it.

5 *Judicial Review*

An integral aspect of ensuring a policy is delivered in a fair and transparent manner is ensuring that there is a right to have the decision reviewed by an independent judicial body and is therefore accountable. Thus, the decision by the ACCC to grant a reward should be subject to judicial review in the same way that immunity decisions should also have a right of review. In this vein, Australia should adopt the

²⁶⁷ See eg, *Hungarian Competition Act*, Art 79/A(5); *Dodd-Frank Act*, § 922(6)(c)(2)(b).

approach of the HCA by creating an express right,²⁶⁸ or the ACCC should consider another appropriate administrative body to independently review its decisions by way of agreement.

6 Confidentiality

Confidentiality assurances are paramount to the successful operation of any informant program, as the risks associated with anti-retaliation have been well demonstrated. Therefore, the ACCC should afford the highest levels of confidentiality to informants, and where requested, maintain the anonymity of informants in the most delicate manner. These assurances should be consistent with those afforded to immunity applicants to ensure certainty and confidence in the cartel informant system.

7 Qui Tam

Finally, if no action is taken by the ACCC within a set period, such as 60 days, then the informant should be given the right to initiate a *qui tam* action on behalf of the government.²⁶⁹ The Senate Committee has recently recommended that the Government consider the introduction of *qui tam* style provisions and the Government should adopt this recommendation.²⁷⁰

In addition to the whistleblower protection provisions, the introduction of a cartel informant model would improve cartel detection and deterrence, by providing another avenue for cartel whistleblowers to reveal information pertaining to cartel conduct. This diversification of enforcement tools would help strengthen the existing anti-cartel enforcement regime, as it does not solely rely on cartel participants applying for immunity. In light of its criticisms, the outlined financial rewards model

²⁶⁸ See, eg, *Hungarian Competition Act*, Art 79/A(4).

²⁶⁹ Department of Justice, above n 182, 2: The *qui tam* complaint is initially sealed for 60 days. The government is required to investigate the allegations in the complaint; if the government cannot complete its investigation in 60 days, it can seek extensions of the seal period while it continues its investigation. The government must then notify the court that it is proceeding with the action (generally referred to as ‘intervening’ in the action) or declining to take over the action, in which case the relator can proceed with the action.

²⁷⁰ Senate Economics References Committee, above n 86, Recommendation 16.

has been designed with appropriate safeguards, in line with the enhanced criteria, to ensure the measures are proportionate to its aims.

CONCLUSIONS AND RECOMMENDATIONS

This thesis has argued that the current method commonly used to assess the effectiveness of the immunity policy is flawed; producing an unduly narrow and unconvincing approach. This is due to the fact that the rational actor model upon which the policy is theoretically based is not an accurate reflection of human behaviour. Whilst the Behavioural Economics ('BE') approach cannot yet provide a cogent set of criteria to assess the immunity policy, it does indicate that there are serious flaws in the rational actor model. It has been this overreliance on economic assumptions and methods of assessment that has led to the policy being viewed in a vacuum; isolated from the enforcement context in which it operates.

This thesis has overcome these limitations in two primary ways. Firstly, the development of enhanced criteria to assess the effectiveness of the immunity policy in line with widely accepted public policy principles of transparency, accountability, consistency and proportionality allows the policy to be viewed within the wider anti-cartel enforcement context in which it operates. This approach enables one to assess the policy's interaction and impact on other areas of the law. Importantly, assessing the policy in its wider context leads to the recognition that the ACCC Immunity Policy is but one enforcement tool that can be utilised by the ACCC. Whilst the immunity policy undeniably plays an important role in cartel detection and deterrence, it is not deserving of the title 'most effective cartel enforcement tool in the world'¹, unless viable alternatives to immunity are also seriously considered and adopted within Australia. This thesis has developed two alternate models to immunity for Australia in the form of cartel specific whistleblower protection and a cartel informant system, which could serve this purpose.

The second contribution this thesis has provided is a shift away from the neo-classical economic emphasis on quantitative methods to assess the operation and effectiveness of the policy, instead utilising a qualitative approach to inform the design of the research and the recommendations within each chapter. This qualitative

¹ See, eg, Gary Spratling, 'Detection and Deterrence: Rewarding Informants for Reporting Violations' (2001) 69 *George Washington Law Review* 798, 799: the United States Corporate Leniency Policy has been the 'most effective generator of cartel cases and is believed to be the most successful program in United States history for detecting large commercial crimes'.

approach is necessary to overcome some of the uncertainty that plagues researchers in this area, particularly given that the number of cartels operating at any time is unknown, and the fact that competition authorities are not forthcoming and transparent in providing immunity application information.

The qualitative interviews provided much-needed insight into the nuances of the policy that are not readily apparent from the little information available in relation to immunity applications. For instance, there has not been a criminal cartel case in Australia, despite cartel conduct being criminalised in 2009. Knowing this information does not help to explain the reasons that may lie behind this fact. However, the qualitative data revealed that there are a number of issues associated with the relationship between the ACCC and the CDPP, including cultural and institutional differences, that impact upon the likelihood of a criminal cartel case. The qualitative data can aid in explaining the gaps left by this quantitative data. These qualitative semi-structured interviews provided valuable empirical insight into the design and operation of the Immunity Policy. These findings were complemented by a cross-comparative analysis of the respective policies in Canada, the United Kingdom and the United States to help inform recommendations for best practice.

Chapter II sets the context for the immunity policy; it provided an overview of the origin and design of the policy within the United States Department of Justice ('DOJ'). This chapter showed that the policy is based on an adaptation of game theory and the prisoner's dilemma and at its heart lie the rational actor model. The chapter proceeded to demonstrate that the assumptions upon which the policy is based, and how it is intended to operate, are based on largely speculative and overgeneralised assumptions. Importantly, this chapter demonstrated that the immunity policy was designed at a time when neo-classical influence was at its peak at the DOJ, which clearly informed the way it was designed and intended to operate.

Chapter III then built upon this analysis by tracing the concept of rationality and its impact on competition law development. It provided an overview of the most influential theoretical developments in competition law, namely the Chicago School of neo-classical economic thought, and more recently the Post-Chicago and Neo-Chicago theories and demonstrated how each theory was premised on the rational actor model. The Chapter then turned to an analysis of the behavioural economics or BE approach to shed light on the limitations of the rational actor model and to

question whether the BE approach was a more appropriate theoretical model for the immunity policy. It concluded that whilst the BE approach is useful at demonstrating the limitations of the rational actor model, it does not provide a cogent set of criteria to assess the effectiveness of the immunity policy.

This was accompanied by the recognition that this overreliance on economic assumptions to assess the effectiveness of the immunity policy produced an overly narrow and unconvincing approach and that the assessment of the policy needed to be more holistic in two primary ways (1) the criteria to assess the policy (2) the method used to inform the research into the policy's design and operation. The chapter concluded by enhancing the orthodox DOJ criteria to include an assessment of widely held public policy principles, namely transparency, accountability, consistency and overall proportionality.

Chapter IV focused on the second approach to enhancing the assessment of the immunity policy by outlining a qualitative, rather than a quantitative method to inform the design and form of the research. As a result, this chapter outlined the key empirical findings that informed the structure and development of the remaining chapters of the thesis. These findings revealed specific and nuanced considerations in relation to the design and operation of the immunity policy, which were previously unavailable in the context of the ACCC Immunity Policy.

As a result of these findings, Chapter V outlined a number of recommendations that would strengthen the ACCC Immunity Policy in relation to its eligibility and cooperation requirements. This included recommending an automatic exclusion provision for recidivists from reapplying for immunity for a second or subsequent time within a 6-7 year period; clarifying and expanding the definition of 'coercion'; shedding light on the limitations of the bifurcated model of enforcement between the ACCC and CDPP, including indicating areas in need of particular attention leading up to Australia's first contested cartel case; and the need for the right of appeal in relation to an ACCC immunity related decision.

Chapter VI focussed on the tension between the roles of public and private enforcement and how these roles intersect with the Immunity Policy. The chapter analysed the delicate balance that exists between ensuring that confidentiality is afforded to immunity applicants versus allowing third parties access to this information to seek compensation for harm caused to them. An analysis of the

common law and newly enacted statutory provisions demonstrated that these provisions are currently inadequate in providing access to immunity information and how this adversely affects the victims of cartel conduct. The balance is currently tipped in favour of the immunity applicants, despite the fact that the ACCC has the power to bring proceedings on behalf of those victims, but chooses not to.² This chapter argues that the balance can be restored by implementing a restitutionary provision that allows for the sharing of immunity information, which would assist third parties pursue their action for damages.

Furthermore, this chapter outlined the problems associated with the sharing of confidential immunity information between competition authorities, and how this can lead to exposure in areas in which the applicant has not yet applied for immunity. The chapter concluded by outlining a number of ways in which greater harmonisation can be achieved, particularly through the implementation of a global marker system with the ICN.

Finally, Chapter VII, in reflection of all of the inadequacies of the current approach, outlines viable alternatives to immunity that have been proven to work in other jurisdictions. This included firming up the existing cooperation policy, which has fallen into disarray as a result of recent court decisions; the implementation of cartel specific whistleblower provisions given the inadequacies of current Australian corporate whistleblower provisions; and the introduction of cartel specific informant system and/or qui tam provisions.

Overall, this thesis has demonstrated that the ACCC Immunity Policy is not operating in accordance with standards widely expected of public policy. The ACCC has not been readily transparent in relation to several areas relating to the Immunity Policy. For instance, the ACCC has not published the consultations that were submitted by various stakeholders in the ACCC's recent review of the policy. The regulator has also failed to provide reasons for the inclusion and exclusion of the recommendations in its final version of the Immunity Policy. Additionally, this thesis has demonstrated a number of areas in need of further clarification in order for the ACCC to meet the democratic requirement for openness.

Furthermore, the ACCC is largely unaccountable for its decisions in relation to the Immunity Policy. This is most evidently reflected in the fact that there is no

² *Competition and Consumer Act 2010* (Cth) s 87 (1A) (b).

right or process of review stipulated in the Policy in the event that an applicant wishes to appeal the ACCC's decision to revoke immunity. The ACCC should be accountable for the manner in which it exercises its discretion in relation to immunity, as the ACCC is not a directly elected body and should be held accountable for its decisions in other ways.³

There are also many areas where the policy is operating inconsistently against the interests of fair administration, creating high levels of uncertainty. The issues associated with the relationship between the ACCC and CDPP, in terms of their cultural and institutional differences, is creating inconsistencies in the way each authority perceives and processes immunity applications. This has led to considerable delay in the determination of conditional criminal immunity. It remains to be seen whether the implementation of a 'letter of comfort' can overcome these inconsistencies and provide the certainty required to encourage immunity applicants to apply. Furthermore, the inconsistent requirements that exist in the context of multi-jurisdictional immunity applications can also create a considerable degree of uncertainty. The ACCC should attempt to resolve this inconsistency by calling for a global marker system as a first step towards harmonisation in this area.

Overall, it is important that the immunity policy be proportionate to its aims of cartel detection and deterrence. As part of this assessment, there is a need to consider whether there are equally effective measures that can also achieve the policy's aims.⁴ This thesis has demonstrated that there are two primary alternatives to Immunity, in the form of cartel specific whistleblower protection and a cartel informant system, which could be implemented to reduce the overreliance on the immunity policy and increase the number of tools available to the ACCC to achieve its aims of cartel detection and deterrence.

These conclusions could not be drawn by simply focusing on the predictability of the immunity policy, the threat of sanctions or the fear of detection; the three factors that currently categorise the model used to assess the policy's effectiveness. These conclusions could also not be drawn from a purely quantitative assessment of the immunity policy on the basis of overgeneralised economic

³ Arnold Bloch Leibler, 'Competition Policy Review - Final Report' (Australian Government - The Treasury, 2015)56-58.

⁴ See also, Gordon Schnell and Aymeric Dumas-Emard, 'How to Catch A Thief - Corporate Leniency and the Irrepressible Challenge of Cartel Detection; Finding a Better Way' (2011) 9 *CPI Antitrust Chronicle* 1.

assumptions of the rational actor model or incomplete information in relation to immunity. Instead, this thesis has contributed to a new approach to the assessment of the Immunity policy, but firstly enhancing the criteria used to assess the policy's effectiveness and secondly, by employing a qualitative and cross-comparative approach to inform the research.

In line with this new approach, what is needed is further empirical research, such as that undertaken by Professor Caron Beaton-Wells, who commenced a similar study during the time of this research, into the design and operation of the ACCC Immunity Policy and the way it is assessed.⁵ There is a particular need for this type of research in further comparative study, or in jurisdictions that have newly implemented an immunity policy or may do so in the future. The assessment of the immunity policy also needs to be accompanied by a greater focus on corporate compliance, which could not be achieved within this research. For instance, Professor Brent Fisse has recently suggested that an adequate corporate compliance program should be a condition of corporate immunity.⁶

Despite the recent review of the ACCC Immunity Policy, this thesis has demonstrated that many components of the policy's design and operation still remain highly unsatisfactory. This may be due to the fact that the review was narrowly defined and largely inadequate in comprehensively addressing the number of issues associated with the policy or its impact and interaction with other areas of the law. As a result, the ACCC should seek to implement the recommendations outlined in this thesis in order to strengthen the Immunity Policy. Most importantly, the ACCC should seriously consider the adoption of alternative methods to immunity, as this is a key area that has been overlooked by the regulator. This should be accompanied by a comprehensive public consultation to arrive at the model that will best fit the Australian anti-cartel enforcement context. In its assessment of these measures, the ACCC should adopt the new approach to assessing the Immunity Policy argued in

⁵ See Caron Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171; Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126.

⁶ Brent Fisse, *Reconditioning Corporate Leniency: The Possibility of Making Compliance Programs a Condition of Immunity* Brent Fisse
<http://www.brentfisse.com/images/Fisse_Compliance_Programs_as_Condition_of_Corporate_Immunity_201114.pdf>.

this thesis by employing the enhanced criteria of assessment and by utilising the qualitative and cross-comparative method to inform their review.

