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The Criminal Prosecution of Anti-Competitive Cartel Conduct in Australia: Issues in Moral Conception and Perception

Jason Harkess
BA, LLB(Hons)

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Faculty of Law

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Abstract

The thesis considers the moral implications arising out of cartel conduct with reference to the criminal cartel offence provisions that came into operation in Australia on 24 July 2009 following the enactment of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth).

As an economic regulatory offence, cartel conduct is not regarded as a conventional crime that easily draws moral condemnation from the community. The moral senses are not provoked in the same way as they are when confronted with situations of theft and murder. This moral discrepancy necessitates consideration of the appropriateness of the use of criminal penalties to sanction cartel conduct, given that the criminal law is traditionally reserved for the punishment of the most serious moral wrong-doing in society.

The thesis contends that there is a rational basis for conceiving cartel conduct to be sufficiently immoral to justify the imposition of criminal sanctions. The issue for examination is then the apparent 'disconnect' between theoretical conceptions of moral wrong-doing and the absence of a sustained public resentment directed towards cartel conduct. The Australian legal context in which the issue of the morality of cartel conduct arises is first considered. Cartel conduct as an economic concept is then explained. Morality is defined, and a range of moral reasoning processes drawn from legal and philosophical literature are applied to conceptualise the immoral nature of cartel conduct at a theoretical level. Consideration is then given to the process by which individual members of the community come to learn and perceive certain kinds of conduct to be immoral. A community manifestation of moral outrage towards cartel conduct is then explained as being dependent on individuals receiving an effective moral education about it. The features of economic regulatory offences thought to obscure people's moral perceptions, generating a 'moral ambiguity' in relation to such offences, are then outlined and considered in relation to cartel conduct. Those features having the most significant impact on community perceptions are then considered more closely.

The thesis concludes that cartel conduct may be conceived to be morally wrong by

applying a variety of different moral reasoning processes, and that it is sufficiently reprehensible to justify criminal penalties. However, there are many factors operating upon cartel conduct causing it to be perceived as morally ambiguous. First, there are the 'complexity' factors. Cartel conduct is a complex phenomenon the many nuances of which are not easily understood by most people. Secondly, there are the 'institutional' factors. Society's institutions that are best positioned to explain cartel conduct and educate the community about its reprehensibility are yet to do so effectively. Nevertheless, moral perspectives can change over time. The Australian community can eventually come to understand the reprehensible nature of cartel conduct if resources are directed towards educating the community and shifting institutional attitudes. The moral justification for criminalisation will then become much clearer.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

The law in this thesis is current at 1 September 2018.

Jason Harkess
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CHAPTER 1

INTRODUCTION

I OVERVIEW

It has been a slow legal journey for determining that cartel offenders will be held criminally liable for their wrong-doing in Australia. From the adoption of a government policy in 2003 that would eventually see criminal laws introduced in 2009, to the actuality of a corporate offender being convicted and sentenced in 2017, it has taken fourteen years. Several more criminal prosecutions against individuals are now on foot in Australia, with each of these individuals facing a potential term of imprisonment if found guilty of the criminal cartel offence. If that occurs, the need for the Australian community to see the immorality in the conduct with clarity becomes all the more important.

This concern arises because cartel conduct does not easily provoke the community's moral senses, if at all. It is not a conventional crime like murder or theft. Rather, it is an 'economic regulatory' or 'white collar' offence, categories of offending behaviour the immorality of which is more difficult to perceive. Cartel conduct has many operating features that combine to obfuscate its immorality. Conventional crimes, which are universally accepted as being morally wrong, do not share this problem. This moral discrepancy leads to cartel conduct being labeled as 'morally neutral' or 'morally ambiguous', raising concerns about the legitimacy of using the criminal law to sanction it. However, steps may be taken towards allaying these concerns. First, the moral wrongfulness arising from cartel conduct can be conceptualised and properly explained. Secondly, the morally obfuscating features can be identified and their underlying causes articulated. From there, the wider public can be better educated about the immorality of cartel conduct so that the moral imperative for criminally prosecuting those who engage in it becomes clear.

Against this backdrop, this thesis considers the moral justification for criminal penalties for cartel conduct being part of Australia's laws. Part II of this chapter provides a brief

statement of the specific questions sought to be answered by this thesis. Part III sets out the relevant contextual background in relation to Australia's criminal cartel laws and explains the general importance of the thesis topic. Part IV outlines what is currently understood in relation to cartel conduct being regarded as a moral problem. Part V sets out the methodology used to answer the specific thesis questions. Part VI concludes this chapter with an outline of the thesis structure.

II STATEMENT OF THESIS QUESTIONS

There are two central questions addressed in this thesis:

1. How is cartel conduct *conceived* to be sufficiently immoral to justify the use of criminal penalties?

2. What factors operate to inhibit the Australian community's *perception* of that immorality?

It is intended that by answering these questions, this thesis will provide new insights into the moral implications of cartel conduct, which can be used to improve the Australian community's understanding of cartel conduct as a moral problem. A greater understanding will strengthen the legitimacy of using criminal penalties to punish individuals who engage in cartel conduct in Australia. It may also encourage Australia's law enforcement authorities to adopt a morally forthright approach to the criminal prosecution of cartel conduct, giving effect to the legislature's ultimate intentions.

III CONTEXTUAL BACKGROUND

A *Criminalisation of Cartel Conduct in Australia*

It has been nine years since criminal penalties for cartel conduct were introduced into Australian law.[1] It was a slow and drawn-out process. The Australian Federal

[1] The Australian Commonwealth Parliament created criminal penalties for cartel conduct by enacting the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth), which came into effect on 24 July 2009. These criminal penalty provisions now appear in Subdivision B of Part IV of the *Competition and Consumer Act 2010* (Cth). The provisions are considered in more detail below Chapter 2

Government announced in late 2001 that there would be an independent review of the competition provisions of the *Trade Practices Act 1974* (Cth), which subsequently led to a committee of inquiry being formed, headed by former High Court judge Sir Daryl Dawson ('Dawson Committee').[2] The Dawson Committee reported its findings to the government in early 2003.[3] That criminal penalties, including imprisonment for individuals, should be introduced for serious or 'hard-core' cartel conduct was one of its more significant recommendations. The government welcomed the Dawson Committee's proposal and immediately announced that it had established a working group to examine and resolve the finer definitional and practical issues necessarily involved in introducing a criminal cartel offence into Commonwealth law.[4] Five more years elapsed before a new government released a draft bill and a call for public submissions.[5] The draft laws were refined and finally passed, coming into effect on 24 July 2009.[6]

In 2014, the Government commissioned another independent review of Australia's competition laws, on this occasion chaired by leading Australian economist Professor Ian Harper ('Harper Review').[7] An issue raised in the Harper Review was whether the relatively new criminal cartel laws were operating effectively.[8] At that stage, no criminal prosecutions for cartel conduct had been launched, and so there were no cases from which practical legal lessons about the operation of the criminal provisions could have been

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Part II.

[2] Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, report dated 31 January 2003, report released 16 April 2003).

[3] Ibid.

[4] The government's response to the Dawson Committee's report was announced contemporaneously with the release of the Committee's report on 16 April 2003. The then Treasurer, Peter Costello, later announced that he had established a working group to consider how the Dawson Committee's recommendations could be implemented. See Peter Costello (Treasurer), 'Working Party to Examine Criminal Sanctions for Cartel Behaviour' (Media Release, 3 October 2003).

[5] Exposure Draft Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth); Department of the Treasury (Competition and Consumer Policy Division), 'Discussion Paper: Criminal Penalties for Serious Cartel Conduct' (Discussion Paper, Department of Treasury, Commonwealth of Australia, 2008).

[6] *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth).

[7] Competition Policy Review Panel, *Competition Policy Review: Final Report* (Commonwealth of Australia, 6 March 2015).

[8] Competition Policy Review Panel, *Competition Policy Review: Issues Paper* (Commonwealth of Australia, 14 April 2014) 32.

learnt. The Harper Review panel reported its findings to the government in March 2015.[9] In the absence of any actual criminal prosecutions, it was not surprising that there were minimal suggestions made in relation to the criminal offence provisions. It recommended that criminal sanctions be retained in Australia, but that the language of the specific criminal prohibitions be simplified and that certain affirmative defences provided for under the legislation be refined.[10] Its recommendations were publicly endorsed by the government,[11] with minor amendments to the cartel offence provisions being passed into law in 2017.[12]

In 2016 the Australian Competition and Consumer Commission ('ACCC') launched its first criminal prosecutions for cartel conduct. Two global shipping companies based in Japan, Nippon Yusen Kabushiki Kaisah ('NYK') and Kawasaki Kisen Kaisak ('K-Line'), were each charged with having engaged in cartel conduct in relation to the international shipping of motor vehicles to Australia between July 2009 and September 2012.[13] NYK pleaded guilty shortly after the charge against it was laid.[14] In August 2017, the Federal Court convicted and fined NYK $25 million.[15] NYK's sentence outcome heralded the successful commencement of Australia's new criminal cartel conduct enforcement regime, drawing attention to the fact that perpetrators of cartel conduct may now be treated as serious criminals by Australia's legal system.

Following the success of the NYK prosecution, the chairman of the ACCC, Rod Sims,

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[9] Competition Policy Review Panel, *Competition Policy Review: Final Report*, above n 7.

[10] Ibid 58-59, 359-67.

[11] Commonwealth of Australia, *Australian Government Response to the Competition Policy Review* (Commonwealth of Australia, 24 November 2015) 23.

[12] See *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), Sch 2. This amending legislation came into effect on 6 November 2017. It made only slight modifications to the scope of operation of the cartel offence provisions in Australian markets. It also clarified the scope of the 'joint venture' affirmative defence that may be advanced by defendants in criminal proceedings. These amendments are not material to the subject matter of this thesis.

[13] Criminal proceedings were commenced against NYK in July 2016: see Australian Competition and Consumer Commission, 'Australia's first criminal cartel charge laid against NYK' (Media Release, 18 July 2016). Criminal proceedings against K-Line were commenced in November 2016: see Australian Competition and Consumer Commission, 'Criminal Cartel Charges Laid against K-Line' (Media Release, 15 November 2016).

[14] See *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (3 August 2017) [167], [192].

[15] Ibid [299].

declared that Australia's 'criminal cartel machine is now built,' and that the Australian public 'will now see its continuing output.'[16] True to its word, in 2018 the ACCC has overseen further output produced by Australia's *criminal cartel machine*. In February, the ACCC commenced criminal proceedings against Country Care Group Pty Ltd ('Country Care prosecution') and two of its senior managers relating to cartel conduct alleged to have occurred in the rehabilitation and aged care products industry.[17] Next, in April, the second Japanese shipping company that had been charged in 2016, K-Line, indicated that it too would be pleading guilty to the criminal cartel conduct charge.[18] Then, in June, the ACCC commenced criminal proceedings against three major banks – Citigroup, Australia and New Zealand Banking Group ('ANZ') and Deutsche Bank – and six senior banking executives ('Banking Cartel prosecution'), alleging criminal cartel conduct in relation to an ANZ institutional share placement that occurred in 2015.[19] Most recently, in August, criminal proceedings were launched against the Construction, Forestry, Mining, Maritime and Energy Union, and one of its branch secretaries, for attempting to implement cartel agreements in the building construction services industry in 2012 and 2013 ('CFMMEU prosecution').[20]

At the time of submitting this thesis, the K-Line, Country Care, Banking Cartel and CFMMEU prosecutions are yet to be finally determined by the courts. The K-Line sentencing hearing is due to be heard by the Federal Court in November 2018.[21] The other three prosecutions, having only commenced this year, are unlikely to be resolved before 2019. When these three cases do eventually come before the Federal Court for determination, they are likely to attract a significant amount of public attention. They represent the first cases in which both Australian organisations and individuals are being

[16] Australian Competition and Consumer Commission, 'Criminal cartel investment pays off' (Media Release, 5 August 2017).

[17] Australian Competition and Consumer Commission, 'Criminal cartel proceedings commenced against Country Care and its managers' (Media Release, 15 February 2018).

[18] Australian Competition and Consumer Commission, 'Second shipping company pleads guilty to criminal cartel conduct' (Media Release, 5 April 2018).

[19] Australian Competition and Consumer Commission, 'Criminal cartel charges laid against ANZ, Citigroup and Deutsche Bank' (Media Release, 5 June 2018).

[20] Australian Competition and Consumer Commission, 'Criminal cartel charges laid against CFMMEU and its ACT branch secretary' (Media Release, 16 August 2018).

[21] Australian Competition and Consumer Commission, 'Second shipping company pleads guilty to criminal cartel conduct', above n 18.

prosecuted for criminal cartel conduct. If any of the individuals are found guilty, it will be the first time that a person faces the prospect of being sentenced to a term of imprisonment for having engaged in cartel conduct in Australia.

B *Rationale for Criminalisation*

Australia's move to criminalise cartel conduct was prompted by a recommendation made by the Organisation for Economic Co-operation and Development ('OECD') in 1998.[22] That recommendation obliged OECD member nations, including Australia, to consider taking steps 'to ensure that their competition laws effectively halt and deter hard core cartels'.[23] The reasons expressed for making the recommendation included that hard core cartels 'are the most egregious violations of competition law', that they 'injure consumers' economically, and that they 'distort' world trade which in turn leads to undue market power, waste and inefficiency.[24] The language used by the OECD disclosed a concern about both the economic and moral implications of cartel conduct, suggesting that legal mechanisms needed to be implemented that both deterred and admonished cartel conduct offenders.

Most OECD member nations already had some form of civil or administrative sanctioning regime in place for addressing cartel conduct, so criminal sanctions were seen to be the logical next step for the purpose of increasing the law's deterrent effect.[25] Furthermore, it was the United States of America ('United States') that was responsible for sponsoring the OECD recommendation, a nation that wanted other nations to adopt criminal enforcement regimes similar to its own.[26] It was therefore reasonably clear, having regard to the context in which the recommendation was made, that criminal penalties and their

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[22] Organisation for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels* C(98)35/FINAL (14 May 1998). See also the discussion in Caron Beaton-Wells, 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia' (2008) 29 European Competition Law Review 185, 185.

[23] Organisation for Economic Co-operation and Development, above n 22.

[24] Ibid.

[25] See generally Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 140-5.

[26] Beaton-Wells, above n 22, 185; Christopher Harding, 'Business Collusion as a Criminological Phenomenon' (2006) 14 Critical Criminology 181, 194-7. See also Maurice Stucke, 'Morality and Antitrust' [2006] Columbia Business Law Review 443, 540-4.

effective enforcement were what the OECD hoped its member nations would implement, where possible.

By the time the Dawson Committee convened in 2002, a number of OECD nations had already implemented, or were in the process of implementing, laws which would see criminal penalties being imposed for cartel conduct in their own countries.[27] The United Kingdom of Great Britain and Northern Ireland ('United Kingdom'), in particular, had only just enacted a criminal offence which prohibited individuals from 'dishonestly' entering into a cartel arrangement.[28] The Dawson Committee took into account the OECD recommendation and other OECD nations' criminal cartel laws, including those of the United States and the United Kingdom. The Dawson Committee's ultimate recommendation that Australia should introduce criminal sanctions was presented on the basis that they would provide the most effective deterrent against perpetration of the cartel offence, and that a criminal enforcement regime would be in keeping with 'growing overseas experience'.[29]

C *Moral Controversy*

The prospect of cartel offenders being labeled 'criminal' and punished by a term of imprisonment in Australia generated a considerable amount of interest and debate. A good deal of that debate arose during the course of the Dawson Committee's review process itself, with over 70 written submissions addressing the issue of whether criminal penalties should be introduced.[30] Following the release of the Dawson Committee's report, and in

[27] The Dawson Committee identified these countries as being Canada, Ireland, Japan, Korea, Norway, the United States, and (individuals only) France, Greece and Switzerland. See the discussion in Trade Practices Review Committee, above n 2, 151-2.

[28] Section 188 of the *Enterprise Act 2002* (UK), when originally enacted, provided that an individual is guilty of an offence 'if he dishonestly agrees with one or more other persons to make or implement' an arrangement in the nature of price-fixing, market-sharing, bid-rigging or output quotas relating to at least two independent business entities. See the discussion relating to this particular provision in Chapter 5 below.

[29] Trade Practices Review Committee, above n 2, 153, 161, 163.

[30] Submissions to Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2002 <http://tpareview.treasury.gov.au/submissions.asp> (accessed 15 September 2018). See also articles published prior to completion of the Dawson Committee's review, in particular Louise Castle and Simon Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition in Australia' (2002) 10 Competition and Consumer Law Journal 1; Allan Fels, 'The TPA and World's Best Practice: Proposals for Criminal Penalties for Hard-core Collusion' (2002) Australian Competition and Consumer Commission Journal 1.

the lead-up to the new criminal laws being introduced, there was much more debate, particularly amongst legal professionals and academics.[31] Mainstream media interest in the proposed criminal laws was also fueled by the record-setting $36 million civil penalty imposed by the Federal Court in 2007 against prominent Australian businessman Richard Pratt for his admitted involvement in a cartel arrangement established between his business, Visy Industries, and rival cardboard manufacturer Amcor.[32] Academics in Australia and overseas have also spent a considerable amount of time investigating public attitudes towards cartel conduct and its criminalisation.[33]

Attitudes are certainly divided regarding the appropriateness of criminal sanctions for cartel conduct. But amongst them all is a common curiosity and genuine concern as to the application of the criminal law to cartel activity. This concern is natural given that cartel conduct has, at least until recently, only ever been subject to a range of civil legal sanctions in Australia, not criminal.[34]

1 *Morality and the Criminal Law*

The severity of introducing criminal sanctions for cartel conduct cannot be overstated. With imprisonment comes humiliation, the deprivation of liberty, and a potentially everlasting moral stigma attaching to those who are ordered to serve such a sentence.

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[31] See for example Julie Clarke and Mirko Bagaric, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31 Australian Business Law Review 192; William Kolasky, 'Criminalising Cartel Activity: Lessons from the US Experience' (2004) 12 Competition and Consumer Law Journal 207; Julie Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10 Deakin Law Review 141; Bill Reid and Elizabeth Henderson, 'Cartels – Criminal Sanctions and Immunity Policy' (2006) 14 Trade Practices Law Journal 199; Brent Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 Australian Business Law Review 235.

[32] The case is reported: *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673. Examples of media reports concerning the Federal Court case and the prospect of criminal laws being introduced include Cameron Stewart, 'Pratt's Cartel "Cost All of Us"', *The Australian* (Sydney), 3 November 2007, 33; John Durie, 'Hand is Up to Kiss and Cartel', *The Australian* (Sydney), 1 December 2007; Patrick Smith, 'Time to Put Cartel before House', *The Australian* (17 December 2007); 'Rudd Government to Crack Down on Cartels', *The Age* (Melbourne), 2 January 2008.

[33] See specifically Caron Beaton-Wells et al, *The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement* (The University of Melbourne, December 2010); Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 Competition Law Review 123.

[34] See however the discussion concerning the legal history of Australia's prohibitions against cartel conduct below Chapter 5 Part III(B), which draws attention to Australia's various ineffective flirtations with the implementation of criminal penalties for cartel conduct in the past.

Imprisonment is a serious affront to basic concepts of human dignity and integrity. Criminal punishment of this type must be justified in a way that is consistent with the general aims of the criminal law.

The need to admonish morally reprehensible conduct is perhaps the most well-known of the criminal law's essential aims, an implication of which is that the criminal law should only concern itself with punishing those who violate society's central values and cause significant harm.[35] Conduct less serious, at least from a moral point of view, should arguably not be subject to criminal punishment. Questions of morality are inextricably linked with the criminal law.

The extent to which cartel conduct is seen to be immoral may therefore be a critical issue in determining whether it should criminal. This issue is particularly important from the point of view of ordinary members of the public, who are most likely to gauge the seriousness of cartel conduct in moral terms rather than economic terms.[36] Criminal condemnation is tantamount to community moral condemnation, and so the moral wrongfulness of cartel perpetrators needs to be reasonably clear to justify this kind of punishment.

2 *Cartel Conduct Not Typical 'Crime'*

For most of us, the central values violated and significant harms caused by crimes such as murder, rape and stealing are easily recognised and their moral wrongfulness intuitively understood. There would not be any need for a public inquiry into why these types of conduct are crimes because the answer is obvious to all concerned. However, the moral wrongfulness of cartel conduct may not be so readily accepted.

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[35] Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 3rd ed, 1995) 16.

[36] Beaton-Wells et al, above n 33, 2; Caron Beaton-Wells, 'Anti-Cartel Advocacy – How Has the ACCC Fared?' (2011) 33 Sydney Law Review 733, 764. The notions of 'ordinary people', 'ordinary members of the public', and similar expressions used throughout this thesis, refer to those members of the community who have undertaken no more than a cursory examination of cartel conduct and its broader implications. Such people may be assumed to have a basic understanding of cartel conduct or, at the very least, have enough knowledge of worldly matters that would enable them to understand cartel conduct were it to be explained to them in straightforward terms. For present purposes, it may be assumed that all but a small section of the community would be classified as 'ordinary people'. Those not intended to fall within this class include lawyers, economists, policy makers, academics and students alike who have had cause to study cartel conduct so as to take their knowledge of it beyond the 'basic' level.

In the course of the debate about cartel conduct being criminalised in Australia, the observation was made that 'one cannot generally point to a group of impoverished retirees ripped off by the price-fixer, as one could with a fraudster or a con-man.'[37] It was a quaint point, appealing to our moral intuitions and inviting a distinction to be drawn between the more 'traditional' property crimes of theft and fraud, and the less well-known economic regulatory offence of cartel conduct. It was an argument clearly designed to undermine the case for cartel criminalisation. While feelings of moral outrage may arise when we are presented with situations involving traditional crime, such feelings do not arise to the same degree, if at all, upon being presented with a situation of cartel conduct. So how can the criminalisation of cartel conduct be justified on a moral basis?[38]

3 *Relevance of Morality Not Clearly Acknowledged*

Arguments of a moral mandate for criminalising cartel conduct did not feature prominently amongst the submissions to the Dawson Committee supporting the criminalisation proposal. The government regulator, the ACCC, was the only body that vigorously pursued the case that cartel conduct should be criminalised because it is 'morally reprehensible'.[39] Several other submissions lent support to that position.[40]

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[37] Castle and Writer, above n 30, 22.

[38] The issue concerning the moral distinction between traditional crimes and economic regulatory offences, such as cartel conduct, is addressed in Chapter 4.

[39] Australian Competition and Consumer Commission, Submission No 56 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2 July 2002, 8, 24-5.

[40] See in particular Energex Limited, Submission No 46 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 14 June 2002, 6 (likening cartel conduct to fraud, robbery and theft); Australian Consumers' Association, Submission No 105 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, July 2002, 31 (likening cartel conduct to theft and fraud); Australian Business Limited, Submission No 112 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 16 July 2002, 3 (likening cartel conduct to theft); De-Anne Kelly MP, Submission No 165 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 6 August 2002, 4 (likening cartel conduct to theft); Council of Small Business Organisations of Australia Limited, Submission No 89 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2 July 2002, 4 (adopting the ACCC's position); Peter Mair, Submission No 5 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2 July 2002, 4 (characterising cartel perpetrators as 'criminals'); Australia and New Zealand Banking Group Limited, Submission No 91 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, July 2002, 12 (viewing cartel conduct 'with abhorrence'); Commonwealth Bank of Australia Limited, Submission No 96 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, July 2002, 42 (referring to a cartel conduct as 'reprehensible behaviour'); Business Council of Australia, Submission No 71 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2 July 2002, 117 (viewing cartel conduct with 'abhorrence'). There

However, many others strongly criticised the ACCC's moral argument.[41] The Dawson Committee acknowledged that cartel activity 'may be sufficiently reprehensible' to justify imprisonment, but it also recognised that there was 'disagreement as to whether a strong enough case had yet been made out' for criminal sanctions to be introduced in Australia.[42] The Dawson Committee also acceded to the argument that, if criminal penalties were to be introduced, the element of 'dishonesty', a morally pejorative term that had been adopted in the British criminal offence, should probably not be adopted in Australia.[43] In the end, the Dawson Committee presented its recommendation of introducing criminal sanctions on the basis of more universally accepted reasons – namely, that they would provide a more effective deterrent and would be consistent with the existing and developing laws of other OECD nations.[44] Whatever the merit in these less controversial reasons for introducing criminal penalties, the Dawson Committee's recommendation was, unequivocally, not presented on a moral platform.

But the morality issue was raised again when the Australian government announced its intention to introduce criminal penalties.[45] The then Federal Treasurer, Peter Costello, characterised cartel conduct as dishonest and deceitful, apparently in the hope that people would understand and accept cartel conduct as being a species of fraud involving a kind of mischief well known to the criminal law:

> Dishonesty goes to the heart of serious cartel conduct, where customers are deceived when purchasing goods or services unaware that the price and supply of those goods

would not appear to be any discernible moral reasoning contained in other submissions that supported the criminalisation proposal.

[41] See in particular State Chamber of Commerce (NSW), Submission No 79 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, July 2002, 9 (arguing that competition laws are 'an economic type of legislation not a criminal law'); Australian Industry Group, Submission No 109 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 15 July 2002, 58-65; International Chamber of Commerce Australia, Submission No 143 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 25 July 2002, 25 (characterising the ACCC's 'campaign' for the introduction of criminal penalties as a case of unwarranted 'cartelophobia'); Law Council of Australia, Submission No 138 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, July 2002, 83-89. See also Castle and Writer, above n 30, 22; Clarke and Bagaric, above n 31.

[42] Trade Practices Review Committee, above n 2, 153.

[43] Ibid 155.

[44] Ibid 153, 161, 163.

[45] Peter Costello (Treasurer), 'Criminal Penalties for Serious Cartel Behaviour' (Media Release, 2 February 2005).

and services were determined by collusion, rather than competition.[46]

The Treasurer's public statement echoed the moral argument championed by the ACCC.[47] If the concept of 'dishonesty' is taken as a proxy for certain types of immoral conduct,[48] it was reasonably clear that the government was now attempting to justify the criminalisation of cartel conduct on a moral basis.

D *Importance of Resolving Moral Controversy*

The unsettled moral discourse concerning the criminalisation of cartel conduct has not gone unnoticed.[49] Leading Australian researchers in the field have described the deliberations regarding the morality of cartel conduct as 'largely elite debates' dominated by lawyers, business people, economists and policymakers.[50] Caron Beaton-Wells and Fiona Haines have suggested that the perspectives of the 'elites' towards cartel conduct may not necessarily align with the perspectives of ordinary members of the Australian public.[51] The issue is important because, if morality is used in its *descriptive* sense, it refers to the community's moral perceptions as a collective.[52] Lawyers and other professionals who may be inclined to engage in the moral debate about cartel conduct make up only a small proportion of this collective. As experts in their respective fields, they may certainly have developed their own *conceptions* of the moral wrong-doing arising out of cartel conduct. However, the opinions of the experts may count for very

[46] Ibid.

[47] Australian Competition and Consumer Commission, Submission No 56 to Trade Practices Review Committee, above n 39, 8, 24-5.

[48] The question of the 'dishonesty' of certain specified conduct is suggested to be inextricably linked to the issue of morality of that conduct. See Angus MacCulloch, 'Honesty, Morality and the Cartel Offence' (2007) 28 European Competition Law Review 355, 358. On the various conceptions of dishonesty, see Maaja Vadi and Tiia Vissak, 'The Nature of (Dis)Honesty, its Impact Factors and Consequences' in Maaja Vadi and Tiia Vissak (eds), *(Dis)Honesty in Management (Advanced Series in Management, Volume 10)* (Emerald Group Publishing, 2013) 3.

[49] See in particular Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 Melbourne University Law Review 675; Fisse, 'The Cartel Offence: Dishonesty?', above n 30; Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour' (2009) 42 Australian and New Zealand Journal of Criminology 218.

[50] Beaton-Wells and Haines, above n 49, 221-2.

[51] Ibid 222.