REFERENCES

A Articles/Books/Reports

ABA Section of Antitrust Law, 'Model Jury Instructions in Criminal Antitrust Cases - Alternative Instruction for 4.C.3 - C. 7' (ABA Section of Antitrust Law, 2009)

Ackerman, Bruce A, 'Law, Economics and the Problem of Legal Culture ' (1986) *Duke Law Journal* 929

Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' (Commonwealth of Australia, 1995) <<http://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf>>

Administrative Review Council, 'What Decisions Should Be Subject to Merit Review?' (Administrative Review Council, Commonwealth of Australia, 1999)

Alon-Shenker, Pnina and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2013) *59 McGill Law Journal* 375

American Bar Association, 'Interview with Judge Susan Illston' (2012) *27 Antitrust* 18

Andenas, Mads and Stefan Zleptnig, 'Proportionality: WTO Law: In Comparative Perspective' (2007) *42 Texas International Law Journal* 371

Anderson, Helen, 'Piercing the Veil on Corporate Groups in Australia: The Case for Reform' (2009) *33 Melbourne University Law Review* 333

Anderson, Helen, 'Veil Piercing and Corporate Groups: An Australian Perspective' (2010) *33 New Zealand Law Review* 1

Anderson, John, *Cognitive Psychology and Its Implications* (W H Freeman/Times Books/Henry Holt & Co, 3rd ed, 1990)

Andreano, R and J Suiegfried, *The Economics of Crime* (John Wiley, 1980)

Antimonopoly Office of the Slovak Republic, 'Cartel Informant Reward' (Antimonopoly Office of the Slovak Republic, 2013) <<http://www.antimon.gov.sk/cartel-informant-reward/>>

Apestequia, Jose, Martin Dufwenberg and Reinhard Selten, 'Blowing the Whistle' (2007) *31 Economic Theory* 143

Arkes, H and C Blumer, 'The Psychology of Sunk Cost' (1985) *35 Organizational Behavior and Human Decision Processes* 124

Arlen, Jennifer, 'Comment: The Future of Behavioral Economic Analysis of Law' (1998) 51 *Vanderbilt Law Review* 1765

Arnold Bloch Leibler, 'Competition Policy Review - Final Report' (Australian Government - The Treasury, 2015)

Ashton, Jeanette, '15 Years Of Whistleblowing Protection Under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?' (2015) 44 *Industrial Law Journal* 29

Association, American Bar, 'Comments of the American Bar Association Section of Antitrust Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review' (2006) <http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_canadian-leniency.authcheckdam.pdf>

Attorney-General's Department, 'Australian Administrative Law Policy Guide' (Australian Government, 2012)

Attorney-General's Department, 'Australia's Bilateral Mutual Assistance Arrangements' (Commonwealth of Australia), <<https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Documents/bilateralper cent20treatiesper cent20onper cent20mutualper cent20assistanceper cent20inper cent20criminalper cent20matters.doc>>

Attorney's General Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Australian Government, 2009)

Aubert, Cécile , Patrick Rey and William E. Kovacic, 'The Impact of Leniency and Whistleblowing Programs on Cartels' (2005) 24 *International Journal of Industrial Organization* 1241

Audretsch, David, 'Divergent Views in Antitrust Economics' (1988) 33 *Antitrust Bulletin* 135

Austin, R P and I M Ramsay, *Ford's Principles of Corporations Law* (Lexis Nexis, 2015)

Australian Competition & Consumer Commission, *ACCC Gets on the Front Foot with Cartels Film 'The Marker'* (30 August 2012) <<https://www.accc.gov.au/media-release/accc-gets-on-the-front-foot-with-cartels-film-per centE2per cent80per cent98the-markerper centE2per cent80per cent99>>

Australian Competition & Consumer Commission, 'The ACCC's Accountability Framework for Investigations' (ACCC, 2013)

Australian Competition & Consumer Commission, 'Authorisation Guidelines' (ACCC, 2013)

Australian Competition & Consumer Commission, 'Leniency Policy for Cartel Conduct' (ACCC, 2003)

Australian Competition & Consumer Commission, 'Review of the ACCC Immunity Policy for Cartel Conduct' (Discussion Paper, ACCC, 2013)

Australian Competition & Consumer Commission, 'Revised 'first in' Immunity Policy for Cartel Conduct' (Media Release, MR 210/05, 29th August 2005)

Australian Competition & Consumer Commission, 'Updated Immunity Policy to Uncover Cartel Conduct' (Media Release, MR 225/14, 10 September 2014)

Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct ' (2014)

Australian Competition and Consumer Commission, 'ACCC Immunity and Cooperation Policy: Frequently Asked Questions' (2014)

Australian Competition and Consumer Commission, 'The ACCC Immunity Policy for Cartel Conduct ' (2009) <<http://www.accc.gov.au/system/files/Immunityper cent20policyper cent20forper cent20cartelper cent20conductper cent20andper cent20interpretationper cent20guidelines.pdf>>

Australian Competition and Consumer Commission, 'ACCC Immunity Policy Interpretation Guidelines' (2009) <<http://www.accc.gov.au/system/files/Immunityper cent20policyper cent20forper cent20cartelper cent20conductper cent20andper cent20interpretationper cent20guidelines.pdf>>

Australian Competition and Consumer Commission, *ACCC Releases Discussion Paper in Cartel Immunity Policy Review* (September 2013)

Australian Competition and Consumer Commission, 'Compliance & Enforcement Policy' (ACCC, 2015)

Australian Competition and Consumer Commission, 'Cooperation Policy for Enforcement Matters' (ACCC, 2002)

Australian Competition and Consumer Commission, 'Draft ACCC Immunity and Cooperation Policy for Cartel Conduct' (April 2014 2014) <https://consultation.accc.gov.au/compliance-enforcement/draft-immunity-and-cooperation-policy/supporting_documents/DRAFTper cent20ACCCper cent20immunityper cent20andper cent20cooperationper cent20policyper cent2009per cent20Aprilper cent202014per cent202.pdf>

Australian Competition and Consumer Commission, 'Review of the ACCC's Leniency Policy for Cartel Conduct' (2005)

Australian Competition and Consumer Commission, 'Submission to the Competition Policy Review - Response to the Draft Report' (Australian Competition and Consumer Commission, 2014)

Australian Law Reform Commission, 'Family Violence - A National Legal Response, Report 114' (Australian Law Reform Commission, 2010)

Australian Law Reform Commission, 'Managing Discovery: Discovery of Documents in Federal Courts, Report 115' (Australian Law Reform Commission, 2011)

Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report 95' (Australian Law Reform Commission, 2003)

Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders, Report 103' (Australian Law Reform Commission, 2006)

Australian Law Reform Commission, 'Uniform Evidence Law (ALRC Report 102)' (Australian Law Reform Commission, 2006)
<<http://www.alrc.gov.au/publications/report-102>>

Australian Securities & Investment Commission, *ASIC Increasing Use of Behavioural Economics Across its Regulatory Business* (18 March 2015) ASIC
<<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-059mr-asic-increasing-use-of-behavioural-economics-across-its-regulatory-business/>>

Australian Securities & Investment Commission, 'Penalties for Corporate Wrongdoing - Report 387' (Australian Securities & Investment Commission, 2014)
<<http://download.asic.gov.au/media/1344548/rep387-published-20-March-2014.pdf>>

Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions, 'Memorandum of Understanding' (2006)

Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions, 'Memorandum of Understanding' (Australian Securities and Investment Commission, 2006)
<http://download.asic.gov.au/files/mou_dpp_mar_2006.pdf>

Avraam, George and Cherrine Chow, *Whistleblower Protection: The Importance of Internal Policies* (May 12 2014) Baker & McKenzie - Canadian Fraud Law
<<http://www.canadianfraudlaw.com/2014/05/whistleblower-protection-the-importance-of-internal-policies/>>

Ayres, Ian, 'How Cartels Punish: A Structural Theory of Self-Enforcing Collusion' (1987) 87 *Columbia Law Review* 295

Ayres, Ian, 'Playing Games with the Law' (1990) 42 *Stanford Law Review*

Baer, Bill, 'Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-out Policy Regarding Corporate Plea Agreements ' (Press Release, 13-422, April 12 2013)

Baer, Miriam, 'Linkage and the Deterrence of Corporate Fraud' (2008) 94 *Virginia Law Review* 1295

Baer, William J, Tim Frazer and Luc Gyselen, 'International Leniency Regimes: New Developments and Strategic Implications' (2005) 246 *Corporate Counsel's International Advisor* 2

Bagaric, Mirko, 'Bad Law Inevitably Leading to Confused Jurisprudence - The Inevitable, Regrettable Fallout From *Barbaro v The Queen*' (2015) 39 *Criminal Law Journal* 3

Bagaric, Mirko, 'The Need for Legislative Action to Negate the Impact of *Barbaro v The Queen*' (2014) 38 *Criminal Law Journal* 133

Bagaric, Mirko, 'The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing' (2014) 51 *San Diego Law Review* 343

Bagaric, Mirko and Athula Pathinayake, 'Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation' (2015) 40 *Australian Bar Review* 64

Baharlou, Kusha, *The Right Carrot for an Unruly Jungle* (University of Sydney, 2011)

Bain, Joe, *Barriers to New Competition* (Harvard University Press, 1st ed, 1956)

Bainbridge, Stephen, 'Abolishing Veil Piercing' (2001) 26 *Journal of Corporate Law* 479

Baker, Donald I, 'Punishment for Cartel Participants in the United States: A Special Model?' in Caron & Ariel Beaton-Wells & Ezrachi (ed), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 1 ed, 2011) 27

Balmain, Charles & Vera Coughlan, 'More Haste Less Speed: the Evolving Practice in Competition Damages Actions in the United Kingdom' (2011) 4 *Global Competition Litigation Review* 147

Barennes, Marc and Gunnar Wolf, 'Cartel Recidivism in the Mirror of European Union Case Law' (2011) 2 *Journal of European Competition law & Practice* 423

Barton, Alana, *Just Deserts Theory* (2012) SAGE Publications
<<http://www.sagepub.com/hanserintro/study/materials/reference/ref3.1.pdf>>

Baumgartel, Sarah, 'Nonprosecution Agreements as Contracts: Stolt-Nielson and the Question of Remedy for a Prosecutor's Breach' (2008) 1 *Wiscosin Law Review* 25

Beale, Sara Sun 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481

Beaton-Wells, Caron, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171

Beaton-Wells, Caron 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 37

Beaton-Wells, Caron, 'Forks in the Road: Challenges Facing the ACCC's Immunity Policy for Cartel Conduct (Part 1)' (2008) 7 *University of Melbourne Law School Research Series*

Beaton-Wells, Caron, 'Immunity Policy: Revolution or Religion? An Australian Case-Study' (2013) 2 *Journal of Antitrust Enforcement* 126

Beaton-Wells, Caron and Ezrachi Ariel, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 1 ed, 2011)

Beaton-Wells, Caron and Brent Fisse, *Australian Cartel Regulation: Law Policy and Practice in an International Context* (Cambridge University Press, 1 ed, 2011)

Beaton-Wells, Caron and Brent Fisse, 'United States Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique' (2011) 56 *The Antitrust Bulletin* 277

Beaton-Wells, Caron and Fiona Haines, 'Making Cartel Conduct Criminal' (2009) 42 *The Australian and New Zealand Journal of Criminology* 218

Beaton-Wells, Caron et al, 'Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement ' (The University of Melbourne, 2010) <<http://cartel.law.unimelb.edu.au/go/project-news/project-survey>>

Beaton-Wells, Caron and Chris Platania-Phung, 'Anti-Cartel Advocacy - How has the ACCC Fared?' (2011) 33 *The Sydney Law Review* 735

Beatty, David, *The Ultimate Rule of Law* (Oxford University Press, 1st ed, 2004)

Becker, Gary S, 'Crime and Punishment: An Economic Approach' 76 *Journal of Political Economy* 169

Becker, Gary S, *The Economic Approach to Human Behaviour* (The University of Chicago Press, 1990)

Beeman, Yvette, 'Accomplice Testimony Under Contingent Plea Agreements' (1987) 72 *Cornell Law Review* 800

Bennett, Peter, 'Submission to the Australian Treasury, Australian Securities and Investment Commission (ASIC) Improving Protections for Corporate Whistleblowers' (Whistleblowers Australia, 2010)

Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907)

Berg, Bruce L, *Qualitative Research Methods for the Social Sciences* (Allyn and Bacon, 4th ed, 2001)

Bezzi, Marcus, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review?' (Paper presented at the Competition Law Conference, Shangri-La Hotel, Sydney, 4 May 2013)

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

Bingaman, Anne K, 'Antitrust Enforcement, Some Initial Thought and Actions' (0867, Antitrust Section of the American Bar Association, 1993)

Bird, Joanne, 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 739

Blecher, Maxwell M, 'The Plaintiff's Viewpoint' (1968-1969) 38 *Antitrust Law Journal*

Blount, Justin and Spencer Markel, 'The End of the Internal Compliance as We Know it, Or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblowing Provisions' (2012) 17 *Fordham Journal of Corporate & Financial Law* 1023

Blum, Ulrich, 'On the Rational of Leniency Programs: A Game-Theoretical Analysis' (2008) 25 *European Journal of Law and Economics* 209

Bonta, J, T Rugge and M Dauvergne, 'The Reconviction Rate of Federal Offenders' (Corrections Research - Solicitor General of Canada, 2003) <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rcvd-fdffndr/rcvd-fdffndr-eng.pdf>>

Borden Ladner Gervais LLP, *Use of Information from Regulatory Investigations in Civil Litigation* (21 January 2015) Lexology <<http://www.lexology.com/library/detail.aspx?g=0ebe4691-a89d-422c-b560-8f3c4de7cc41>>

Bornstein, Jeffrey, Laura Brevetti and Leanne Hartmann, 'DOJ's New Guidance on Criminal Discovery Practices: How Much Has Changed?' (K&L Gates, 2010) <<http://www.klgates.com/dojs-new-guidance-on-criminal-discovery-practices-how-much-has-changed-01-27-2010/>>

Bos, Iwan and Frederick Wandschneider, 'Cartel Ringleaders and the Corporate Leniency Program' (CCP Working Paper 11-13 - Masstricht University and the University of East Anglia, 2011)

Bougette, Patrice, Marc Deschamps and Frederic Marty, 'When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law' (GREDEG Working Paper No. 2014-23, 2014) <<http://www.gredeg.cnrs.fr/working-papers/GREDEG-WP-2014-23.pdf>>

Bourgeois, L, 'On the Measurement of Organisational Slack' (1981) 6 *Academy of Management Review* 29

Bowen, Chris, *Making Jail as Real for Cartels As the Temptation To Steal* (November 5 2008) Sydney Morning Herald <<http://www.smh.com.au/news/opinion/making-jail-as-real-for-cartels-as-the-temptation-to-steal/2008/11/04/1225560833543.html>>

Brand, Vivienne, Sulette Lombard and Jeff Fitzpatrick, 'Bounty Hunters, Whistleblowers and a New Regulatory Paradigm' (2013) 41 *Australian Business Law Review* 292

Brenner, Steffen 'Self-disclosure at International Cartels' (2011) 42 *Journal of International Business Studies* 221

Brockner, J and J Rubin, *Entrapment in Escalating Conflicts: A Social Psychological Analysis*. (Springer-Verlag, 1st ed, 1985)

Brown, A J, 'Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 2 *E-Journal of Internation and Comparative Labour Studies* 4

Brown, Darryl K, 'Criminal Law Theory and Criminal Justice Practice' (2012) 73 *American Criminal Law Review*

Buccirossi, Paolo and Giancarlo Spagnolo, 'The Effects of Leniency on Illegal Transaction: How (Not) to Fight Corruption' (SSE/EFI Working Paper Series in Economics and Finance, 2001) <<http://swopec.hhs.se/hastef/papers/hastef0456.pdf>>

Bucy, Pamela, 'Games and Stories: Game Theory and the Civil False Claims Act' (2004) 31 *Florida State University Law Review* 603

Bunzel, H and Howard Miller, 'Defending 'The Last Man Standing' - Trench Lessons From the 2008 Criminal Antitrust Trial United States v Swanson' (2008) 7 *Antitrust Source* 1

Burks, Melanie and Jane Mills, *Grounded Theory: A Practical Guide* (SAGE Publications Ltd, 2011)

Burns, Jean Wegman, 'The New Role of Coercion in Antitrust' (1991) 60 *Fordham Law Review* 379

Bushway, Shawn and Peter Reuter, 'Economists' Contribution to the Study of Crime and the Criminal Justice System' (2008) 37 *The University of Chicago Crime and Justice* 389

Caldwell, Leslie, 'Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference' (United States Department of Justice, 2014)

Calvani, Terri and Torello Calvani, 'Cartel Sanctions and Deterrence' (2011) 56 *The Antitrust Bulletin*

Canada, Government of, 'Dangerous Offender Legislation' (Government of Canada, 2014) <<http://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/protctn-gnst-hgh-rsk-ffndrs/dngrs-ffndr-dsgntn-eng.aspx>>

Cannzaro, Enzo, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 *European Journal of International Law* 889

Carree, Martin, Andrea Gunster and Maarten Schinkel, 'European Antitrust Policy 1957-2004: An Analysis of Commission Decisions' (2010) 36 *Review of Industrial Organization* 97

Cass-Gottlieb, Gina and Graeme Edgerton, 'Application of the Australian Trade Practices Act and ACCC Immunity Policy to International Cartel Conduct' (2006) 2 *International Bar Association* 8

Castle, Louise & Simon Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia' (2002) 10 *Competition & Consumer Law Journal* 1

Cauffman, Caroline, 'The Interaction of Leniency Programmes and Actions for Damages' (2011) 7 *The Competition Law Review* 181

Celli, Riccardo and Christian Riis-Madsen, 'Strengthened Cartel Enforcement in the European Union: Balancing an Effective Leniency Programme with the Desire for Private Enforcement Action' (2006) 2 *International Bar Association* 23