[52] The distinction between *normative* and *descriptive* notions of morally is explained below Chapter 3 Part II(A)(1).

little if they are not shared by the public. Members of the community need to perceive the immorality if they are to be wholly satisfied that cartel conduct has been justifiably criminalised.[53]

In the absence of there being a clear community consensus as to the moral wrongfulness of cartel conduct, questions may be raised as to the legitimacy of using the criminal law to sanction it.[54] The potential for the criminalisation of cartel conduct to present itself as a global 'moral conundrum' has grown considerably over the last decade. There has been a 'burgeoning' of criminal laws in the last twenty years that have been enacted by many nations, including Australia, that deal exclusively with cartel conduct.[55] While it has often been stated that the primary aim of such new laws is to deter economically harmful behavior, we must be reminded that the concept of crime is as much about misconduct as it is about the harm caused by it.[56] The need to identify and effectively convey to the general public any moral opprobrium associated with cartel conduct is therefore a necessary measure in making the criminalisation process a meaningful success.[57]

The issue of whether cartel conduct is a true crime in the morally repugnant sense is also raised by relatively recent legal changes effected (or not effected, as the case may be) overseas. In the United Kingdom, a recent amendment to the *Enterprise Act 2002* (UK) removed the element of 'dishonesty' from Britain's statutory definition of criminal cartel conduct.[58] Does this legislative amendment amount to a tacit acknowledgment by British lawmakers that cartel conduct cannot be regarded as morally wrongful?[59]

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[53] Harding, above n 26, 200.

[54] Ibid; Caron Beaton-Wells and Ariel Ezrachi, 'Criminalising Cartels: Why Critical Studies?' in Caron Beaton-Wells and Ariel Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 3, 6; Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' above n 49, 679-80.

[55] Harding, above n 26, 182.

[56] Ibid 200-1.

[57] Ibid.

[58] Section 47 of the *Enterprise and Regulatory Reform Act 2013* (UK) removed the element of 'dishonesty' from the criminal cartel offence provisions contained in s 188 of the *Enterprise Act 2002* (UK), with the amendment coming into effect on 1 April 2014. See Peter Whelan, 'Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence' (2015) 78 Modern Law Review 493.

[59] See discussion below Chapter 5 Part III(B)(3).

In New Zealand, on the other hand, the move towards criminalisation came to a sudden and unexpected halt altogether less than 3 years ago, until it was suddenly re-enlivened by an unexpected change in government in late 2017. In October 2011, the New Zealand National Party was in power, led by Prime Minister John Key. The National government had then introduced a bill into Parliament proposing that criminal penalties for cartel conduct be introduced into New Zealand law for the first time.[60] In December 2015, following a lengthy public consultation and review process, the government announced that it would be removing criminal sanctions from the amending bill.[61] It was believed there would be a 'significant risk that cartel criminalisation would have a chilling effect on pro-competitive behaviour'[62] and that it was difficult to identify clear cases of 'blameworthy' cartel conduct.[63] Nothing more was done until a change of government in late 2017 when the New Zealand Labour Party, led by Jacinda Ardern, took office in a coalition arrangement with the New Zealand First Party and the Green Party. Re-enlivening the criminalisation process was a clear priority for the Ardern government, with a new bill being tabled in February this year.[64]

The most immediate concern for Australia is that there remains to be seen a moral resolve in relation to the criminal prosecution of cartel conduct. While the ACCC's first prosecution for cartel conduct against NYK was ultimately successful, it is still too early to tell whether criminal penalties will be welcomed by the Australian public as a suitable punitive measure for this kind of corporate wrong-doing. NYK's case involved a guilty plea by a metaphysical corporate entity. For reasons not expressed, the Australian prosecuting authorities did not charge the individual corporate executives who were responsible for running the cartel on NYK's behalf. Pragmatic considerations may have led to this decision, with an agreement possibly having been reached with the prosecuting authorities that in return for NYK pleading guilty no criminal charges would be laid

[60] Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-3) (NZ), cl 22.

[61] Cabinet (NZ) Economic Growth and Infrastructure Committee, 'Minute of Decision' (2 December 2015) EGI-15-MIN-0167; Cabinet (NZ) Committee Paper, 'Removal of the Criminal Offence for Cartels from the Commerce (Cartels and Other Matters) Amendment Bill' (2 December 2015) EGI-15-SUB-1067.

[62] Cabinet (NZ) Committee Paper, above n 61, [15].

[63] Ibid.

[64] Commerce (Criminalisation of Cartels) Amendment Bill 2018 (22-1) (NZ), introduced into the House of Representatives of New Zealand on 15 February 2018.

against any individuals. As the first criminal prosecution of its kind in Australia, this kind of 'plea bargain' may have been seen as a desirable outcome for prosecuting authorities. A guilty plea guaranteed a conviction. It would set a valuable precedent for criminal cartel conduct being prosecuted again in the future, even if that guilty plea came from a corporation rather than an individual. In short, the practical view may have been taken that 'a bird in the hand is worth two in the bush'. The criminal prosecution of individuals was therefore to be left for another day. Nonetheless, while that outcome may have represented a quick and sensible resolution to the NYK case, it also meant that moral issues arising from cartel conduct were not effectively ventilated. There was no lengthy trial and no protestations of innocence from respected members of the business community. Nobody went to prison. As such, the case was not a true test of Australia's moral resolve to punish cartel offenders for serious criminal wrong-doing.[65]

The upcoming sentencing hearing of K-Line will also be similarly limited in terms of its moral implications. However, the Country Care, Banking Cartel and CFMMEU prosecutions, which involve several individuals being prosecuted, are much more likely to rouse the public's moral senses when these cases come before the courts. How will the public react when the alleged perpetrators are facing the prospect of imprisonment? If there is a moral basis for making cartel conduct criminal, that moral justification needs to be clear. If the Australian community does not perceive the immorality of cartel conduct, that lack of understanding needs to be explained. If it cannot be explained, then the use of criminal penalties to sanction cartel conduct may need to be reconsidered.

IV CURRENT UNDERSTANDING AND RELEVANT LITERATURE

Prior to the move by many OECD nations to criminalise cartel conduct, the question of whether cartel conduct is a moral problem received relatively little academic attention outside of the United States.[66] But with the criminalisation process being progressed in countries such as the United Kingdom, Australia and New Zealand, a diverse range of

[65] See discussion below Chapter 3 Part II(C) and Chapter 4 Part IV(H), concerning the difficulties associated with holding metaphysical corporate entities morally accountable for their wrongful actions.

[66] See the discussion in Harding, above n 26, 197-98; Stucke, above n 26.

opinions about the issue began to emerge.

A *Categorisation of Arguments*

Arguments about the morality of cartel conduct can be sorted, at least initially, into three distinct categories.[67] First, there are the arguments that contend that cartel conduct is morally wrong. Second, there are those who argue the opposing proposition that those who engage in it are morally virtuous for doing so. Third, there are those who claim that cartel conduct is neither right nor wrong, rather it is morally neutral. Arguments of moral neutrality essentially embody the claim that cartel conduct has amoral status as a species of human conduct, meaning that it is neither good nor bad.

Some arguments of moral neutrality have been extended to include the claim that cartel conduct is morally ambiguous.[68] Such claims appear to introduce a fourth category of argument, and an acknowledgement that the competing perspectives contained in the first three categories are all potentially valid and reasonable. If this fourth school of thought is to be preferred, it may lead to the conclusion that it is simply not possible to reconcile conflicting opinions of cartel conduct being morally right, morally wrong or morally neutral.

1 *Morally Wrong*

The claim that cartel conduct is morally wrong is not straightforward, primarily because different moral reasoning processes have been applied to reach this conclusion.[69] The most basic argument is premised on 'competition' being a fundamental tenet of the free market economy. Businesses within the same market must compete rather than co-operate with one another. Cartel conduct constitutes a direct and deliberate violation of this assumption resulting in foreseeable economic harm to individual consumers and to society as a whole.[70] Accordingly, by deliberately engaging in such anti-competitive and

[67] Stucke, above n 26, 444-6.

[68] Beaton-Wells and Haines, above n 49. See generally Stuart P Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame Journal of Law, Ethics and Public Policy 501.

[69] See further discussion below Chapter 3 Part II.

[70] See further discussion below Chapter 2 Part V.

harmful conduct, perpetrators of cartel conduct are said to act immorally.[71] The moral message is then emphasised by characterising such conduct as 'dishonest',[72] 'egregious',[73] 'hard core',[74] 'reprehensible',[75] tantamount to 'theft' or 'deceit,[76] an 'abuse of power',[77] or by using other labels that clearly connote moral wrong-doing.[78] Whether such arguments are persuasive depends significantly on our ability to recognise the moral wrongfulness of cartel conduct intuitively, and to accept that the morally pejorative labels are appropriate for that reason.[79]

It has also been suggested that the moral impropriety of cartel conduct derives from the fact that fundamentally 'moral' institutional frameworks within society have proscribed it. The laws of various nations have at various stages in history declared cartel conduct to be illegal, with civil or criminal penalties able to be imposed against those who choose to flout those laws. Religious codes, too, have also frowned upon certain kinds of cartel conduct.[80] An individual's adherence to society's legal and religious institutions is a minimum moral requirement.[81] It therefore follows that individuals who choose to violate

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[71] See for example Australian Competition and Consumer Commission, Submission No 56 to Trade Practices Review Committee, above n 39, 24-5, which essentially embodies this argument.

[72] See for example Peter Costello, above note 45.

[73] Organisation for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, above n 22.

[74] Ibid.

[75] Australian Competition and Consumer Commission, Submission No 56 to Trade Practices Review Committee, above n 39, 8, 24-5

[76] Ibid. See also the many other submissions that employed these characterisations cited above n 40.

[77] Harding, above n 26, 200. See also the suggestion that individual cartel offenders may be on a personal 'power-trip' in Christopher Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation' in Caron Beaton-Wells and Ariel Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 359, 369.

[78] See for example Joseph E Harrington, 'How Do Cartels Operate?' (2006) 2 Foundations and Trends in Microeconomics 1, 80, expressing 'disdain' for cartel conduct; Mario Monti, 'Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?' (Speech at 3rd Nordic Competition Policy Conference, Stockholm, 11-12 September 2000), describing cartel conduct as 'a cancer' on the economy; Graeme Samuel, 'Foreword' in Australian Competition and Consumer Commission, *Cartels – Deterrence and Detection: A Guide for Government Procurement Officers* (Australian Competition and Consumer Commission, 2009) 1, described cartels as 'insidious'.

[79] See discussion below Chapter 3 Part II(B)(4) concerning moral intuitionism.

[80] See the discussion concerning historical religious texts indicating cartel conduct to be morally wrong in Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8 Queensland University of Technology Law Journal 363, 373.

[81] Anna Zarkada-Fraser, 'A Classification of Factors Influencing Participating in Collusive Tendering Agreements' (2000) 23 Journal of Business Ethics 269, 270; John Hendry, 'Morality and Markets: A Response to Boatright' (2001) 11 Business Ethics Quarterly 537, 542.

the legal or religious order by engaging in cartel conduct behave in a morally reprehensible manner by doing so.

Others have engaged in an analysis of the moral implications of cartel conduct by comparing and contrasting it with other forms of conduct well known to be morally reprehensible.[82] This is essentially moral reasoning by analogy.[83] An argument of this nature first requires identification of a well-known or 'traditional' wrong which appears to be broadly similar to cartel conduct. Secondly, it requires an assessment of the extent to which the morally salient features of the traditional wrong appear to be present in, or are at least analogous to, the typical case of cartel conduct. This approach has led compelling arguments as to why cartel conduct is tantamount to 'stealing' or 'theft',[84] 'fraud' or 'deceit',[85] or 'cheating',[86] and therefore morally wrong by analogy.

However, arguably the most considered opinions have expressly drawn upon more fundamental principles of normative moral philosophy and criminal legal theory to explain the moral wrongfulness of cartel conduct.[87] The most convincing of these would appear to combine moral consequentialism or deontology with legal theories of harm and criminal punishment. These are considered in further detail below.[88]

2 *Morally Right*

There are relatively few proponents of the argument that cartel conduct is a morally virtuous activity. These kinds of arguments should, however, be acknowledged because

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[82] See in particular Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' above n 1; Peter Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (2013) 33 Oxford Journal of Legal Studies 535; John Lever and John Pike, 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence": Part 1' (2005) 26 European Competition Law Review 90.

[83] See generally Stuart P Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006).

[84] See discussion below Chapter 3 Part V(A)(3).

[85] Ibid Part V(A)(4).

[86] Ibid Part V(A)(5).

[87] See in particular Bruce Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (2012) 32 Legal Studies 369; Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press, 2014); Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 Law and Society Review 591, 604 note 14 (and accompanying text).

[88] See discussion below Chapter 3 Part V(A)(1), V(A)(2).

they are likely to be a contributing factor to the absence of a broad consensus about the moral implications of cartel conduct.

One strain of argument suggests that cartel conduct is a natural and positive response to excessive competition in times of economic downturn.[89] Cartel arrangements are a means of providing economic stability, yielding benefits for both businesses and the consuming public.[90] A cartel arrangement permits businesses to survive in times of economic hardship by avoiding 'anarchic' and 'ruinous' competition.[91] The argument here is put on the basis that competition is not necessarily good at all, but can actually be quite harmful or 'evil'.[92] Cartels may therefore be regarded as morally righteous because they are a means by which to address the iniquity that competition occasionally begets.

A somewhat different approach to identifying the good to be found in cartel conduct requires acknowledging, and then accepting as necessary, the immediate harm it causes. The detrimental effects of cartel conduct are argued to be only short-lived. In the longer-term, cartels are a tangible and effective mechanism for incentivising other businesses to compete with the cartels.[93] This results in a greater economic benefit over time.

It has also been suggested that, because cartel conduct involves co-operation between would-be competitors, the cost of doing business that would ordinarily be associated with the competitive process is reduced by cartel conduct.[94] Cartels are therefore 'far from being creatures bordering on the demonic.'[95] They should be seen in a positive light because they are 'an intermediate productive structure between monopolies and multiple competing firms … [being] in certain situations the optimal combination of coordination and cooperation.'[96]

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[89] See generally Robert Liefmann, *Cartels, Concerns and Trusts* (Methuen, 1932) 45-91.

[90] Ibid.

[91] Ibid 46.

[92] Ibid 7.

[93] Pascal Salin, 'Cartels as Efficient Productive Structures,' (1999) 9 The Review of Austrian Economics 29, 35-9.

[94] Ibid 34-41.

[95] International Chamber of Commerce Australia, above n 41, 27.

[96] Ibid.

3 *Morally Neutral*

Perhaps the most effective arguments tending to frustrate claims that cartel conduct is morally wrong are those suggesting it is bereft of any moral content whatsoever. These arguments stem from cartel conduct being regarded as a 'white collar' or 'regulatory' offence, categories of offending that stand apart from more conventional criminal offences such as robbery and theft.[97] While the moral wrongfulness of conventional crime is plain for all to see, the immorality of white collar and regulatory offences is thought to be comparatively imperceptible.[98] Sanford Kadish described the specialised body of laws that prescribe penalties for economically undesirable behaviour as a category of crime best characterised as 'morally neutral'.[99] He attributed the morally neutral status of such offending to a range of factors, basing his conclusions on a comparative analysis of the morally salient features of conventional property crime and economic regulatory offences. His analysis is both intuitively and intellectually appealing and may be adapted and applied to cartel conduct. His arguments are given more detailed consideration below.[100]

4 *Morally Ambiguous*

Recent scholarship in social legal theory has produced a more critical approach to discerning the moral wrongfulness of white collar and regulatory crime.[101] Stuart Green has suggested that for many such offences the claim of moral neutrality is too conveniently made.[102] Like Kadish before him, Green recognised that economic regulatory offending, and white collar crime more generally, are categories of offending

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[97] Clarke and Bagaric, above n 31, 198. See generally Sanford Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 University of Chicago Law Review 423. The concepts of 'white collar crime' and 'economic regulatory offence' are explored in more detail in Chapter 4 below.

[98] Kadish, above n 97.

[99] Ibid.

[100] See below Chapter 4.

[101] Stuart P Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 Emory Law Journal 1533; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 68; Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, above n 83.

[102] Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', above n 101, 1536-7.

whose moral wrongfulness is difficult to perceive.[103] Green, however, preferred to use the label 'morally ambiguous', reflecting a more circumspect approach to determining the moral implications of such behaviour.[104]

The difference in meaning between moral neutrality on the one hand, and moral ambiguity on the other, is more than slight. Green's conception of moral ambiguity assumes immorality may underpin any number of white collar and regulatory offences, but the task of identifying that moral wrongfulness is what presents the most difficulty. He suggests that a considered assessment of the moral properties of any given white collar or regulatory offence is warranted before a sensible conclusion can be reached as to its moral status. That is because the offence in question may exhibit features that are indicative of both moral propriety and moral impropriety – hence his conception of moral 'ambiguity'. Green's observations invite an analysis of any given white collar or regulatory offence that begins with the identification of its morally salient features. His approach encourages an analysis that then aims to isolate and understand the features that indicate moral wrongfulness, as distinct from those other features that do not. This analytical process effectively lifts the veil of moral obfuscation with which white collar offending is so often associated. The moral wrongfulness of the conduct may then become much clearer.

The issue of whether cartel conduct may be regarded as morally ambiguous has been addressed to some extent by Australian academics Caron Beaton-Wells and Fiona Haines.[105] They appear to reject the notion that cartel conduct can be seen to be morally reprehensible simply by relying on one's own intuitions. Such an approach 'overlooks the tensions and complexities of the conduct itself'.[106] They further suggest that cartel conduct may be reasoned to be morally wrong by applying the more considered frameworks discussed above, including moral reasoning by analogy or theories of moral consequentialism.[107] They essentially accept Green's argument that white collar offences

[103] Green, 'Moral Ambiguity in White Collar Criminal Law', above n 68, 502-3.

[104] Ibid.

[105] Beaton-Wells and Haines, above n 49.

[106] Ibid 218.

[107] Ibid 221-2.

cannot all be regarded as morally neutral, and that his theory of moral ambiguity is intellectually appealing.[108] They ultimately propose that cartel conduct, as a species of white collar crime, fits squarely within the 'morally ambiguous' category.

While Beaton-Wells and Haines provided insight into the possible causes of the moral ambiguity surrounding cartel conduct within the context of the Australian criminalisation process, their work does not purport to be a specific adaptation of Green's theories to the subject. Rather, they frame their thesis in terms of the challenges for the cartel criminalisation process in Australia more generally. They argue that the challenges are caused by several 'ambiguities', 'moral ambiguity' being identified as but one of these. They refer to two other kinds of ambiguity – 'legal ambiguity' and 'economic ambiguity' – which, together with the moral ambiguity of cartel conduct, represent three distinct yet 'interdependent tensions, conflicts or complexities' that characterise cartel criminalisation in Australia.[109] Significantly, they do not purport to resolve all of these ambiguities themselves. Rather, the express purpose of their work is to draw attention to many of these ambiguities so that insight can be gained into the problems inherent in criminalising business misbehaviour such as cartel conduct.[110]

B *Public Attitudes*

There has been some empirical research into the attitudes of ordinary people towards cartel conduct in both Australia[111] and the United Kingdom[112] since each of these countries moved to introduce criminal laws. Caron Beaton-Wells led the research team which designed and administered a survey in Australia approximately one year after legislation introducing criminal penalties for cartel conduct came into effect.[113] A principal purpose of this survey was to evaluate ordinary Australians' views of cartel conduct and the extent to which they regarded it as morally wrong. The rationale for the survey was stated as being that 'from the perspective of legal or moral philosophy, public

[108] Ibid.

[109] Ibid 219.

[110] Ibid 218.

[111] Beaton-Wells et al, above n 33.

[112] Stephan, above n 33.

[113] Beaton-Wells et al, above n 33.

support for the treatment of behaviour as an offence is seen as important to the integrity and coherence of the criminal law'.[114]

The Australian survey results obviously had the potential to advance the 'elite debates' by introducing objective data into the discussion, and perhaps even producing results that might tend to resolve the debate one way or the other. However, the results of the survey were by no means clear. While a high proportion of the respondents thought that cartel conduct should be legally prohibited, the majority of Australian respondents rejected the proposition that it should be a criminal offence.[115] Even fewer were of the view that cartel perpetrators should be jailed.[116] A conservative interpretation of these results is that, at least in Australia, moral attitudes towards cartel conduct remain unclear.

The Australian survey results would certainly be consistent with the results of comparable empirical research that has been carried out in other countries.[117] In particular, Andreas Stephan conducted a similar survey designed to gauge public perceptions of cartel conduct in the United Kingdom.[118] The British survey had been carried out almost four years after cartel conduct became a criminal offence punishable by imprisonment in Britain.[119] It might have been thought that, given the lengthier period the public had to come to terms with the fact of criminalisation, the survey respondents would have been more amenable to accepting cartel conduct as a criminal offence. However, the results were remarkably similar to those obtained from the Australian survey. While just over half of the British respondents thought price-fixing was dishonest, only 11% thought that

[114] Ibid 10.

[115] Ibid 82 (44.1% thought price-fixing should be a criminal offence), 88 (36.5% thought the same for market-sharing), 92 (42.8% thought the same for output quotas).

[116] Ibid 77.

[117] See in particular Stephan above n 33. In relation to white collar crime more generally, see Nicole Piquero, Stephanie Carmichael and Alex Piquero, 'Assessing the Perceived Seriousness of White-Collar and Street Crimes' (2008) 54 Crime and Delinquency 291; Colin Goff and Nancy Nanson-Clark, 'The Seriousness of Crime in Fredericton, New Brunswick: Perceptions Toward White-Collar Crime' (1989) 31 Canadian Journal of Criminology 19; Francis Cullen, Bruce Link and Craig Polanzi, 'The Seriousness of Crime Revisited: Have Attitudes Toward White Collar Crime Changed?' (1982) 20 Criminology 83; Marvin Wolfgang *et al*, *The National Survey of Crime Severity* (United States Department of Justice, 1985) 46.

[118] Stephan above n 33.

[119] See s 188 of the *Enterprise Act 2002* (UK), which came into effect the following year on 20 June 2003. The British survey was carried out between 28-30 March 2007.

imprisonment was an appropriate form of punishment.[120] Even less considered price-fixing comparable to theft or fraud.[121] As Stephan concluded, the British results suggest that while there may be some social stigma against cartel conduct, it is not regarded as morally reprehensible as traditional crimes.[122]

C *No Consensus*

There certainly appears to be a rational basis for arguing that cartel conduct is immoral. In Australia, that position appears to have been advanced by government policymakers and the ACCC in the context of the criminalisation process. But there is also a rational basis for arguing that cartel conduct is not immoral. The empirical data gathered to date suggests attitudes towards cartel conduct are divided. There is no consensus and so the moral controversy remains.

British academic Christopher Harding made the following observation, which arguably reflects the current state of affairs in Australia:

> While it is now relatively easy to find statements by regulators and government departments indicating the delinquency of cartel behaviour, it is much more difficult to trace similar expressions in wider public opinion, or in media comment.[123]

Harding further suggested that outside the United States there is 'no strong feeling on the part of the wider public about the inherent criminality of price fixing and like practices'.[124] He referred to this as a prevailing public 'agnosticism' towards cartel conduct, and that this general apathy appears to persist despite 'the hortatory and educative material increasingly disseminated by competition authorities' to persuade the wider public of its criminality.[125] He explained the moral ambivalence very simply:[126]

> This is not to suggest that public sentiment in many countries is hostile to

[120] Stephan above n 33, 144.

[121] Ibid.

[122] Ibid.

[123] Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels', above n 26, 197.

[124] Ibid.

[125] Ibid.

[126] Ibid.

> criminalization of cartel behaviour, but rather something more like an indifference: 'yes, we can see that these businessmen are breaking the rules, and that there ought to be some legal control, but do we really see them as criminals?'

This disconnection between the moral perceptions of the government and the wider public needs to be properly understood. Perhaps the problem lies with the ordinary person's understanding of the nebulous concept of morality itself, or its application to the economic complexities of cartel conduct. Perhaps it lies with the social processes involved in moral instruction. Or perhaps the problem is caused by a combination of many factors operating simultaneously. This thesis explores these possible explanations.

V RESEARCH PROBLEM AND METHODOLOGY

This thesis aims to advance the debate relating to the moral implications of cartel criminalisation in Australia by addressing the two questions set out in Part II above. For ease of reference they are restated:

1. How is cartel conduct *conceived* to be sufficiently immoral to justify the use of criminal penalties?

2. What factors operate to inhibit the Australian community's *perception* of that immorality?

The first question raises issues with respect to the conception of cartel conduct as a moral problem from the perspective of criminal legal theory. It implicitly assumes that the moral wrongfulness of cartel conduct may be conceived through the application of considered normative reasoning processes. Indeed, there are many ways in which cartel conduct can be reasoned to be morally wrong, and several of these moral arguments are outlined in Chapter 3 below. While some observations are made as to the weaknesses in these arguments, the approach taken in addressing this question is largely explanatory rather than argumentative. Explanations of the moral reasoning processes used to argue that cartel conduct is morally wrong are provide a foundation for answering the second question.

The second question concerns the difficulty that many people seem to have in perceiving

the moral wrongfulness of cartel conduct. The question assumes that there is a reasonable basis for conceptualising cartel conduct to be morally wrong within a normative analytical framework. However, it draws attention to a distinction, and potential discrepancy, between theoretical conceptions of moral wrong-doing and actual community perceptions of moral wrong-doing. Why do so many members of the community fail to see the moral wrongfulness of cartel conduct? Building upon the work of Beaton-Wells and Haines, and drawing upon the influential theories of Green and other socio-legal theorists who have sought to explain the moral peculiarities of white collar crime, this thesis seeks to argue and explain the conflict as a case of moral ambiguity, rather than moral neutrality, capable of resolution. To this end, it seeks to identify and explain the main factors that have led to cartel conduct becoming a morally ambiguous criminal offence in Australia.

A critical distinction is therefore drawn at the outset of this thesis. On the one hand, there is the conscious and considered reasoning processes that are capable of being applied by any intelligent person to the question of whether cartel conduct actually is, as a matter of moral truth, wrong. If a person were to answer that question affirmatively by applying such explicit moral reasoning processes, that person has obviously concluded in their own mind that cartel conduct is morally wrong. This would be a case of a person theorising or *conceiving* cartel conduct to be a moral problem, an exercise in mental thought processes that falls within the scope of the first question posed in this thesis. On the other hand, there is the quite separate and distinct issue of whether the community at large actually *perceives* cartel conduct to be morally wrong, which falls for consideration in answering the second question. This distinction is one that underpins much of the discussion in this thesis. It is a distinction that roughly corresponds with the difference between *normative* and *descriptive* notions of morality, concepts which are explained in Chapter 3 below.

Another important distinction drawn in this thesis is between the conduct of *individuals* and the conduct of *corporations* through which such individuals may be acting. The possible attribution of moral responsibility to corporations, which are most likely to be the principal legal perpetrators of cartel conduct, is a specific issue not within the scope of this thesis. Rather, the present concern lies in considering the moral accountability of the individual human actors whose decisions and conduct underpin corporate action. Legal corporations are created by individuals as a common means of giving practical

effect to their business enterprises. As such, they are a common feature of cartel conduct. The use of corporations to carry on business plays some role in obfuscating ordinary people's perceptions of the moral wrong-doing that may be attributed to the individuals involved in corporate activity. To that limited extent, the role of the corporation is relevant consideration for the purposes of this thesis.[127] However, the thesis does not purport to make observations or draw general conclusions in relation to the moral accountability of metaphysical corporate entities themselves. Imputing the actions of individuals to a metaphysical entity is fraught with conceptual and legal difficulties.[128] To be clear, recognising a corporation as a moral agent capable of being held morally accountable for its criminal actions raises difficult issues beyond the scope of the present subject matter. The observations and conclusions drawn in this thesis about the 'moral wrongfulness' of cartel conduct relate to individual (i.e. not corporate) behaviour.

With these qualifications in mind, the thesis will proceed to address the issues raised by the thesis questions by:

1. explaining the precise type of cartel conduct that is now subject to criminal penalties in Australia, which includes:
    a. a definition and explanation of cartel conduct;
    b. an explanation of the harm it causes; and
    c. an explanation of the essential economic principles underpinning the complaint made against it;
2. reviewing and critically evaluating the moral reasoning processes that have led to theoretical conceptions of the moral wrongfulness of cartel conduct, with a view to:
    a. identifying precisely the morally salient features of cartel conduct; and
    b. understanding the rational basis upon which individuals who have engaged cartel conduct are morally accountable and deserving of criminal punishment for having done so;
3. explaining the social learning processes that operate to engender individuals with moral knowledge, in contemplation of how the community might be expected to come

[127] See below Chapter 3 Part II(C) and Chapter 4 Part IV(H).

[128] See generally Bruce Coleman, 'Is Corporate Criminal Liability Really Necessary?'(1975) 27 Southwestern Law Journal 908; Richard T De George, 'Moral Responsibility and the Corporation' (1981) 12 Philosophic Exchange 41.

to understand the moral wrongfulness cartel conduct;

4. reviewing and critically evaluating relevant literature relating to theories of white collar crime that have sought to explain why the moral wrongfulness of such offences can be difficult to perceive, with a view to identifying those general factors which are most likely to be obfuscating the moral wrongfulness of cartel conduct;
5. explaining how those factors appear to be inhibiting the moral learning process and the Australian' community's moral perceptions in relation to cartel conduct, with particular reference to:
    a. the complexities of cartel conduct, and the associated difficulties ordinary people may have in coming to understand and distinguish it from socially acceptable business behavior;
    b. the attitudes of society's institutions that are best positioned to explain and educate the broader community as to the moral reprehensibility of cartel conduct, and those attitudes impacting on their ability to do so effectively.

VI CONCLUSION

The thesis concludes that cartel conduct may be conceived to be morally wrong by applying a variety of different moral reasoning processes, and that it is sufficiently reprehensible to justify criminal penalties. However, there are many factors operating upon cartel conduct causing it to be perceived as morally ambiguous. First, there are the 'complexity' factors. Cartel conduct is a complex phenomenon the many nuances of which are not easily understood by most people. Secondly, there are the 'institutional' factors. Society's institutions that are best positioned to explain cartel conduct and educate the community about its reprehensibility are yet to do so effectively. Nevertheless, moral perspectives can change over time. The Australian community can eventually come to understand the reprehensible nature of cartel conduct if resources are directed towards educating the community and shifting institutional attitudes. The moral justification for criminalisation will then become much clearer.

Chapter 2 of this thesis defines and explains cartel conduct. Chapter 3 considers how cartel conduct may be conceived, and ultimately perceived, as a moral problem. Chapter 4 reviews and critically evaluates theories of white collar crime, with a view to identifying

the possible causes of moral perceptions about cartel conduct being obscured such that it becomes a ‘morally ambiguous’ offence. Chapter 5 identifies and explains the main factors generating moral ambiguity in relation to cartel conduct in Australia. Chapter 6 provides a summary and conclusion to this thesis.

CHAPTER 2

WHAT IS CARTEL CONDUCT?

I OVERVIEW

This chapter defines and explains cartel conduct. Its principal aims are to identify what is meant by 'cartel conduct' and to provide the factual foundation for the moral reasoning processes that are considered in Chapter 3. Part II sets out Australia's statutory definition of cartel conduct and its legal context. Part III considers the etymological origins of the word *cartel* and the basic definition of 'cartel conduct' derived from ordinary dictionary meanings. Part IV considers cartel conduct more closely as an economic phenomenon. It reviews economic definitions and considers how economic understandings of cartel conduct have subsequently come to be adapted by policymakers and incorporated into law. Part V considers further economic concepts in order to gain insight into the complexity of cartel conduct, the kinds of harm it causes, and the objective conditions that facilitate its occurrence. Part VI concludes this chapter.

II AUSTRALIA'S STATUTORY DEFINITION

Australia's Parliament created criminal penalties for cartel conduct by enacting the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) which came into force on 24 July 2009. This Act amended the *Trade Practices Act 1974* (Cth) ('TPA') by introducing provisions that explicitly prohibit cartel conduct in the nature of price-fixing, bid-rigging, market-sharing and output quota agreements.[1] Criminal offences and parallel civil penalty provisions were created, the latter being intended to mirror the pre-existing TPA's existing civil penalty regime but with specific civil cartel prohibitions now expressly stated.[2] Since the criminal offence provisions were introduced, the name

[1] See discussion on the legal history of Australia's statutory prohibitions below Chapter 5 Part III(B).

[2] Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 [1.10].

of the TPA has been changed to the *Competition and Consumer Act 2010* (Cth) ('CCA').[3]

Division 1 of Part IV of the CCA contains the criminal and civil prohibitions against cartel conduct. Under s 45AF, a corporation commits an indictable offence if it 'makes a contract or arrangement, or arrives at an understanding' which contains a 'cartel provision'.[4] Under s 45AG, a separate indictable offence is also committed by a corporation if it 'gives effect to the cartel provision' contained in such a cartel agreement.[5] Collectively, ss 45AF and AG may be referred to as Australia's 'criminal cartel offence provisions'.

To prove either offence, the prosecution must establish both 'physical' and 'fault' elements in accordance with the Commonwealth *Criminal Code*.[6] The elements of each offence are summarised in Table 1 below.[7] The civil penalty provisions are expressed identically save that there is no requirement to prove any of the fault elements.[8]

Table 1

***COMPETITION AND CONSUMER ACT 2010* (CTH) CRIMINAL CARTEL OFFENCE PROVISIONS**			
SECTION NO	**OFFENCE**	**PHYSICAL ELEMENTS**	**FAULT ELEMENTS**
45AF	***Making*** a Cartel Agreement	• The corporation ***intended*** to make the cartel agreement.	• The corporation ***intended*** to make the cartel agreement.
		• The cartel agreement ***contained a cartel provision***.	• The corporation ***knew or believed*** the cartel agreement contained a cartel provision.
45AG	***Giving Effect*** to a Cartel Provision	• A cartel agreement ***contained a cartel provision***	• The corporation ***knew or believed*** the cartel agreement contained a cartel provision.
		• The corporation ***gave effect*** to the cartel provision.	• The corporation ***intended*** to give effect to the cartel provision.

[3] The name change became effective on 1 January 2011. Apart from the statute being renamed, all relevant cartel conduct provisions in the statute were unaffected. The language of the civil and criminal prohibitions, including the statutory section numbers assigned to them under the former TPA, remain the same under the CCA. References to the relevant statutory provisions hereinafter will therefore be made to the CCA.

[4] CCA, s 45AF. For the purposes of this thesis, no point of distinction is made between the statutory expressions 'contract', 'arrangement' and 'understanding'. Accordingly, they will collectively be referred to as 'cartel agreement'.

[5] CCA, s 45AG.

[6] *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'), s 3.2.

[7] CCA, ss 45AF and 45AG. See also Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 [2.29].

[8] CCA, ss 45AJ and 45AK.

The definition of 'cartel provision' is exhaustive and captures all cartel agreements between competing businesses in the nature of *price-fixing*, *market sharing*, *bid-rigging* and *output quotas*.[9] In this respect, Australia's statutory definition reflects a four-pronged classification system, derived from national and international economic and political influences, that requires putting any alleged case of cartel conduct into one of four pre-determined categories. These different types of cartel conduct – price-fixing, market sharing, bid-rigging and output quotas – are explained further in Part III below.

The actions and states of mind of individual directors, employees and agents of a corporation may be imputed to the corporation for the purposes of determining a corporation's liability.[10] Such individuals and anyone else who is involved in a corporation's contravention of a cartel offence are also liable to being charged with contravening the cartel offence provisions. Section 79 of the CCA specifically provides that individuals are personally liable for breaching the cartel offence provisions if they:

- attempt to contravene a cartel offence provision;[11]
- aid, abet, counsel or procure a person to contravene a cartel offence provision;[12]
- induce, or attempt to induce, a person (whether by threats or promises or otherwise) to contravene a cartel offence provision;[13]
- are in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of a cartel offence provision;[14] or
- conspire with others to contravene a cartel offence provision.[15]

The establishment of any of these states of mind of an individual perpetrator bears upon the moral implications arising from cartel conduct.[16]

A corporation which is found guilty of a cartel offence faces conviction and a fine of up

[9] CCA, s 45AD. See also Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 [2.28].

[10] CCA, s 84.

[11] CCA, s 79(1)(aa). See also *Acts Interpretation Act 1901* (Cth), s 2C (providing that the expression 'person' in any commonwealth statute includes a corporation).

[12] CCA, s 79(1)(a).

[13] CCA, s 79(1)(b).

[14] CCA, s 79(1)(c).

[15] CCA, s 79(1)(d).

[16] See discussion below Chapter 3 Part II(C).

to $10 million, three times the value of the benefit derived by the cartel participants from having committed the offence, or 10% of the corporation's annual turnover during the 12-month period immediately prior to the commencement of the offending conduct.[17] Individuals involved in the commission of a cartel offence face conviction and up to ten years' imprisonment or a maximum fine of up to $420 000 or both.[18]

III ETYMOLOGY AND ORDINARY MEANING OF 'CARTEL CONDUCT'

The word 'cartel' derives from the German word *kartell*.[19] In relation to the latter, its first significant use occurred in 1879 in the German parliament during a debate about how independent businesses in the German railway industry were banding together and agreeing to charge their customers higher prices for their products in the German domestic market.[20] *Kartell* was used to describe business alliances formed for this peculiar purpose.

The word was subsequently imported into English-speaking nations and anglicised to 'cartel', with the essential original German meaning of the word being retained. The *Oxford English Dictionary* defines it simply as 'an agreement or association between two or more business houses for regulating output, fixing prices, etc.; also, the businesses thus combined; a trust or syndicate.'[21] The first appearance of the word in mainstream media may be traced to a story published in the British newspaper *The Daily Chronicle* in 1902 about the oversupply of 'cartel' sugar.[22] At about the same time, 'cartel' started to be used more regularly in academic literature as a label to describe this specific type of business arrangement between independent businesses,[23] and becoming commonly used by

[17] CCA, ss 45AF(3) and 45AG(3).

[18] CCA, s 79(1)(e). The monetary penalty is specified as a maximum of 2 000 penalty units. One penalty unit is currently valued at $210 (effective from 1 July 2017, the *Crimes Amendment (Penalty Unit) Act 2017* (Cth) amended the value of a penalty unit, increasing it from $180 to $210).

[19] *Oxford English Dictionary* (Oxford University Press, 2nd ed, 1989).

[20] Roman Piotrowski, *Cartels and Trusts* (Allen & Unwin, 1933) 11, 22. Piotrowski also notes that the first book devoted to the subject of cartels was written by Friedrich Kleinwachter, *Die Kartelle* (Innsbruck, 1883). See also Robert Liefmann, *Cartels, Concerns and Trusts* (Methuen, 1932) 7.

[21] *Oxford English Dictionary*, above n 19. See also *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009), defining 'cartel' as 'a collusive syndicate, combine, or trust generally formed to regulate prices and output in some field of business'; Lexico Publishing LLC, *Dictionary.com* <http://www.dictionary.com> (accessed 15 September 2018), defining 'cartel' as 'an international syndicate, combine, or trust formed especially to regulate prices and output in some field of business'.

[22] *The Daily Chronicle* (24 May 1902, 6/3), quoted in *Oxford English Dictionary*, above n 19.

[23] See, for example, Andre Sayous, 'Cartels and Trusts in Holland in the Seventeenth Century' (1902) 17

mainstream economists by the late-1920s.[24]

The word 'conduct' is a commonly understood notion that is typically used to describe human action (and sometimes inaction) in varying contexts. The relevant dictionary definition specifically refers to it as 'the action or manner of conducting, directing, managing, or carrying on (any business, performance, process, course, etc.).'[25]

There is no separate dictionary entry for the compound concept of 'cartel conduct'. However, by combining the two single-word entries, a simple dictionary definition may be taken to be 'the action of conducting, directing, managing, or carrying on an agreement or association between two or more business houses for regulating output, fixing prices, etc.'

If the dictionary definitions of 'cartel' and 'cartel conduct' represent the ordinary meanings of the words, a cartel is essentially a market-based phenomenon that manifests as a direct result of dealings between independent commercial entities. It comprises three essential elements: (1) an agreement; (2) entered into by two or more separate businesses; and (3) which relates to the regulation of certain aspects of the commercial transactions each business enters into with its respective customers (e.g., relating to the total quantity of goods that each business is prepared to sell to its customers, or the prices that customers must pay for the goods). This relatively straightforward definition is consistent with, though obviously not as specific as, Australia's current statutory definition as outlined in Part II above. It is also a somewhat reduced and simplified definition that may be seen as deriving from economic understandings of cartel conduct considered in the next part of this chapter.

IV ECONOMIC, POLITICAL AND LEGAL INFLUENCES

While the word 'cartel' is a recently invented label, the actual phenomenon of cartel

Political Science Quarterly 381.

[24] See generally Janice Kinghorn and Randall Nielsen, 'A Practice without Defenders: The Price Effects of Cartelization' in Peter Grossman (ed), *How Cartels Endure and How They Fail* (Edward Elgar, 2004) 130, 131.

[25] *Oxford English Dictionary*, n 19.

conduct has been known to exist ever since human societies started developing market-based systems of trade and commerce.[26] Collusion between businesses 'is a part of modern economic life' and '[h]istory, as well as common sense, tells us that businesses will collude.'[27] Adam Smith, often considered the founding father of modern capitalism, made the observation in 1776 with the publication of his *Inquiry into the Wealth of Nations* that there is the obvious inference to be drawn when rival businesses communicate with one another:

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.[28]

Smith's observation 'neatly' encapsulates what is known as cartel conduct today.[29] However, cartels existed long before the time of Smith. Some kinds of cartel were recognised and prohibited by law as early as the days of the Byzantine Empire in the fifth century.[30]

A *Economic Definitions*

It was not until around the late nineteenth century that economists started to consider cartels more closely, and so a specific label used to identify them was introduced.[31] In the first known book devoted to the subject, Austrian economist Friedrich Kleinwachter described cartels as 'agreements of producers-entrepreneurs in the same branch of trade aiming at a partial elimination of unlimited mutual competition and such a regulation of

[26] Piotrowski, above n 20, 12-18; George Stocking and Myron Watkins, *Cartels or Competition? The Economics of International Controls by Business and Government* (Twentieth Century Fund, 1948) 5; Peter Grossman, 'Introduction: What Do We mean by Cartel Success?' in Peter Grossman (ed), *How Cartels Endure and How They Fail* (Edward Elgar, 2004) 1.

[27] Grossman, above n 26, 1. See also John Connor, *Global Price Fixing* (Springer, 2007) 25, 46.

[28] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Metalibri Digital Library, first published 1776, 2007 ed) 105-6.

[29] Connor, above n 27, 25.

[30] Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 8th ed, 2015) 546 [13.07]. See also John Connor, Albert Foer and Simcha Udwin, 'Criminalizing Cartels: An American Perspective' (2010) 1 New Journal of European Criminal Law 199, 207-10, considering the historic roots of criminal laws against cartel conduct.

[31] Connor, above n 27, 45-46.

production that would at least approximately adapt to demand.'[32] Kleinwachter's definition reflects the ordinary dictionary meaning of *cartel* in that it refers to 'agreements' between businesses 'in the same branch of trade'.[33] Significantly, however, it goes further by incorporating into the definitional framework an underlying anti-competitive purpose of such agreements.

Economists that followed Kleinwachter also considered the anti-competitive aspect of the agreement integral to the definition.[34] Robert Liefmann, a professor of economics at Freiberg University and arguably the next most influential writer in the field, defined cartels as being 'voluntary agreements between … independent enterprises of similar type to secure a monopoly of the market'.[35] In this definition, the motive of the parties to the agreement *to secure a monopoly of the market* again draws attention to the underlying anti-competitive purpose of the agreement. According to Liefmann, this was the very essence of a cartel arrangement:

> [Monopoly] is evidently the essential point in definition; it means that the cartels aim at excluding as far as possible competition within their range of activity. It is upon this monopolistic character of the cartels that their effectiveness both for good and for evil depends. [36]

Since these early economic definitions were originally proposed, subsequent economic definitions have retained the same essential components. More recently, cartel conduct has been defined by one economist as 'a group of oligopolistic firms that agree to act collectively as a monopolist in some industrial or economic enterprise',[37] and by another as 'collusive agreements among firms in what otherwise would be competitive industries

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[32] Friedrich Kleinwachter, *Die Kartelle* (Innsbruck, 1883) 126, as quoted and translated by Piotrowski, above n 20, 11-12.

[33] See above n 21 and accompanying text.

[34] See for example the discussion in Liefmann, above n 20, 7-8; Piotrowski, above n 20, 31-47; Alfred Marshall, *Principles of Economics* (MacMillan & Co, 8th ed, 1920) 177; Stocking and Watkins, above n 26, 3; George Stigler, 'A Theory of Oligopoly' (1964) 72 Journal of Political Economy 44; Kinghorn and Nielsen, above n 24, 131; Connor, above n 27, 46; Philip C Newman, *Cartel and Combine: Essays in Monopoly Problems* (Foreign Studies Institute, 1964) 9.

[35] Liefmann, above n 20, 7-8. As Connor, above n 27, 46 observed: 'Liefmann's positions continued to influence German economists for decades to come.'

[36] Liefmann, above n 20, 7. See, also, the sources referred to above n 34.

[37] Franklin Mixon, 'Legal Cartels and Social Contracts: Lessons from the Economic Foundations of Government' (1996) 23 International Journal of Social Economics 37, 37.

[with their] goal … specifically to raise prices, determine output, and maximise joint industry profits.'[38] Modern economic literature is abundant with many other definitions and formulations, though the slight differences between them are insignificant for the purposes of this thesis.[39] A particularly comprehensive definition, which seeks to both explain and characterise cartels from economic, legal and policy perspectives, has been proposed by John Connor, Professor of Economics at Purdue University:

> A cartel is an association of two or more legally independent firms that explicitly agree to coordinate their prices or output for the purpose of increasing their collective profits. The members of a cartel must knowingly and intentionally conspire to raise (lower) the price of the produce that they sell (buy) above (below) the price that natural market forces would cause in the absence of the cartel's actions. Affecting price will cause the quantity of product sold in the market to contract, but some cartels reinforce the price distortion by agreements to reduce output, sales, or industry capacity. Cartels can sign contracts or use various subtle techniques to communicate, monitor, and enforce agreements. Those conspiracies that engage in overt agreements about market price or quantity are called "naked" or hard-core cartels.[40]

B *Types of Cartel Conduct*

When cartels became the subject of scrutiny by economists, it was observed that they tended to manifest in particular ways. Liefmann proposed a taxonomy of cartel types which has largely been followed to this day by economists, lawyers and policymakers alike.[41] Four of the most common types of cartel agreement, which exhaustively represent the kind of cartel conduct now prohibited by the statutory criminal prohibitions in Australia,[42] are price-fixing, market-sharing, bid-rigging and output quotas.[43]

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[38] Grossman, above n 26, 2.

[39] For a recent and thorough consideration of various definitions, see Jurgita Bruneckienė et al, *The Impact of Cartels on National Economy and Competitiveness: A Lithuanian Case Study* (Springer, 2015) 3-7.

[40] Connor, above n 27, 21.

[41] Liefmann, above n 20, 32-5. See also the categorisation of cartels proposed by Eliot Jones, *The Trust Problem in the United States* (MacMillan, 1923) 1-13; Newman, above n 34 , 6-8; Richard Posner, 'A Statistical Study of Antitrust Enforcement' (1970) 13 Journal of Law and Economics 365, 403, identifying 12 different types of cartel conduct; Connor, above n 27, 27, suggesting at least 16 different species of cartel conduct.

[42] See the discussion and statutory references outlined in Part II above.

[43] See Liefmann, above n 20, 32-5. Note, however, that Liefmann identifies more than these particular four kinds of cartel arrangement.

1 *Price-fixing*

Price-fixing agreements, the most common form of cartel agreement, involve otherwise competing independent businesses (the cartel participants) agreeing that their respective products or services will not be offered to prospective customers below a certain price. Such agreements have a direct effect of increasing the profits of the cartel participants as a result of higher prices being charged to their customers.[44]

2 *Market-sharing*

Market-sharing agreements occur where the cartel participants agree to divide up prospective customers within a market. The agreement will stipulate that identified groups of prospective customers are to be allocated to a particular cartel participant, so that each cartel participant will enjoy the regular business of certain customers to the exclusion of all other cartel participants. The customers may be grouped according to their geographical location, or according to some other classification system (e.g., according to customers' product needs).[45] Alternatively, if the customers are known, the agreement may actually specify which particular customer is allocated to which particular cartel participant so that each cartel participant effectively has a list of allocated customers.[46] The market-sharing agreement is given effect by each cartel participant refusing to do business with customers that have been allocated to another cartel participant.[47] The end result is similar to that produced by a price-fixing agreement in that the cartel participants are able to secure greater profits by charging their customers higher prices.[48]

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[44] Whish and Bailey, above n 30, 556-65; Stephen Corones, *Competition Law in Australia* (Thomson Reuters, 6th ed, 2014) 284-97; Connor, above n 27, 25-7.

[45] Connor, above n 27, 27-9; Whish and Bailey, above n 30, 565-6; Corones above n 44, 357-8, 300.

[46] See for example *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673. See generally Connor, above n 27, 27-9; Whish and Bailey, above n 30, 565-6.

[47] Connor, above n 27, 27-9. See for example *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673.

[48] For further discussion and elaboration of the specific ways market-sharing agreements manifest, see Whish and Bailey, above n 30, 565-8; Corones, above n 44, 300, 357-8; Connor, above n 27, 27-9.

3 *Bid-rigging*

Bid-rigging agreements (also known as *collusive tendering*) arise as a result of a prospective customer's call for the provision of certain goods or services through a tender process. The cartel participants, who might otherwise have submitted competitive bids independently of one another each hoping to win the only available contract with the customer, have instead agreed amongst themselves which of them is to win the contract and at what cost to the customer. This is typically achieved by the agreed 'winning' bidder disclosing to the 'losing' bidders the details of its bid before the bid is submitted, and the losing bidders ensuring that their own submitted bids are commercially less attractive to the customer.[49] The customer, who has assumed that all the received bids have been set competitively and independently of one another, is oblivious to the bid-rigging agreement. Predictably, the customer selects the winning bid which has presented as the most commercially attractive, at which point the bid-rigging agreement is given full effect. Bid-rigging agreements have a similar effect to price-fixing agreements in that the cartel participant who wins the tender secures a more profitable outcome at the expense of the customer. The cheapest price presented to the customer in the tender process that is 'bid-rigged' is higher than it would have been had there been no such bid-rigging agreement.[50]

4 *Output Quotas*

Output quotas occur out of competing businesses' concerns about there being an over-supply of goods or services in a particular market. The over-supply of product has the effect of forcing the competing businesses to reduce their product prices (and, consequently, reduce their profits) to allow the best chance of securing the corresponding 'under-supply' of customers.[51] Output quota cartel agreements involve the otherwise competing businesses agreeing to reduce their production output to address this issue. This is effected usually in accordance with clearly set out unit production quotas over a

[49] Whish and Bailey, above n 30, 571; Corones, above n 44, 301.

[50] For further discussion and elaboration of the specific ways bid-rigging and collusive tendering arrangements manifest, see Whish and Bailey, above n 30, 571-4; Corones, above n 44, 301-3; Connor, above n 27, 25-6.

[51] Connor, above n 27, 29; Whish and Bailey, above n 30, 568.

specified period of time.[52] The effect of such output quota agreements is to increase the profits of the cartel participants as a result of being able to charge higher prices to their customers.[53] In this sense, output quota agreements generate an outcome that has practically the same effect as price-fixing agreements. However, the increase in price arising is effected more subtly than by way of an explicit price-fixing agreement. The output quotas limit supply, which in turn causes an increase in consumer demand, which in turn gives the cartel participants greater liberty to increase their prices independently without fear of losing a significant amount of custom to business rivals.[54]

C *OECD Classification System*

Economists have identified other categories (and sub-categories) of cartel conduct,[55] although the reduction of the many identifiable types into the four-pronged classification system of: (1) price-fixing; (2) market-sharing; (3) bid-rigging; and (4) output quotas, appears to have become the well-accepted practice of economists today.[56] This straightforward economic approach to cartel definition may be a result of an recognised need for analytical simplicity, but is more likely due to modern economists adapting to the definitions that have been developed and set by policy and lawmakers and applied by the courts.[57]

In 1998, the OECD recommended that its member nations take steps to ensure that their competition laws 'effectively halt and deter hard core cartels'.[58] In doing so, it defined a

[52] Connor, above n 27, 29-30. See also the examples referred to in Whish and Bailey, above n 30, 568-71.

[53] Whish and Bailey, above n 30, 568.

[54] For further discussion and elaboration of output quota arrangements, see Whish and Bailey, above n 30, 568-71; Corones, above n 44, 297-300; Connor, above n 27, 29-30.

[55] See the sources referred to above n 41. For an historically interesting cartel classification system proposed by an early American economist, see Jones, above n 41, 1-13. Jones was a professor of economics at Stanford University and classified cartels as either price-fixing 'trusts' or 'pools', further sub-dividing 'pools' into six types which appear to capture market-sharing, bid-rigging and output quota agreements. Jones' classification system, identifying price-fixing 'trusts' as the principal concern, reflects the United States experience of cartels becoming a common economic problem at the turn of the twentieth century. Separate legal entities known as 'trusts' were often set up by cartel participants as a separate agency that administered their cartel agreements.

[56] See the review and discussion of the various cartel conduct formulations contained in Bruneckienė et al, above n 39, 3-7.

[57] See above Part II. See also the legal definitions of the other jurisdictions referred to in Chapter 5 below.

[58] Organisation for Economic Co-operation and Development, *Recommendation of the Council*

'hard core cartel' as follows:[59]

> [A]n anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.

The four-pronged cartel classification system embodied in this definition was incorporated into law by many member nations, including the United Kingdom[60] and Australia.[61] The OECD's definition arguably reflects a modern day global convergence of the understandings of economists, lawyers and policymakers as to what exactly constitutes cartel conduct and the four specific types of such conduct that are of principal economic concern.

Whatever the type of cartel being considered on any given occasion, the essential feature of all types is that the effect of the terms of cartel agreements is to allow the cartel participants, as a collective, to emulate a monopoly situation.[62] By reason of the agreement's function of eliminating competition as between the cartel participants, they are able to behave as if they were a single business enterprise occupying a virtually exclusive or dominant position in the market. As an effective monopoly, the cartel participants can raise the prices of their products without fear of significant commercial reprisals.

D *Cartel Conduct vs. Tacit Collusion*

A distinguishing feature of cartel conduct is that participants must 'knowingly' and 'intentionally' enter into the cartel agreement.[63] Together with the harm known to be caused by cartel conduct, it is the calculated actions of those persons who choose to enter into a cartel agreement that has led to this kind of anti-competitive behaviour being

concerning Effective Action against Hard Core Cartels C(98)35/FINAL (14 May 1998).

[59] Ibid.

[60] *Enterprise Act 2002* (UK), s 188.

[61] See above Part II.

[62] Connor, Foer and Udwin, above n 30, 201.

[63] See discussion above Part II. See also Connor, above n 27, 21.

labeled 'hard core'.[64] The defining elements of *knowledge* and *intention* mean that there must be an explicit agreement or clear understanding between the cartel participants as to their mutual assent to the terms of the cartel agreement. In this way, all cartel participants can be said to be consciously aware that they are jointly involved in a cooperative anti-competitive venture and of the effects (including harmful effects) that the venture will have.[65]

Here, a distinction is routinely drawn between anti-competitive behaviour amongst independent businesses that amounts to *explicit collusion* (i.e. cartel conduct), and that which amounts to *tacit collusion*. Tacit collusion is sometimes referred to as 'conscious paralellism', 'non-cooperative behaviour', or 'price leadership'.[66] Tacit collusion involves more subtle anti-competitive behavior that falls short of an expressly communicated agreement.[67] In the typical case, one competing business makes a decision to raise the price of its product, and does so independently and absent any discussion with its business rivals beforehand. The price elevation is likely to prompt customers to turn to substitutable products offered by business rivals at cheaper more competitive prices. If the business rivals were to respond to the price increase in a purely competitive manner (assuming there is no immediate commercial imperative for them to raise prices to maintain satisfactory profit levels), they would most likely keep their own prices at the lower current levels to attract the disaffected customers. However, as 'tacit colluders', the other rivals will instead see the announced price increase of its rival as a pricing 'signal', which they then follow by increasing their own prices to a corresponding level.[68]

The harmful economic effects of tacit collusion are much the same as that which results from explicit collusion in the form of cartel conduct and is, therefore, indistinguishable

[64] Organisation for Economic Co-operation and Development, above 58. See also an explanation of the concept of 'hard core' cartel by David King, 'Criminalisation of Cartel Behaviour' (Ministry of Economic Development (NZ) Occasional Paper, 2010) 5-6.

[65] Connor, above n 27, 21.

[66] Ibid.

[67] Ibid. See, also, Gregory Werden, 'Economic evidence on the existence of collusion: Reconciling antitrust law with oligopoly theory' (2004) 71 Antitrust Law Journal 719; Ray Rees, 'Tacit Collusion' (1993) 9 Oxford Review of Economic Policy 27.