Charmaz, Kathy, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (SAGE Publications, 2006)

Chesebro, James W and Deborah J Borisoff, 'What Makes Qualitative Research Qualitative?' (1997) 8 *Qualitative Research Reports in Communication* 3

Choi, Jay Pil and Heiko Gerlach, 'Global Cartels, Leniency Programs and International Antitrust Cooperation' (Michigan State University, 2010) <<http://ssrn.com/abstract=1587968>>

Chowdhury, Michelle, 'From Paper Promises to Concrete Commitments: Dismantling The Obstacles to Transatlantic Cooperation in Cartel Enforcement' (2011) *AAI Working Paper No. 11-09*

Christine, Parker. and Vibeke Lehmann Nielsen, 'THE FELS EFFECT: Responsive Regulation and the Impact of Business Opinions of the ACCC' (2011) 20 *Griffith Law Review* 91

Christopher, Russell L, 'The Prosecutors Dilemma: Bargains and Punishments' (2003) 72 *Fordham Law Review*

Cicchini, Michael, 'Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains' (2008) 38 *New Mexico Law Review* 159

Claessens, Stijn and Laura Kodres, 'The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions' (International Monetary Fund - Research Department and Institute for Capacity Development, 2014)

Clark, Eugene, 'Comparative Research in Corporate Law' (1996) 3 *Canberra Law Review* 18

Clark, Stuart and Christina Harris, 'Class Actions in Australia: (Still) A Work in Progress' (2008) 31 *Australian Bar Review* 63

Clarke, Julie, 'The Increasing Criminalization of Economic Law – A Competition Law Perspective' (2012) 19 *Journal of Financial Crime* 76

Cohen, Lloyd and Joshua Wright, *Pioneers of Law and Economics* (Edward Elgar Publishing, 1st ed, 2009)

Comino, Vicky, 'The Challenge of Corporate Law Enforcement in Australia' (2009) 23 *Australian Journal of Corporate Law* 233

Commissioner of Competition and Director of Public Prosecutions, 'Memorandum of Understanding' (Competition Bureau- Canada, 2010)

Committee of Financial Services, 'Wrong Numbers: The Accounting Problems at WorldCom' (United States House of Representatives, 2002) <<http://www.gpo.gov/fdsys/pkg/CHRG-107hhr83079/html/CHRG-107hhr83079.htm>>

Commonwealth Department of Public Prosecutions, 'Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process' (Australia's Federal Prosecution Service, 2014) <<http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>>

Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, 'Memorandum of Understanding Between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct' (15 August 2014)

Commonwealth Ombudsman, 'Better Practice Guide to Complaint Handling' (Commonwealth Ombudsman, 2009)

Competition and Markets Authority, 'Applications for Leniency and No-Action in Cartel Cases - Detailed Guidance on the Principles and Process' (Competition and Markets Authority, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf>

Competition and Markets Authority, 'Rewards for Information about Cartels' (United Kingdom Competition and Markets Authority, 2008) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf>

Competition and Markets Authority, 'What Does Behavioural Economics Mean for Competition Policy' (United Kingdom Office of Fair Trading, 2010)

Competition Bureau, 'Adjustments to the Immunity Program and the Bureau's Response to Consultation Submissions' (Competition Bureau, 11 May 2011)

Competition Bureau, 'Competition Bureau Launches Whistleblowing Initiative' (Competition Bureau, 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03573.html>>

Competition Bureau, 'Competitor Collaboration Guidelines' (Competition Bureau, 2009)

Competition Bureau, 'Corporate Immunity - Agreement' (Competition Bureau, 2011) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02479.html>>

Competition Bureau, 'Immunity Program under the Competition Act' (Competition Bureau, 7 June 2010)

Competition Bureau, 'Immunity Program: Frequently Asked Questions' (Competition Bureau, 2013)

Competition Bureau, 'Leniency Program' (Competition Bureau, 2010)

Competition Bureau, 'Leniency Program: Frequently Asked Questions' (Competition Bureau, 2010)

Competition Bureau, 'Whistleblowing Initiative - Criminal Cartel Whistleblowing Initiative' (Competition Bureau, 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html>>

Competition Bureau and Department of Public Prosecutions, 'Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions' (Competition Bureau Canada, 2010) <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf/\\$file/Protocole-entente-Memorandum-of-Understanding.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf/$file/Protocole-entente-Memorandum-of-Understanding.pdf)>

Competition Commission of Pakistan, 'Revised Guidelines on "Reward Payment to Informants Scheme"' (Competition Commission of Pakistan, <http://www.cc.gov.pk/images/Downloads/guidlines/reward_paymentannexure_ii.pdf>

Connor, John, 'Anti-Cartel Enforcement by the DOJ: An Appraisal' (2008) 5 *The Competition Law Review* 89

Connor, John, 'Cartel Amnesties Granted - Worldwide Whistleblowers' (Purdue University, 2009)

Connor, John, 'Cartels Portrayed: Detection' (2011) *AAI Working Paper No. 11-05* 23

Connor, John, 'A Critique of Partial Leniency for Cartels by the U.S. Department of Justice' (Paper presented at the 6th International Industrial Organization Conference, Arlington, Virginia, Arlington, Virginia, May 17, 2008 2008)

Connor, John, 'Problems with Prison in International Cartel Cases' (2011) 56 *The Antitrust Bulletin* 311

Connor, John, 'A Symposium on Cartel Sanctions: Recidivism Revealed: Private International Cartels 1990-2009' (2010) 6 *Competition Policy International* 101

Corcoran, Suzanne, 'Comparative Corporate Law Research Methodology ' (1993) 3 *Canberra Law Review* 54

Cornwall, Lori, Sandra Forbes and Mark Katz, 'Canada: Recent Developments in Private Antitrust Litigation' (Private Antitrust Litigation News, 2002) <<http://www.dwpv.com/images/canadarecentdevelopmentsinprivateantitrustlitigation.pdf>>

Corporations and Financial Services Division, 'Improving Protections for Corporate Whistleblowers - Options Paper' (Australian Treasury, 2009)

Corrigan, Michael, 'Submission in Response to Consultation on Review of the ACCC Immunity Policy for Cartel Conduct' (Law Council of Australia - Competition and Consumer Committee, 2013)

Crane, Daniel A, 'A Neo-Chicago Perspective on Antitrust Institutions' (2012) 78 *Antitrust Law Journal* 43

Crane, Daniel A, 'Optimizing Private Antitrust Enforcement' (2010) 63 *Vanderbilt Law Review*

Crane, Daniel A, 'Technocracy and Antitrust' (2008) 86 *Texas Law Review*

Crawford, James, Jacqueline Peel and Simon Olleson, 'The ILC's Articles on Responsibility of States for International Wrongful Acts: Completion of the Second Reading' (2007) 12 *European Journal of International Law*

Creyke, Robyn, 'Administrative Tribunals' in Matthew Groves and HP Lee (eds), *Australian Administrative Law - Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007)

Cucinotta, Antonio, Roberto Pardolesi and Roger Van den Bergh, *Post-Chicago Developments in Antitrust Law* (Edward Elgar Publishing Inc, 1st ed, 2002)

Cyert, Richard, James March and G Clarkson, *A Behavioral Theory of the Firm* (Englewood Cliffs: Prentice Hall, 1 ed, 1963)

Dalton, Dan and Idalene Kesner, 'On the Dynamics of Corporate Size and Illegal Activity: An Empirical Assessment' (1988) 7 *Journal of Business Ethics* 861

Davies, Stephen and Oindrila De, 'Ringleaders in Larger Number, Asymmetric Cartels' (ESRC Centre for Competition Policy & Indian Institute of Management, 2012)

De Stefano, Gianni, 'Access of Damage Claimants to Evidence Arising Out of European Union Cartel Investigations: A Fast Evolving Scenario' (2012) 5 *Global Competition Litigation Review* 95

DellaVigna, Stefano, 'Psychology and Economics: Evidence from the Field' (2009) 47 *Journal of Economic Literature* 315

Department for Business Innovation and Skills, 'Policy Paper Consumer Rights Act 2015' (United Kingdom Government, 14 August 2015) <<https://www.gov.uk/government/publications/consumer-rights-act-2015>>.

Department of Finance and Deregulation, 'Influencing Consumer Behaviour: Improving Regulatory Design Research Design' (Australian Government - Department of the Prime Minister and Cabinet, 2012)

Department of Justice, '60 Minutes with Anne K. Bingaman, Assistant Attorney General, Antitrust Division, United States Department of Justice' (1994-1995) 63 *Antitrust Law Journal* 323

Department of Justice, *About the Division* United States Department of Justice - Antitrust Division <<http://www.justice.gov/atr/about/index.html>>

Department of Justice, *Antitrust Division 2013 Criminal Enforcement Update* Department of Justice - Antitrust Division <<http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>>

Department of Justice, 'Antitrust Division Manual' (United States Department of Justice, 2015) <<http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf>>

Department of Justice, *Bank of America Agrees to Pay \$137.3 Million in Restitution to Federal and State Agencies as a Condition of the Justice Department's Antitrust Corporate Leniency Program* (December 7 2010) United States Department of

Justice <<http://www.justice.gov/opa/pr/bank-america-agrees-pay-1373-million-restitution-federal-and-state-agencies-condition-justice>>

Department of Justice, *Criminal Program Update - Division Update Spring 2015*
U.S Department of Justice - Antitrust Division <<http://www.justice.gov/atr/division-update/2015/criminal-program-update>>

Department of Justice, 'The False Claims Act: A Primer' (U.S Department of Justice, 2011) <http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf>

Department of Justice, 'Fraud Statistics - Overview' (Civil Division, United States Department of Justice, 2013) <http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf>

Department of Justice, 'Model Corporate Conditional Leniency Letter' (Department of Justice - Antitrust Division, 2008) <<http://www.justice.gov/atr/public/criminal/239524.htm>>

Department of Justice, 'Model Individual Conditional Leniency Letter' (Department of Justice - Antitrust Division, 2008) <<http://www.justice.gov/atr/public/criminal/239526.htm>>

Department of Justice, 'Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements' (Department of Justice 2013) <http://www.justice.gov/atr/public/press_releases/2013/295747.htm>

Department of Justice, 'U.S Attorney's Manual - Title 9: Criminal - Grand Jury' (United States Department of Justice, 2012) <<http://www.justice.gov/usam/usam-9-11000-grand-jury#9-11.010>>

Department of Justice, DOJ, 'Corporate Leniency Policy' (0091, Department of Justice - Antitrust Division, 1993)

Department of Justice, DOJ, 'Leniency Policy for Individuals' (0092, Department of Justice - Antitrust Division, 1993)

Director of Public Prosecutions, 'Public Prosecution Service of Canada Deskbook' (Director of Public Prosecutions 1 March 2014 2014) <<http://www.ppsc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>>

Dixon, Megan, Ethan Kate and Janet McDavid, 'Too Much of a Good Thing?: Is Heavy Reliance on Leniency Eroding Cartel Enforcement in the United States?', 2014 <<https://www.competitionpolicyinternational.com/too-much-of-a-good-thing-is-heavy-reliance-on-leniency-eroding-cartel-enforcement-in-the-united-states/>>

Drabsch, Talina, 'Reducing the Risk of Recidivism' (NSW Parliamentary Library Research Service 2006)

- Duhaime, Irene and Charles Schwenk, 'Conjectures on Cognitive Simplification in Acquisition and Divestment' (1985) 10 *The Academy of Management Review* 287
- Durham, Alexis, 'Criminology: Justice in Sentencing: The Role of Prior Record of Criminal Involvement' (1987) 78 *Journal Criminal Law & Criminology* 614
- Ebersole, Dave, 'Blowing the Whistle on the Dodd-Frank Whistleblower Provisions' (2011) 6 *Ohio State Entrepreneurial Business Law Journal* 123
- Eisner, Marc Allen, *Antitrust and the Triumph of Economics - Institution and Policy Change* (The University of North Carolina Press, 1st ed, 1991)
- Ekelund, Robert and Robert Hebert, *A History of Economic Theory & Method* (Waveland Press, Inc, 6th ed, 2014)
- Ellickson, Robert C, 'Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics ' (1989) 65 *Chicago-Kent Law Review* 23
- Elliott, C. Blaine, 'Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches' (2003) 16 *Washington & Lee University School of Law Capital Defense Journal*
- Ellis, Christopher and Wesley Wilson, 'Cartels, Price-Fixing, and Corporate Leniency Policy: What Doesn't Kill Us Makes Us Stronger' (Department of Economics, University of Oregon, 2008) <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2008&paper_id=339>
- Ellis, Evelyn, *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999)
- Emililou, Nicholas, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, 1996)
- Emmett, Ross, *The Elgar Companion to the Chicago School of Economics* (Edward Elgar Publishing Limited, 2010)
- Enderndorf, Natalie Harsdorf, 'The Road After Pflieger: Austrian Preliminary Reference Raises New Questions on Access to File by Third Parties in Cartel Proceedings' (2013) 34 *European Competition Law Review* 78
- Engstrom, David Freeman, 'Harnessing the Private Attorney General: Evidence from Qui Tam Litigation ' (2013) 112 *Columbia Law Review* 1244
- Etzioni, Amital, 'Behavioural Economics: Toward a New Paradigm' (2011) 55 *American Behavioral Scientist* 1099
- Etzioni, Amital, 'How Rational Are We?' (1987) 2 *Sociological Forum* 1

European Competition Network, 'ECN Model Leniency Programme' (European Competition Network, 2012)

European Competition Network, 'Protection of Leniency Material in the Context of Civil Damages Actions' (European Competition Network, Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012)

European Parliament and of the Council, 'Directive Of the European Parliament and Of the Council Of On Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and Of the European Union' (2014) <http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf>

Ezrachi, Ariel and Caron Beaton-Wells, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing Ltd, 1st ed, 2011)

Faichney, Daniel, 'Autocorrect? A Proposal to Encourage Voluntary Restitution through the White-Collar Sentencing Calculus' (2014) 104 *The Journal of Criminal Law & Criminology* 389

Farar, John, 'Piercing the Corporate Veil in Favour of Creditors and Pooling of Groups - A Comparative Study' (2013) 25 *Bond Law Review* 31

Farrar, John, ' In Pursuit of An Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance ' (2001) 13 *Australian Journal of Corporate Law*

Feldman, Yuval and Orly Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality' (2010) 88 *Texas Law Review* 1151

Fels, Allan, 'International Perspective Competition Policy Asia Pacific Region Regional Economic Development Policy to Planning to Investment Opportunities in Vietnam Hanoi ' (Australian Competition and Consumer Commission, 11 - 13 December 1995)

Ferziger, Marsha and Daniel Currell, 'Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs' (1999) *University of Illinois Law Review* 1141

First, Harry, 'The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law ' (2001) 68 *Antitrust Law Journal* 711

Fishbein, Stephen, Kafele Heather and Casey O'Neill, 'Confidentiality Waivers in Global Cartel Investigations' (Shearman & Sterling LLP, <<http://www.carteldigest.com/siteFiles/Antipercent20Cartelpercent20Headlines/Confidentialityperpercent20Waiversperpercent20inperpercent20Globalperpercent20Cartelperpercent20Investigations1.pdf>>

Fishman, Clifford S, 'Criminal Law: Defense Witness as "Accomplice" Should the Trial Judge Give A "Care and Caution" Instruction?' (2005) 96 *Journal Criminal Law & Criminology*

Fisse, Brent, 'An Immunity Policy for Insider Trading and Market Manipulation?' (Paper presented at the LCA Corporations Workshop, 2008)

Fisse, Brent, *Reconditioning Corporate Leniency: The Possibility of Making Compliance Programs a Condition of Immunity* Brent Fisse <http://www.brentfisse.com/images/Fisse_Compliance_Programs_as_Condition_of_Corporate_Immunity_201114.pdf>

Foer, Albert, 'The Federal Antitrust Commitment: Providing Resources to Meet the Challenge' (The American Antitrust Institute, 1999)

Foer, Albert and Robert Lande, 'The Evolution of United States Antitrust Law: The Past, Present and (Possible) Future' (American Antitrust Institute, 1999)