[68] Connor, above n 27, 21.

economically.[69] However, recognition of the distinction between explicit and tacit collusion is important for legal and moral reasons. First, it is well established as a matter of legal principle that there is a higher degree of moral culpability attaching to those who *intentionally* engage in prohibited conduct than there is to those who do so unintentionally.[70] The criminal law recognises that the former is more blameworthy than the latter, even though the harmful consequences arising from both situations of conduct may be the same.[71]Second, there is the issue of proof. An intention to engage in an anti-competitive cartel conduct may be readily inferred if there is evidence of an explicit agreement between competing businesses to do so. In cases of tacit collusion, however, there is no such explicit agreement. The difficulty that then presents itself is that the decision of each business to raise its prices is open to conflicting interpretations. On the one hand, the concurrent price increases may be attributable to some 'unspoken' anti-competitive understanding between each business. On the other hand, the competing businesses may simply be increasing their prices independently, albeit coincidentally, in response to market conditions that permit them to do so. Only the former situation involves collusion and attracts liability as a matter of principle.[72] But how does a prosecutor or a plaintiff prove that it is one but not the other? It is extremely difficult for them to do so, particularly in criminal cases where the standard of proof is 'beyond reasonable doubt'.[73]

In Australia, tacit collusion was only recently made unlawful in 2012 by the legislative enactment of civil (not criminal) 'price signalling' prohibitions confined to the banking industry.[74] However, due to a perceived 'over-reach' of the provisions, these were repealed and replaced in 2017 with a general civil prohibition against 'concerted

[69] Ingeborg Simonsson, *Legitimacy in EU Cartel Control* (Hart Publishing, 2010) 70. The harmful economic effects of cartel conduct are outlined and discussed in Part V(D) below.

[70] See discussion below Chapter 3 Parts II(C), IV(B)(3).

[71] Ibid.

[72] Simonsson, above n 69, 71.

[73] See generally Connor, above n 27, 21, 62-4, referring to the state of law relating to tacit collusion in the United States being 'unsettled'; Simonsson, above n 69, 70-2.

[74] Specific price signalling laws were introduced by the *Competition and Consumer Amendment Act (No 1) 2011* (Cth) which passed through both Houses of Parliament on 24 November 2011 and received Royal Assent on 6 December 2011. It came into operation six months later on 6 June 2012. These laws were repealed in 2017 and never applied by the courts.

practices' having the effect, or likely effect, of substantially lessening competition.[75] The practical effectiveness of this new statutory prohibition against cases of tacit collusion is yet to be tested by the Australian courts.

Because of the difficulties associated with cases of tacit collusion, cases of cartel conduct (which, by definition, involve explicit collusion) arguably stand apart in terms of their reprehensibility. Evidence of the explicit anti-competitive agreement makes the intention to engage in such activity clear and the flagrancy in doing so palpable. For this reason, it has been a modern practice of policy and lawmakers to describe cartel conduct as 'serious' or 'hard-core'.[76]

V FURTHER COMPLEXITIES OF CARTEL CONDUCT

This part explains further economic concepts and discrete aspects of cartel conduct that must be considered to understand the nature and extent of cartel conduct as not only an *economic* problem, but also as a potential *moral* problem. Consideration will be given to the importance of competition, the nature and extent of the harm caused by cartel conduct, and the objective conditions which allow cartel conduct to occur. These considerations are relevant to the moral content of cartel conduct in different ways. First, to understand competition, and what it achieves economically for society, is to understand its value. It is the value of competition that may conceivably be characterised as a moral virtue.[77] Cartel conduct constitutes a violation of this virtue and for that reason may be regarded as morally wrong.[78] Secondly, the presence of harm is also considered to be a component of moral wrong-doing.[79] Accordingly, to understand the nature and extent of the harm caused by cartel conduct also provides further insight into the extent of its potential moral

[75] The recommendation to repeal and replace Australia's original price signalling prohibitions was expressed in the Final Report of the Harper Review. See Competition Policy Review Panel, *Competition Policy Review: Final Report* (Commonwealth of Australia, 6 March 2015) 59-60. The 'concerted practices' prohibition is now to be found in s 45(1)(c) of the CCA.

[76] See for example the discussion in Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, report dated 31 January 2003, report released 16 April 2003) 148-59.

[77] See below Chapter 3 Part IV(B)(1).

[78] Ibid.

[79] See below Chapter 3 Part IV(B)(2).

wrongfulness. Thirdly, an appreciation of the objective conditions that tend to facilitate cartel conduct permits a greater understanding of the knowledge and thought processes likely to be present in the minds of those individuals responsible for it. This will bear on an individual's moral culpability.[80]

A *Competition*

Australia, like most other western liberal democracies, has a free market economy. This economic reality is a basic assumption that underpins many social and political issues arising from business conduct in Australia, as well as commercial legal disputes that come before the Australian courts. In the context of dealing with a case involving a breach of Australia's civil penalty provisions against cartel conduct, the Federal Court has described Australia's economic system as being based upon a philosophy of private enterprise and competition.[81] Indeed, it is the process of competition occurring as between independent businesses that has long been acknowledged by economists as an essential hallmark of the free market economy.[82]

In the free market, competition manifests itself as rivalry between independent businesses trading in the same or similar goods or services.[83] The presence of competition implies the following conditions: (a) the existence of two or more persons able and willing to engage in a contest; (b) a desire on the part of the persons to achieve the same or similar goals; and (c) actual participation in a struggle or contest by the persons to achieve the desired goals.[84] In the context of independent businesses trading in the same market, the

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[80] See below Chapter 3 Part IV(B)(3).

[81] *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169, [13]. See also *Re QCMA and Defiance Holdings* (1976) 25 FLR 169, 187; Corones, above n 44, 2-14.

[82] See generally Thomas J Anderson, *Our Competitive System and Public Policy* (South-Western Publishing, 1958); Corones, above n 44, 2-14; Whish and Bailey, above n 30, 4; Anna Zarkada-Fraser, 'A Classification of Factors Influencing Participating in Collusive Tendering Agreements' (2000) 23 Journal of Business Ethics 269, 271.

[83] See Connor, above n 27, 21; Corones, above n 44, 14; Whish and Bailey, above n 30, 4. See also Maurice Stucke, 'Reconsidering Competition' (2011) 81 Mississippi Law Journal 107, 111-14, noting that economists have not reached a consensus in defining 'competition', although many see it as involving the process of rivalry; Jan Rittaler, *Industrial Concentration and the Chicago School of Antitrust Analysis: A Critical Evaluation on the Basis of Effective Competition* (Verlag Peter Lang, 1988) 33-6, discussing the ambiguous nature of the concept of 'competition' and suggesting that, rather than defining it, its characteristics as a process are more easily identified.

[84] Anderson, above n 82, 3.

'contest' essentially involves businesses seeking to make a profit by selling their respective products to the consuming public.[85] Each business is competing to secure the same limited custom to the exclusion of other businesses so as to maximise their share of the market and profits so as to maintain an ongoing viable business.[86] The struggle between businesses leads them to discover exactly what products and services customers want and how these may be produced and supplied in the cheapest possible way.[87]

B *Benefits of Competition*

An immediate benefit derived from the competitive process is 'economic efficiency'.[88] The concept of economic efficiency itself has a number of sub-types such that it is more accurate to speak of a plurality of efficiencies rather than a singular efficiency when considering the beneficial economic implications of the competitive process.[89] Practical benefits also flow to individual consumers in the form of higher quality products at cheaper prices as a result of these efficiencies.

1 *Economic Efficiencies*

Where there are many buyers and sellers in a market, competition is said to be 'optimal'. This means that the natural market forces of supply and demand will result in the greatest number of products being sold at a price that is acceptable to both buyer and seller, such that the total amount of revenue generated from the proceeds of sales is maximised.[90] Society's economic resources have been allocated to their most efficient use, leading to the economic phenomenon of 'allocative efficiency'.[91] Allocative efficiency results in the greatest net economic benefit being obtained by society because the maximised sales proceeds, obtained as a result of products being optimally priced, ensures that the contribution these transactions make to the value of the economy as a whole is also always

[85] Ibid 5-6.

[86] Stucke, above n 83, 114.

[87] *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, 187; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶41-357, 42,682-83.

[88] Corones, above n 44, 14; Whish and Bailey, above n 30, 4-5.

[89] Corones, above n 44, 15; Whish and Bailey, above n 30, 5-6.

[90] Corones, above n 44, 15; Whish and Bailey, above n 30, 5.

[91] *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, 187; Corones, above n 44, 15; Whish and Bailey, above n 30, 5. See also Anderson, above n 82, 18.

at its greatest.[92] Competition is therefore often said to be not an end in itself, but rather a process that leads to an increase in the total economic welfare of society (otherwise referred to as the maximisation of *total* consumer welfare).[93] Society as a whole benefits as a consequence of the competitive process.

Competition between businesses also generates other efficiencies. The struggle for customers also leads to 'productive efficiency'[94] in that businesses face constant pressure to produce their goods and services at the lowest possible cost.[95] A business that is inefficient with its production methods 'tends to face excessive costs, inadequate returns, and possible bankruptcy'.[96]

Competition is also said to lead to 'dynamic efficiency' in that it encourages businesses to 'keep ahead' of rivals by enhancing their existing products, developing new ones, and improving productive methods and business operations.[97] The business that is continuously turning its mind to how it can be more innovative, and implementing such innovations, is 'dynamically' efficient because it adapts to changing market conditions and reacts to rivals' attempts to erode its market share. If a business commits enough resources to research and development, its products will remain relatively high in quality and cheap to produce, and attractive to the consumer thereby ensuring the ongoing retention of its market share. By contrast, 'competition presents a hazardous situation to that [business] desirous of resting on past laurels or of following the same methods year after year.'[98]

2 *Individual Consumer Benefits*

The disposition of society's resources by the mechanism of competition has obvious practical benefits for individual consumers. As the competitive battle between business

[92] Corones, above n 44, 15; Whish and Bailey, above n 30, 5.

[93] Corones, above n 44, 14-15; Whish and Bailey, above n 30, 5.

[94] Corones, above n 44, 15-16; Whish and Bailey, above n 30, 5-6.

[95] *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, 187; Corones, above n 44, 16; Whish and Bailey, above n 30, 5-6; Anderson, above n 82, 18-19.

[96] Anderson, above n 82, 18.

[97] *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, 187-88; Corones, above n 44, 16-17; Whish and Bailey, above n 30, 6; Anderson, above n 82, 18.

[98] Anderson, above n 82, 21.

rivals takes place, an individual consumer will enter the market searching for a product and must make a choice as to which of the business rivals' competing products to purchase. A high degree of competition between businesses will mean that that the consumer is presented with a large range of quality products on offer at the cheapest possible prices. Less competition, or the absence of competition altogether, may mean that a smaller range of relatively inferior products is on offer at higher prices. Every consumer personally benefits from a competitive marketplace because competition reduces prices so that 'for any given income, however low, a larger basket of goods and services can be purchased.'[99]

C *Benefits Outweigh Disadvantages*

Competition has not always been seen as desirable.[100] Negative effects can include wastage of society's resources, the inability of any one business to grow and thrive as a result of competitive conditions, and the potential destruction of businesses and livelihoods in the case of extremely fierce competition.[101] However, the general consensus amongst mainstream economists today is that the advantages of vigorous competition outweigh any perceived detriments.[102] In the context of the marketplace, the propensity for human beings to crave material wealth translates into a desire by businesses to expend the least amount of resources to gain the maximum amount of profits.[103] A business cannot be relied upon by its own motion to make decisions that will lead to improvements in its products and its operational efficiencies, and to pass its own costs savings onto consumers by offering products at cheaper prices. In the absence of competition, a business is empowered to charge its customers more for a product that is relatively unremarkable in quality, and there is a natural inclination on the part of businesses to do so. That is because the business that has no competition has no fear that customers will become disaffected and shop elsewhere; there is nowhere else for the

[99] Kenneth Elzinga, 'The Goals of Antitrust: Other than Competition and Efficiency, what else Counts?' (1977) 125 University of Pennsylvania Law Review 1192, 1194.

[100] Stucke, above n 83, 117.

[101] See generally the discussion contained in Anderson, above n 82, 21-22.

[102] Anderson, above n 82, 22-23. See also Organisation for Economic Co-operation and Development, above n 24; Corones, above n 44, 2-19; Whish and Bailey, above n 30, 18-19.

[103] Darren Filson et al, 'Market Power and Cartel Formation: Theory and an Empirical Test' (2001) 44 Journal of Law and Economics 465, 466; Armen Alchian, *Economic Forces at Work* (Liberty Press, 1977).

customer to go. To a certain extent, the business with no competition is at liberty to be greedy and lazy, by charging more and providing less.

Competition disempowers a business to engage in such behaviour by providing a real incentive for businesses to do exactly the opposite. As Anderson argues, competition between sellers tends to 'protect buyers from inconsiderate treatment, poor quality and excessive prices' and in that sense it 'tends to harness the profit motive to the public interest'.[104] This latter observation reflects a certain irony that a competitive market can lead to the creation of a significant public benefit derived from a business's selfish desire to maximise its own material wealth. Cheaper prices enjoyed by consumers as a result of vigorous competition are not the product of some altruistic motivation on the part of the competing businesses. Rather, they are an unintended by-product of individual businesses' constant craving for greater profits, a conclusion originally drawn by Adam Smith. Through the selfish desire to maximise one's own wealth, competing businesses are 'led by an invisible hand' to enhance the welfare of the public at large without any intention of doing so.[105]

D *Harm Caused by Cartel Conduct*

The success of the competitive free market system depends principally on the attitudes of those persons who operate the business organisations involved. Businesses trading in a market must each maintain a willingness to compete and operate independently of one another.[106] As one might expect, a competitive strategy tends to be that which prevails among businesses. In maintaining a simple utilitarian desire to maximise its own profits, a business must assume a very basic 'every man for himself' and 'survival of the fittest' mentality. Independent businesses operating in a free market economy are naturally inclined to adopt this competitive predisposition.[107] Competing businesses are supposed to act 'antagonistically' towards one another.[108]

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[104] Anderson, above n 82, 17-19.

[105] Smith, above n 28, 349. See also Corones, above n 44, 19, 109-10.

[106] See Anderson, above n 82, 3.

[107] Rittaler, above n 83, 26; Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 2nd ed, 1993); George Stigler, *The Organization of Industry* (Richard D Irwin, 1968) 72-4.

[108] Rittaler, above n 83, 35.

However, this presumptive competitive strategy is not the exclusive method by which businesses may realise greater profits. Where there is more than one independent business operating in a market, there is the potential for these businesses to come together and combine to form an anti-competitive cartel.[109] By definition, a cartel is constituted by independent businesses, who would otherwise be market rivals, expressly agreeing not to compete with one another. By entering into such an agreement, the cartel members have substituted co-operation for competition.[110] As a co-operating collective, they are then able to emulate a situation of monopoly. This empowers them to engage in the behaviour that competition would otherwise specifically prevent. Cartel members can artificially inflate the prices of their product above the optimal price that a competitive market would otherwise dictate. They have no fear of losing customers to their business rivals offering similar products at cheaper prices because the 'rivals', too, have raised their prices in accordance with the cartel agreement. Natural market forces have been eliminated, and so all the cartel members are able to enjoy 'supra-normal' profits.

While members of a cartel may reap the benefits of their cartel agreement, the consequential economic harm suffered by others in society can be significant. It is generally accepted that cartel conduct is the 'most egregious' and most harmful of all types of anti-competitive conduct.[111] The nature of the harm caused by such conduct is essentially that which is anticipated when competition in a market is absent. Cartel conduct causes economic inefficiencies as well as specific economic harm to individual consumers.

1 *Undermining Economic Efficiencies*

When businesses in a market collectively increase the prices charged for their products, there will be a reduction in the total amount of product sold in that market.[112] This occurs

[109] Margaret Levenstein and Valerie Suslow, 'What Determines Cartel Success?' (2006) 44 Journal of Economic Literature 43.

[110] Ibid 45.

[111] Organisation for Economic Co-operation and Development, *Hard Core Cartels* (OECD Publishing, 2000) 6; Organisation for Economic Co-operation and Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws* (OECD Publishing, 2002) 5. See also Whish and Bailey, above n 30, 546-7.

[112] Andrea Günster, Martin Carree and Mathijs van Dijk, 'Do Cartels Undermine Economic Efficiency?' (Paper presented at the American Economic Association 2012 Annual Meeting, Chicago, 8 January 2012)

through the operation of the forces of supply and demand. As the price of a product increases, there will be a correlating decrease in consumer demand for that product. By reason of the price increase, one or more consumers are no longer willing to purchase as many products as they otherwise would if the products were instead optimally priced in a perfectly competitive market. Allocative efficiency is compromised, with the end result being that the total value generated from sales in the market is less than that which would be produced in a competitive market. The reduction in allocative efficiency is often referred to as the 'dead-weight loss' to the total economy generated by the cartel, a concept defined as '[t]he total dollar value of potential benefits not achieved … resulting from too few or too many resources used in a given market'.[113]

By way of example, in a local market for the retail sale of bread loaves there may be only two independent bakery businesses operating, with the competitive price for a single loaf of bread being $5. At this price, consumers in the market are willing to buy a total of 100 loaves between the two bakeries every weekend. The total value in sales each weekend is therefore $500 (calculated by multiplying $5 by 100). However, when the two bakeries enter into a cartel agreement and agree to raise the price of their bread to $6 per loaf, only 80 loaves are sold between them. This reduces the total value in sales in the local bread loaf market to $480 per weekend (ie, $6 x 80). While the bakeries obviously have the capacity to produce more bread, consumers are not prepared to buy as much at the higher price and so the bakeries reduce their output accordingly. The loss to the economy, or the 'dead-weight loss', in this instance may be calculated as being $20 per weekend (ie, the difference between the total value in sales yielded when the loaves are competitively priced, and the total value yielded when the cartel agreement is in place).

Depending on the nature of the cartel agreement, the 'productive' and 'dynamic' efficiencies of the cartel member businesses may also be compromised.[114] As each

3-4, 14-15. See, also, Louis Kaplow, 'An economic approach to price fixing' (2011) 77 Antitrust Law Journal 343; Ministry of Economic Development (NZ), *Regulatory Impact Statement: Criminalisation of Cartels* (13 October 2011) 2.

[113] Irvin Tucker, *Macroeconomics for Today* (South-Western, 8th ed, 2014) 88. See, also, King, above n 64, 5-6; Ministry of Economic Development (NZ), above n 112, 2.

[114] Günster, Carree and van Dijk, above n 112, 14-15; Ministry of Economic Development (NZ), above n 112, 2-3.

business is prepared to respect other cartel members' need for maintaining their own respective profits and existing customer bases, the very nature of the cartel agreement will engender within each business a sense of commercial complacency or an inclination of 'resting on past laurels'.[115] No longer fearful of being outdone by their former rivals, the now non-competing businesses may be disinclined to expend resources that would reduce their production costs and enhance their production capabilities and outputs.[116] In the case of the example of the two bakeries, the effect of their cartel agreement may result in one or both businesses continuing to use outdated equipment and outmoded methods of bread production. The quality of their bread loaves would also remain stagnant when compared to that which would be produced in a more competitive market. While it is difficult to place a precise quantitative value on the losses caused by such productive and dynamic inefficiencies, in many instances this kind of harm caused by cartel conduct is self-evident.[117] The cartel members' businesses simply do not evolve for the better through the effluxion of time, nor do their products.

2 *Harm to Individual Consumers*

Perhaps the more common and most well-known complaint about cartel conduct concerns the harmful economic effect that it has on individual consumers. With prices of products artificially inflated above the competitive price by the cartel agreement, individual consumers are presented with an unpalatable choice. The consumer must decide to either: (a) pay a higher price for the product that is potentially stagnant in quality (often referred to as the 'price overcharge'[118]); or (b) forego purchasing the product altogether and spend what they can afford on second-choice products in different markets. Whatever their decision, the quantity or quality of goods and services contained in each individual consumer's basket is reduced. Through the elimination of competition by the cartel, the welfare of the individual consumer suffers.

Typically, it is the loss suffered by those consumers by way of price overcharge that

[115] Anderson, above n 82, 21.

[116] Ministry of Economic Development (NZ), above n 112, 3.

[117] See for example the empirical study of Günster, Carree and van Dijk, above n 112.

[118] John Connor, *Price-Fixing Overcharges* (Purdue University, 3rd ed, 2014) 7.

receives the most attention in the debate about cartel conduct, and not the less tangible losses in economic efficiency.[119] That is because a purchasing consumer's loss is quantifiable once it is known what the competitive (lower) price would have been in the absence of the cartel. The loss that is not quantifiable, however, includes the potential reduction in quality of the product arising from any dynamic inefficiencies generated by the cartel. Such qualitative losses are difficult to measure. Consumers who choose not to buy the product by reason of the higher price also suffer qualitative losses. That is because these consumers have not been deprived of any specific sum of money, rather they have instead opted to spend their money on less preferred products. And so, the focus in ascertaining the harm suffered turns to those consumers who have decided to purchase the products from the cartel members at the higher anti-competitive prices. Their losses are determined by calculating the difference between the theoretical competitive price and the actual price they paid for the products, an exercise frequently carried out by economists in cartel conduct court proceedings.[120] In the bakery cartel example described above, the loss suffered by an individual consumer purchasing one loaf of bread at the artificially inflated cartel price is $1 (being the difference between actual price of $6 and the competitive price of $5 that would have applied had the bakeries not entered into the cartel agreement). The total loss suffered by all consumers each weekend is $80 (the difference between $480 and $400).

3 *Total Harm Caused*

Whether objection is taken to the dead-weight loss, or to the price overcharge incurred by individual consumers, the significance of the harm caused by cartel conduct, once it is

[119] See for example the observations of Justice Heerey in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673, [312], concerning the effects that a cardboard box cartel would have on the prices of products having to be paid by ordinary consumers. See also Connor, *Price-Fixing Overcharges*, above n 118, 7-12; Christopher Leslie, 'Antitrust Damages and Deadweight Loss' in Kevin Marshall (ed), *The Economics of Antitrust Injury and Firm-Specific Damages* (Lawyers & Judges Publishing Company, 2008) 45, 49-51.

[120] See generally Connor, *Price-Fixing Overcharges*, above n 118, 7-12; Douglas Zona, 'Structural Approaches to Estimating Overcharges in Price-fixing Cases' (2011) 77 Antitrust Law Journal 473; Marcel Boyer and Rachidi Kotchoni, 'How Much Do Cartels Overcharge?' (2015) 47 Review of Industrial Organization 119; John Connor, 'Forensic Economics: An Introduction With Special Emphasis On Price Fixing' (2007) 4 Journal of Competition Law and Economics 31. The exercise of calculating the price overcharge is not without its difficulties, as the OECD noted in Organisation for Economic Co-operation and Development, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (OECD publishing, 2002) 77.

discovered, usually derives from the aggregation of consumer transactions over time. A single transaction involving the purchase by a consumer of a cartel-priced product is unlikely to be perceived as a significant harm in itself. Rather, the effect of cartel-priced products will only be perceived as being significant by looking at multiple consumer transactions in relation to the cartel members' products over an extended period of time.[121] In many instances, the difference between the actual (cartel) price paid by the consumer and the theoretical competitive price may amount to no more than a few dollars, or even a few cents, in a single-item transaction. The consumer who pays $6 instead of $5 for a loaf of bread one weekend because of the operation of the local bakery cartel is hardly likely to complain about one occasion of being overcharged. Indeed, such consumers are unlikely to perceive the negative impact that such a small overcharge will have on their 'basket of goods' for that particular week at all. Rather, the effect of cartel-priced products will practically be felt by a consumer only if the transaction is repeated at regular intervals over a period of time. A loaf of bread bought twice a week over a year-long period at the cartel price of $6 (instead of $5) by a single consumer represents a total loss for that consumer of $104, a sum of money that is far more appreciable in an average consumer's personal budget.

But even then, what is felt by the individual consumer in this respect is the price overcharge only, and not the deadweight loss. In relation to the latter, the significance of harm to the economy can only be appreciated by looking at the total quantity of cartel-priced transactions entered into by consumers as a collective (ie, society) over a protracted period. The dead-weight loss is often regarded as the most difficult to quantify.[122] However, once the economist has calculated the price overcharge, and the total number of products purchased by consumers from the cartel members at the cartel price over a specified period, the total value of the price overcharge may be used as a proxy to estimate the total dead-weight loss incurred by the economy.[123] This has been conservatively

[121] Connor, *Price-Fixing Overcharges*, above n 118, 7.

[122] See the discussion in Connor, *Price-Fixing Overcharges*, above n 118, 7. See also Nonthika Wehmhörner, 'Optimal pecuniary sanctions and the US sentencing and EU fining guidelines' in Katalin Cseres, Maarten Schinkel and Floris Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar, 2006) 217, 228; Leslie, above n 119, 49.

[123] Organisation for Economic Co-operation and Development, *Hard Core Cartels: Recent Progress and*

estimated to be 10-20% of the price overcharge, although on some occasions may be up to 50%.[124]

In a comprehensive review of 700 published economic studies and judicial decisions in which over 2 000 quantitative estimates of price overcharges had been made in separate cases of cartel conduct, Connor estimated that the median average long-run price overcharge for all types of cartels is 23%.[125] The hypothetical example of the bakery cartel used above involves a price overcharge of 20% (an extra $1 payable by consumers on top of the $5 competitive price) certainly approximates to this median. But perhaps more alarming is that the empirical survey demonstrated that particularly successful cartels operating at 'peak' effectiveness are capable of charging between 60% and 80% above the competitive price.[126]

Connor's survey also demonstrated that cartels can be formed and operated successfully in a wide variety of industries and markets. Products subject to a cartel agreement have included everyday items such as cardboard boxes, vitamins, coffee, beer, pasta, canned mushrooms, petrol for the car and even toilet paper.[127] Cartels have also been entered into by competing service providers who were in the business of supplying ordinary consumers with electricity, telephone connections, hotel accommodation, real estate agents services, and movie tickets.[128] Cartels are also just as likely to be formed by competing businesses supplying products to other businesses used by these other businesses in the process of producing their own products. Markets that have been affected by cartels include markets for the supply of building construction services, concrete, nails, gunpowder, animal vitamin supplements, air freight services, and

Challenges Ahead (OECD publishing, 2003) 8-9.

[124] Ministry of Economic Development (NZ), above n 112, 2; Organisation for Economic Co-operation and Development, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, above n 120, 77.

[125] Connor, *Price-Fixing Overcharges*, above n 118, 86. See, also, Connor, Foer and Udwin, above n 30, 203-4. See, however, Boyer and Kotchoni, above n 120, who suggest that the median price overcharge may be significantly lower.

[126] Connor, *Price-Fixing Overcharges*, above n 118, 62-5.

[127] See the various the list of markets in which cartels have occurred considered by Connor, *Price-Fixing Overcharges*, above n 118, 164-75.

[128] Ibid.

uranium, to name just a few.[129]

Illegal cartels can continue to operate successfully and undetected for many years.[130] It is clear that in such circumstances the economic harm caused by any one cartel can be very significant. In the United States, it is estimated that cartel conduct causes loss to consumers and to the American economy exceeding billions of dollars every year.[131] When taking into account the economic losses caused to consumers and economies in other countries, the total loss suffered by consumers and the global economy at large would see that figure multiply.[132] The OECD has characterised this problem as a 'multi-billion dollar drain on the global economy.'[133] Accordingly, whether complaint is made against the price overcharge, the deadweight loss, or against both such losses caused by cartel conduct, the economic harm may be regarded as significant and extreme by its aggregative effects.[134]

E *Facilitating Factors*

Cartel agreements are certainly not 'the norm' in a free market economy. They tend to manifest only when certain conditions exist without which they are unlikely to be sustained or established at all. As George Stigler argued, 'collusion is impossible for many firms, and collusion is much more effective in some circumstances than in others.'[135] Specifically, there needs to be certain objective conditions relating to the businesses and the market in which those businesses are operating that will be conducive

[129] Ibid.

[130] Levenstein and Suslow, above n 109, the authors' empirical research suggesting that the median length of a cartel operating in the United States is 5 years; Richard Posner, 'A Statistical Study of Antitrust Enforcement' (1970) 13 Journal of Law and Economics 365, 402, the author's data revealing the median length of a cartel operating in the United States to be 6 years; David Round 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, 256, the authors' data revealing that most cartels in Australia operate for more than 2 years, at least in relation to those cases that have been successfully prosecuted by the regulatory authority.

[131] Organisation for Economic Co-operation and Development, *Hard Core Cartels* (OECD Publishing, 2000) 7.

[132] Ibid. See also Connor, *Global Price Fixing*, above n 27, 7-8.

[133] Organisation for Economic Co-operation and Development, *Hard Core Cartels*, above n 131, 5.

[134] See discussion in Connor, *Global Price Fixing*, above n 27, 7-8.

[135] Stigler, 'A Theory of Oligopoly', above n 34, 44. See also Filson et al, above n 103; Katherine McElroy and John Siegfried, 'The Economics of Price Fixing' in Terry Calvani and John Siegfried (eds), *Economic Analysis and Antitrust Law* (Little, Brown & Co, 1988) 139.

to cartel conduct occurring. Connor has referred to such objective conditions as 'facilitating factors' which 'increase the probability that a cartel will be formed, stable or enduring.'[136]

1 *High Seller and Low Buyer Concentration*

A high concentration (low number) of independent businesses within a market, with a high degree of market share between them, tends to make for a better chance of cartel success.[137] Possessing a high degree of market custom is obviously necessary if the cartel is to have any realistic chance of emulating a monopoly. It has been suggested that for a cartel to be viable, there should be no more than five or six independent businesses which share between them 70 percent of the custom in the relevant market.[138] A cartel agreement which involves a greater number of independent businesses becomes more difficult to manage and keep together. As each business has its own particular needs and idiosyncrasies, there are more variables with which to contend where there is a greater the number of cartel members.[139] Too many cartel members means it will be difficult to formulate terms of a cartel agreement that will be satisfactory to every cartel participant.[140] An increased number of cartel participants also creates an increased logistical burden of ensuring that every participant is complying with the terms of the cartel agreement and that no participant is 'cheating' by reverting to an independent

[136] Connor, *Global Price Fixing*, above n 27, 34. See also Stigler, above n 34, 44; McElroy and Siegfried, above n 135, 143; Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antirust Principles and Their Application* (Aspen Publishers, 2009) ¶2002. Basic Cartel Economics, ¶2002f1.

[137] Connor, *Global Price Fixing*, above n 27, 34-5; Stigler, above n 34; Areeda and Hovenkamp, above n 136, ¶405. Cartels, ¶405a; George Hay and Daniel Kelley, 'An Empirical Survey of Price Fixing Conspiracies' (1974) 17 Journal of Law and Economics 13, 14-15; McElroy and Siegfried, above n 135, 139; Posner, above n 130, 399.

[138] Connor, *Global Price Fixing*, above n 27, 34-5; Peter Asch and Joseph Seneca, 'Characteristics of Collusive Firms' (1975) 23 Journal of Industrial Economics 223, 224. See also Wayne Baker and Robert Faulkner, 'The Social Organization of Conspiracy: Illegal Networks in the Heavy Equipment Industry' (1993) 58 American Sociological Review 837, 841.

[139] Areeda and Hovenkamp, above n 136, ¶405. Cartels, 405b1; Baker and Faulkner, above n 138, 841; Frederick Scherer, *Industrial Market and Economic Performance* (Houghton Mifflin, 2nd ed, 1980) 199-200.

[140] Connor, *Global Price Fixing*, above n 27, 34-5; Baker and Faulkner, above n 138, 841; McElroy and Siegfried, above n 135, 139; Areeda and Hovenkamp, , above n 136, ¶405. Cartels, ¶405a.; Hay and Kelley, above n 137, 14.

competitive strategy.[141]

As a corollary, a low concentration (high number) of buyers in the market also facilitates cartel success.[142] The absence of any one particular buyer being in a stronger negotiating position than any other buyer will mean that there is little risk of a cartel participant being tempted to 'cheat'.[143] Cartels are more likely to endure if there is no single buyer who, because of the buyer's relatively large trade requests, is in a position to entice a cartel participant to abandon the terms of cartel agreement to secure the buyer's ongoing custom. It may also be surmised that the existence of many buyers means that each cartel participant is likely to be reasonably well-informed (by regular buyers' price queries) as to whether the other participants are generally adhering to the cartel agreement.[144]

2 *Homogeneity of Product*

The homogeneity or 'standardisation' of products, as between cartel participants, is a necessary requirement for a cartel to have any realistic chance of long-term success.[145] This facilitating factor refers to the need for each cartel participant's competing product to be sufficiently similar (or, conversely, to be insufficiently differentiable) to those of its rivals, such that the cartel does indeed effectively emulate a monopoly.[146] A monopoly business, after all, has a unique product which has no competition; there are no competing substitutable products offered by other businesses in the market, so there is nowhere else for the buyer to turn in the event of customer dissatisfaction with price.[147] Where one cartel participant's product has sufficiently distinguishing features that differentiate it from that of another participant, those features may influence a prospective customer's

[141] Baker and Faulkner, above n 138, 841; Areeda and Hovenkamp, , above n 136, ¶405. Cartels, ¶405b.; Hay and Kelley, above n 137, 14; McElroy and Siegfried, above n 135, 139-40.

[142] Connor, *Global Price Fixing*, above n 27, 35; Baker and Faulkner, above n 138, 841; McElroy and Siegfried, above n 135, 145; Bruneckienė et al, above n 39, 82.

[143] McElroy and Siegfried, above n 135, 145; Stigler, above n 34, 44; Bruneckienė et al, above n 39, 82.

[144] McElroy and Siegfried, above n 135, 145.

[145] Connor, *Global Price Fixing*, above n 27, 36-7; Stigler, above n 34, 44-5; McElroy and Siegfried, above n 135, 144; Areeda and Hovenkamp, , above n 136, ¶2002. Basic Cartel Economics, ¶2002f2; Hay and Kelley, above n 137, 15; Bruneckienė et al, above n 39, 81.

[146] Connor, *Global Price Fixing*, above n 27, 36; Stigler, above n 34, 45; Hay and Kelley, above n 137, 15.

[147] Connor, *Global Price Fixing*, above n 27, 36.

decision to buy irrespective of the cartel participants having set the same price. In such cases, distinguishing features between rivals' products effectively undermines the effectiveness of any cartel agreement.[148] If, however, the customer sees no difference between competing products, the cartel will be much more effective as the only concern customers will have is whether they are acquiring the product for the best available price.[149]

3 *Consumer Insensitivity to Price*

There is little point in engaging in cartel conduct if, because of the cartel members raising the prices of their products, consumer demand for the products substantially depreciates or disappears altogether. Demand for their products needs to remain static, or 'inelastic'.[150] However unified the cartel members may be in positioning themselves to emulate a monopoly, consumers may be more or less sensitive to price increases depending on the nature of the product being sold. High sensitivity to price increases means that consumers will begin dispensing with their need for the product altogether and abandon the market. This of course would be completely contrary to what the cartel members would be aiming to achieve by their agreement, as their profits would also start to rapidly disappear. Low consumer sensitivity to price increases therefore represents the most preferable situation for the cartel members because consumers will continue to buy to buy the products despite a price hike.[151]

4 *High Barriers to Entry*

While members of a cartel may emulate a situation of a monopoly by co-operating with one another, they will never attain the enjoyment of actual monopoly. There will always be the potential for new businesses to enter the market with the aim of enticing the cartel members' customers away by offering similar products at a cheaper price.[152] The threat

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[148] McElroy and Siegfried, above n 135, 144; Baker and Faulkner, above n 138, 841; Scherer, above n 139, 200; Hay and Kelley, above n 137, 15

[149] Hay and Kelley, above n 137, 15.

[150] Connor, *Global Price Fixing*, above n 27, 37; Hay and Kelley, above n 137, 15; McElroy and Siegfried, above n 135, 143-5; Bruneckienė et al, above n 39, 83; Henry de Jong, *The Structure of European Industry* (Kluwer, 3rd ed, 1993) 35-36.

[151] Hay and Kelley, above n 137, 15; Henry de Jong, above n 150, 35-6.

[152] Areeda and Hovenkamp, above n 136, ¶2002. Basic Cartel Economics, ¶2002f6; Levenstein and

of prospective competition is an aspect of competition that can never be completely eliminated, no matter how secure the cartel members may believe their stranglehold on the market to be.[153] They must remain mindful of the commercial possibility that one or more new businesses may be ready to enter the market at any time with competitively priced products that undercut those of the cartel members. When that occurs, the ongoing viability of their cartel agreement may be in serious jeopardy.[154]

The first critical question for the prospective competitor to consider is whether, and to what extent, there are any practical commercial 'barriers' that must be overcome before it can start to be a truly viable business and an effective competitor with others already trading in the market. The concept of 'barriers to entry' refers to commercial obstacles for any new business seeking to gain entry into a particular market and commence trading. These may include the initial cost of entering the market, government regulatory hurdles, access to intellectual property and distribution networks, and the time it takes for a new business to establish an economy of scale.[155] If the barriers to entry are few or 'low', there is very little in the way of a new business quickly entering the market and offering competing products at competitive prices on a long-term basis with relative ease.[156] Low barriers to entry constitute market conditions that are not facilitative of cartels being established or enduring for any reasonable period of time.[157] If, however, the barriers to entry are significant or 'high', entry into the market by any new business is much more difficult.[158] High barriers to entry effectively deter would-be competitors from entering the market at the outset. For this reason, members of a cartel can raise their prices above the competitive level by a much greater margin before inducing entry of a would-be

Suslow, above n 109, 49.

[153] See the discussion in Peter Grossman, 'Why One Cartel Fails and Another Endures: The Joint Executive Committee and the Railroad Express' in Peter Grossman (ed), *How Cartels Endure and How They Fail* (Edward Elgar, 2004) 111, 114-15.

[154] Ibid.

[155] On the various kinds of barriers to entry that may operate to hinder would-be competitors, see Connor, *Global Price Fixing*, above n 27, 40-41; McElroy and Siegfried, above n 135, 144; Whish and Bailey, above n 30, 46-7; Corones, above n 44, 125-28.

[156] Connor, *Global Price Fixing*, above n 27, 40-1; Asch and Seneca, above n 138, 224; McElroy and Siegfried, above n 135, 140; Bruneckienė et al, above n 39, 81

[157] Ibid.

[158] Ibid.

competitor. The cartel will be much more successful as a consequence.[159]

5 *Large Businesses with Low Profit/Growth Performance*

Larger businesses tend to engage in cartel conduct as a means of increasing their profit performance or growth.[160] There may be a specific concern that current profit performance levels are unsatisfactory having regard to the high ratio of fixed and variable costs associated with running the business.[161] Large businesses are more likely to recognise that they are particularly vulnerable when suffering low profit and growth performance. A downturn in market conditions or the economy more generally, or 'price wars' created by fierce competition from business rivals seeking to expand their market share, can quickly lead a business barely surviving on waning profits to becoming a non-viable business trading at a substantial loss.[162] Larger businesses trading in the same market may be particularly aware of their own as well as their rivals' economic vulnerabilities. They appreciate that these vulnerabilities could be significantly reduced by entering into a cartel agreement with one another. A cartel agreement will stabilise their profits and provide them with a certain degree of financial security. There is a strong economic motive for a business in these circumstances to engage in cartel conduct, and so they may be less inclined to resist temptation to do so.[163]

VI CONCLUSION

Cartel conduct constitutes a clear violation of the fundamental market principle that independent businesses should compete and not collude with one another. Given that cartel agreements by definition involve mutual assent to the terms of a mutually beneficial private agreement, it is done deliberately. A successful cartel also requires certain market conditions to be in place, meaning that a host of complex variables must be considered by cartel participants when they engage in cartel conduct. If they are successful, the scale

[159] Asch and Seneca, above n 138, 236; Grossman, 'Why One Cartel Fails and Another Endures: The Joint Executive Committee and the Railroad Express', above 153, 122.

[160] Asch and Seneca, above n 138, 225, 236.

[161] Ibid.

[162] McElroy and Siegfried, above n 135, 145-6.

[163] McElroy and Siegfried, above n 135, 146; Levenstein and Suslow, above n 109, 43.

of economic harm suffered by individual consumers and the community at large can be very significant.

These objective matters concerning cartel conduct provide the foundation for arguing the case that it is sufficiently morally reprehensible to be sanctioned by the criminal law. The moral reasoning processes that may be adapted are considered and applied in the next chapter.

CHAPTER 3

MORALITY, THE CRIMINAL LAW AND CARTEL CONDUCT

I OVERVIEW

This chapter considers how cartel conduct may be conceived, and ultimately perceived, to be morally wrong such as to justify the intervention of the criminal law. It explains some of the fundamental matters that inform the moral debate about cartel conduct. What is 'morality' and how is a certain kind of conduct determined to be 'immoral'? What is the nature of the relationship between morality and the criminal law? How wrong must conduct be before it is appropriately deemed 'criminal'? Answers to these questions will provide a foundation for understanding how cartel conduct may come to be seen as morally wrong within a criminal legal context.

Part II considers morality as a general social phenomenon and how certain kinds of conduct may be reasoned to be morally wrong. It considers the various approaches that may be adopted when determining whether a novel category of human conduct contravenes society's moral order and contemplates how these approaches might be applied to cartel conduct. Part III considers how individual members of society come to learn a certain behaviour is morally wrong, and the possible issues that might arise when the application of these processes are considered in relation to cartel conduct. Part IV considers morality, its relationship to the criminal law, and an objective approach to determining whether given conduct is sufficiently immoral to be criminal. Part V explains how this objective approach may be applied to cartel conduct. Part VI concludes this chapter.

II MORALITY, MORAL EPISTEMOLOGY AND CARTEL CONDUCT

If the question, '*Is cartel conduct immoral?'* is posed, one should not expect to find the answer easily. The consternation here stems not so much from cartel conduct being a

particularly controversial economic phenomenon but rather from *morality* being a notoriously difficult concept to define and apply. Morality has been debated by philosophers for centuries. Legal scholars, sociologists and other kinds of social scientist have also had much to say about morality within the context of their respective disciplines. The end result is that there are now many different methods that may be employed when determining issues concerning morality. This gives rise to a particular difficulty when considering whether a certain kind of conduct, such as cartel conduct, is morally right or wrong. What assumptions and method of analysis should be adopted?

Of those who have inquired into the moral implications of cartel conduct and shared their findings, some have been clear about the moral epistemological framework they have chosen to adopt.[1] However, many others have expressed views without giving any explicit consideration to morality itself.[2] Morality, its meaning, and other fundamental concepts relating to its application, are then either assumed to be understood or are inconspicuously glossed over in the course of argument. The reader is left to infer what general assumptions about morality have been made based on the commentator's expressed reasons and ultimate conclusions reached. Of course, this is not an entirely satisfactory approach intellectually, especially when the reader's principal concern is to understand exactly why the commentator is asserting a particular moral position. It is, however, a practice explicable on the basis that it avoids opening a proverbial *Pandora's Box* that a candid discussion about morality necessarily entails.

This part highlights and briefly explains fundamental aspects of morality, and approaches

[1] See for example Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press, 2014), applying a normative framework of analysis to the issue of cartel conduct; Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 Melbourne University Law Review 675, reasoning cartel conduct to be morally wrongful by analogising it with cheating, deceiving and stealing; Julie Clarke, 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 Journal of Financial Crime 76, also analogising cartel conduct with other financial crimes such as theft and fraud.

[2] See for example Louise Castle and Simon Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition in Australia' (2002) 10 Competition and Consumer Law Journal 1, arguing that the regulation of competition 'is not, of itself, a morally prescriptive undertaking' and that those who breach economic norms 'are not "wrong", they are "anti-competitive"' (but without explaining morality or moral wrongfulness more generally); Julie Clarke and Mirko Bagaric, 'The desirability of criminal penalties for breaches of Part IV of the Trade Practices Act' (2003) 31 Australian Business Law Review 192, arguing that cartel conduct is 'not intrinsically wrong' on the basis that no 'direct harm' is caused to any 'victims', as compared to more traditional crimes (but falling short of a clear explanation as to how the moral content of conduct in general is affected by such considerations).

to moral analysis, which appear to have informed the debate about the moral implications of cartel conduct. The discussion is limited to those general aspects of morality which are relevant to this thesis. It is beyond the scope of this thesis to exhaustively define morality and to identify the most appropriate moral epistemological frameworks that might be applied to resolve the moral debate about cartel conduct. No attempt is made to evaluate and pass judgment on the extent to which commentators to date have been explicit or implicit with their moral deliberations, nor to reconcile the potentially conflicting approaches that may be taken. The principal aim of this part is to identify the essential conceptual foundations of morality that will facilitate a better understanding of: (1) how cartel conduct may be *conceived* to be morally wrong; and (2) the processes by which members of the community would come to *perceive* cartel conduct to be morally wrong.

A *What is Morality?*

The notion of 'morality' refers to an informal public code of conduct put forward by all rational persons of a society or group of human beings with the lessening of evil or harm as its essential goal.[3] It is a broad body of norms, sometimes referred to as a 'moral code', designed to govern and guide individuals' behaviour towards one another in the course of their everyday activities. Morality fosters individual human beings living together in peace and harmony.[4] It is the embodiment of what the community considers to be the objective conditions that make up good social tradition and which facilitate our survival and productive lives.[5] Individuals who act in accordance with the moral code behave in a manner that is deemed to be morally 'desirable', 'right' or 'good'.[6]

The corollary concept of 'immorality' is inextricably linked to morality. It refers to conduct on the part of an individual that positively violates, or is otherwise inconsistent with, the kinds of morally right behaviour promoted by the moral code. Such individuals are said to act in breach of the moral code and are deemed to have behaved in a manner

[3] Bernard Gert, *Morality: Its Nature and Justification* (Oxford University Press, 2005) 14.
[4] Ibid, 3-14.
[5] Robin Allott, 'Objective Morality' (1991) 14 Journal of Social and Biological Structures 455, 457; John Kekes, *Moral Tradition and Individuality* (Princeton University Press, 1989) 3-11; John Scott, *Internalization of Norms: A Sociological Theory of Moral Commitment* (Prentice-Hall, 1971) 35.
[6] See generally the discussion in Gert, above n 3, 309-37, concerning language that is used by people when making moral judgments. See also Allott, above n 5, 456.

that is morally 'undesirable', 'wrong', 'bad' or 'evil' for having done so.[7]

As applied to the subject matter of this thesis, the two related concepts of morality and immorality would oblige consideration of two related questions: (1) When businesses are *acting competitively* with one another in the market, are they conducting themselves in a manner that is *morally right*?; and (2) When businesses are *engaging in cartel conduct*, are they conducting themselves in a manner that is *morally wrong*?

1 *Descriptive vs. Normative Notions*

Morality as a notion may be used in both a *descriptive* and a *normative* sense when considered in relation to specified human conduct.[8] When used descriptively, morality refers to a code of conduct that a society has actually put forward and accepted as the code governing the behaviour of individual members of that society.[9] An individual member of the group who acts in contravention of the moral code behaves immorally, irrespective of their personal beliefs about whether a particular rule should be part of the moral code. It is what the community, as a collective, thinks that matters. From the social scientist's perspective, morality in this respect is used non-judgmentally – hence, 'descriptively'. This descriptive sense of morality is typically used when making 'external' observations about a society and determining whether certain specified conduct has been accepted by that society as being either morally right or wrong. The question posed in such contexts, expressed generally, is '*Does this society accept this conduct to be morally right or wrong?*'. The specific questions to be posed when considering cartel conduct may be expressed as follows: (1) Does Australian society accept that businesses are under a moral obligation to act competitively? (2) Does Australian society accept that it is morally wrong to engage in cartel conduct?

When used normatively, morality refers to the code of conduct that *would* (ie, 'ought to') be put forward by all rational persons. In the context of discussing individual behaviour within a society, a normative reference to morality entails a judgment about what

[7] Gert, above n 3, 309-37; Allott, above n 5, 456.

[8] See generally Bernard Gert and Joshua Gert, 'The Definition of Morality', *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N Zalta (ed), URL = <https://plato.stanford.edu/archives/fall2017/entries/morality-definition/> (accessed 15 September 2018).

[9] Ibid.

individuals should be doing (or not be doing, as the case may be) to adhere to the moral code. An answer to the question, *'Is this conduct morally right or wrong?'*, when posed within a normative analytical framework, does not depend on the individual moral perspectives of the members of the society. It is immaterial that one or more individual members, or perhaps even a majority of members, may not have accepted a particular rule as part of their moral code. The relevant perspective is that of the observer posing the question, who is attempting to rationalise why the observed conduct ought to be regarded as either morally right or wrong. In relation to the issue of cartel conduct, the relevant questions may be expressed normatively as follows: (1) Should businesses be regarded as being under a moral obligation to act competitively? (2) Should it be regarded as morally wrong for businesses to engage in cartel conduct?

These two different senses of morality – descriptive and normative – are not mutually exclusive, nor interdependent with respect to their real-world application. The application of one or both notions may be considered in relation to the same specified kind of conduct with potentially similar or different outcomes reached in each moral evaluation. For example, the moral obligation that a person ought not to kill other people may be reasoned to be morally wrong on a normative basis. It may also be found to be wrong on a descriptive basis because the particular society concerned actually accepts that it is wrong to kill people. On the other hand, female circumcision may be reasoned to be morally wrong on a normative basis, yet a particular society may view it to be a perfectly acceptable social practice.[10] In a similar vein, cartel conduct may be reasoned to be morally wrong on a normative basis, yet the Australian community may not have adopted that same actual perspective. The ultimate conclusions reached as to the normative and descriptive moral statuses of given conduct are therefore variable.

2 *Which Notion is Relevant?*

The distinction between normative and descriptive notions of morality roughly corresponds with the distinction that has been made between moral conception and perception in this thesis. When a person *conceives* cartel conduct to be morally wrong,

[10] See the discussion concerning the conflict of moral perspectives about female circumcision/genital mutilation in Brian Earp, 'Between Moral Relativism and Moral Hypocrisy: Reframing the Debate on "FGM"' (2016) 26 Kennedy Institute of Ethics Journal 105.

that person has rationalised how cartel conduct is wrong on a normative basis. Hence, 'moral conception', as the expression is used in this thesis, implicitly incorporates a normative sense of morality. On the other hand, when a person *perceives* cartel conduct to be morally wrong, that person actually understands and accepts cartel conduct as being wrong. Accordingly, the expression 'moral perception' implicitly incorporates a descriptive sense of morality.

Few commentators have drawn the distinction, whether explicitly or implicitly, between conceiving the theoretical wrongfulness of cartel conduct and the actuality of perceiving it as such. The distinction between normative and descriptive notions of morality is therefore not often made. This has sometimes resulted in expressed points of view being unclear because of the imprecise language commentators have chosen to use. For example, the statement 'cartel conduct is *not* morally wrong' may be interpreted in several ways. It could mean any of the following: (1) the commentator personally does not accept that cartel conduct is morally wrong (with no view being expressed as to what the Australian community actually thinks, or what others ought to believe); (2) the commentator believes that the Australian community has not accepted that cartel conduct is morally wrong (with no view being expressed as to whether the Australian community ought to hold that perspective, or whether the commentator personally holds that perspective); (3) the commentator believes that cartel conduct ought not to be regarded as morally wrong (with no view expressed as to what others in the community actually perceive about the morality of cartel conduct); or (4) the commentator believes that the Australian community has not accepted that cartel conduct is morally wrong *and* that is the perspective that it ought to hold. Any such ambiguity may resolve itself once the commentator makes further observations that implicitly disclose either a normative or descriptive framework of analysis. However, in many instances the commentator's expressed opinion remains vague insofar as what exactly is intended to be meant by 'morality', leaving the point about the moral implications of cartel conduct unclear.

This thesis aims to be more explicit in drawing the distinction. Attention has already been drawn to the empirical data that has been gathered to date about the moral perceptions of

ordinary members of the Australian community in relation to cartel conduct.[11] If one's ultimate aim is to prove that the Australian community actually perceives cartel conduct to be morally wrong (i.e. that cartel conduct is, *descriptively*, immoral) the data does not support that proposition. At best, the evidence demonstrates that the perspective of the Australian community, as a collective, is equivocal on the issue. At worst, it suggests that the Australian community does not accept that cartel conduct is morally wrong. Accordingly, when morality is used descriptively, it is reasonable to conclude that there is no clear evidence demonstrating that cartel conduct is morally wrong in Australia.

This conclusion does not prevent a normative analytical framework being adopted to argue that the Australian community *ought to* regard cartel conduct as being morally wrong. Some of these normative arguments are outlined in Part IV below. Assuming that one or more of these normative arguments is intellectually sustainable, there would remain an obvious discrepancy between moral theory and Australia's social reality that will need to be explained. Whatever the merit in the theoretical conceptions of cartel conduct as a normative moral wrong, why does the Australian community fail to perceive it as such? This is a critical question that this thesis seeks to answer.

B *What Makes Conduct Morally Right or Wrong?*

Normative and descriptive senses of morality underpin the many methods that may be employed for determining whether certain conduct is morally right or wrong. Some methods may be seen as complimentary to one another (or, at the very least, not philosophically incompatible) whereas others may be seen as mutually exclusive or diametrically opposed. Those methods that appear to have been drawn upon in the moral debates about cartel conduct are briefly explained below.

1 *Relativism*

Although there is merit to found in the claim that there are certain 'universal' moral truths applicable to all human societies,[12] determining whether certain conduct is morally right

[11] See above Chapter 1 Part IV(B).
[12] See the discussion concerning universal moral norms below Part II(B)(4).

or wrong is usually approached on a *relative* basis.[13] Moral determinations are made relative to some standard or framework that has been adopted by a society, this standard itself containing value-laden assumptions.[14] As this thesis is concerned with Australian society's perception of the moral wrongfulness of cartel conduct, it is appropriate that morality is used on a relativistic basis. Accordingly, when considering the moral implications of cartel conduct, an assessment must be made on the basis of the commonly accepted standards entrenched within the Australian community. In particular, regard must be had to the values that underpin a western secular liberal democracy.[15]

A relativistic approach to morality would appear to have been assumed in most, if not all, discussions to date concerning the morality of cartel conduct in Australia and in other western liberal democracies. Private enterprise and competition between businesses are critical features of a free market, and it is with these aspects of Australian society in mind that a claim of cartel conduct being morally wrong must be made. It would be an exercise in futility to argue that cartel conduct is a universal moral wrong across all human cultures. The choice of economic system varies between societies, geographically and historically. Command-based economic systems, such as socialism and communism, do not embrace private enterprise and competition as the most effective means to achieve a fair distribution of economic resources. In societies that adopt those other kinds of economic systems, the argument that cartel conduct is morally wrong may not be able to be advanced very far at all. For example, those member nations of the Organization of the Petroleum Exporting Countries ('OPEC') are unlikely to entertain the argument that cartel conduct is morally wrong. OPEC is regarded as a 'text book' example of an international cartel because its members, sovereign states, co-operate to regulate the supply and price of oil that their countries collectively produce.[16] A successful argument that cartel conduct is morally wrong depends on the assumption that the free market is the economic system chosen to achieve a fair distribution of resources amongst its

[13] See generally Neil Levy, *Moral Relativism: A Short Introduction* (Oneworld, 2002). See also Allot, above n 5, 456; Hugh Mackay, *Right and Wrong* (Hodder Headline Australia, 2005) 23.

[14] Levy, above n 13. See also Allott, above n 5.

[15] As Mackay, above n 13, 23 notes: '[T]he idea of morality being a *relative* thing has been widely accepted as an inherent feature of any liberal, secular society.'

[16] See, generally, Bassam Fattouh and Anupama Sen, 'The Past, Present, and Future Role of OPEC' in Thijs Van de Graaf, Benjamin Sovacool, Arunabha Ghosh, Florian Kern and Michael Klare (eds), *The Palgrave Handbook of the International Political Economy of Energy* (Palgrave Macmillan, 2016) 73-95.

individual members.[17] That assumption is adopted in this thesis.

2 *Classical Moral Philosophy*

Moral philosophers often distinguish between *consequentialist* and *deontological* normative theories of morality.[18] The application of both kinds of normative frameworks have been considered in relation to cartel conduct.[19] Moral consequentialists maintain that the morality of individual acts and intentions depends on the ultimate result, or *consequences*, of those acts and intentions.[20] Conduct which generates more good than harm for society would be regarded as morally right, whereas conduct generating more harm than good is regarded as morally wrong.[21] In relation to cartel conduct, the relevant question expressed in consequentialist terms would be, *'Does the sum total of harmful consequences arising out of cartel conduct exceed the sum total of benefits?'*

Moral deontologists, by contrast, do not focus on the consequences of actions in determining their morality. They instead turn their attention to the intrinsic nature of the actions themselves and the intentions of the individuals responsible for those actions.[22] Individual members of society are said to owe one another moral 'duties', the precise content of which is determined on a reasoned and principled basis.[23] If the question, *'Would I want all businesses in this situation to act competitively and refrain from cartel conduct?'* is answered affirmatively, arguably we each have a moral duty to refrain from engaging in cartel conduct.