Gale, Nicola et al, 'Using the Framework Method for the Analysis of Qualitative Data in Multi-disciplinary Health Research' (2013) 13 *BMC Medical Research Methodology* 117

Galini, Ross, 'Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements' (2000) 68 *Fordham Law Review* 1245

Gamble, Roger, 'The Cartel Penumbra: Where Public and Private Enforcement Policies Intersect' (2013) 42 *Common Law World Review* 23

Gangemi, Melissa, 'Grittith University v Tang: Review of University Decisions Made 'Under an Enactment' ' (2005) 27 *Sydney Law Review* 567

Garland, H, 'Throwing Good Money After Bad: The Effect of Sunk Costs on the Decision to Escalate Commitment to an Ongoing Project' (1990) 75 *Journal of Applied Psychology* 728

Garland, H and S Newport, 'Effects of Absolute and Relative Sunk Costs on the Decision to Persist with a Course of Action' (1991) 48 *Organizational Behavior and Human Decision Processes* 55

Garrett, Brandon, *Time to Crack Down on Recidivist Banks Instead of Slapping Wrists* The Conversation <<http://theconversation.com/time-to-crack-down-on-recidivist-banks-instead-of-slapping-wrists-39285>>

Gartner, Dennis and J Zhou, 'Delays in Leniency Application: Is There Really a Race to the Enforcer's Door?' (University of Bonn & Tilburg Law and Economics Center (TILEC), 2012) <<file:///C:/Users/pl490/Downloads/SSRN-id2188141.pdf>>

Gelb, Harvey, 'Piercing the Corporate Veil - The Undercapitalization Factor' (1982) 59 *Chicago-Kent Law Review* 1

Gevertz, Franklin, 'Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil' (1997) 76 *Oregon Law Review* 853

Gibson, Dunn & Crutcher Lawyers, *2012 Mid-Year Criminal Antitrust Update* (6th June 2012) Gibson, Dunn & Crutcher lawyers <<http://www.gibsondunn.com/publications/Documents/2012MidYear-CriminalAntitrustUpdate.pdf>>

Gilligan, George, Helen Bird and Ian Ramsay, 'Regulating Directors' Duties How Effective Are The Civil Penalty Sanctions In The Australian Corporations Law' (Centre for Corporate Law and Securities Regulation - The University of Melbourne, 1999)

Gilovich, Thomas, Dale Griffin and Daniel Kahneman, *Heuristics and Biases* (Cambridge University Press, 1st ed, 2002)

Ginsburg, Douglas and Joshua Wright, 'Antitrust Sanctions' (2010) 6 *Competition Policy International* 3

Gobert, James and Maurice Punch, *Rethinking Corporate Crime* (Cambridge University Press, 2003)

Goerlich, Helmut, 'Fundamental Constitutional Rights: Content, Meaning and General Doctrines' in Ulrich Karpen (ed), *The Constitution of the Federal Republic of Germany* (1988) 45-65

Goldring, John, 'Accountability of Commonwealth Statutory Authorities and "Responsible Government"' (1980) 11 *Federal Law Review* 353

Gordon, Michelle, 'Criminalisation of Cartel Conduct' (2010)

Green, Stuart, 'Theft by Coercion: Extortion, Blackmail, and Hard Bargaining' (2004-2005) 44 *Washburn Law Journal* 553

Greenfield, Tony, *Research Methods for Postgraduates* (Arnold, 1996)

Griffin, Dale and Amos Tversky, 'The Weighing of Evidence and the Determinants of Confidence' (1992) 24 *Cognitive Psychology* 411

Groves, Matthew, 'Should we Follow the Gospel of the ADJR Act?' (2010) 34 *Melbourne University Law Review* 736

Guirguis, Ayman, 'Risk of Disclosure of Immunity Applicant Confidential Information and Documents – The Position in Australia' (Corrs Chambers Westgrath, 2012) <<http://www.corrs.com.au/assets/thinking/downloads/Cartel-Paper-Ayman-Guirguis-IBA-Annual-Conference-Dublin.pdf>>

Guirguis, Ayman, Richard Flitcroft and Asa Lam, *Where to Now for Agreed Civil Penalty Outcomes Following the CFMEU and Barbaro Decisions?* (May 8 2015) <http://www.lexology.com/library/detail.aspx?g=4c985974-d688-471b-8f1a-2f66fec07159&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Australian+IHL+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2015-05-11&utm_term=>>

Guirguis, Ayman, Sarah Godden and Asa Lam, *ACCC v Chopra: Penalty Submissions in the Aftermath of CFMEU and Barbaro* (25 July 2015) Lexology <http://www.lexology.com/library/detail.aspx?g=c501c886-f1f7-4a2f-b37d-4a5740d73d3f&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Australian+IHL+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2015-07-28&utm_term=>>

Guttuso, Laura, 'The Enduring Question of Access to Leniency Materials in Private Proceedings: One Draft Directive and Several Court Rulings' (2014) 7 *Global Competition Litigation Review* 10

Guttuso, Laura, 'A View of the Macrocosm of International Cartel Enforcement: How the Boomerang of Cross-Border Disclosure Springs Back to its Domestic Context' (2015) 43 *Australian Business Law Review* 27

Haist, Matthew, 'Deterrence in a Sea of Just Desserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism' (2009) 99 *Journal Criminal Law & Criminology* 789

Hallevy, Gabriel, 'The Recidivist Wants to Be Punished: Punishment as an Incentive to Reoffend' (2009) 5 *International Journal of Punishment and Sentencing* 120

Hamdani, Assaf and Alon Klement, 'Corporate Crime and Deterrence' (2008) 61 *Stanford Law Review* 271

Hammond, Scott, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (Department of Justice - ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, 2010)

Hammond, Scott, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations' (U.S Department of Justice, 2006)

Hammond, Scott, 'The United States Model of Negotiated Plea Agreements' (OECD Competition Committee Working Party No.3, 2006)

Hammond, Scott and Belinda Barnett, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters ' (Department of Justice, November 19 2008)

Hammond, Scott D, 'Cornerstones of an Effective Leniency Program ' (Department of Justice, 2004)

Hansberry, Heidi, 'In Spite of Its Good Intentions, The Dodd-Frank Act Has Created An FCPA Monster' (2012) 102 *Journal Criminal Law & Criminology* 195

Hansen, Marc, Luca Crocco and Susan Kennedy, 'Challenges to International Cartel Enforcement and Multi-Jurisdictional Leniency Applications – Disclosure of Leniency Applicant Statements and Materials' (Latham & Watkins, 2012)

Hansen, Marc, Luca Crocco and Susan Kennedy, 'New Fault Lines In International Cartel Enforcement And Administration Of Leniency Programs - Disclosure Of Immunity Applicant Statements', *Mondaq Business Briefing* 30 January 2012

Hansmann, Henry and Reiner Kraakamn, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879

Harding, Christopher, 'Cartel Deterrence: The Search for Evidence and Argument' (2011) 56 *The Antitrust Bulletin* 345

Harper, Ian et al, 'Competition Policy Review - Final Report' (Commonwealth of Australia, 2015)

Harrington, Joseph E, 'How do Cartels Operate?' (Department of Economics, John Hopkins University, 2006) <www.econ.jhu.edu/People/Harrington>

Harris, George C, 'Testimony for Sale: The Law and Ethics of Snitches and Experts' (2000) 28 *Pepperdine Law Review* 1

Henning, Peter, *Guilty Pleas and Heavy Fines Seem to Be Cost of Business for Wall St* (May 20, 2015) New York Times <<http://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html>>

Hennings, Klaus and Warren Samuels, *Neoclassical Economic Theory* (Kluwer Academic Publishers, 1990)

Herfeld, Catherine, 'The Potentials and Limitations of Rational Choice Theory: An Interview with Gary Becker' (2012) 5 *Erasmus Journal for Philosophy and Economics* 73

Hesch, Michael, 'The Effects of Ringleader Discrimination on Cartel Stability and Deterrence - Experimental Insights' (2012) 3 *Journal of Advanced Research in Law and Economics* 26

Hickman, Tom, 'Problems for Proportionality' (2010) *New Zealand Law Review* 303

Hinloopen, Jeroen, 'An Economic Analysis of Leniency Programs in Antitrust Law' (2003) 151 *De Economist* 415

Hinloopen, Jeroen and Adriann Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' (2008) 39 *The RAND Journal of Economics* 607

Hodgekiss, Christopher, 'Cartels and the Competition and Consumer Act 2010 (Cth)', *Commercial Law Quarterly* 2013

Holmes, Phillip and Simon Girardet, *Cartels & Leniency 2012*, International Comparative Legal Guides (Global Legal Group, 5th ed, 2011)

Hopkins, Andrew, 'Controlling Corporate Deviance' (1980) 18 *Criminology* 198

House of Representatives, 'False Claims Act Correction Act of 2009' (United States House of Representatives - House Report 111-97, 2009) <<http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt97/html/CRPT-111hrpt97.htm>>

Hovenkamp, Herbert, *The Antitrust Enterprise - Principle and Execution* (Harvard University Press, 1st ed, 1948)

Hovenkamp, Herbert, 'Antitrust Policy After Chicago' (1985) 84 *Michigan Law Review* 213

Hovenkamp, Herbert, 'Post-Chicago Antitrust: A Review and Critique' (2001) *Columbia Business Law Review* 257

Huffman, Max, 'Marrying Neo-Chicago with Behavioral Antitrust' (2012) 78 *Antitrust Law Journal* 105

Hughes, Randal and Emrys Davis, 'Immunity, Sanctions & Settlements: Canada' (Bennett Jones LLP, 2014) <<http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/7/canada/>>

Hungarian Competition Authority, 'Regular Questions about the Cartel Informant Reward' (Hungarian Competition Authority, 2010) <http://www.gvh.hu/en/other/6429_en_regular_questions_about_the_cartel_informant_reward.html>

Huschelrath, Kai and Nina Leyeyda, 'A Methodology for the Evaluation of Competition Policy' (2010) 6 *European Competition Journal*

Hyytinen, Ari, Frode Steen and Otto Toivanen, 'Cartels Uncovered' (NHH Dept. of Economics 2010) <<http://ssrn.com/abstract=1578126> or <http://dx.doi.org/10.2139/ssrn.1578126>>

Illiev, Dragomir, 'European Commission Guidance for Leniency Applicants on Delivering Oral Statements' (2014) 5 *Journal of European Competition law & Practice* 271

International Competition Network, 'Anti-Cartel Enforcement Manual: Chapter 2: Drafting and Implementing an Effective Leniency Policy' (International Competition Network, May 2009)

International Competition Network, 'Anti-Cartel Enforcement Manual: Compilation of "Good Practices" from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group' (International Competition Network, 2011)

International Competition Network, 'Cooperation Between Competition Agencies in Cartel Investigations' (International Competition Network - Cartels Working Group - Subgroup 1 - General Framework, 2006)

International Competition Network, 'Defining Hard Core Cartel Conduct: Effective Institutions: Effective Penalties' (International Competition Network - ICN Working Group on Cartels, 2005)

International Competition Network, 'Waivers of Confidentiality in Cartel Investigations– Explanatory Note' (International Competition Network, 2009) <<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/waiver.aspx>>

Iyengar, S and M Leppar, 'When Choice is Demotivating: Can One Desire Too Much of a Good Thing?' (2000) 79 *Journal of Personality and Social Psychology* 995

Jansen, Harrie, 'The Logic of Qualitative Survey and Its Position in the Field of Social Research Methods' (2010) 11 *Qualitative Social Research* 11

Jennar, Bryan, *Methods of Text and Discourse Analysis* (SAGE Publications, 1st ed, 2000)

Johnson, Emily, 'Should "Inconsistency" of Administrative Decision Give Rise to Judicial Review?' (2012) 71 *AIAL Forum* 50

Johnson, Peter, 'Proportionality in Administrative Law: Wunderkind or Problem Child?' (1996) 26 *Western Australian Law Review* 138

Jolls, Christine, 'Behavioral Economic Analysis of Redistributive Legal Rules' (1998) 51 *Vanderbilt Law Review* 1653

Jolls, Christine, Cass Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471

Jones, Owen, 'Why Behavioral Economics Isn't Better, and How it Could Be' (Vanderbilt Law School - Law & Economics Working Paper Number 14-30 - Public Law & Legal Theory Working Paper Number 14-32, 2014)

Joshua, Julian, 'DOA: Can the United Kingdom Cartel Offence be Resuscitated?' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 1 ed, 2011) 129

Kahneman, Daniel and Tversky Amos, 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47 *Econometrica* 263

Kahneman, Daniel, Paul Slovic and Amos Tversky, *Judgement Under Uncertainty: Heuristics and Biases* (Cambridge University Press, 1st ed, 1982)

Kamba, W 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485

Katz, Mark, Erika Douglas and Megan Cheerma, 'Blowing the Whistle on Cartels in Canada' (Canadian Bar Association, 2013)
<<http://www.cba.org/CBA/PracticeLink/2013-08-biz/cartels-e.aspx>>

Keane, P, 'Judicial Review: The Courts and the Academy' (2008) 82 *Australian Law Journal* 623

Kelman, Mark, 'Symposium: Empirical Legal Realism: A new Social Scientific Assessment of Law and Human Behavioural Law and Behavioural Science: Conceptual Overviews' (2003) 97 *Northwestern University Law Review* 1347

Kiefel, Susan, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85

Kim, Jae-Shin, 'Cartel Regulation in South Korea' (Korean Fair Trade Commission - Director, Cartel Policy Division, 2012)
<<http://www.adbi.org/files/2012.05.02.cpp.sess3.3.kim.cartel.regulation.korea.pdf>>

Klawaiter, Donald and J. Clayton Everett, 'The Legacy of Stolt-Neilsen: A New Approach to The Corporate Leniency Program' (2006) *The Antitrust Source* 1

Klawiter, Donald and Jennifer Driscoll, 'A New Approach To Compliance: True Corporate Leniency for Executives' (2008) 22 *Antitrust* 77

Klein, Gordon, 'Cartel Destabilization and Leniency Programs – Empirical Evidence' (Discussion Paper No. 10-107, Centre for European Economic Research, 2010)

Knox, Ron and Morris Schonberg, *Is DG Comp More Likely to Raise a Fine Than to Lower It?* (10 November 2010) *Global Competition Review*
<<http://globalcompetitionreview.com/indepth/analysis/29350/is-dg-comp-likely-raise-fine-lower-it/>>

Kobayashi, Bruce and Timothy Muris, 'Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century' (2012) 78 *Antitrust Law Journal* 147

Kobayashi, Bruce H, 'Product Differentiation: Game theory and Antitrust: A Post-Mortem ' (1997) 5 *George Mason Law Review* 411

Kolasky, William J, 'Antitrust Compliance Programs: The Government Perspective' (Paper presented at the Corporate Compliance 2002 Conference, San Francisco, July 12 2002)

Kolasky, William J, 'United States and European Union Competition Policy: Cartels, Mergers and Beyond' (Department of Justice, January 25 2002)

Kon, Stephen and Amy Barcroft, 'Aspects of the Complementary Roles of Public and Private Enforcement of United Kingdom and European Union Antitrust Law: An Enforcement Deficit?' (2008) 1 *Global Competition Litigation Review* 11

Kopcke, Richard, Jane Little and Geoffrey Tootell, 'How Humans Behave: Implications for Economics and Economic Policy' (Paper presented at the Federal Reserve Bank of Boston Conference Series, June 2003)

Korean Fair Trade Commission, 'Annual Report' (Korean Fair Trade Commission, 2003) <file:///C:/Users/pl490/Downloads/Annualper cent20Report_2003.pdf>

Korean Fair Trade Commission, 'Annual Report on Competition Policy Developments in South Korea' (Organisation for Economic Cooperation and Development, 2003) <<http://www.oecd.org/korea/34720758.pdf>>

Korean Fair Trade Commission, 'KFTC's Launch of Reward System for Informants - Press Release' (Korean Fair Trade Commission, 2005) <<http://www.ftc.go.kr/data/hwp/rewardssystem.doc>>

Korean Fair Trade Commission, 'Public Notification on Implementation of Leniency Program' (2012)

Korean Fair Trade Commission, 'Recent Changes to South Korea's Cartel Enforcement Regime' (Korean Fair Trade Commission, 2005) <http://www.ftc.go.kr/data/hwp/room_docu.doc>

Korobkin, Russell and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California Law Review* 1051

Kovacic, William E, 'Bounties as Inducement to Identify Cartels' (British Institute of International and Comparative Law, 2006) <http://www.biicl.org/files/1211_eui_fiosele_june_2006__kovacic_paper.pdf>

Kovacic, William E, 'Criminal Enforcement Norms in Competition Policy: Insights from U.S Experience' in Caron & Ariel Beaton-Wells & Ezrachi (ed), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 45

Kovacic, William E, 'The Modern Evolution of U.S Competition Policy Enforcement Norms ' (2003) 71 *Antitrust Law Journal* 377

Kovacic, William E, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels' (2000-2001) 69 *George Washington Law Review* 766

Kovacic, William E, 'Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting' (1996) 29 *Loyola of Los Angeles Law Review* 1799

Kovacic, William E and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' (2000) 14 *Journal of Economic Perspective* 43

Krause, George *A Two-Way Street: The Institutional Dynamics of the Modern Administrative State* (University of Pittsburgh Press, 1st ed, 1999)

Kunreuther, Howard, 'The Changing Societal Consequences of Risks from Natural Hazards' (1979) 443 *The ANNALS of the American Academy of Political and Social Science* 104

Kunreuther, Howard and Paul Slovic, 'Economics, Psychology and Protective Behavior' (1978) 68 *The American Economic Review* 64

Kwek, Wilkins & Glenda and Georgia, 'Penalties Not Tough Enough for White-Collar Crime: ASIC', *Sydney Morning Herald* 2014 <<http://www.smh.com.au/business/penalties-not-tough-enough-for-white-collar-crime-asic-20140219-3312i.html>>

Labaton, Stephen, *Profile: Anne K Bingaman: Rousing Antitrust Law from Its 12-Year Nap* (July 25) *The New York Times* <<http://www.nytimes.com/1993/07/25/business/profile-anne-k-bingaman-rousing-antitrust-law-from-its-12-year-nap.html?pagewanted=all&src=pm>>

Lacity, Mary C and Marius A Janson, 'Understanding Qualitative Data: A Framework of Text Analysis Methods' (1994) 11 *Journal of Management Information Systems* 137

Lamb, Ainslie and Lamb Litrich, *Lawyers in Australian Society* (Federation Press, 2007)

Lambert, Adam and Ruth Bonino, 'Changes to Protection for Whistleblowers' (Clyde & Co, 2013) <http://www.clydeco.com/uploads/Files/Publications/2013/CC003455_Changes_to_Protection_for_Whistleblowers_25_06_13.pdf>

Landes, Robert and Joshua Davis, 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the United States' (2011) 2011 *Brigham Young University Law Review* 315

Landes, Robert and Joshua Davis, 'Defying Conventional Wisdom: The Case for Private Antitrust Enforcement' (2013) 48 *Georgia Law Review* 1

Landes, Robert and Joshua Davis, 'Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement' (2013) 36 *Seattle University Law Review* 1269

Latessa, Edward and Christopher Lowenkamp, 'What Works in Reducing Recidivism?' (2006) 3 *University of St Thomas Law Journal* 521

Latimer, Paul and A J Brown, 'Whistleblower Laws: International Best Practice' (2008) 31 *University of New South Wales Law Journal* 766

Lawrence et al, Jon, 'English High Court Orders Disclosure of Leniency Materials ' (Freshfields Bruckhaus Deringer, 2012)

Law Council of Australia, 'Law Council Comments and Queries Regarding the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008' (2008) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCACommentsOntheDraftFedCourtAmendmentpercent28CriminalJurisdictionpercent29Bill.pdf>>

Lazear, Edward, 'Gary Becker's Impact on Economics and Policy' (2015) 105 *American Economic Review: Papers & Proceedings 2015* 80

Lee, Jenny, 'Corporate Corruption & the New Gold Mine: How the Dodd-Frank Act Overincentizes Whistleblowing' (2012) 77 *Brooklyn Law Review* 303

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

Leff, Arthur Allen, 'Economic Analysis of Law: Some Realism about Nominalism' (1974) 60 *Virginia Law Review* 451

Leifer, Samuel, 'Protecting Whistleblower Protections in the Dodd-Frank Act' (2014) 113 *Michigan Law Review* 121

Leslie, Christopher R, 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2005) 31 *The Journal of Corporation Law* 453

Leslie, Christopher R, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents' (2008) 49 *William & Mary Law Review* 1621

Leslie, Christopher R, 'Editorial -Antitrust Leniency Programmes' (2011) 7 *The Competition Law Review* 175

Leslie, Christopher R, 'Rationality Analysis in Antitrust' (2010) 158 *University of Pennsylvania Law Review* 261

Leslie, Christopher R, 'Trust, Distrust and Antitrust' (2004) 82 *Texas Law Review* 515

Levenstein, Margaret C and Valerie Y Suslow, 'What Determines Cartel Success' (2006) 44 *Journal of Economic Literature* 43

Leveque, Francois and Howard Shelanski (eds), *Antitrust and Regulation in the European Union and United States - Legal and Economic Perspectives* (Edward Elgar Publishing Ltd, 2009)

Library of Congress, *Guide to Law Online: Enron Hearings* Law Library of Congress <<http://www.loc.gov/law/help/guide/federal/enronhrgrs.php>>

- Liebler, Arnold Bloch, 'Submission on the ACCC's Immunity Policy for Cartel conduct' (Arnold Bloch Liebler, 2013)
- Lin, Wen-Ting, 'Organisational Slack and Firm's Internationalization' (2009) 44 *Journal of World Business* 397
- Locke, Terry, *Critical Discourse Analysis* (Bloomsbury Academic, 1st ed, 2004)
- Lombard, Sulette and Vivienne Brand, 'Corporate Whistleblowing: Public Lessons for Private Disclosure' (2014) 42 *Australian Business Law Review* 351
- Love, Joseph, 'The Rise and Decline of Economic Structuralism in Latin America: New Dimensions' (2005) 40 *Latin American Research Review* 100
- Low, Martin and Sorcha O'Carrol, 'Added Complexity - Recent Development in Criminal Cartel Law' (2008) 4 *Competition Law International (IBA)* 30
- Lunn, Pete, 'Regulatory Policy and Behavioural Economics' (OECD, 2014) <<http://dx.doi.org/10.1787/9789264207851-4-en>>
- Lunn, Pete, 'Regulatory Policy and Behavioural Economics' (OECD, 2014)
- Lynch, Niall, 'Immunity in Criminal Cartel Investigations: A United States Perspective' (Latham & Watkins, 2011)
- Lynch, Sarah 'The Case for Increased Private Enforcement of Cartel Laws in Australia' (2011) 39 *Australian Business Law Review* 385
- Macrakis, Nicholas and Michael Legg, 'The Dodd-Frank Act whistleblower Reforms Put Bounty on Corporate Non-Compliance: Ramifications and Lessons for Australia' (2012) 40 *Australian Business Law Review* 26
- Mahoney, Paul and Chris William Sanchirico, 'Norms, Repeated Games, and the Role of Law' (2003) 91 *California Law Review* 1281
- Mahr, Eric and Sarah Licht, 'Making ACPERA Work' (2015) 29 *Antitrust* 31
- Malhotra, Naresh K, 'Information Load and Consumer Decision Making' (1982) 8 *Journal of Consumer Research* 419
- Manktelow, K and D Over, *Rationality - Psychological and Philosophical Perspectives* (Routledge, 1st ed, 1993)
- March, James, 'Exploration and Exploitation in Organisational Learning' (1991) 2 *Organizational Science* 71
- Marshall, Pariz, 'Submission to the ACCC for the Review of the ACCC Immunity Policy 2013' (University of Wollongong, 2013)

Marshall, Pariz, 'Submission to the ACCC for the Review of the ACCC Immunity Policy 2013 - Comments on the Draft Immunity Policy' (University of Wollongong, 2014)

Marshall, Pariz, 'Submission to the ACCC for the Review of the ACCC Immunity Policy 2013 - Response to the Discussion Paper on Cartel Immunity' (University of Wollongong 2013)

Marshall, RC and LM Marx, 'Section 1 Compliance from an Economic Perspective' in Nicolas Charbit, Elisa Ramundo and William E Kovacic (eds), *An Antitrust Tribute Liber Amicorum* (Institute of Competition Law, 2014)

Martinez, Spencer, 'Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency' (1999) 47 *Cleveland State Law Review* 141

Maxfield, Linda, 'Measuring Recidivism under the Federal Sentencing Guidelines' (2005) 17 *Federal Sentencing Reporter* 166

May, Peter, 'Regulatory Regimes and Accountability' (2007) 1 *Regulation & Governance* 8

Mays, Nicholas and Catherine Pope, 'Rigour and Qualitative Research' (1995) 311 *BMJ* 109

Mazur, Eli Paul, 'Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice' (2002) 51 *Duke Law Journal* 1333

McDonald, John, 'Crime and Punishment: A Social Welfare Analysis' (1987) 15 *Journal of Criminal Justice* 245

McGarity, Thomas, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival* (Yale University Press, 1st ed, 2013)

Mehta, Judith, 'Behavioural Economics in Competition and Consumer Policy' (University of East Anglia, 2013)

Meir, Matt, 'Let the Press and Government Grapple: The Constitutional Question Posed by a Statutory Right of Reply' (2012) 17 *Media and Arts Law Review* 368

Mendez, Javier and Juan Gonzalez, 'Old and New Ideas in Competition Policy' (University of Las Palmas - Department of Applied Economics, 2002)

Mercurio, Nicholas, 'How the Chicago School Overshot the Mark: Antitrust Law and Policy in Terms of the Legal-Economic Nexus' (2015) *A Research Annual* 405

Michaelsen, Christopher, 'Reforming Australia's National Security Laws: The Case for a Proportionality-Based Approach' (2010) 29 *University of Tasmania Law Review* 31

Miller, Nathan H, 'Strategic Leniency and Cartel Enforcement' (2009) 99 *American Economic Review* 750

Miller, Richard, 'Price Fixing and Whistleblowing: A 'Bounty' for A Mutiny on the Good Ship Collusion?' (1978) 10 *Antitrust Law & Economics Review* 87

Ministry of Justice, 'Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders' (United Kingdom Ministry of Justice, 2010) <<http://webarchive.nationalarchives.gov.uk/20120119200607/http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf>>

Mitchell, Gregory, 'Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence' (2002) 91 *Georgetown Law Journal* 67

Moberly, Richard, 'Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later' (2012) 64 *South Carolina Law Review* 1

Motta, Massimo and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347

Murray, Charles, *Losing Ground: American Social Policy 1950-1980* (BasicBooks, 1st ed, 1984)

Neumann, John and Oskar Morgenstern, *Theory of Games and Economic Behaviour* (Princeton University Press, 1st ed, 1947)

Nolasco, Claire, Michael S Vaughn and Rolando V. del Carmen, 'Towards a New Methodology for Legal Research in Criminal Justice' (2010) 21 *Journal of Criminal Justice Education* 1

Nordlander, Kristina, 'The Commission's Policy on Recidivism: Legal Certainty for Repeat Offenders?' (2005) 2 *The Competition Law Review* 1

Note, 'Accomplice Testimony and Credibility: "Vouching" and Prosecutorial Abuse of Agreements to Testify Truthfully' (1980-1981) 65 *Minnesota Law Review* 1169

Obersteiner, Thomas, 'International Antitrust Litigation: How to Manage Multijurisdictional Leniency Applications' (2013) 4 *Journal of European Competition Law and Practice* 16, 18.

O'Kane, Michael, 'International Cartel Criminalisation and Leniency: Recent Lessons from the United Kingdom and Global Comparisons' (2012) *Competition Law International* 55

O'Brien, Justin, 'Securing Corporate Accountability or Bypassing Justice? The Efficacy and Pitfalls of Pre-Trial Diversion' 19 *Australian Journal of Corporate Law* 161

OECD, 'APEC-OECD Integrated Checklist on Regulatory Reform' (Organisation for Economic Cooperation and Development, 2005)
<<http://www.oecd.org/regreform/34989455.pdf>>

OECD, 'Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations' (Organisation for Economic Cooperation and Development, 2005)

OECD, *Cartels and Anti-Competitive Agreements* Organisation for Economic Cooperation and Development <www.oecd.org/competition/cartels>

OECD, 'Competition Policy in Australia' (Organisation for Economic Cooperation and Development, 2010)

OECD, 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (OECD Working Paper on Regulatory Management and Reform, 2005)

OECD, 'Ex officio Cartel Investigations and the Use of Screens to Detect Cartels' (Organisation for Economic Cooperation and Development, 2013)

OECD, 'Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes' (Organisation for Economic Cooperation and Development, 2002)

OECD, 'Hard Core Cartels – Harm and Effective Sanctions' (Organisation for Economic Cooperation and Development, 2002)

OECD, 'Hard Core Cartels: Recent Progress Ahead' (Organisation for Economic Cooperation and Development, Paris, 2003)

OECD, 'Improving International Cooperation in Cartel Investigations' (Organisation for Economic Cooperation and Development, 2012)

OECD, 'Leniency for Subsequent Applicants' (Organisation for Economic Cooperation and Development- Working Party No.3 on Cooperation and Enforcement, 2012)

OECD, 'OECD Principles of Corporate Governance' (Organisation for Economic Cooperation and Development, 2004)
<http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf>

OECD, 'Promoting Compliance with Competition Law' (Organisation for Economic Cooperation and Development - Policy Roundtables, 2011)

OECD, 'Public Sector Transparency and the International Investor' (Organisation for Economic Cooperation and Development, 2003)

OECD, 'Regulatory Policies in OECD Countries - From Interventionism to Regulatory Governance' (Organisation for Economic Cooperation and Development, 2002)

OECD, 'Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels' (Organisation for Economic Cooperation and Development, Paris, 2002)

OECD, 'United States - The Role of Competition Policy in Regulatory Reform' (Organisation for Economic Cooperation and Development, 1998)

OECD, 'Whistleblower Protection: Encouraging Reporting' (Organisation for Economic Cooperation and Development, 2012)
<<http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>>

OECD, 'Working Party No. 3 on Co-operation and Enforcement - Use of Markers in Leniency Programs' (Organisation for Economic Cooperation and Development, 2014)

Office of Fair Trading, 'The Impact of Competition Interventions on Compliance and Deterrence' (Office of Fair Trading, 2011)

Ogden, David, '165 Guidance for Prosecutors Regarding Criminal Discovery' (Offices of the United States Attorneys, 2010)
<http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm>

O'Neill, Michael, Linda Maxfield and Miles Harer, 'Past as Prologue: Reconciling Recidivism and Culpability' (2004) 73 *Fordham Law Review* 245

Osborne, Michael and Michael Binetti, *International Comparative Legal Guides: Canada - Cartels & Leniency 2015*, International Comparative Legal Guides (2015)

Ottolenghi, S, 'From Peeping Behind the Corporate Veil, to Ignoring it Completely' (1990) 53 *The Modern Law Review* 338

Overhuls, Chelsea Hunt, 'Unfinished Business: Dodd-Frank's Whistleblower Anti-Retaliation Protections Fall Short for Private Companies and their Employees' (2012) 6 *Journal of Business, Entrepreneurship and the Law* 1

O'Wright, Joshua, 'Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust' (2012) 78 *Antitrust Law Journal* 241

Pacella, Jennifer, 'Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code' (2015) 17 *University of Pennsylvania Journal of Business Law* 345

Palanski, Jan, 'Informant Reward Schemes in Competition Enforcement - Working Paper' (2014) <<http://ssrn.com/abstract=2457450>>