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[17] This assumption is evidently adopted by some of the most thoroughly considered expositions on the morality of cartel conduct. See for example Wardhaugh, above n 1, 18.

[18] See generally Walter Sinnott-Armstrong, 'Consequentialism', *The Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), Edward Zalta (ed), URL = <https://plato.stanford.edu/archives/win2015/entries/consequentialism/> (accessed 15 September 2018); Larry Alexander and Michael Moore, 'Deontological Ethics', *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward Zalta (ed), URL = <https://plato.stanford.edu/archives/win2016/entries/ethics-deontological/> (accessed 15 September 2018).

[19] For a deontological (social contractarian) account of the immorality of cartel conduct see Wardhaugh, above n 1. For a consequentialist (utilitarian) account see Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 Law and Society Review 591, 604 n 14 (and accompanying text).

[20] See generally Sinnott-Armstrong, above n 18.

[21] Ibid.

[22] See generally Alexander and Moore, above n 18.

[23] See generally Jens Timmermann, *Kant's 'Groundwork of the Metaphysics of Morals': A Critical Guide* (Cambridge University Press, 2009) 21-62.

Moral *sentimentalism* is another branch of classical moral philosophy that has considered how the morality of human conduct can be discerned from the emotional responses generated by it.[24] Conduct that is morally right tends to generate positive emotional responses in both the individual who performed the act and in those who may be apprised of it. The morally virtuous individual may feel a sense of altruism, benevolence or perhaps some small degree of self-satisfaction for having performed a morally good act.[25] Others in the community may have corresponding feelings of pride, affection or admiration that are directed towards the individual upon becoming aware of the good deed. They may also express their praise and perhaps even bestow a reward on the individual.[26] By contrast, conduct that is morally wrong generates negative sentiments. A moral wrong-doer will feel guilty or ashamed for having violated the moral code, while others in the community may feel indignant, outraged and perhaps even hostile towards the wrong-doer.[27] The moral wrong-doer will be blamed for their wrong-doing and may be held accountable by incurring some form of community punishment.[28]

Moral sentimentalism is premised on the existence of human psychology and the innate ability of human beings to empathise with the experiences of others.[29] When we are made aware of situations of conduct, our immediate reaction is often constituted by the manifestation of emotions and feelings in the mind.[30] The presence of positive feelings may then lead us to approve of the conduct. The presence of negative feelings may lead us to disapprove of the conduct. Alternatively, no emotions may manifest at all, which may in turn indicate the absence of any moral content in the conduct altogether. Moral sentimentalism is also often associated with descriptive rather than normative notions of

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[24] See generally Shaun Nichols, *Sentimental Rules: On the Natural Foundations of Moral Judgment* (Oxford University Press, 2004). See also Stuart P Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 Emory Law Journal 1533, 1594.

[25] Nichols, above n 24, 30-64.

[26] Gert, above n 3, 320; William Damon, *The Moral Child: Nurturing Children's Natural Moral Growth* (The Free Press, 1988) 13-30; R Jay Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press, 1994) 18-53.

[27] Nichols, above n 24, 3-29, 83; Gert, above n 3, 322; Damon, above n 26; Wallace, above n 26.

[28] Gert, above n 3, 322-4; Damon, above n 26; Wallace, above n 26

[29] See generally Antti Kauppinen, 'Moral Sentimentalism', *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward Zalta (ed), URL = <https://plato.stanford.edu/archives/spr2017/entries/moral-sentimentalism/> (accessed 15 September 2018).

[30] Ibid.

morality because the inception of the moral analysis commences with the identification of actual positive or negative emotional responses to observed conduct.[31] However, moral sentimentalists consider that the existence of emotive responses to human conduct stem from moral principles that may be identified through conscious and considered reasoning processes. They are inclined to rationalise the existence of positive or negative emotional responses on the basis of normative moral principles derived from divine providence or secular rational thought processes.[32] The rationalised normative principles and the moral sentiments both explain the morality of a situation and are associated with one another.[33] For example, the negative feelings of moral outrage that tend to manifest in an observer when presented with a situation of murder is consistent with the normative notion that *'one ought not to kill'*. It is a case of the theoretical conception of moral wrong-doing coinciding with actual social perceptions of wrong-doing.[34] The community outrage generated by acts of murder demonstrates that the community clearly sees the evil which the normative rule stipulates. In this respect, moral sentimentalism bridges the gap between normative and descriptive frameworks.

There are, however, instances of normative moral theory being applied to produce conceptions of moral wrong-doing, yet a corresponding moral perception of wrong-doing is not apparent or, at best, the negative sentiments may only be slight. Cartel conduct would seem to be a case in point. When an ordinary person is presented with a situation of cartel conduct, it may arouse no negative emotional response at all. If the normative moral theorist takes the view that cartel conduct is wrong, how might the sentimentalist reconcile the discrepancy between the conceptual theory and an apathetic emotional perception? Nowadays, moral learning theorists would draw attention to the possibility that the absence of a negative emotional response may be due to an individual, or indeed society as a whole, having yet to 'learn' about the moral impropriety of the impugned conduct.[35] That is certainly the explanation contemplated and advanced in this thesis in relation to cartel conduct.

[31] Ibid.
[32] See generally Kauppinen, above n 29.
[33] See generally Nichols, above n 24, 3-29, 83-96.
[34] See below Part III, regarding sociological explanations concerning the internalisation of moral norms.
[35] Ibid.

3 *Intuitionism*

Like sentimentalists, moral intuitionists take the view that the existence of emotional responses in human beings is a primary indicator of moral judgments being made.[36] However, unlike sentimentalists, the moral intuitionist does not leave any room for the argument that these emotional responses are traceable to a higher level of moral reasoning or divine providence. Moral judgments are essentially 'gut reactions' to situations of human conduct that are presented to us.[37] If we flinch or feel outraged or disgusted when presented with a scenario of alleged wrong-doing, that reaction is taken to be a reliable indicator of the degree of moral wrongfulness of the conduct. Jonathan Haidt suggests that every human being has an inbuilt 'like-o-metre', a throwback from human evolutionary development that has survived the passage of time.[38] The like-o-metre permits affective responses to be generated very quickly so that the individual can then immediately gauge the most appropriate course of action in response to a situation.[39] The individual will either 'like' the situation or not, an immediate and instinctive assessment which is essentially a moral judgment.

Haidt's approach to morality is somewhat Darwinian because it likens human moral instincts to the instincts that all creatures have in the animal kingdom.[40] Morality is approached on the basis that moral judgments are produced by human biological processes in response to environmental stimuli. However, an objective scientific mindset, or a firm belief in Darwin's theory of evolution, are not pre-requisites for adopting an intuitionist's approach. Hugh McKay, for example, simply refers to moral values as 'the

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[36] See generally Jesse Graham et al, 'Mapping the Moral Domain' (2011) 101(2) Journal of Personality and Social Psychology 366; Thalia Wheatley and Jonathan Haidt, 'Hypnotic Disgust Makes Judgments More Severe' (2005) 16 Psychological Science 781; Jonathan Haidt, 'Moral psychology for the twenty-first century' (2013) 42 Journal of Moral Education 281; Joshua Greene and Jonathan Haidt, 'How (and where) does moral judgment work?' (2002) 6 Trends in Cognitive Sciences 517; Jorge Moll, Ricardo de Oliveira-Souza and Paul Eslinger, 'Morals and the human brain: a working model' (2003) 14 NeuroReport 299.

[37] Wheatley and Haidt, above n 36, 780-3; Moll, de Oliveira-Souza and Eslinger, above n 36.

[38] Jonathan Haidt, *The Happiness Hypothesis: Putting Ancient Wisdom to the Test of Modern Science* (Random House, 2006) 26. See also Jonathan Haidt and Fredrik Bjorklund, 'Social Intuitionists Answer Six Questions About Morality' in Walter Sinnott-Armstrong (ed), *Moral Psychology* (MIT Press, 2007) 181, 186–7.

[39] Haidt, *The Happiness Hypothesis: Putting Ancient Wisdom to the Test of Modern Science*, above n 38; Haidt and Bjorklun, above n 38.

[40] See in particular Haidt's use of the 'elephant' metaphor in Haidt, *The Happiness Hypothesis: Putting Ancient Wisdom to the Test of Modern Science*, above n 38, 26.

ideals we aspire to, the beliefs to which we attach particular significance, the essence of our desire …. like signposts pointing to the meaning we give our lives'.[41] Morality is thought to be something that is just 'there', with morally good and bad behaviour capable of being identified as soon as it is encountered.

Whether one prefers to draw upon 'gut feelings', the in-built human 'like-o-metre', or metaphorical 'signposts' as the means by which to gauge the morality of certain conduct, common amongst all intuitionists is the descriptive and reductionist approach they take to morality. Rational explanations as to why individuals may feel that certain behaviour is morally right or wrong are not accommodated by the intuitionist because they are deemed irrelevant. Normative philosophical approaches to the moral evaluation of conduct are seen to produce artificial 'external justifications' for the basal moral instincts that all ordinary individuals have.[42] The intuitionist argues that nobody needs to be a moral philosopher or criminal legal theorist to judge what is right and wrong in the world, because we have all been pre-programmed with an innate ability to do so.

The intuitionist's approach to morality is practically accessible to everyone, and not just to the intellectual elite. When presented with a situation of conduct and asked to reflect upon its moral implications, an individual need only draw upon their own intuitions to make an assessment. Arguably this is exactly what most people do as a matter of course when making judgments about everyday life events. For example, moral intuition may be all that is needed for an individual to appreciate that an act of killing, stealing or lying is morally wrong and ought to be punished. For those individuals disinclined to engage in the 'elite debates' enjoyed by moral philosophers and legal scholars, having their intuitive assessment supplemented with a considered philosophical explanation of the wrong-doing would serve no practical purpose. An intuitive approach to morality is likely to serve the community reasonably well as a reliable means of determining the morality of most situations.

The limitations of the intuitionist's approach become apparent when dealing with situations that do not involve an application of relatively straightforward or universally

[41] Mackay, above n 13, 20.

[42] Wheatley and Haidt, above n 36, 783; Haidt, 'Moral psychology for the twenty-first century', above n 36, 286-9.

accepted moral norms.[43] While intuitions may suffice for appreciating the moral wrongfulness of killing, stealing and lying, they may be of little assistance when attempting to evaluate more socially complex conduct that is uncommon and about which the community as a whole may have a limited understanding. Cartel conduct and other types of white collar offences fall into this category. The difficulty with relying exclusively on intuitions for assessing the morality of such conduct is perhaps aptly demonstrated by the results of the surveys conducted in Australia and the United Kingdom which gauged public attitudes towards cartel conduct.[44] When presented with situations of price-fixing and other cartel conduct scenarios, most survey respondents did not think that individuals who engaged in such conduct were 'criminals' who ought to be sent to prison.[45] Situations of theft and fraud were, evidently, much clearer cases of criminal wrong-doing.[46] Presumably that is because the ordinary person's moral intuitions tend to generate a strong aversion towards theft and fraud, but for cartel conduct negative emotions may barely be triggered at all. The end result is that the average person, and society as a whole, may be in a state of moral apathy towards cartel conduct. For the moral intuitionist, that is where the moral inquiry is likely to end – cartel conduct is apparently not morally wrong. Yet for others, particularly those who view morality as a product of social learning rather than biological programming, that is where a very interesting inquiry just begins. The discrepancy between the conception of moral wrong-doing and lack of perception must be explained.[47]

4 *Universal Norms*

Whatever moral epistemological framework one adopts, there is a general consensus that there are some moral norms which are applicable to everyone across all human cultures and civilisations. These are sometimes referred to as *universal* moral rules, norms or values.[48] The most general universal moral rule is known as 'The Golden Rule' which is

[43] Universal moral norms are considered below Part II(B)(4).
[44] The relevant results of these surveys were introduced above Chapter 1 Part IV(B).
[45] Ibid.
[46] Ibid.
[47] See below Part III, concerning the internalisation processes that are suggested as being necessary for an individual, and a society, to come to accept certain conduct as being morally wrong.
[48] Richard Kinnier, Jerry Kernes and Therese Dautheribes, 'A Short List of Universal Moral Values' (2000) 45 Counselling and Values 4; Gert, above n 3, 112; Kent Keith, *Morality and Morale: A Business Tale* (Terrace Press, 2012).

often expressed simply as '*Do unto others as you would have them do unto you.*'[49] The Golden Rule rests at the apex of the hierarchy of all moral rules from which all other more specific universal rules derive. Many of these rules are expressed as prohibitions against harmful conduct, with a corresponding positive obligation being implicit in each negatively-expressed rule. They include the following:[50]

- *'Do not kill (respect life).'*
- *'Do not cause pain* (*respect bodily integrity*).'
- *'Do not cheat (adhere to rules and be fair).'*
- *'Do not break promises (keep promises).'*
- *'Do not lie (speak truthfully).'*
- *'Do not deceive (be honest).'*
- *'Do not steal (respect property).'*
- *'Do not break the law (obey the law).'*
- *'Do not deprive of freedom (respect liberty).'*

Many of these universal norms are enshrined in domestic[51] and international[52] criminal laws and other laws designed to protect fundamental human rights and freedoms. Because these moral norms are universally accepted, there is no controversy about their moral content. Whatever moral framework is adopted – normative or descriptive, consequentialist or deontological, sentimentalist or intuitionist – the ultimate conclusion

[49] Kinnier, Kernes and Dautheribes, above n 48, 5.

[50] The list here contains a sample of universal norms and is not intended to be exhaustive. Not everyone agrees on how exactly each of these universal norms should be expressed (the wording differs between commentators). However, the rules expressed here are some that have been included in the lists of universal rules in the following sources: Gert, above n 3, 112; Bernard Gert, *Common Morality: Deciding What to Do* (Oxford University Press, 2004) 20; Keith, above n 48; Kinnier, Kernes and Dautheribes, above n 48; Stuart P Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006).

[51] See for example the offence provisions contained in Australia's *Crimes Act 1914* (Cth), *Criminal Code Act 1995* (Cth), *Crimes Act 1900* (NSW), *Crimes Act 1958* (Vic), *Criminal Code Act 1899* (Qld), *Criminal Law Consolidation Act 1935* (SA), *Criminal Code Act 1924* (Tas), and *Criminal Code Compilation Act 1913* (WA), federal and state legislation that prescribes punitive sanctions against individuals who offend against others' physical or mental well-being, personal property, and for violations of other fundamental community standards.

[52] See for example the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), an international treaty designed to ensure all human beings have certain fundamental rights and freedoms wherever they live; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, an international treaty designed to provide innocent victims of war with minimum standards of humane treatment.

that they are *moral* norms is the same. Considered explanations are unnecessary. A reconciliation of the conflicts between each of the competing moral epistemological frameworks employed to reach the same conclusion would also be an entirely academic exercise.

It is not suggested that refraining from cartel conduct, or acting competitively in the marketplace, are obligations which appear in any authoritative list of universal moral norms. However, when an attempt is made to liken cartel conduct to one or more moral norms that do appear in such lists, the significance of universal norms for the purposes of this thesis becomes clear. Compelling arguments may be but forward that cartel conduct is morally wrong by employing a framework of analysis founded on analogical reasoning. This kind of argument is explained in the next section below.

5 *Analogy*

Moral reasoning by *analogy* involves examining specified conduct the moral status of which appears uncertain (the 'questionably' immoral conduct), and then comparing it to another kind of conduct which is well accepted as being immoral. If, upon completion of the comparative analysis, the morally salient features of each kind of conduct appear to be very similar, the moral uncertainty that existed in relation to the questionably immoral conduct is arguably resolved. The conduct is reasoned to be morally wrong because it is so similar to another kind of conduct already established as being morally wrong.[53]

Stuart Green argued that an analogical approach to assessing the moral wrongfulness of conduct is particularly useful when considering white collar offending.[54] Green acknowledged that the moral wrongfulness of conduct proscribed by such offences is often difficult to perceive. There is 'genuine doubt' amongst the legal profession, academics, the media and ordinary people that such conduct is morally wrong.[55] This 'moral ambiguity', he suggests, is a major point of distinction between white collar offending and 'core' cases of crime such as theft and murder – the wrongfulness of core

[53] See, generally, Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, above n 50.
[54] Ibid 1.
[55] Ibid 1, 24-9.

crimes is never in doubt.[56] Nonetheless, Green proposed that any moral uncertainty surrounding any particular white collar offence is capable of being resolved by applying an analogical framework.

Green identified a number of universal norms, or what he refers to as 'everyday … powerful norms', which he argued can be used as reference points for gauging the wrongfulness of the kinds of socially complex behaviour proscribed by many modern day white collar offences.[57] Included in his list of norms are the norms against *cheating*, *stealing*, *deception*, *promise-breaking*, *disloyalty* and *exploitation*.[58] Green argued that these norms inform and shape the foundations of many white collar offences.[59] When properly understood and their constituent elements articulated, one or more of these everyday norms may be applied to the specific kind of conduct proscribed by a white collar offence for the purposes of assessing the latter's moral content.[60] The end result may reveal that the white collar offence is much more akin to the violation of an everyday moral norm than had previously been thought. Any difficulty in perceiving the moral wrong-doing associated with the white collar offence may then be more readily overcome.

This analogical approach has wide-ranging appeal. As Green explained:[61]

> [A]lmost every civilized person will have some rudimentary understanding that it is morally wrong, at least in certain core cases, to lie, cheat, steal, coerce, exploit, break promises, and the like. … Even people who have never had occasion to read a single page of moral philosophy are capable of making remarkably fine-grained distinctions about, say, what properly constitutes cheating or stealing.

That everyone has 'some rudimentary understanding' of everyday moral norms and is capable of 'making remarkably fine-grained distinctions' about them resonates with the intuitionist's approach to the assessment of the morality that was outlined above.[62] However, unlike intuitionists, moral analogists do not rest their laurels on the manifestation of immediate gut reactions in response to situations of conduct. The need

[56] Ibid 1.
[57] Ibid.
[58] Ibid 53-128.
[59] Ibid 45.
[60] Ibid.
[61] Ibid.
[62] See above Part II(B)(3).

to compare and contrast an everyday norm with a white collar offence, in order to identify their objective similarities, necessarily involves some degree of rational analysis. But it is still a relatively straightforward approach, certainly when it is compared to the complicated kind of analysis that might be applied by a moral philosopher. The approach is designed to make the moral assessment of white collar crime accessible to everyone. If, for example, the offence of tax avoidance can be explained simply in terms of 'stealing', the moral impropriety of tax avoidance will be plain for all to see.

The analogical approach to morality is also likely to appeal to legal academics and practitioners. The doctrine of *stare decisis*, or 'precedent', is a cornerstone feature of legal systems which are based on the English common law.[63] The doctrine declares that cases must be decided the same way when their material facts are the same.[64] It is a fundamental aspect of legal practice that results in lawyers adopting a professional habit of comparing new factual scenarios that present themselves with the facts of previously decided court cases. Lawyers are effectively 'forced' to engage in analogical reasoning on a daily basis because it allows them to anticipate how a novel factual scenario is most likely to be decided were it to go to court.[65] Determining whether a certain kind of conduct is immoral by analogical reasoning involves the same analytical method, save that the process is applied to reach a conclusion concerning the morality of the conduct as opposed to its legality. It is therefore perhaps not surprising that many commentators with legal backgrounds have applied analogical reasoning to determine whether cartel conduct is morally wrong. Specifically, consideration has been given to whether cartel conduct is morally analogous to cheating, stealing, deceit and fraud, with a variety of different conclusions being reached.[66]

Moral reasoning by analogy has drawbacks that are borne out by a problem inherent in all exercises in analogical reasoning. While many similarities may be identified when comparing an established moral norm with a novel form of conduct, there will also be

[63] Glanville Williams, *Learning the Law* (Stevens & Sons, 9th ed, 1973) 67-8.
[64] Ibid.
[65] See generally the discussion in Norbert Paulo, *The Confluence of Philosophy and Law in Applied Ethics* (Palgrave Macmillan, 2016) 61-4.
[66] See below Part V(A)(3), V(A)(4) and V(A)(5).

points of distinction.[67] And so the analogy eventually ends. One is then obliged to consider whether the points of distinction between the two kinds of conduct might explain why one is regarded as clearly immoral and the other is not. This issue certainly arises when considering the extent to which cartel conduct may be likened to theft, fraud and deceit.[68] The argument that cartel conduct may be morally wrong by analogy may then lose its force.

C *Moral Responsibility*

The application of morality is unique to human beings.[69] Moral rules have no application to non-human entities such as animals, artificially-intelligent machines, or metaphysical entities such as corporations that may be legally distinct from the individual human beings controlling them.[70] That is because human beings, unlike anything else in the world, have an incomparable ability to think about their conduct and foresee the possible consequences arising from it. They have a unique ability to assimilate a host of variables while engaging rational thought processes to make a qualitative assessment as to whether a proposed course of conduct is right or wrong.[71] As such, human beings are often referred to as 'moral agents'.

As moral agents, individuals will be judged by others in the community by the extent to which they adhere to the moral code. When an individual engages in conduct that would ordinarily be regarded as a breach of the code, the individual has behaved wrongfully and will be held morally responsible for the violation.[72] The level of responsibility is typically reflected by the mechanisms of moral censure that society imposes against the individual, such as the chosen form of punishment.

When assessing moral responsibility, several assumptions are usually made about individuals in their capacity as moral agents. Individuals are assumed to be rational in

[67] See generally Paulo, above n 65, 101-3.
[68] See discussion below Part V(A)(3), V(A)(4) and V(A)(5).
[69] Gert, *Common Morality: Deciding What to Do*, above n 50, 10-11.
[70] Ibid. See however the relatively recent arguments concerning 'corporate moral responsibility' in James Dempsey, 'Corporations and Non-Agential Moral Responsibility' (2013) 30 Journal of Applied Philosophy 334.
[71] Gert, *Common Morality: Deciding What to Do*, above n 50, 87-92.
[72] Gert, *Morality: Its Nature and Justification*, above n 3, 322.

conducting themselves as members of society.[73] They should know and understand what the moral code requires and prohibits, and that the community expects them to behave in accordance with it.[74] Individuals are also assumed to have 'free will' and to act autonomously. When they conduct themselves in a particular way on a particular occasion, it is reasonable to infer that they have chosen to act deliberately and intentionally.[75] Individuals will also know the immediate and short-term consequences of most of their actions, including any foreseeable harm that might be caused to others.[76] They also know that other members of the community are potentially vulnerable to harm by their own actions and that everyone would rather avoid such harm.[77]

These assumptions significantly inform the process of making a moral judgment. In circumstances where individuals cause harm to others, have done so deliberately, and with full knowledge that their conduct would be harmful and in violation of the moral code, a high level of moral responsibility attaches.[78] Moral judgment against such individuals will be very harsh. Conversely, where individuals could not have known their conduct is wrong or that harm would be caused, their moral responsibility will be significantly reduced or perhaps extinguished altogether.[79] A critical aspect of moral judgement involves assessing the state of mind of the alleged moral wrong-doers, with particular attention given to the awareness they have of their actions causing harm and being wrong. It should also be noted that there is a significant overlap between factors that bear upon *moral* responsibility and *legal* responsibility, particularly within the context of the criminal law.[80] However, a critical distinction that may be drawn between the two is that, whereas ignorance of a rule will have no bearing on an individual's legal liability, it may still diminish their moral culpability.[81]

An inquiry into the moral responsibility of individuals who have engaged in cartel conduct would therefore require the following questions to be considered: (1) To what

[73] Gert, *Common Morality: Deciding What to Do*, above n 50, 91
[74] Ibid.
[75] Gert, *Common Morality: Deciding What to Do*, above n 50, 87-8. See also Scott, above n 5, 36-7.
[76] Gert, *Common Morality: Deciding What to Do*, above n 50, 87-8.
[77] Ibid 88-9.
[78] Ibid 20-1.
[79] Ibid 10-11; Gert, *Morality: Its Nature and Justification*, above n 3, 25-6.
[80] See discussion below Part IV(B).
[81] Gert, *Morality: Its Nature and Justification*, above n 3, 161, 362.

extent did each individual turn his or her mind to entering into and giving effect to the cartel agreement?; (2) To what extent was each individual aware of the economic harm that would be caused by the cartel agreement, and in particular by way of the price overcharge incurred by individual consumers and the dead-weight loss incurred by society as a whole?; and (3) To what extent did each individual consider that their conduct might amount to a violation of a generally accepted norm or practice that obliges independent businesses to compete rather than co-operate with one another? Did they consider that engaging in cartel conduct may be morally wrong? These questions are considered further in Part IV below.

III MORAL LEARNING AND CARTEL CONDUCT

Sociology and social psychology provide insights into the process of how individuals come to recognise certain modes of conduct as being permitted or prohibited by the moral code.[82] Theories of morality advanced by sociologists conflict markedly with those advanced by moral intuitionists. While both schools of thought acknowledge the importance of identifying emotive responses when attempting to discern moral rules, sociologists argue that the manifestation of such feelings is a product of moral learning rather than the result of an inborn ability to distinguish right from wrong. Sociologists suggest that an individual's ability to recognise moral wrong-doing is acquired by 'internalising' moral norms, a complex learning process undertaken by individuals as they are socialised into the community throughout their lives.[83]

The appeal of the sociological approach for present purposes lies in its capacity to account for an apparent 'disconnect' between any normative framework of analysis which seeks to explain the moral wrongfulness of cartel conduct, and prevailing public attitudes that appear not to reflect a moral consensus to the same effect. Sociological approaches have certainly been applied in the past to provide explanatory theories as to why white collar offences, as a general class of crime, are not easily perceived to be morally wrong.[84] These

[82] See generally Scott, above n 5. See also Kevin Durkin, *Developmental Social Psychology* (Blackwell, 1995) 467-503.

[83] Scott, above n 5, 87-126.

[84] See in particular Edwin Sutherland, *White Collar Crime* (Greenwood Press, first published 1949, 1983 ed); Stuart P Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame Journal of

theories will be considered in more detail in Chapter 4 below. For the moment, consideration will be given to some key aspects of moral learning that are likely to be applicable in relation to cartel conduct. It may be that one or more of these aspects of the moral internalisation process has been disrupted. This, in turn, may explain the lack of a moral consensus about it.

A *Distinction between 'Values', 'Norms' and 'Rules'*

The concepts of moral 'value', 'norm' and 'rule' are often used interchangeably.[85] However, subtle differences in their meanings can be identified for the purposes of understanding the sequence of events that leads to community entrenchment of a moral rule. The emergence of a moral *value* commences the process. A moral value is an ideal or belief that manifests in the subjective mind of an individual.[86] It is essentially a specific standard of behaviour. The individual believes that acting consistently with the standard is desirable as a participating member of the community. From the value develops a moral *norm* – an actual habit or practice of acting consistently, and not inconsistently, with the value in certain pre-determined situational contexts. Where a norm exists, most members of the community have adopted the view that everyone ought to behave in conformity with the standard in given circumstances for the good of the community.[87] Positive feelings arising out of compliance with the norm, and negative feelings arising from non-compliance, become a standard response whenever the norm is applicable in a situation.[88] The emergence of a moral norm may then lead to the formal articulation of the *rule* orally or in writing. It may be expressed positively to encourage compliance (e.g. *"X ought to do Y"*), but is more often expressed negatively to discourage non-compliance (e.g. *" X ought not to do Z"*).[89]

For the purposes of this thesis, the relevant moral value may be regarded as the value of

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[85] See discussion in Scott, above n 5, 61.

[86] Ibid 81-3.

[87] Scott, above n 5, 68; See also Judith Blake and Kingsley Davis, 'Norms, Values, and Sanctions' in Robert E L Faris (ed), *Handbook of Modern Sociology* (Rand McNally, 1964) 456; Talcott Parsons, *The Structure of Social Action* (Free Press, 1968) 75.

[88] Scott, above n 5, 56-66.