Papp, Florian Wagner-von, 'What If All the Bid Riggers Went to Prison and Nobody Noticed? - Criminal Antitrust Law Enforcement in Germany' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Hart Publishing, 2010) 157-182

Parker, Christine, 'Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality' in Caron & Ariel Beaton-Wells & Ezrachi (ed), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 239

Parker, Christine, 'Economic Rationalities of Governance and Ambiguity in the Criminalisation of Cartels' (2012) *Centre for Regulatory Studies and Law Faculty* 24

Parker, Christine, 'Report on Interviews with Civil Respondents in Cartel Cases' (Centre for Regulatory Studies and Law Faculty, Monash University, 2011) <<http://cartel.law.unimelb.edu.au/go/project-news/project-outputs>>

Parker, Christine, 'The War on Cartels and the Social Meaning of Deterrence' (2012) *Centre for Regulatory Studies and Law Faculty*

Parker, Christine and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56 *The Antitrust Bulletin* 377

Pascoe, Janine, 'Corporate Sector Whistleblower Protection in Australia - Some Regulatory Problems and Issues' (2008) 22 *Australian Journal of Corporate Law* 82

Pascoe, Janine and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 *Common Law World Review* 144

Paternoster, Raymond, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100 *Journal of Criminal Law & Criminology* 765

Patton, Michael Quinn, *Qualitative Research & Evaluation Methods* (Sage Publications, 3 ed, 2002)

Payne, Jennifer, 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' (1997) 56 *The Cambridge Law Journal* 284

Payne, Jason, 'Recidivism in Australia: Finding and Future Research' (2007)

Pearlman, Steven and Rachel Fischer, *Antitrust Whistleblower Protection Bill Introduced in Senate (Again)* (July 14 2015) *The National Law Review* <[file:///C:/Users/pl490/Downloads/Antitrustper cent20Whistleblowerper cent20Protectionper cent20Billper cent20Introducedper cent20Inper cent20Senateper cent20\(Again\)per cent20_per cent20Theper cent20N.pdf](file:///C:/Users/pl490/Downloads/Antitrustper cent20Whistleblowerper cent20Protectionper cent20Billper cent20Introducedper cent20Inper cent20Senateper cent20(Again)per cent20_per cent20Theper cent20N.pdf)>

Pecman, John, 'Remarks by John Pecman, Interim Commission of Competition' (Canadian Competition Bureau - Canadian Bar Association Spring Speech, 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03571.html#Initiative>>

Pinna, Andrea, 'Optimal Leniency Programs in Antitrust' (Working paper 2010/18, Centre for North South Economic Research & Queen Mary, University of London, 2010)

Pitkin, Hanna, 'Some Neglected Cracks in the Foundation of Utilitarianism' (1990) 18 *Political Theory* 104

Pitofsky, Robert, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press, 1st ed, 2008)

Platania-Phung, Chris and Christine Parker, 'The Deterrent Impact of Cartel Criminalisation: Report of a Survey of Australian Business People' (University of Melbourne, 2012)

Platania-Phung, Chris and Christine Parker, 'The Deterrent Impact of Cartel Criminalisation: Supplementary Report on a Survey of Australian Public Opinion Regarding Business People's Views on Anti-Trust Laws and Enforcement' (2012) <<http://cartel.law.unimelb.edu.au/go/project-news/project-outputs>>

Plecas, Darryl et al, 'Do Judges Take Prior Record into Consideration? An Analysis of the Sentencing of Repeat Offenders in British Columbia' (University of Fraser Valley, 2012) <<http://www.ufv.ca/media/assets/criminology/do+judges+consider+prior+record.pdf>>

Pope, Catherine and Nicholas Mays, 'Critical Reflections on the Rise of Qualitative Research' (2009) 339 *BMJ* 3425

Pope, Catherine, Sue Ziebland and Nicholas Mays, 'Analysing Qualitative Data' (2000) 320 *BMJ* 114

Posner, Richard A, 'The Decline of Law as An Autonomous Discipline: 1962-1987' (1987) 100 *Harvard Law Review* 761

Posner, Richard A, 'The Economic Approach to Law' (1974) 53 *Texas Law Review* 757

Posner, Richard A, 'An Economic Theory of the Criminal Law' (1985) 85 *Columbia Law Review* 1193

Posner, Richard A, *A Failure of Capitalism - The Crisis of '08 and the Descent into Depression* (Harvard University Press, 1st ed, 2009)

Posner, Richard A, 'A Program for the Antitrust Division' (1970) 38 *University of Chicago Law Review* 500

Posner, Richard A, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 *Stanford Law Review* 1551

Posner, Richard A., 'Some Uses and Abuses of Economics in Law' (1979) 46 *The University of Chicago Law Review* 281

Priest, Phillip, 'Crime and Justice: Prosectors' Duties in the Wake of Barbaro' (2014) 88 *Australian Law Journal* 386

Productivity Commission, 'Behavioural Economics and Public Policy' (Australian Government Productivity Commission Roundtable Proceedings, 2007)

Pryse, Michael, 'Handbook on Multijurisdictional Competition Law Investigations: Australia' (<<http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/treatises/australia.pdf>>

Pyper, Doug, 'Whistleblowing and Gagging Clauses: the Public Interest Disclosure Act 1998' (House of Commons Library - Business and Transport Section, 2014) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00248>>

Qian, Ni, 'Necessary Evils: How to Stop Worrying and Love Qui Tam' (2013) *Columbia Business Law Review*

Queensland Ombudsman, 'Good Decision-Making Guide' (Queensland Ombudsman, 2007)

Ramsay, Ian and Noakesm David, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250

Rapoport, Anatol and Albert Chammah, *Prisoner's Dilemma: A Study in Conflict and Cooperation* (University of Michigan Press, 1965)

Rapp, Geoffrey Christopher, 'Four Signal Moments in Whistleblower Law: 1983-2013' (2013) 30 *Hofstra Labor and Employment Law Journal* 389

Rapp, Geoffrey Christopher, 'Mutiny by the Bounties? The Attempt to Reform Wall Street By the New Whistleblower Provisions of the Dodd-Frank Act' (2012) *Brigham Young University Law Review* 73

Reeson, Andrew and Simon Dunstall, 'Behavioural Economics and Complex Decision-Making - Implications for the Australian Tax and Transfer System' (CSIRO, 2009)

Reeves, Amanda, 'Behavioral Antitrust: Unanswered Questions on the Horizon' (2010) *The Antitrust Source* 1

Reeves, Amanda, 'Behavioral Antitrust: Unanswered Questions on the Horizon' (2010) *The Antitrust Source* 1

Reeves, Amanda and Maurice E Stucke, 'Behavioral Antitrust' (2011) 86 *Indiana Law Journal* 1527

Reid, Bill and Elizabeth Henderson, 'Cartels- Criminal Sanctions and Immunity Policy' (2006) 14 *Trade Practices Law Journal* 10

Reksulak, Michael 'Antitrust Public Choice(s)' (2010) 142 *Public Choice* 423

Renehan, Peter and Peta Stevenson, 'Purity but at What Price: the Application of Barbaro Principles to Pecuniary Penalty Proceedings' (Paper presented at the Competition Law Conference, Sydney, 30 May 2015)

Research Sage Publications, 'Introduction to Survey Methods' (1998) 46 *Current Sociology* 1

Reynolds, Graham and Janet Bolten, 'International: Defending a Cartel Case in Canada' (2011) 25 *Antitrust American Bar Association* 91

Richards, Kelly, 'Technical and Background Paper: Measuring Juvenile Recidivism in Australia' (Australian Government - Australian Institute of Criminology, 2011)

Ringland, Clare, 'Measuring Recidivism: Police Versus Court Data' (2013) 175 *Crime and Justice Bulletin*

Ritchie, J and J Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publishers, 2003)

Roberts, Julian 'Punishing Persistence ' (2008) 48 *British Journal of Criminology* 468

Robertson, Paterson, Duke & Andrew, Jeannie & Arlen, *Principles of Contract Law 4th Edition* (ThomsonReuters, 4th ed, 2011)

Robinson, Paul, Cahill, Michael and Daniel Bartels, 'Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory' (2010) 89 *Texas Law Review* 291

Rochette, Vincent, *Supreme Court Allows Wiretap Evidence to be Disclosed for Purposes of a Class Action Alleging Anticompetitive Practices* (October 2014) NortonRoseFulbright
<<http://www.nortonrosefulbright.com/knowledge/publications/122399/supreme-court-allows-wiretap-evidence-to-be-disclosed-for-purposes-of-a-class-action-alleging-anticompetitive>>

Rosch, J. Thomas, 'Behavioral Economics: Observations Regarding Issues that Lie Ahead' (Federal Trade Commission - Vienna Competition Conference, 2010)

Ross, Ysaiah and Peter MacFarlane, *Lawyers' Responsibility & Accountability - Cases, Problems & Commentary* (LexisNexis Butterworths, 3rd ed, 2007)

Rostain, Tanina, 'Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement' (2000) 34 *Law and Society Review* 973

Round, David, 'Consumer protection: At the Mercy of the Market for Damages' (2003) 10 *Competition & Consumer Law Journal*

Round, David and Leanne Hanna, 'Curbing Corporate Collusion in Australia: The Role of Section 45A of the Trade Practices Act ' (2005) 29 *Melbourne University Law Review* 242

Rubin, Edward L, 'Putting Rational Actors in Their Place: Economics and Phenomenology' (1998) 51 *Vanderbilt Law Review* 1705

Rubinfeld, Daniel, 'On the Foundations of Antitrust Law and Economics' in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S Antitrust* (Oxford University Press, 2008)

Saint-Antoine, Paul et al, *Senate Passes Another Criminal Antitrust Anti-Retaliation Act* (31 July 2015) Lexology <file:///C:/Users/pl490/Downloads/Senatepercent20passespercent20anotherpercent20Criminalpercent20Antitrustpercent20Anti-Retaliationpercent20Actpercent20-percent20Lexologypercent20(1).pdf>

Sandelowski, Margarete and Julie Barroso, 'Writing the Proposal for a Qualitative Research Methodology Project' (2003) 13 *Qualitative Health Research* 781

Sanders et al, Micheal, 'Disclosure of Leniency Materials in Follow-on Damages Actions: Striking "The Right Balance" Between the Interests of Leniency Applicants and Private Claimants?' (2013) 34 *European Competition Law Review* 174

Sauvagnat, Julien, 'Prosecution and Leniency Programs: A Fool's Game' (Discussion Paper, Toulouse School of Economics (TSE) 2011)

Saverda, Christine, 'Accomplices in Federal Court: A Case for Increased Evidentiary Standards' (1990) 100 *Yale Law Journal* 785

Schmalensee, Richard, 'Thoughts on the Chicago Legacy in United States Antitrust' in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S Antitrust* (Oxford University Press, 2008)

Schmitthoff, M, 'The Science of Comparative Law' (1939-1941) 7 *Cambridge Law Journal* 94

Schnell, Gordon, 'Bring In the Whistleblowers and Pay Them—The Next Logical Step in Advancing Antitrust Enforcement' (2013) *CPI Antitrust Chronicle* 1

Schnell, Gordon and Aymeric Dumas-Emard, 'How to Catch A Thief - Corporate Leniency and the Irrepressible Challenge of Cartel Detection; Finding a Better Way' (2011) *CPI Antitrust Chronicle* 1

Schroeder, Jeanne L, 'The Economics of Race and Gender: Rationality in Law and Economics Scholarship ' (2000) 79 *Oregon Law Review* 147

Schwenk, Charles, 'Cognitive Simplification Processes in Strategic Decision-Making' (1984) 5 *Strategic Management Journal* 111

Seale, Clive, 'Quality in Qualitative Research' (1999) 5 *Qualitative Inquiry* 465

Securities and Exchange Commission, '2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program' (United States Securities and Exchange Commission, 2014) <<http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>>

Securities and Exchange Commission, 'Frequently Asked Questions' (U.S Securities and Exchange Commission - Office of the Whistleblower, 2010) <https://www.sec.gov/about/offices/owb/owb-faq.shtml#P9_2483>

Securities and Exchange Commission, 'Office of the Whistleblower' (United States Securities and Exchange Commission, 2010) <<https://www.sec.gov/whistleblower>>

Securities and Exchange Commission, 'SEC Adopts Rules to Establish Whistleblower Program' (United States Securities and Exchange Commission, 2011) <<https://www.sec.gov/rules/final/2011/34-64545.pdf>>

Senate Committee on Banking, Housing and Urban Affairs, 'Report on the Restoring American Financial Stability Act of 2010' (Senate Committee on Banking, Housing and Urban Affairs - Senate Report 111-176 2010) <<http://www.gpo.gov/fdsys/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf>>

Senate Economics References Committee, 'Performance of the Australian Securities and Investments Commission' (Australian Government, 2014)

Shaffer, Gregory C. and Nathaniel H. Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) 12 *Sedona Conference Journal* 1

Shafir, E, I Simonson and A Tversky, 'Reason-Based Choice' (1993) 49 *Cognition* 11

Shenefield, John H, 'The Disclosure of Antitrust Violations and Prosecutorial Discretion' (17th Annual Corporate Council Institute, October 4 1978)

Shubik, Martin, 'Symposium - Just Winners and Losers - The Application of Game Theory to Corporate Law and Practice - Game theory, Law and the Concept of Competition ' (1991) 60 *University of Cincinnati Law Review*

Simon, Herbert, 'Nobel Memorial Lecture - Rational Decision-Making in Business Organisations' (Carnegie-Mellon University, 1978)

Sims, Stephen W and Theodore S Salant, 'Law and Economics: Game theory and the law: Ready for Primetime?' (1996) 94 *Michigan Law Review*

Sims, Rod, 'Opening Address: IBA Competition Conference' (Paper presented at the International Bar Association 9th Competition Mid-Year Conference, Sydney, 21 March 2013)

Skurka, Steven, 'Perspectives on the Role of Cooperators and Informants: A Canadian Perspective On The Role of Cooperators and Informants' (2002) 23 *Cardozo Law Review* 759

Slot, Piet Jan, 'Does the Pfleiderer Judgment Make the Fight Against International Cartels More Difficult?' (2013) 34 *European Competition Law Review* 197

Smith, Adam, *Theory of Moral Sentiments* (Strand & Edinburgh, 2nd ed, 1761)

Smith, Joanna and Jill Firth, 'Qualitative Data Analysis: The Framework Approach' (2011) 18 *Nurse Researcher* 52

Sokol, D. Daniel, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201

Sokol, D. Daniel, 'Policing the Firm' (2014) 89 *Notre Dame Law Review* 785

Sonnenfeld, Jeffrey and Paul Lawrence, 'Why Do Companies Succumb to Price Fixing?' (1978) 56 *Harvard Business Review* 145

Spagnolo, Giancarlo, 'Leniency and Whistleblowers in Antitrust' in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press, 1st ed, 2008)

Spratling, Gary, 'The Corporate Leniency Policy - Answers to Recurring Questions' (United States Department of Justice, 1998)
<<http://www.justice.gov/atr/public/speeches/1626.pdf>>

Spratling, Gary, 'Detection and Deterrence: Rewarding Informants for Reporting Violations' (2001) 69 *George Washington Law Review* 798

Spratling, Gary, 'Making Companies an Offer They Shouldn't Refuse' (U.S Department of Justice - Antitrust Division, 1998)

Srivastava, A and S Thomson, 'Framework Analysis: A Qualitative Methodology for Applied Policy Research' (2009) 4 *JOAAG* 72

Steffes, James C, 'Immunity Given to The Accomplice Witness' (1971-1972) 21 *Drake Law Review* 331

Stellios, Kon and Caterina Cavallario, 'Immunity - A Dilemma for Both Whistleblowers and the ACCC' (2011) 19 *Australian Journal of Competition and Consumer Law* 18

Stephan, Andreas, 'An Empirical Assessment of the European Leniency Notice' (2009) 5 *Journal of Competition Law and Economics* 537

Stephan, Andreas, 'Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool? CCP Working Paper 14-3' (ESRC Centre for Competition Policy & Norwich Law School, University of East Anglia, 2014)