[89] Scott, above n 5, 68-70.

competition in the marketplace. The relevant norm is the practice of behaving competitively in the marketplace or, if expressed negatively, the practice of refraining from engaging in cartel conduct. The relevant rule may be expressed simply as '*One ought to behave competitively in the marketplace'* or *'One ought not to engage in cartel conduct.'*

B *Conditioning and Reinforcement*

Individuals must be educated about the importance of behaving in a particular way in order for them to incorporate the underling moral value into their own personal belief system and conform to the community's expectations. Psychological literature, from which sociologists have drawn, informs us that moral education is most effectively administered by an individual being socially conditioned to behave in accordance with the standard deemed desirable by the community.[90] Social conditioning typically takes the form of 'reinforcement'.[91] Positive reinforcement occurs when an individual is praised or rewarded for an act of complying with the desired standard by another member of the community.[92] Negative reinforcement occurs when an individual is admonished or punished for an act of non-compliance.[93] An individual's moral commitment is reinforced through their own personal experience of being rewarded and punished for instances of compliance and non-compliance with the standard. It is also reinforced whenever they observe other individuals being rewarded and punished.[94] Repeated and consistent reinforcement over time eventually leads to an individual psychologically 'internalising' the community standard.[95]

Having internalised the standard, the individual's cognitive processes have become extremely adept at recognising what is right and wrong in situations to which the standard applies.[96] Moral judgments are made instantaneously without the individual needing to

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[90] Scott, above n 5, 41-6; B F Skinner, *Science and Human Behavior* (MacMillan, 1953) 59-65.

[91] Scott, above n 5, 45; Kevin Durkin, *Developmental Social Psychology* (Blackwell, 1995) 467-70.

[92] Scott, above n 5, 45-6.

[93] Ibid.

[94] Ibid 55-7.

[95] Ibid 106-10. See also Peter Railton, 'Moral Learning: Conceptual foundations and normative relevance' (2017) 167 Cognition 172, 176-7.

[96] Scott, above n 5, 106-10; Railton, above n 95, 176-7.

engage in a conscious moral rationalisation process before being able to understand whether conduct is right or wrong.[97] The individual relies instead on the positive or negative feelings that are generated in their mind immediately in response to the situation presented. These are the same moral feelings which moral intuitionists suggest operate within us intrinsically.[98] However, these 'intuitive' feelings are not intrinsically generated responses to situations of conduct at all. Rather, they are the end result of a highly complex exercise in moral learning.[99]

Insofar as cartel conduct is concerned, successful completion of the moral learning process would lead an individual to internalising the beliefs that, firstly, competition is morally right and, secondly, that cartel conduct is morally wrong. If a sufficiently large number of individual members of the community have successfully completed that process, one would expect to observe prevailing community attitudes towards cartel conduct reflecting that outcome. Evidently, there is an absence of a prevailing community attitude of that nature in Australia. If that remains the case, questions may then be raised as to the extent to which individual members of the community have been socially conditioned about the moral wrongfulness of cartel conduct. If social conditioning has been attempted, what might explain its ineffectiveness?

C *Moral Learning in a Complex Society*

Effective moral education depends on the efficacy of the social reinforcement mechanisms used to educate individual members of the community about the specific norm concerned.[100] In modern societies, this can be a very complicated social feat. There are many social institutional frameworks regulating the behaviour of individuals and their interactions with one another.[101] They include tangible organisations constituted by actual people such as families and households, schools, churches, and media organisations. They also include political institutions such as government agencies, law enforcement bodies

[97] Scott, above n 5, 106-10; Railton, above n 95, 176-80.

[98] See above Part II(B)(3).

[99] Railton, above n 95, 180.

[100] Joyce Hertzler, *Social Institutions* (McGraw-Hill, 1929) 144-6

[101] See generally ibid 1-14, 140-52.

and the courts, and economic institutions such as the market.[102] There are also the social institutions constituted by delineable sets of social customs or practices that have evolved within society over a long period of time.[103] These include the law, religion, language and culture.[104]

The interrelationships between the various social institutions are complex. Their functions are often mutually dependent and overlapping. So which institutions are likely to assume the responsibility for educating us about the moral wrongfulness of cartel conduct? And how effective can these institutions be if they task of moral education is taken up much later in individuals' lives? These are concerns that underpin the subject matter discussed in Chapters 4 and 5. However, some key aspects of the social conditioning processes and social institutional frameworks that potentially impact any moral learning process associated with cartel conduct are briefly outlined below.

1 *Internalising Norms Later in Life*

It is well accepted by social scientists that learning about morals starts from a very young age.[105] Parents assume the primary responsibility of teaching their children about what is morally right and wrong in the world and continue to do so for many years to come. For example, parents are the first line of defence when we are taught the virtue of telling the truth, and not lying. It is a value that is impressed upon us by many other social institutions in almost all aspects of social life thereafter. However, the moral rules associated with more complex interactions in society must be taught much later in life when individuals have developed a greater cognitive ability to understand the conduct at issue.[106] Conduct proscribed by many white collar offences, including cartel conduct, would fall into this category of later moral learning.

The internalisation of moral norms at a later stage of life is fraught with difficulties.[107]

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[102] Ibid.

[103] Ibid.

[104] Ibid.

[105] Scott, above n 5, 154-69.

[106] Ibid.

[107] See generally ibid 45-56; Anders Schinkel and Doret J de Ruyter, 'Individual Moral Development and Moral Progress' (2017) 20 Ethical Theory and Moral Practice 121, 133-4.

First, the conduct in question is itself likely to be more difficult to understand because many individuals, even as adults, have not been involved with situations in which the conduct has occurred.[108] The concern here lies with the ability of ordinary people to understand what cartel conduct is exactly, how cartel agreements are entered into, and what effect these agreements have on others' lives. Second, fewer social institutions will be equipped with the expertise in the subject matter to deliver moral reinforcement strategies that can effectively educate a morally uninformed public about the conduct. Cartel conduct and its moral implications is not a subject which is taught to children by their parents, school teachers, and most community organisations. The responsibility would need to be assumed by government bodies, professional organisations, academics, higher educational institutions, and the media. Third, there is the added difficulty of individuals being much less impressionable as the subjects of moral reinforcement strategies as adults than they would have been as children.[109] These matters are all likely to have an adverse impact on the public's moral uptake of cartel conduct.

2 *A Complex Network of Norms*

Modern civilisation presents countless social contexts in which individuals interact with one another. A vast network of moral norms has developed to cater for all these interactions. Moral norms and rules exist in 'layers', with the top layer occupied by the most general ideal, *'Do unto others as you would have them do unto you.*'[110] More specific moral rules, and exceptions to these rules, are generated over time to deal with more specific situations. Moral norms do not rank equally and so individuals must be taught to understand which norm is to be given priority in a situation of conflict.[111] For example, the moral norm that compels individuals to keep their promises must be modified to allow for an exception when it conflicts with the moral norm that obliges individuals not to physically harm one another – *'Keep your promises, <u>except</u> when you have promised to kill another.'* If there is confusion or uncertainty surrounding the interaction of various norms and their exceptions in a specified situation, the ability of an individual to

[108] Scott, above n 5, 167.

[109] Scott, above n 5, 68.

[110] Ibid 75-9.

[111] Ibid 79.

internalise a specific norm applicable to a specific situation may be detrimentally affected.

This draws attention to an inevitable difficulty that would be associated with the internalisation of a norm that prohibited cartel conduct. Individuals must de-prioritise a number of other norms so as to give moral primacy to the value of competition. These norms, with the necessary exceptions articulated, may be expressed as follows:

- '*Individual businesses are at liberty to strike a bargain with one another on terms they believe to be mutually beneficial, except where the bargain is in the nature of a cartel agreement.*'
- '*Individual businesses must keep their promises, except where the promise is made to a business competitor within the context of a mutual exchange of promises amounting to a cartel agreement.*'
- '*Individual businesses are at liberty to strike a bargain with consumers on terms they believe to be mutually beneficial, except where the essential terms of the bargain have been pre-determined by the operation of a cartel agreement entered into by the business and one or more of its competitors.*'

The moral reconciliation of these general rules and their respective exceptions designed to account for the prohibition against cartel conduct is a cognitively challenging exercise for any individual. Courts of law have had to grapple with a conflict of this very nature, albeit expressed as a conflict in terms of legal priorities rather than moral priorities.[112] If the conflict is not resolved by individuals internally, it may ultimately impact on their ability to perceive the moral wrongfulness of cartel conduct.

3 *Strength and Consistency in Reinforcement*

Social institutions charged with the responsibility of reinforcing the moral message about cartel conduct will need to deliver that message consistently and with a strong resolve. By doing so, the prospect of a moral norm that prohibits cartel conduct becoming entrenched as part of the community's moral code is significantly increased. The primary means by which social institutions may educate individuals about the morality of conduct is through the use of language.[113] Language is our primary means of communication. It

[112] See below Chapter 5.

[113] Scott, above n 5, 48.

can be used to define cartel conduct and explain why it is wrong, articulate the rules that prohibit it, and admonish those involved in situations of non-compliance with the rules. If such matters are communicated to members of the community regularly and consistently, when they experience their first 'close encounter' with cartel conduct their high levels of moral commitment should permit them to sense the reprehensibility. Perception of the moral wrong-doing should flow much more easily.[114]

There are several social institutions that, because of their expertise or specialised function, are best placed to deliver the moral message about cartel conduct to the community most effectively. They include:

- political and government organisations that are responsible for formulating economic policy and laws relating to the regulation of cartel conduct;
- economists, economic organisations, and scholars in the discipline of economics, all of whom have a high level of knowledge of the intricacies of cartel conduct, its economic implications and the fundamental economic principles at stake;
- legal institutions, including practicing lawyers and government regulators responsible for enforcing the legal prohibitions against cartel conduct, legal academics, the courts, and the law itself; and
- media organisations, which are capable of extracting the essential points about cartel conduct made by other social institutions and then communicating these to the public at large.

The law itself warrants special attention. Individuals are taught from a very young age that compliance with the law is an essential moral requirement. The duty to obey the law is well entrenched in the moral sensibilities of most people by the time they reach adulthood.[115] An effective way to expedite the moral inculcation of other standards of behaviour that are introduced to individuals later in life is to have those standards articulated as formal legal requirements.[116] Accordingly, if cartel conduct is declared to be illegal, the legal prohibition itself continuously operates to reinforce all other messages

[114] Ibid 77.

[115] Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990) 31.

[116] Daniel L Chen and Susan Yeh, 'The Construction of Morals' (2014) 104 Journal of Economic Behavior & Organization 84, 84; Allott, above n 5, 456.

communicated that highlight its wrongfulness.[117] If the further step is taken to make the legally prohibited conduct subject to *criminal* penalties, the moral message sent by policy and law makers is even stronger.

Nevertheless, as an institutional strategy, criminalisation is not the panacea for just any kind of conduct about which the community is thought to be morally uninformed. Care needs to be taken to ensure that the conduct sought to be criminalised bears the essential hallmarks of moral impropriety for which the criminal law is ordinarily reserved, as Part IV elaborates upon below.

IV MORALITY AND CRIME

Morality has traditionally been regarded as underpinning much of the criminal law. Conduct that the law deems criminal is also often seen by the community to be immoral, irrespective of its criminal legal status. The community will see the murderer, robber or thief as each having committed both a moral *and* a legal violation. Moral values will therefore frequently coincide with the legal values underpinning criminal offences. Some important aspects about the special relationship between morality and the criminal law must therefore be explained.

A *Retributive Function of the Criminal Law*

It is well established that there are a variety of legitimate purposes for having criminal laws in a modern society.[118] One essential justification for imposing criminal sanctions against individuals is community retribution for individual wrong-doing.[119] Retributive theories of justice are closely aligned with morality,[120] and they are clearly relevant when considering the immorality of cartel conduct.[121] That is because both morality and the

[117] Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 3rd ed, 1995) 42-4.

[118] See generally Guyora Binder, *Criminal Law* (Oxford University Press, 2016) 1-22, 57-93.

[119] Binder, above n 118, 75-93. See also *Veen v The Queen (No 2)* (1987) 164 CLR 465, 476: 'The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform.'

[120] Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659.

[121] Peter Whelan, 'Cartel Criminalization and the Challenge of Moral Wrongfulness' (2013) 33 Oxford Journal of Legal Studies 535, 543-54.

criminal law call for the punishment of the moral wrong-doer. State sanctioned punishment, institutionalised by the criminal law, is exacted on individuals who have engaged in morally reprehensible conduct.[122] The level of punishment is imposed because it is said to be commensurately deserved – the punishment fits the crime.[123] Punishment administered through the criminal legal process serves as an integral part of the community's everyday judgments of praise and blame. It publicly expresses moral disapprobation, censuring conduct and its perpetrators that have offended and outraged us.[124] For present purposes, therefore, morality derives its significance in the criminal law from the principle of 'just deserts'. The criminal law is the community's formal legal code and sanctioning device that is capable of giving effect to the community's informal code of morality.[125]

B *When is Conduct Sufficiently Immoral to Be Criminal?*

The issue of morality is often expressed as an issue pertaining to 'criminality' when contemplating whether the criminal law is an appropriate vehicle for punishing individual wrong-doing.[126] Of course, not all immoral conduct should be declared criminal. Telling a lie or breaking a promise might be regarded in most instances as morally wrong, but everyone would also agree that not all situations of lies and broken promises are deserving of criminal punishment. It is a question of degree. How bad must the conduct be before the criminal law intervenes?

Criminal legal theorists have tended to approach the issue of assessing the criminality of

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[122] Henry M Hart, 'The Aims of the Criminal Law' (1958) 23 Law and Contemporary Problems II A 4; Michael S Moore, 'The Moral Worth of Retribution' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Edinburgh University Press, 1992) 188; Joel Feinberg, 'The Expressive Function of Punishment' in Antony Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press, 1994) 71.

[123] See generally Andrew von Hirsch and Andrew Ashworth, 'Desert' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Edinburgh University Press, 1992) 181; Andrew von Hirsch, 'Censure and Proportionality' in Antony Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press, 1994) 112.

[124] Feinberg, above n 122; Australian Law Reform Commission ('ALRC'), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 65.

[125] Kent Greenawalt, 'Punishment' in Joshua Dressler (ed), *Encyclopedia of Crime and Justice* (Macmillan, 2nd ed, 2002) 1282, 1285.

[126] See generally the discussion in Simon Green, *Crime, Community and Morality* (Routledge, 2014) 190-4. In relation to cartel conduct see Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1.

conduct by considering the level of harm caused by an act and the individual's state of mind. For existing conventional crimes, the *actus reus* (literally, 'guilty deed') and *mens rea* (literally, 'guilty mind') attributable to an offender combine to form the physical and mental elements necessary to prove the commission of the criminal offence.[127] These legal concepts are discussed more generally by criminal legal theorists under the general topics of 'harm' and 'culpability', respectively. They significantly mirror the components of harm and moral agency that are integral to the concept of morality. The criminal law stands for the general proposition that human beings are moral creatures who are individually autonomous and are individually responsible for their acts of choice.[128] Harmful acts committed by culpable individuals will be sanctioned by the criminal law accordingly.

In path-breaking work, Stuart Green argued that the moral content of specified conduct can be objectively ascertained for the purposes of determining whether it ought to be criminalised on moral grounds.[129] Green's work was inspired by a relatively common complaint expressed nowadays that many modern white collar and regulatory criminal offences are 'morally neutral' and that this has resulted in 'over-criminalisation' of the criminal law.[130] Green was sceptical about these claims and so proposed a methodology for determining the moral content of offences thought to be morally neutral. That methodology draws upon concepts well known to criminal legal theorists but obliges specific consideration of only those aspects of conduct that are pertinent to its moral content. For any specified conduct that is, or is proposed to be, a criminal offence Green identifies three material considerations for determining its level of moral wrongfulness: (i) whether the conduct violates an identifiable moral norm ('moral wrongfulness');[131] (ii) the degree of harm or risk of harm caused by the conduct ('harm');[132] and (iii) the state

[127] ALRC, above n 124, 141.

[128] See generally Ashworth, above n 117, 27.

[129] Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', above n 24. See also Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, above n 50, a more comprehensive work in which Green seeks to explain the moral wrongfulness of white collar crime.

[130] Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', above n 24, 1536-45.

[131] Ibid 1552.

[132] Ibid 1550.

of mind of the individual responsible ('culpability').[133] Together, these three inter-related and overlapping elements combine to form the moral content of criminal offences.[134]

While Green's purpose for proposing this method of analysis was to use it to determine whether a given offence is morally neutral, the same method can be applied to determine a critical issue in this thesis: *Is cartel conduct sufficiently immoral to be considered a crime?* This question is specifically addressed in Part V below. However, a brief explanation of each of the three material considerations relating to the moral content of an offence is initially provided.

1 *Moral Wrongfulness*

It is axiomatic that a primary function of the criminal law is to enshrine society's core moral values and norms, and to condemn individuals who violate them.[135] Green recognised that it is vital to identify the societal moral norm underpinning an offence if there is to be any reasonable prospect of concluding it to be wrong in the traditional criminal sense.[136] In his original thesis, Green acknowledged the difficulties associated with attempting to prescribe the most appropriate moral epistemological framework for this purpose, and so he did not purport to do so.[137] In a subsequent more comprehensive work, Green adopted analogical moral reasoning as his preferred framework for identifying the moral norms underpinning white collar crimes.[138] However, any number of alternative methods, such as those which have been outlined in Part II(B) above, could also be employed for this purpose.

2 *Harm*

Green sought to differentiate criminal offences that result in relatively trivial harm from

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[133] Ibid 1547.

[134] Ibid 1553.

[135] Law Reform Commission of Canada, *Our Criminal Law* (Information Canada, 1976) 5; Ashworth, above n 117, 42-4;

[136] Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', above n 24, 1551-2.

[137] Ibid.

[138] Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, above n 50. See discussion above Part II(B)(5).

those that cause more serious harms with which the criminal law is traditionally associated.[139] Moral impropriety in the criminal sense is associated with the latter, and rarely the former. This proposition is consistent with the 'harm principle', which stipulates that criminal punishment should only be imposed to prevent harm to others, and that the harm is sufficiently serious to warrant criminal sanction.[140]

Assessing the seriousness of harm for any given offence can be a complicated exercise because there are different types and varying degrees of harm.[141] The criminal law is usually invoked when conduct causes harm to individuals' core interests.[142] Offences against the person, such as murder and assault, are considered to involve serious harm because the physical integrity of the victim has been directly violated. Offences against private property interests, such as burglary and theft, are criminal because they amount to a direct misappropriation of a victim's material resources.[143] Andrew von Hirsch and Nils Jareborg have explained the essential rational for these kinds of harms being labelled 'criminal':[144]

> [P]eople need safety, shelter and certain possessions to live tolerably. It thus makes sense to gauge the gravity of criminal harms by the importance that the relevant interests have for a person's standard of living.

For the purposes of contemplating the criminalisation of a new crime, it has been suggested that the primary focus should be on identifying the discernible harm arising out of the typical or 'standard' case.[145] However, measuring the degree to which conduct detrimentally impacts on individual well-being is not an exact science. Gauging the gravity of harm may be particularly difficult when the harm caused is not immediately obvious, is not tangible, or is not incurred by any readily identifiable victims. The harm caused by many white collar offences, such as insider trading or tax evasion, falls into

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[139] Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', above n 24, 1550.

[140] Joel Feinberg, *Harm to Others* (Oxford University Press, 1984) 26; Ashworth, above n 117, 32, 37.

[141] See generally Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harms: a Living Standard Analysis' (1991) 11 Oxford Journal of Legal Studies 1.

[142] Ibid 11-12.

[143] Ibid.

[144] Ibid 12.

[145] Ibid 4-5, 12.

this category. The immediate economic impact of this kind of illegal conduct is felt only institutionally or by the public purse.[146] On the other hand, the financial windfall obtained by the offenders in such cases will usually dwarf the sums stolen in cases of common theft or burglary.[147] The economic harm suffered in white collar crimes is therefore very real and of a significance that should concern the criminal law.

3 *Culpability*

The concept of culpability in criminal law largely reflects the concept of moral responsibility previously discussed.[148] The inquiry into the criminality of conduct relates to the state of mind of an individual at the time he or she engaged in the impugned conduct. Crimes will ordinarily have a mental element as a constituent part of the offence which the prosecution must prove beyond reasonable doubt. The mental states of 'intention', 'recklessness', 'wilful blindness' and 'negligence' are the most commonly used terms for grading the possible levels of awareness an individual might have. Crimes may also be defined to target individuals who engage in prohibited conduct 'deliberately', 'knowingly', 'maliciously', 'fraudulently' or 'dishonestly'.[149]

The level of moral culpability is determined by assessing the extent to which offenders have turned their minds to their actions, the anticipated harmful consequences of their actions, and the wrongfulness of their actions. Individuals are regarded as the 'most criminal' where their actions are carefully considered, the resulting harm intended and calculated, and where they are aware that their conduct is legally or morally wrong. In such situations, and where the harm is of a most serious kind, the criminal law will mete out severe punishment. At the other end of the scale, the criminal law will view individuals as less criminal if their harmful actions are accidental or involuntary, or they ought not to have been expected to understand the wrongfulness or the potential harmful

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[146] Stuart P Green, 'Moral Ambiguity in White Collar Criminal Law', above n 84, 509-10.

[147] See for example *R v Hannes* (2000) 158 FLR 359 (a case of insider trading that netted the offender $2m in illegal profits following the public announcement of a takeover bid of a publicly listed company, which the offender had prior knowledge of); *R v Hawkins* [2013] NSWCCA 208 (a case of false tax returns being filed that netted the offender approximately $600,000 in illegal financial gain).

[148] See above Part II(C).

[149] See LexisNexis, *Halsbury's Laws of Australia*, 130 Criminal Law, 'Mens rea generally' [130-75].

consequences of their actions.

V CONCEIVING CARTEL CONDUCT AS AN IMMORAL CRIME

This part considers the moral content of cartel conduct with reference to the three material considerations outlined above – moral wrongfulness, harm and culpability. The purpose of this part is to outline the case that may be made for theoretically conceiving cartel conduct as an immoral crime.

A *Moral Wrongfulness*

Arguments that cartel conduct is immoral have tended to draw upon either normative analytical frameworks or moral reasoning by analogy.

1 *The Consequentialist (Utilitarian) Argument*

The question for the utilitarian philosopher is whether the sum total of harmful consequences arising out of cartel conduct exceed the sum total of any benefits.[150] The cost/benefit calculation which is integral to this approach invites an assessment of the morality of cartel conduct by applying a quantitative measure. By applying economic principles and standards of analysis to the particular transactions of concern, the harm caused is quantifiable in monetary terms.[151] Cartel conduct lends itself to a moral evaluation in utilitarian terms for this reason, although there are some limitations to the analysis. The starting point is to view competition as a moral value adherence to which yields the most economic benefit for society. As Christine Parker explained:

> [I]f we take a utilitarian view of ethics, then there is no problem with seeing cartel behavior or any other non-compliance with economic regulation designed with some idea of either efficient or fair competition to be seen as a 'moral requirement.' If we see it as good that the marketplace is competitive, then it is quite appropriate to say

[150] See above Part II(B)(2).

[151] See above Chapter 2 Part V(D).

that it is a moral or ethical requirement to act in a way that ensures this is so…[152]

Those who behave competitively may be regarded as morally virtuous for doing so because they are positively contributing to the maximisation of the total economic welfare for society. By contrast, those who engage in cartel conduct are morally wrong for doing so because their actions lead to inefficiencies and a reduction of society's total economic output.[153] In particular, cartel conduct has a deleterious effect on allocative inefficiency leading to an economically calculable 'dead-weight loss'.[154] It also has a deleterious effect on productive and dynamic efficiencies, also making society clearly worse off economically.[155] Insofar as the reduction in economic efficiencies is of concern, the moral wrongfulness of cartel conduct in utilitarian terms is reasonably clear.

However, the main drawback of adopting the utilitarian approach is that it only accounts for the immorality arising out of these economic inefficiencies caused by cartel conduct. Any complaint about the harm caused to individual consumers by way of the price overcharge[156] is not capable of being addressed within the utilitarian framework. That is because the price overcharge incurred by a consumer amounts to a transfer of wealth from the consumer to the business, with the net effect for society being nil (the consumer is *$X* worse off, but the business if *$X* better off). In this respect, the price overcharge generates a morally neutral outcome in utilitarian terms. By contrast, the net effect arising from the less tangible dead-weight loss and reduction in productive and dynamic efficiencies is clearly negative, and so utilitarianism can be used to explain the immorality of cartel conduct at least insofar as those particular harms are concerned.

2 *The Deontological (Social Contractarian) Argument*

Social contractarian moral philosophy, a sub-species of deontology, suggests that moral duties and obligations can be discerned by considering what rules every individual would

[152] Parker, above n 19. See also Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour' (2009) 42 Australian and New Zealand Journal of Criminology 218, 236.

[153] See above Chapter 2 Part V(D).

[154] See above Chapter 2 Part V(D)(1).

[155] Ibid.

[156] See above Chapter 2 Part V(D)(2).

theoretically agree to as a member of society.[157] John Rawls identified two fundamental 'principles of justice' that would guarantee a just and morally acceptable society, namely: (1) that each individual be given the most extensive basic liberty compatible with the liberty of others; and (2) that social and economic positions are to everyone's advantage and open to all. Rawls' theory of justice assumes that not everyone is born with an equal share of society's economic resources, but that everyone would agree that each individual should be able to reap the benefits of the free market system whatever their individual economic circumstances. From this position of analysis, it has been argued that obliging businesses to act competitively in the market, and to refrain from cartel conduct, are just, fair and moral requirements.[158]

When applied to cartel conduct, Rawls' theory of justice is similar to utilitarianism in that both are premised on competition being conceived as a moral value. The maintenance of competition is seen as essential for the proper and effective functioning of the free market. However, the deontological approach then gives matters of justice and fairness primacy. The market itself is seen as a critical instrument chosen by society for the purposes of achieving a fair distribution of resources amongst its members.[159] Individuals are imbued with a moral duty to avoid engaging in cartel conduct so as not to harm this important social institution. It is reasoned that all individuals in society would agree to assume this duty because it is just and fair having regard to the various positions that individuals occupy at various times in the market.

Unlike utilitarianism, this deontological framework provides a more comprehensive account of the immorality to be found in cartel conduct. It accounts for the economic harm caused by the resultant economic inefficiencies as well as the harm incurred to the consumer in the form of the price overcharge.[160] That is because the concern is about fairness from the point of view of individuals in what Rawls' referred to as the 'original position'. All individuals occupy various roles in society at various times. Even the cartel perpetrator must be forced to consider the injustice and unfairness arising from an

[157] See generally John Rawls, *A Theory of Justice* (Harvard University Press, 1971); David Gauthier, *Morals by Agreement* (Oxford University Press, 1987).

[158] See in particular Wardhaugh, above n 1, 18-51. See also Gauthier, above n 157, 83-112, 261-65.

[159] Wardhaugh, above n 1, 44.

[160] See the explanation given by Wardhaugh, above n 1, 44-5.

occasion in which they occupy the role of consumer, and another business is over-charging them pursuant to a cartel agreement. They are likely to be outraged in such circumstances.[161] Accordingly, the prohibition against cartel conduct is a rule of fairness that everyone would agree to and so becomes part of the moral code.

3 *Cartel Conduct as Stealing*

Cartel conduct is often argued to be tantamount to theft or stealing.[162] Stealing has long been subject to criminal sanctions in modern legal systems, with subtle differences to be found in the various legal formulations. The essence of stealing is 'to violate, in some fundamental way, another's rights of ownership.'[163] Cartel conduct is thought to be like theft because a business engaged in cartel conduct violates a consumer's right of ownership to a sum of money by appropriation of a price overcharge.[164]

The strength of the theft analogy is to be found in the harm caused. A consumer suffers the same amount of damage whether it is caused by the thief who steals from their purse or by the business that overcharges because of a cartel agreement. The difficulty with the analogy, which has been acknowledged,[165] arises when further consideration is given to the consumer's entitlement to retain the price overcharge. Is this akin to a personal property right? It has been suggested that the theft analogy is 'fallacious' for this reason.[166] The price overcharge is not 'property' in the same way that notes and coins in purse, or even money in a bank account, are regarded as property. To suggest otherwise would presuppose a very broad and novel definition of property that is unprecedented by

[161] This proposition is supported by the empirical observations of Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 Law and Society Review 591, 604. When asked to consider the hypothetical scenario of being a victim of cartel behaviour themselves, most individuals involved in running businesses would consider such conduct to be morally wrong.

[162] Bruce Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (2012) 32 Legal Studies 369, 369. Consideration of the theft analogy is given in Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 700-1; Whelan, above n 121, 544-50. The concepts of 'theft' and 'stealing' are used interchangeably in this thesis with no difference in meaning intended.

[163] Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, above n 50, 89; Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 700-1.