Stephan, Andreas, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5(1) *The Competition Law Review* 123

Stephan, Andreas and Ali Nikpay, 'Leniency Theory and Complex Realities' (University of East Anglia & Centre for Competition Policy - CCP Working Paper 14-8, 2014) <<http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-8.pdf/3a273397-457c-4109-8920-d79c6709774b>>

Stewart, Daniel, 'Griffith University v Tang, 'Under an Enactment' and Limiting Access to Judicial Review' (2005) 33 *Federal Law Review* 525

Stewart, James, *For UBS, a Record of Averting Prosecution* (July 20, 2012) The New York Times <http://www.nytimes.com/2012/07/21/business/ubss-track-record-of-averting-prosecution-common-sense.html?_r=0>

Steyn, Karen, 'Consistency - A Principle of Public Law' (1997) 2 *Judicial Review* 22

Strasser, Kurt, 'Piercing the Veil in Corporate Groups' (2005) 37 *Connecticut Law Review* 637

Stucke, Maurice E, 'Am I a Price Fixer? A Behavioural Economic Analysis of Cartels' in Caron & Ariel Beaton-Wells & Ezrachi (ed), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 1 ed, 2011) 263

Stucke, Maurice E, 'Behavioral Economists at the Gate: Antitrust in the 21st Century' (2007) 38 *Loyola University Chicago Law Review* 513

Stucke, Maurice E, 'Better Competition Advocacy' (2008) 82 *St. John's Law Review* 951

Stucke, Maurice E, 'The Implications of Behavioural Antitrust' (The University of Tennessee College of Law - Legal Studies Research Paper Series, 2012)

Stucke, Maurice E, 'Morality and Antitrust' (2006) *Columbia Business Law Review*

Sullivan, E and Richard Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford University Press, 2009)

Sullivan, Kevin, Kate Ball and Sarah Klebolt, 'The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA' (2011) 11 *American Bar Association Antitrust Source* 5

Sweeney, Bonny, 'Earning ACPERA's Civil Benefits: What Constitutes "Timely" and "Satisfactory" Cooperation?' (2015) 29 *Antitrust* 37

Sweeney, Siobhan Caitlin, 'Australia's New Cartel Laws: Time for a Hard, Fresh Look at Compliance' (2010) 18 *Trade Practices Law Journal* 35

Taladay, John, 'Time for a Global "One-Stop Shop" For Leniency Markers' (2012) 27 *Antitrust* 43

Tarun, Robert W and Peter Tomczak, 'A Proposal For a United States DOJ Foreign Corrupt Practices Act Leniency Policy 2010' (2010) 47 *American Criminal Law Review* 153

Taylor, Aristotle, *Aristotle: Nicomachean Ethics, Books II--IV : Translated with an Introduction and Commentary* (Oxford University Press, 2006)

Teong, Samantha, 'Stamping Out Rubber-Stamped Penalties? Determining an Appropriate Judicial Response to Agreed Penalties in Civil Penalty Settlements' (2015) 43 *The Australian Business Law Review* 48

Thaler, Richard, 'Toward a Positive Theory of Consumer Choice' (1980) 1 *Journal of Economic Behavior & Organization* 39

Thaler, Richard and Cass Sunstein, 'Libertarian Paternalism' (2003) 93 *The American Economic Review* 175

Thaler, Richard and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth & Happiness* (Yale University Press, 1st ed, 2008)

The University of Melbourne, *The Cartel Project* <<http://cartel.law.unimelb.edu.au/>>

Thepot, Florence, 'Leniency and Individual Liability: Opening the Black Box of the Cartel' (2011) 7 *The Competition Law Review* 221

Thompson, Robert, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 *Cornell Law Review* 1036

Thompson, Robert, 'Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors' (1999) 13 *Connecticut Journal of International Law* 379

Thompson, Robert, 'Piercing the Veil: Is Common Law the Problem?' (2005) 37 *Connecticut Law Review* 619

Thompson, Robert, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 47 *Vanderbilt Law Review* 1

Tilley, Iris, 'A Sour Carrot and a Big Stick: Reviving Antitrust Enforcement After Stolt-Nielsen' (2007) 6 *Seattle Journal for Social Justice* 391

Tomasic, R, *Casino Capitalism? Insider Trading in Australia* (Australian Institute of Criminology, 1 ed, 1991)

Tor, Avishalom, 'Understanding Behavioral Antitrust' (2013) 92 *Texas Law Review* 573

Trade Practices Committee of Review, 'Review of the Competition Provisions of the Trade Practices Act' (Commonwealth of Australia, 2003)

Trehan, Rajan, 'An 'Unfortunate Bit of Legal Jargon': Prosecutorial Vouching Applied to Cooperating Witnesses' (2014) 114 *Columbia Law Review* 997

Trott, Stephen S, 'Words of Warning for Prosecutors Using Criminals as Witnesses' (1996) 47 *Hastings Law Journal* 1381

Truong, Cam 'The ACCC's Immunity Policy: A New Application of the "Prisoner's Dilemma"' (2007) 15 *The Trade Practices Law Journal*

Tsoukala, Philomila, 'Gary Becker, Legal Feminism and the Costs of Moralizing Care' (2007) 16 *Columbia Journal of Gender and Law* 357

Tung, Liam, *Whistleblower App FraudSec Features Anonymising Encrypted Messaging* (May 15 2015) The Age <<http://www.theage.com.au/it-pro/business-it/whistleblower-app-fraudsec-features-anonymising-encrypted-messaging-20150511-1mzc51.html>>

Tversky, A and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 *Science* 453

Uesugi, Akinori, 'How Japan is Tackling Enforcement Activities Against Cartels' (2005) 13 *George Mason Law Review* 349

United Kingdom Department for Business Innovation & Skills, 'Whistleblowing Framework Call for Evidence - Government Response' (United Kingdom Department for Business Innovation & Skills, 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323399/bis-14-914-whistleblowing-framework-call-for-evidence-government-response.pdf>

United Kingdom Department for Business Innovation & Skills, 'The Whistleblowing Framework: Call for Evidence' (United Kingdom Department for Business Innovation & Skills, 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212076/bis-13-953-whistleblowing-framework-call-for-evidence.pdf>

United Kingdom, The Whistleblowing Commission, 'Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the United Kingdom' (Public Concern at Work - The Whistleblowing Charity, 2013) <<http://www.pcaw.org.uk/files/WBCper cent20Reportper cent20Final.pdf>>

Ulen, Thomas S, 'The Growing Pains of Behavioral Law and Economics' (1998) 51 *Vanderbilt Law Review* 1747

UNCTAD, 'The Use of Leniency Programs as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries' (United Nations Conference on Trade and Development, 2010)

United States Government Accountability Office, 'Criminal Cartel Enforcement - Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection' (United States Government Accountability Office, 2011)

United States Sentencing Commission, 'Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines' (United States Sentencing Commission, 2004)

United States Sentencing Commission, 'Federal Sentencing Guidelines Manual' (United States Sentencing Commission, 1987)

Vaughn, Robert, 'Transparency in the Administration of Laws: The Relationship Between Differing Justifications For Transparency and Differing Views of Administrative Law' (2011) 26 *American University International Law Review* 969

Vega, Matt, 'Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Bounty Hunting' (2012) 45 *Connecticut Law Review* 483

Vogt, Jeff, 'Don't Tell Your Boss? Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank' (2015) 67 *Oklahoma Law Review* 353

Wagner, Robert, 'Criminal Corporate Character' (2013) 65 *Florida Law Review* 1293

Waller, Spencer, 'The Antitrust Legacy of Thurman Arnold' (2004) 78 *St. John's Law Review* 569

Ward, David, Mark Stafford and Louis Gray, 'Rational Choice, Deterrence, and Theoretical Integration' (2006) 36 *Journal of Applied Social Psychology* 571

Warin, Joseph, Burns, David and John Chesley, 'To Plead or Not to Plead? Reviewing a Decade of Criminal Antitrust Trials' (2006) *The Antitrust Source* 1

Weisburd, David, Ellen Chayet and Elin Waring, 'White-Collar Crime and Criminal Careers: Some Preliminary Findings' (1990) 36 *Crime & Delinquency* 342

Welsh, Michelle, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908

Wendel, W. Bradley, 'Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation' (2002) 77 *Indiana Law Journal* 1

Werden, Gregory, Scott Hammond and Belinda Barnett, 'Deterrence and Detection of Cartels: Using all the Tools and Sanctions' (2011) 56 *The Antitrust Bulletin* 207

Werden, Gregory, Scott Hammond and Belinda Barnett, 'Recidivism Eliminated: Cartel Enforcement in the United States Since 1999' (Department of Justice - Antitrust Division, September 22 2011)

West, Andrew, 'Impermissible Submissions on Sentence' (2014) 34 *Queensland Lawyer* 11

White, Lawrence, 'The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion' (2010) 5 *Economics, Management and Financial Markets* 26

Wigger, A, *The Politics of the Transformation of the European Union Competition Regime* (2008)

Wiley, John Shepard, 'Reciprocal Altruism as a Felony: Antitrust and the Prisoner's Dilemma' (1988) 86 *Michigan Law Review* 1906

Williams, Ryan, 'The Devil They Know: The DOJ's Flawed Antitrust Leniency Program and Its Curious Pursuit of Stolt-Nielsen' (2007) 85 *North Carolina Law Review* 974

Williamson, Oliver, 'The Merger Guidelines of the U.S Department of Justice - In Perspective' (United States Department of Justice, 2002)
<<http://www.justice.gov/atr/hmerger/11257.htm>>

Wils, Wouter P.J, ' Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25

Wils, Wouter P.J, 'Recidivism in European Union Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition*

Wisenberg, Solomon and George Horn, 'Department of Justice Issues Guidance for Prosecutors Regarding Criminal Discovery' (Barnes & Thornburg LLP, 2010)
<<http://www.lexology.com/library/detail.aspx?g=7ea984d3-566d-402d-902e-4478bba0ffe7>>

Wolfe, Simon et al, 'Whistleblower Protection Rules in G20 Countries: The Next Action Plan - Public Consultation Draft' (Blueprint for Free Speech; The University of Melbourne; Griffith University & Transparency International Australia, 2014)
<<http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf>>

Wright, Joshua and Douglas Ginsburg, 'Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty' (2012) 106 *Northwestern University Law Review* 1033

Wright, Joshua and Judd. E Stone II, 'Misbehavioral Economics: The Case Against Behavioral Antitrust' (2012) 33 *Cardozo Law Review* 1517

Wright, Robert, *Nonzero: The Logic of Human Destiny* (Vintage Books, 1st ed, 2000)

Wylie, I S, 'Cartel Compensation – A Consumer Perspective' (2011) 39 *Australian Business Law Review* 177

Yeoh, Peter, 'Whistleblowing: Motivations, Corporate Self-Regulation, and the Law' (2014) 56 *International Journal of Law and Management* 459

Yulchon LLC, *Revamped Korean Leniency Regime: No More Cheap Way Out for Repeat Cartelists and Second-in-Line Confessors* (October 31 2012) Lexology <<http://www.lexology.com/library/detail.aspx?g=43c72699-15cb-4f0a-aa8b-8f39f4c2a37f>>

Zingales, Nicolo, 'European and American Leniency Programmes; Two Models Towards Convergence?' (2008) 5 *The Competition Law Review* 5

B Cases

Adler v Australian Securities and Investments Commission (2003) 179 FLR 1

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Australian Competition and Consumer Commission v Energy Australia Pty Ltd (2014) FCA 336

Australian Competition and Consumer Commission v Flight Centre Limited (No 3) (2014) FCA 292

Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL (2011) FCA 938

Australian Competition and Consumer Commission v Visy Holdings Pty Ltd (No 3) (2007) FCA 1617

Australian Competition and Consumer Commission v Visy (No 2)(2007) 239 ALR 762

Australian Securities and Investments Commission v Adler (2002) 168 FLR 253; *Re HIH Insurance Ltd* (2002) 42 ACSR 80

Australian Woollen Mills v Commonwealth (1954) 92 CLR 424

Barbaro v The Queen, Zirilli v The Queen (2014) 253 CLR 58

Barton v Armstrong (1976) AC 104

Blair v. United States, 250 U.S. 273 (1919)

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

Cadbury Schweppes Pty Ltd v Amcor Limited (2008) FCA 88

Cashflow Finance Pty Ltd v Westpac Banking Corp (1999) NSWSC 671

Carlill v Carbolic Smoke Ball Co (1893) 1 QB 256

Carr v J A Berriman Pty Ltd (1953) 89 CLR 327

Con-stan Industries of Australia Ltd v Norwich Winterthur Insurance (Australia) Ltd
(1986) 160 CLR 226

Commissioner for Consumer Protection v Susilo (2014) WASC 50

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64

Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1

Crown v Clarke (1927) 40 CLR 227

Donaldson & Hosenbein, Inc. v. F. Hoffmann-LaRoche, Ltd., Case No. 1:98CV0062
(D.D.C. filed Mar. 28, 1998)

Dougan v Ley (1946) CLR 142

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423

Edwards v Blomley (2002) NSWSC 460 (Unreported, Studdert J, 12 June 2002)

Esso Australia Resources Ltd v Commissioner of Taxation (1999) 201 CLR 49

*Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and
Energy Union* (2015) 320 ALR 631

Gibson v Manchester City Council (1979) 1 WLR 294

Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)

Griffith University v Tang (2005) 221 CLR 99

Harriton v Stevens (2002) NSWSC 461

Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd (1991) 22 NSWLR 298

Hoare v R (1989) 167 CLR 348

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (1962) 2 QB 26

Imperial Oil v Jacques (2014) SCC 66

Johnson v The Queen (1976) 136 CLR 619

Korean Airways Co Ltd v Australian Competition and Consumer Commission (2008) FCA 265

Lowe v The Queen (1984) 154 CLR 606

Markarian v The Queen (2005) 228 CLR 357

Maxwell v The Queen (1996) 184 CLR 501

McCulloch v Maryland (1819) 4 Wheat 316

National Grid Electricity Transmission Plc v ABB Ltd (2012) EWHC 869

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Neat Domestic Trading Pty Ltd v Australian Wheat Board Ltd (2003) 216 CLR 277

New South Wales v Macquarie Bank (1992) 30 NSWLR 307

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (1979) 2 WLR 419

Occidental Worldwide Investments Corp v Skibs A/S Avanti (The 'Siboen and The Siboen') (1976) 1 Lloyds Rep 293

Pfleiderer AG v Bundeskartellamt (C-360/09) [2011] All E.R. (EC) 979 (ECJ (Grand Chamber))

Progressive Mailing House v Tabali (1985) 157 CLR 17

R v Channon (1978) 20 ALR 1

R v George, Burns, Burnett and Crawley (unreported) 7 December 2009; (2010) 174 JP 313; (2010) EWCA Crim 1148

R. v. Nestlé Canada Inc 2015 ONSC 810

R. v. Stinchcombe 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326

Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich (2003) 44 ACSR 682

Re Toll and Australian Securities Commission (1993) 29 ALD 412

Robinson v Harman (1848) 1 Ex 850; 154 ER 363

Schutz DSL (Aust) Pty Ltd v VIP Plastic Packaging Pty Ltd (2009) 82 IPR 477; (2009) FCA 1049

Sellars v Adelaide Petroleum NL (1994) 179 CLR 332

Sheahan (as liquidator of SA Service Stations) (in liq) v Verco (2001) 79 SASR 109

Stolt-Nielsen S.A. v. United States, 352 F. Supp. 2d 553, 568 (E.D. Pa. 2005)

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR 632

United States v. AU Optronics Corp., No. CR-09-0110 (N.D. Cal. Mar. 13, 2012), 2012 WL 889874

United States v. Crompton Corp., 399 F. Supp. 2d 1047, 1048 (N.D. Cal. 2005)

United States v. Madori, 419 F.3d 159, 169 (2d Cir.2005)

United States v. Triumph Capital Group, 544 F.3d 149 (2nd Cir. 2008))

Universe Tankships Inc of Monrovia v International Transport Workers Federation (1983) AC 366

Veen (No 1) v R (1979) 143 CLR 458; *Veen (No 2) v R* 143 CLR 472

Waller v James (2002) NSWSC 42

Zecevic v Director of Public Prosecutions (Vic) (1987) 162 CLR 645

C Legislation

Act No. LVII/1996 on the Prohibition of Unfair and Restrictive Market Practices.

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Antitrust Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237(2004), 118 Stat. 665 (2004)

Competition Act RSC 1985, c C-34 s 45

Competition and Consumer Act 2010 (Cth)

Consumer Rights Act 2015 (United Kingdom) c.15

Corporations Act 2001 (Cth)

Clayton Act. 15 U.S.C. § 15a.

Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No, 111-24, 123 Stat. 1743 (2009)

Crimes Act 1914 (Cth)

Criminal Antitrust Anti-Retaliation Act of 2013, S 42, 113th Congress 2013

Criminal Code 1995 (Cth)

Criminal Code, RSC 1985, c C-46

Criminal Justice Act 2003 (United Kingdom) c.44

Crimes (Sentencing) Act 2005 (ACT)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Criminal Law (Sentencing) Act 1988 (SA)

Criminal Procedure and Investigations Act 1996 (United Kingdom) c.25

Director of Public Prosecutions Act 1983 (Cth)

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010)

Employment Rights Act 1996 (United Kingdom) c 18

Enterprise Act 2002 (United Kingdom) c. 40 s 188

Enterprise and Regulatory Reform Act 2013 (United Kingdom) c 24

False Claims Act, 31 U.S.C, §§ 3729 – 3733.

Federal Court of Australia Act 1976 (Cth)

Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in 15 and 28 U.S.C. (2000))

Judiciary Act 1903 (Cth)

Legal Services Directions 2005

Legislative Standards Act 1992 (Qld)

Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010)

Penalties and Sentences Act 1992 (Qld)

Public Disclosure Act 2013 (Cth)

Public Interest Disclosure Act 1998 (United Kingdom)

Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act) Pub L No 107-204, 116 Stat 745

Securities Exchange Act of 1934 §21 A 48 Stat. 881, 15 USC

Sentencing Act (NT)

Sentencing Act 1991 (Vic)

Sentencing Act 1995 (WA)

Sherman Act, July 2, 1890, ch 647, 26 Stat. 209, 15 U.S.C. 1-7

Tax Relief and Health Care Act of 2006 § 406(a)(1)(D), Pub. L. No. 109-432, 120 Stat. 2922

Trade Practices Act 1974 (Cth)

D Treaties

Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance [1999] ATS 22

Free Trade Agreement, Australia-United States, signed 18th May 2004, [2005] ATS
1 (entered into force 1 January 2005)

Japan-Australia Economic Partnership Agreement, signed 8th July 2014, [2015]
ATS 2 (entered into force 15 January 2015)

APPENDIX A

INTERVIEW QUESTIONS

1. Demographic/introductory questions
 - a. History of the institution
 - b. Role of the individual
 - c. Professional background
 - d. Personal experience with the immunity policy
2. General views on the immunity policy
 - a. What is your opinion of the immunity policy for cartel conduct generally?
 1. What role do you think the immunity policy plays in cartel enforcement?
 2. Has your opinion changed since the policy was first implemented?
 3. What/Who do you believe has had the biggest influence on the enforcement of the immunity policy in Australia?
 4. What about influences outside of Australia?
 5. Cartel Project Survey – Almost 50per cent of public disagreed with the use of an immunity policy – what is your opinion of this?
 6. Difficulties of locating information regarding immunity – what is your experience of this? (ie is it counterintuitive to deterrence as one of goals)
 7. OVERRELIANCE – suggestion that the ACCC over-relies on the policy – what is your opinion on that?
3. Theory underpinning the immunity policy
 - a. What theory do you believe informs the design and operation of the immunity policy?
 1. What is your opinion of this theory’s operation?
 2. Explain this part – anomalies in immunity policy with greater understanding of “rationality.”
4. Practical components of the immunity policy
 - a. What elements do you think are the most successful in the immunity policy?
 - b. What do you see as the most challenging aspects of enforcement of the immunity policy and why?
 1. *Eligibility/Administration*
 - a. What is your opinion of the relationship between the ACCC and the CDPP in relation to the granting of immunity?
 - b. Exclusion -How is a cartel ‘ringleader’ defined?
 - c. How can immunity be revoked?
 - d. Is there an appeal process for refused/revoked applications for immunity?
 - e. How do you feel about cartel recidivists being excluded from immunity applications?
 - f. What do you think of the ‘carve out’ policy? (Found mostly in the U.S.)
 - g. What is your opinion of the use of the ‘omnibus question’? This occurs at the end of the interview, where

a witness may be asked if they are aware of any other cartels or illegal anticompetitive practices that they have not been questioned over and about which they can provide information.

- i. What is the position in Australia regarding the use of the ‘omnibus’ question?

2. *Cooperation*

- a. What is required to fulfill the “ongoing disclosure” requirement?
- b. What is your opinion of the “ongoing disclosure” requirement?
- c. What do you think of the Amnesty Plus/Minus policy found in the U.S and Canada?
 - i. Would you recommend this policy be implemented in Australia?
- d. What do you think of the U.S requirement that immunity applicants must provide restitution to injured parties?
- e. What is your opinion of the ACCC Cooperation Policy?
 - i. How does it compare to the U.S/Canada /European Union process?

3. *Confidentiality*

- a. How is the Protected Cartel Information Scheme (PCI) intended to operate?
- b. Does the PCI scheme strike the appropriate balance between ensuring victims of cartel behaviour have access to information to establish their case versus ensuring a high level of confidentiality is afforded to immunity applicants?
- c. Should the identity of immunity applicants be maintained before and after the court decision, as is the practice of the United States and Canada?

4. *Alternatives to an Immunity Policy*

- a. What is your opinion of a ‘Cartel informant system’ such as those that currently exist in South Korea and United Kingdom?
- b. What other proactive enforcement tools could the ACCC focus on as part of its cartel enforcement efforts?

5. *Miscellaneous*

- a. What is your opinion regarding the credibility of immunity applicants in cartel cases?
 - i. Is your opinion the same regarding contested criminal cartel cases, as opposed to civil cases?
 - ii. How do you feel about Model Jury Directions being used in this context?
- b. What happens in the event that immunity is obtained in one jurisdiction and then refused in another?
- c. What is your opinion of the idea of establishing a “one-stop global shop for leniency – such as a clearinghouse marker system suggested by John Taladay?

- i. What consequences does this have for international cartel enforcement?
 - d. How is derivative immunity for employees of corporate immunity applicants achieved?
 - i. What is your opinion on this process?
 - ii. Are employees advised of the application, and their rights and obligations? If so, when? Former employees?

APPENDIX B

PARTICIPANT INFORMATION SHEET

Researcher

Miss Pariz Marshall, LLB (Hons), PhD Candidate, Sessional Lecturer, Faculty of Law, University of Wollongong. Ph 0423 450 145 Email: pl490@uowmail.edu.au.

The Project

The ACCC Immunity Policy for Cartel Conduct: A Critical Legal Analysis

This project aims to undertake qualitative semi-structured interviews of various stakeholders who have expert knowledge and/or experience with the Australian Competition and Consumer Commission Immunity Policy for Cartel Conduct. This research will be conducted with a view to critiquing its theoretical and practical design and operation. This project aims to generate much needed empirical evidence regarding this policy, specifically in Australia and the United States, with the purpose of assisting with the policy's development and refinement.

The ACCC Immunity policy was first implemented in Australia in 2005 and revised in July 2009. It is largely deemed by regulators worldwide as the 'single most effective cartel enforcement tool'. The policy works by offering immunity to the first cartel participant to come forward and reveal their conduct, subject to a number of conditions. Despite its heavy endorsement, the policy has not been subject to any substantial critical review regarding its theoretical and practical operation in Australia, particularly as compared to other jurisdictions such as the United States, the United Kingdom and Canada.

The aims of this Project include the generation of empirical evidence to better understand the way the policy operates in order to assess its effects and identify the challenges involved in its enforcement. Specifically, the Project will:

- undertake a critical legal analysis of the theoretical underpinnings of the immunity policy and assess its utility in the context of the way in which business people interact with the law;
- critically analyse the practical components of the immunity policy including issues relating to eligibility, cooperation, administration and alternatives to immunity;
- assess the likely impact of the immunity policy on cartel deterrence and compliance with the law;
- compare the ACCC Immunity policy and its enforcement with the immunity policies in the United States, United Kingdom and Canada; and
- make recommendations that will further help to strengthen the immunity policy and cartel enforcement more generally.

Obtaining the views of senior people in various stakeholder organisations, including enforcement agencies, the legal profession, the business sector and cartel experts is crucial to fulfilling these aims.

Purpose of the interview

The purpose of this interview is to gain an understanding of how people involved in stakeholder organisations such as the enforcement agencies, the legal profession, and cartel experts

view the immunity policy for cartel conduct. Data from these stakeholder interviews will provide empirical evidence to enable the researcher to make recommendations and draw conclusions about the issues set out above.

Comparing responses of Australian stakeholders with stakeholders in the United States, said to be the ‘father’ of cartel law, will assist in comparing and contrasting the position in each country as to: its theoretical design, its practical components and operation and ultimately inform recommendations to shed light on the policy’s limitations and strengthen its enforcement.

Why are you being asked to participate in this Project?

As a senior member of a stakeholder organization in the United States, the researcher believes that you would be able to comment on cartel immunity and some or all of the issues relevant to this Project.

The researcher identified you as a potential interviewee through your extensive knowledge and experience regarding competition policy in the United States as a leading international competition lawyer and as the Co-Chair of the American Bar Association Section of Antitrust Law's Presidential Transition Report Task Force.

As a highly esteemed lawyer in the field of competition policy, you are well placed to offer comments from an operational and policy point of view regarding the Immunity Policy in the United States which will be extremely valuable to the research on Australia’s immunity policy. The interview questions will include questions, as relevant, about:

- Demographic/Introductory questions,
- Government Industry relations/views on immunity policies,
- The theory underpinning the immunity policy,
- The practical design and operation of the policy including issues relating to eligibility, cooperation, administration and alternatives to immunity,
- The effectiveness of the policy and its potential limitations,
- Patterns in cartel enforcement relating to the immunity policy,
- Any other points you think it important for us to understand.

Your comments and views will be used in the researcher’s analysis of the theoretical and practical design and operation of the immunity policy, including its strengths and limitations. Additionally, your comments and views will also inform practical recommendations the researcher will make in respect of the implementation and enforcement of the ACCC Immunity policy, which will form the final chapter of the researcher’s thesis.

What is involved in agreeing to participate?

Participating will involve you giving us an interview which should take approximately 1- 1.5 hours. If you agree, the researcher would like to record and transcribe the interview so that the researcher can analyse it later. The researcher will discuss the time and place for the interview with you and arrange a mutually convenient time and place.

Will my information be kept confidential?

The data from this research project will be published in a thesis and potentially will be used in journals and presented at conferences; however, your identity will be kept confidential and published only with your permission. Although I will report direct quotations from the interview, if requested, you will be given a pseudonym, and all identifying information (*including relevant possibilities such as the name of the institution, the participant's position, etc.*) will be removed from the published material. Or if you would prefer, we can use a generic description of your position rather than your name. Some people, who have knowledge of your organisation, may still be able to identify you from your responses. If you choose to keep your identity confidential, then we will not disclose your name unless we are required to by law. We will set out the detail of any confidentiality arrangements in the consent form.

If you agree, can you change your mind later?

Participating in this Project is entirely up to you. You may change your mind about participating at any time and withdraw your data from the study without having to give an explanation, up until the point that the data is analysed.

What will happen to the information you give to the Project?

The record of your interview will only be available to members of the research team as set out above. The researcher will keep the physical records in a locked filing cabinet and the electronic records in a password protected electronic file and we will not disclose any confidential information unless required by law.

Information from your interview will only be published in accordance with any confidentiality terms we agree with you. Audio recordings of your interview will not be released so you will not be identified by your voice. Audio recordings will be kept for a period of at least 5 years after the Project is completed and they will be identifiable, however the researchers will work from transcriptions of the recordings.

The researcher may use information provided in your interview in their publications about the immunity policy and cartel enforcement more generally. Publications are expected to take the form primarily in a doctrinal thesis, but potentially also journal articles, conferences and scholarly books. You will be sent a transcript of the interview and asked to confirm its accuracy. You will not be quoted directly from the transcript prior to this confirmation being provided.

How do you take part in the Project or find further information about the Project?

The researcher will discuss your participation with you. You are welcome to contact any of the research team at any time to talk about the Project and ask any questions. You can contact us as set out below.

If you agree to participate in the Project then the researcher will arrange for you to sign a consent form.

What if you have concerns about the Project?

We are happy to talk about any queries or concerns that you may have. You may contact the researchers as below.

- Pariz Marshall, 0423 450 145, pl490@uowmail.edu.au

If you still have concerns about the Project after we have discussed them with you then you can contact the Ethics Manager, Human Research Ethics, The University of Wollongong, Australia – Eve Steinke Ph: (02) 4221 4457 **Email:** eves@uow.edu.au

Thank you for your time in reviewing our Project materials so far.

Yours sincerely,

Miss Pariz Marshall LLB (Hons)

APPENDIX C

CONSENT FORM - STAKEHOLDERS

The ACCC Immunity Policy for Cartel Conduct: A critical legal analysis

This document indicates that you consent to participate in an interview to assist with research into the Project ‘The ACCC Immunity Policy for Cartel Conduct: A critical legal analysis’ and how your interview will be dealt with.

You may withdraw your consent to your involvement in this Project at any time and may also withdraw any unprocessed data.

All the interview data will be kept securely for at least 5 years after publication of the results and may be used by the research team in further research during or after that time.

If the data from your interview will be used without identifying you, then we will not publish your name or other identifying information unless required to by law. However, it may still be possible for readers to identify you from your responses to some of the interview questions.

A record of the interview will be made as indicated below. You will be identified as indicated below.

Miss Pariz Marshall

0423 450 145

pl490@uowmail.edu.au

I consent to be interviewed for the Research Project ‘The ACCC Immunity Policy for Cartel Conduct: A critical legal analysis.’ I have been given a copy of this consent form and the Participant Information Sheet to keep. What I say in the interview may be recorded and used by the research team in publications.

I consent to the interview being recordedY/N

I consent to being named in publicationsY/N

I consent to my position being described in publications ...Y/N

The special identification arrangements for my interview are (please describe)

Signed:.....

(participant signature)

Signed:.....

Name:

(Print name)

Name:

(Print name)

Date:

Date:

APPENDIX D
INTERVIEWEE LIST

1. Professor Christine Parker – Monash University (9.07.2013)
2. Andrew Christopher - Webb Henderson – Partner (22.07.2013)
3. Professor Caron-Beaton Wells – Melbourne University (26.04.2013)
Melbourne
4. Bruce Lloyd – Clayton Utz – Partner (17.06.2013)
5. Simon White SC – Sixth Floor – Barrister (25.07.2013)
6. Carolyn Oddie – Allens – Partner (23.07.2013)
7. Graeme Samuel – Former Chairman of the ACCC (26.04.2013) - Melbourne
8. Murray Deakin – K & L Gates – Partner (15.07.2013)
9. Georgina Foster – Baker & McKenzie – Partner (15.07.2013)
10. Michael Gray – Herbert Smith Freehills (29.07.2013)
11. Louie Lou – Australian Competition and Consumer Commission
(19.08.2013)
12. Trudy Hall – Australian Competition and Consumer Commission
(19.08.2013)
13. Nick McHugh – Norton Rose Fulbright – Head of Antitrust and Competition
(22.07.2013)
14. Ross Zaurrini – Ashurst – Partner (23.08.2013)
15. Elizabeth Sarofim – Ashurst – Senior Associate (23.08.2013)
16. Melissa Fraser – Ashurst – Senior Associate (23.08.2013)