[164] Whelan, above n 121, 544-50; Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 700-1.

[165] Whelan, above n 121, 544.

[166] Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity', above n 162, 386.

conventional legal standards.

A further point of distinction between cartel conduct and theft pertains to the voluntariness of the transaction. In cases of theft, victims do not voluntarily part with their property. Yet in cases of cartel conduct there is no question as to what the victim is acquiring and how much they are voluntarily paying for it.[167] Certainly, the victim in this situation is deprived of useful information about how the price of the product has been set, before they decide whether to enter into the transaction. Accordingly, an argument may be made that theft has occurred because there has not been 'informed consent' by the victim when they agreed to the transaction. However, as Wardhaugh argues, harm to the victim arising out of such transactions may be characterisable as 'more of a feeling of "I didn't get as good of a bargain as I probably could have", than the feeling (perhaps including a very real feeling of violation) which one has after being a victim of theft.'[168]

4 *Cartel Conduct as Deception*

Alternatively, cartel conduct may amount to deception.[169] Deception may be defined as communicating a message intended to cause a person to believe something that is untrue.[170] Applied to cartel conduct, the argument is premised on the basis that a business transacting with a consumer in a free market economy is making certain representations to the consumer by doing so.[171] In particular, it is representing that the price agreed has been set on this basis that the business is acting independently and competitively with other businesses. The representations are ultimately false because the price paid by the consumer has been pre-determined by the operation of a cartel agreement the existence of which the business has concealed. The consumer has therefore been deceived.

The main weakness in the deception analogy lies in the need to found the deception on

[167] Ibid 387.

[168] Ibid.

[169] Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 699-700.

[170] Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, above n 50, 76; Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 699.

[171] Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 699-700

implicit, rather than explicit, misrepresentations. Cartel conduct does not ordinarily involve businesses making express representations to their customers about how their prices have been set.[172] The business does not explicitly state '*I am not in league with my competitors*' or '*my prices have been set independently and competitively*'.[173] Ordinarily, nothing is said about such matters. Consumers make their own assumptions about the pricing strategies of the businesses they choose to deal with. These undisclosed assumptions are variable and businesses can hardly be expected to be held to every single one. Furthermore, there is no empirical evidence demonstrating that consumers tend to assume that businesses have not colluded.[174] A further weakness in the analogy is that, for many consumers, had they been made aware that the product price was the result of collusion, they may have bought the product anyway. In such cases, customers are overcharged because of the cartel conduct, yet they have placed no reliance on the assumption that prices have been set competitively. In this situation, there is no deceit, but the anti-competitive behaviour resulting in a price overcharge remains just as offensive. At this point, the analogical moral reasoning with deception must therefore end.

5 *Cartel Conduct as Cheating*

Lastly, it has been argued that cartel conduct amounts to cheating.[175] Green's definition of cheating requires, firstly, an individual to violate a fair and fairly enforced rule. Secondly, the individual must have the intention of obtaining an unfair advantage over a party with whom the individual is in a co-operative, rule-bound relationship.[176] As applied to cartel conduct, the relevant 'rule' that is violated is that which obliges businesses to act competitively and set their prices independently of one another.[177] The rule may be regarded as 'fair' for all of the reasons considered earlier, concerning the benefits of

[172] Jeremy Lever and John Pike, 'Cartel Agreements, Criminal conspiracy and the Statutory "Cartel Offence": Part 1' (2005) 26 European Competition Law Review 90; Whelan, above n 121, 552.

[173] See the discussion in Whelan, above n 121, 552-3.

[174] Ibid 553.

[175] Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 698-9. Whelan, above n 121, 555-9.

[176] Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, above n 50, 57

[177] Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal', above n 1, 699.

competition.[178] Businesses violating the rule clearly intend to gain an unfair advantage over consumers by way of the price overcharge. The businesses can also be said to be in a co-operative, rule-bound relationship with consumers in their capacity as fellow participants in the market. Essentially, the argument is premised on the idea that the market is a rule-based institution in which both businesses and consumers participate. By engaging in cartel conduct, businesses infract a fundamental market rule that obliges businesses to act competitively. This amounts to cheating.

The concern with the cheating analogy is that it is potentially applicable to many other common crimes, although 'cheating' would not seem to be the primary cause of the moral wrong-doing. For example, common theft may be characterised as cheating on the same basis as cartel conduct. An individual who steals also 'cheats' because there is a fair and fairly enforced 'rule' in society that obliges individuals to respects others' private property. By violating the rule, the thief gains an unfair advantage against the property owner by securing exclusive possession of the property stolen. The thief and the victim may be said to be in a 'co-operative rule bound relationship' in that they are both members of a community that subscribes to the belief of private property ownership. The thief has therefore 'cheated'. Yet it is obvious to all concerned that cheating is not the primary source of the thief's moral impropriety; it is something else, namely the violation of a private property right. And so the same question may be asked in relation to cartel conduct.

B *Harm*

The harm caused by cartel conduct is perhaps the least contentious issue for the purposes of ascertaining its moral properties. The main complaint against cartel conduct is that it 'robs consumers and other market participants of the tangible blessings of competition.'[179] The most tangible of these 'blessings' is the cheaper prices at which consumers are able to purchase products in a competitive market.[180] The price overcharge is therefore often regarded as the most harmful effect because, once the cartel is

[178] See above Chapter 2 Part V(B) and V(C).

[179] Gregory Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime' (2009) 5 European Competition Journal 19, 23.

[180] See discussion above Chapter 2 Part V(B)(2).

discovered, it may be calculated and the precise amount of economic loss incurred by each of the cartelist's customers realised.[181] This loss is quantified as a monetary sum – a 'dollar figure' – and is of the same nature as the quantifiable harm suffered by victims of conventional property crimes. Though the economic loss suffered by a single customer in one transaction with the cartelist might appear trifling, the significance of the harm is often found in the aggregation of recurring transactions the cartelist has with that customer as well as their many other customers.[182] Over a protracted period, a successful cartel will inflict a much greater amount of economic harm upon its victims than the common thief will ever be capable of inflicting upon his victims.[183] Indeed, the crime of theft pales in comparison to cartel conduct when the issue of harm is considered. Cartel conduct is appropriately criminalised for this reason alone.

Consideration may also be given to the less perceptible harms arising from cartel conduct, including the economic harms arising from inefficiencies.[184] These too are arguably significant enough to warrant the intervention of the criminal law. Wardhaugh has also argued that the harm of most criminal significance is the harm that cartel conduct causes to the market as a social institution.[185] The market, he argued, is the primary means by which western liberal society have chosen to achieve distributive justice.[186] All individuals within that society will expect, as a bare minimum, that transactions in the market will occur in a fair manner. This fundamental rule of fairness obliges all businesses to compete with one another and refrain from colluding.[187] He therefore explained the criminal harm caused by cartel conduct as follows:

> The conduct of the hard-core cartelist strikes at our expectations for a fair environment for exchange. By agreeing on prices, quantities and markets with illusory 'competitors', the cartelists have created hidden rules, known only to themselves, but by which all are expected to play. The presence of such activities in the marketplace

[181] See above Chapter 2 Part V(D)(2).
[182] See above Chapter 2 Part V(D)(3).
[183] Werden, above n 179, 23.
[184] See above Chapter 2 Part V(D)(1).
[185] Wardhaugh, above n 1, 44.
[186] Ibid.
[187] Ibid.

> undermines our confidence in the fairness of the market.[188]

C *Culpability*

Culpability requires consideration of the extent to which those individuals responsible for engaging in cartel conduct have turned their minds to consider the consequences of their actions.[189] Business ethicists Anna Zarkada-Fraser and Martin Skitmore observed that individuals within a business responsible for making the decisions that lead to cartel agreements take into account a host of variables, including a moral evaluation of their conduct, before doing so.

> Collusion … is not an institutional interplay that takes place in a moral vacuum. Participation in some form of collusive tendering is first and foremost a decision made by an individual: a person with certain personal characteristics and attitudes, a sense of right and wrong and a set of personal and organizational objectives to meet.[190]

Determining the level of culpability of perpetrators requires consideration of several aspects of the thought processes of the individuals involved. First, consideration must be given to the extent to which an individual has turned their mind to entering into and giving effect to the cartel agreement. Australia's criminal cartel offence provisions require the prosecution to establish that an offending individual *intended* to enter into or give effect to such an agreement, and was *aware* of its cartel terms.[191] In any given case, the prosecution will need to adduce evidence of the communications and dealings between individuals working within each rival business, which objectively demonstrates the existence a cartel agreement. Evidence of consumer transactions, which occur subsequently, would also be needed to demonstrate each business adhering to the cartel agreement's terms. Such evidence would paint a reasonably clear picture of cartel conduct

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[188] Ibid 45.

[189] See above Part II(C).

[190] Anna Zarkada-Fraser and Martin Skitmore, 'Decisions with Moral Content: Collusion' (2000) 18 Construction Management and Economics 101, 102-3. Zarkada-Fraser and Skitmore's research and arguments were specifically directed towards collusive tendering (bid-rigging) in the construction industry. Their observations relating to the moral content of individual mangers' decision-making in such contexts would seem to be just as applicable to other forms of cartel conduct. See also Christine Parker and Vibeke Lehmann Neilson, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56 The Antitrust Bulletin 377, as to the host of variables that are generally taken into account by business managers when engaging in cartel conduct.

[191] See above Chapter 2 Part II.

being perpetrated deliberately and by design. Cartel conduct does not occur by accident. It is constituted by the voluntary actions of individuals who have engaged in conscious and considered reasoning processes.[192] This aspect of the cartel perpetrator's mind provides a reasonably solid starting point for arguing that they are morally culpable to the requisite degree well recognised by the criminal law. It is a state of mind clearly contemplated by s 79 of the CCA, which sets out the various mental states of individuals involved in cartel conduct that will attract criminal liability.[193]

Secondly, to what extent has the individual turned their mind to the issue of harm? Are they aware that their cartel agreement will harm others? The price overcharge incurred by the cartel participants' customers is the inevitable immediate consequence of a cartel agreement being implemented. Whatever their personal motivations for choosing to engage in cartel conduct, it is reasonable to infer that those involved in the cartel are aware that the price overcharge generates a gain for the business and a corresponding loss for the customer.[194] In this regard, the cartel participant's awareness of the harm caused is comparable to that of the common thief – the thief's gain is the victim's loss. On this basis, the moral culpability of the cartel offender is characteristically criminal.

On the other hand, it is unlikely that cartel perpetrators turn their minds to how their conduct will negatively impact on society more generally. Except perhaps for the most contemplative cartel offender, most would not spare a thought for the damage resulting from the economic inefficiencies, nor for the damage caused to the free market as an essential social institution. From an individual's point of view, such harms are relatively esoteric and too detached from their immediate commercial concerns. For the purposes of determining general moral culpability, it is not suggested that the typical cartel offender is aware of these less tangible harmful effects.

Thirdly, to what extent do individual cartel perpetrators turn their minds to the possibility

[192] Zarkada-Fraser and Skitmore, above n 190, 109-10. See also *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (3 August 2017), [239]: 'Cartels, by their very nature, are likely to be deliberate and covert and are likely to require some degree of planning and deliberation.'

[193] See discussion above Chapter 2 Part II.

[194] See discussion above Part II(C).

that their actions may be morally or legally wrong? When a cartel agreement is proposed, a business manager will engage in an evaluation of whether the proposed cartel conduct is 'right or wrong'.[195] Most individual managers are likely to conclude that any kind of proposed cartel conduct will be perceived as wrong or, at the very least, 'unacceptable'.[196] Indeed, it does seem rather obvious that those individuals involved in operational matters of a business would be aware of society's expectation that they ought to compete with their business rivals, rather than collude, in a market fundamentally premised on free enterprise and competition. On the other hand, there is certainly empirical evidence suggesting that many of those who engage in cartel conduct believe they are morally justified in doing so, particularly when the primary motivation is to boost flailing profits in times of economic hardship.[197] These kinds of justification are sometimes referred to as the 'Robin Hood' defence because the decision to engage in cartel conduct is motivated by a desire to help those who depend on the continuing survival of the business. Upon this reasoning, the cartelist views himself not as a flagrant violator of the law, but a law-breaker with virtuous intentions.[198] However, such self-serving moral justifications come undone very quickly when consideration is given to other aspects of the perpetrator's thoughts and actions. Those involved in a cartel invariably know that their actions are contrary to some criminal or civil law, but proceed to engage in the prohibited conduct nevertheless.[199] They also tend to go to great lengths to shroud their interactions with one another in secrecy in order to conceal the existence of the cartel from consumers and law enforcement authorities.[200] It is the kind of 'cloak and dagger' behaviour one find in the

[195] Zarkada-Fraser and Skitmore, above n 190, 103.

[196] Ibid 109.

[197] See the discussion of such evidence in Angus MacCulloch, 'Honesty, Morality and the Cartel Offence' (2007) 28 European Competition Law Review 355, 361-2. See also Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 Law and Society Review 591, 603.

[198] Ibid.

[199] John Connor, *Global Price Fixing* (Springer, 2007) 10-11; Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 8th ed, 2015) 497; David King, 'Criminalisation of Cartel Behaviour' (Ministry of Economic Development (NZ) Occasional Paper, 2010) 25; Organisation for Economic Co-operation and Development, *Hard Core Cartels* (OECD Publishing, 2000) 23.

[200] Wayne Baker and Robert Faulkner, 'The Social Organization of Conspiracy: Illegal Networks in the Heavy Equipment Industry' (1993) 58 American Sociological Review 837, 843-44; John Connor, Albert Foer and Simcha Udwin, 'Criminalizing Cartels: An American Perspective' (2010) 1 New Journal of European Criminal Law 199, 203; Connor, above n 199, 11; Whish and Bailey, above n 199, 497; Organisation for Economic Co-operation and Development, *Hard Core Cartels*, above n 199, 5, 12. See also Graeme Samuel, 'Cartel ringleaders are well-dressed criminals, so why not send them to jail?', *The*

criminal underworld or in a spy novel, and betrays their true understanding of the moral implications of their conduct.

Lastly, some attention should be given to the objective conditions that tend to facilitate cartel conduct, which are uncommon and complex.[201] It is only 'when the stars align' that it will be worthwhile for businesses to enter into in a cartel arrangement. The decision to do so necessarily requires the synthesis a host of market variables peculiar to their industry. These must be regularly reviewed by the cartel participants as the market variables fluctuate over time. Such decisions are calculated and deliberate, and hardly opportunistic. They are also borne out of a conscious realisation that their businesses occupy a unique position of market power which, by their conduct, they have chosen to flagrantly abuse. For all of these reasons, it is reasonable to conclude that the culpability of the typical cartel offender will be very high. Accordingly, it seems only appropriate that that they be held to account within a criminal legal framework.

VI CONCLUSION

This chapter has demonstrated that understanding the moral implications of cartel conduct is conceptually difficult. However, it is reasonably clear that a case may be made that cartel conduct can be *conceived* to be sufficiently immoral to justify the intervention of the criminal law. This chapter has also raised the issue that, despite the theoretical conceptions of moral wrong-doing arising out of cartel conduct, there may be issues associated with moral learning that inhibit the community's moral *perceptions* of that wrong-doing. The next two chapters, Chapters 4 and 5, explains the main causes of concern that appear to be hindering the Australian community's moral uptake of the wrongful nature of cartel conduct.

Age (Melbourne), 3 November 2007.

[201] See above Chapter 2 Part V(E).

CHAPTER 4

CARTEL CONDUCT AS AN ECONOMIC REGULATORY OFFENCE: PROBLEMS IN MORAL PERCEPTION

I OVERVIEW

This chapter considers whether cartel conduct is a morally neutral economic regulatory offence. It examines the literature that has sought to differentiate economic regulatory offences from more conventional property crimes on the basis of perceived differences between their moral properties. Community attitudes towards each category of offence differ. Conventional property crimes are perceived to be immoral, whereas economic regulatory offences do not provoke the same level of community disapproval. Cartel conduct falls into the latter category. The apparent discrepancy between the theoretical conceptions of the moral wrong-doing to be found in cartel conduct and actual community perceptions needs to be explained. Why are the crimes of theft and fraud clearly perceived to be immoral, yet cartel conduct is not? Is the proposition that cartel conduct is morally neutral a fair and accurate claim?

Part II of this chapter restates observations that have been made about the moral content of economic regulatory offences, as compared to that of more traditional crimes, which have led to the argument that economic regulatory offences are morally neutral. Part III explains the concept of 'moral neutrality'. It reviews the socio-legal literature that has sought to identify the factors and aspects of economic regulatory offending that appear to impact on the community's moral perceptions of such behaviour. This part also introduces and explains 'moral ambiguity', an alternative concept which, when applied, suggests that the moral implications of economic regulatory offences are far from clear. Part IV considers the factors tending to generate moral neutrality or moral ambiguity, as the case may be, in application to cartel conduct. Part V considers whether 'moral ambiguity', rather than 'moral neutrality', is the more appropriate label to apply to economic regulatory offences and cartel conduct. It is contended that the difficulties associated with perceiving the moral wrongfulness of cartel conduct may be resolved with

more effective moral education. Accordingly, 'moral ambiguity' is argued to be the more appropriate label to apply. Part VI concludes this chapter.

II TRADITIONAL CRIMES VS. REGULATORY OFFENCES

If ordinary law-abiding citizens were asked to give an example of a 'crime', an analysis of their responses would likely yield a list of specific criminal offence types well-known to the general public and in the history of the criminal law. Murder, assault, theft, burglary, and rape would most likely appear on this list. Each would be regarded as a conventional crime.[1] By contrast, it is highly unlikely that the list would feature any offences commonly referred to as 'regulatory', 'public welfare' or 'white collar' offences. Such offences include driving without a licence, discharging toxic chemicals into a natural waterway, and cartel conduct. While definitional distinctions can be drawn between each of the three classification concepts,[2] they significantly overlap and are often used interchangeably. Cartel conduct, for example, may be regarded as being both a 'regulatory' and 'white collar' offence. For the purposes of the issues raised by this thesis, no significance lies in any finer points of distinction. For brevity, attempts will be made in this chapter to refer to them all collectively as *regulatory* offences, and to cartel conduct as a specific instance of *economic regulatory* offending.

A *Regulatory Offences Devoid of Moral Content*

Regulatory offences all share a commonality in that their membership comprises offences that are not ideal 'exemplars' of crime.[3] Of course, regulatory offences are certainly capable of being 'criminal' in the strict legal sense because Australia's legal system is

[1] Stuart P Green, 'Prototype Theory and the Classification of Offences' (2000) 4 Buffalo Criminal Law Review 301, 301.

[2] It is beyond the scope of the present discussion to outline these distinctions. As mentioned above, the concepts of 'regulatory', 'public welfare' and 'white collar', as used in the context of criminal legal theory, significantly overlap such that any given offence may fall into all three categories (e.g. industrial manslaughter). On the other hand, another offence may fall into only one or two categories, such as unlicensed driving, which is arguably 'regulatory' or 'public welfare' but not 'white collar'. See generally Francis Sayre, 'Public Welfare Offenses' (1933) 33 Columbia Law Review 55; Edwin Sutherland, *White Collar Crime* (Greenwood Press, first published 1949, 1983 edition); Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006).

[3] Green, 'Prototype Theory and the Classification of Offences', above n 1, 301.

premised on the philosophy of legal positivism.[4] A regulatory offence is a 'crime' if the legislature enacts a law deeming it to be so. Nevertheless, if there is a prevailing intuitive tendency to regard theft as more criminal than cartel conduct, that discrepancy in perception needs to be properly understood.

One explanation for this prevailing attitude is that regulatory offences are thought to be deficient in terms of their moral content. Modern legislation is replete with criminal offences with very little moral stigma attaching to them. Since the industrial revolution, certain broadly defined areas of complex social activity have been subject to legislative intervention that has resulted in the law being used to impose criminal penalties for conduct that is relatively morally innocuous.[5] In most common law jurisdictions, for example, there are now extensive bodies of statutory law designed to regulate behaviour on the roads, safety in the work place, access to prescription medicines, and fairness in the marketplace. Within each of these areas of legal regulation, certain criminal offences are created as a means of deterring a prevailing type of behaviour generally considered to be undesirable, and for the ultimate purpose of protecting the general welfare of the public.[6] As a general category of crime, regulatory offending is often regarded as falling outside the traditional criminal sphere because the moral senses are supposedly less easily disturbed by the regulatory offender, as compared to the murderer or common thief.

The distinction between conventional and regulatory crimes is often articulated as being one between criminal offences which are *mala in se* (referring to conduct that is inherently wrong or evil) and those which are *mala prohibita* (referring to conduct that is not inherently wrong or evil, but merely prohibited by the law).[7] This distinction is one designed to highlight an apparent departure, which regulatory offences represent, from

[4] See generally Brian Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 Australian Journal of Legal Philosophy 1.

[5] See generally Sayre, above n 2; Sanford Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 University of Chicago Law Review 423; Stuart P Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 Emory Law Journal 1533.

[6] See generally Australian Law Reform Commission ('ALRC'), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 109; Patriicia Hanh Rosochowicz, 'The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law' (2004) 24 European Competition Law Review 752, 752.

[7] ALRC, above n 6, 113.

the common understanding that the criminal law is concerned only with the enforcement of core moral values. It is for this reason that criminal regulatory offences have been the subject of considerable criticism.[8] Attention has been drawn to the effect that the criminalisation of regulatory offending has on the integrity of the criminal law generally. The essential argument is that the moral authority of the criminal law is seriously undermined when criminal sanctions are increasingly applied to situations which do not involve serious harm or conduct otherwise deserving of moral condemnation.[9] Some commentators have gone so far as to say that the increasing prevalence of criminal regulatory offences has led to the criminal law now being devoid of any moral justificatory principle, and that the decision to criminalise certain conduct 'appears to be no more sophisticated than tossing a coin.'[10]

B *Economic Regulatory Offences*

Laws designed to restrict certain types of business conduct, in furtherance of the promotion and protection of considered economic policy, fall into a specific sub-category of regulatory offences. This sub-category would include laws regulating the conduct of corporations and corporate behaviour, consumer protection and competition laws, tax laws, and customs imports and exports laws.[11] As is the case with regulatory laws generally, legislatures sometimes consider it necessary to supplement the civil laws with criminal laws in the specific field of economic regulation. The moral criticisms that are directed at the criminalisation of regulatory offences generally may then be tailored more specifically.

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[8] See in particular Sayre, above n 2; Kadish, above n 5; Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968); Francis Allen, 'The Morality of Means: Three Problems in Criminal Sanctions' (1981) 42 University of Pittsburgh Law Review 737; Paul Robinson, 'Moral Credibility and Crime' (1995) 275 Atlantic Monthly 72; Julie Clarke and Mirko Bagaric, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31 Australian Business Law Review 192; Erik Luna, 'The Overcriminalization Phenomenon' (2005) 54 American University Law Review 703; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008).

[9] Robinson, above n 8, 77.

[10] Clarke and Bagaric, above n 8, 200-2. See also Husak, above n 8, 61, describing the modern expansion of the criminal law as having 'little to do with anything that plausibly can be construed as the enforcement of morality.'

[11] Kadish, above n 8, 424.

Sandford Kadish advanced a particularly strong case against the criminalisation of economic regulatory offences in the United States on this basis.[12] His arguments have been influential and have informed the case against the criminalisation of cartel conduct in Australia.[13] Consistent with the arguments directed against the criminalisation of regulatory offences generally, Kadish's central thesis is that economic regulatory crimes are anomalous because they sanction behaviour that is 'morally neutral'.[14]

III MORAL NEUTRALITY AND MORAL AMBIGUITY

Kadish's argument is premised in part on moral reasoning by analogy, or 'counter-analogy' to be more precise.[15] He sought to compare general features of traditional property crimes, such as theft and fraud, with the corresponding features of economic regulatory offences. He identified several distinctions between them, which he then suggested might explain why conventional property crimes are perceived to be morally wrong whereas economic regulatory offences are not.

Kadish's thesis also built on the earlier work of Edwin Sutherland, a sociologist who had sought to understand and explain public perceptions of white collar crime.[16] It is therefore appropriate that some of the essential observations made by Sutherland, insofar as they appear to have been incorporated into Kadish's arguments, are outlined first before turning to consider Kadish's claims more closely.

A *Sutherland's Observations*

Sutherland had observed that there was a noticeable absence of moral stigma attaching to white collar crimes.[17] He thought this was principally due to the 'differential implementation' of the criminal law as it applies to large corporations and businessmen.[18]

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[12] Kadish, above n 8.

[13] See for example the numerous references to Kadish in Louise Castle and Simon Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition in Australia' 10 Competition and Consumer Law Journal 1, 10-11, 13, 16, 23-4.

[14] Kadish, above n 8, 427.

[15] See the explanation of moral reasoning by analogy above Chapter 3 Part II(B)(5).

[16] Sutherland, above n 2.

[17] Ibid 43-4.

[18] Ibid 46-51.

Sutherland was referring to an apparent disparity of treatment of offenders within the criminal justice system, with those who were of high social status being treated as less criminal than those from the lower socio-economic classes. He explained this disparity as being attributable to several factors that he thought impacted on the community's moral perceptions of perpetrators of white collar crime.[19] They include the following:

- There is a demonstrable reluctance on the part of law makers and law enforcers in creating and applying criminal laws against the interests of highly regarded businessmen.[20]
- Conduct giving rise to white collar crime is often more complex than conventional crimes, and their harmful effects often dispersed across large numbers of individuals and over lengthy periods of time, making it difficult for the average person to appreciate their wrongfulness.[21]
- Such crimes are also relatively new and represented a specialised part of the criminal law, again making it difficult for the public to see their moral roots as akin to those of conventional crimes.[22]
- Social institutions responsible for informing and educating the public about the wrongfulness of criminal violations, such as the media and government organisations, failed to do so effectively in relation to white collar crime. This is a result of the social institutions themselves having moral attitudes that differentiated between traditional crime and white collar crime.[23] Consequently, ordinary members of the public remained largely uninformed and, by necessary implication, morally apathetic about white collar crime.

Sutherland concluded that these factors operate to hamper the community manifesting an 'organised resentment' towards white collar crime.[24] For Sutherland, this represented an unsatisfactory outcome as a matter of principle. Those who committed white collar crimes

[19] Ibid.
[20] Ibid 46-8.
[21] Ibid 50.
[22] Ibid 51.
[23] Ibid 50, 247-51.
[24] Ibid 51.

usually did so deliberately and in full knowledge that they were in violation of the law.[25] It was therefore counter-intuitive that such individuals were not subject to the same level of public condemnation as those who committed ordinary street crimes. He was clearly frustrated by the features of the broader social context that tended to obscure the community's moral perceptions of white collar crime.

B *Kadish's Argument*

Kadish was less judgmental with his more specific inquiry into the moral characteristics of economic regulatory offences. He acknowledged that there were many relatively new 'economic' crimes that have reasonably clear moral underpinnings. For example, offences such as fraud, embezzlement, and other modern-day offences involving the misappropriation of property, he explained, were conceived to address behaviour that 'threatened newly developing ways of transacting business.'[26] These kinds of modern day economic crimes were not the primary target of his inquiry. Kadish saw these crimes as being modern day derivatives of the traditional crime of theft and constituting 'a well documented chapter in the history of the criminal law'.[27] Collectively, these may be referred to as modern day 'conventional property crimes'. He suggested that the moral wrongfulness of these relatively new kinds of conventional property crime is not particularly difficult to appreciate once it is understood that they are all primarily designed to uphold the community's belief in the value of private property. They are simply conceptual extensions of traditional theft with their moral underpinnings being entirely analogous. Kadish proceeded to argue that economic regulatory offences, such as cartel conduct, are morally distinguishable from conventional property crimes. He drew upon observations that had been made by Sutherland a decade earlier, and sought to explain why economic regulatory offences do not tend to provoke the moral senses.

Kadish identified three critical factors that he believed explained the moral neutrality of economic regulatory offences. First, he thought there was a fundamental difference in the nature of the interest that economic regulatory offences were designed to protect.

[25] Ibid.

[26] Kadish, above n 8, 425.

[27] Ibid.

Conventional property crimes 'protect private property interests against the acquisitive behavior of others in the furtherance of free private decision', whereas the newer economic regulatory crimes 'seek to protect the economic order of the community against harmful use by the individual of his property interest'.[28] Secondly, he pointed out that the conduct prohibited by the economic regulatory offences 'closely resembles acceptable aggressive business behavior' and, accordingly, 'the stigma of moral reprehensibility does not naturally associate itself' with such conduct.[29] Thirdly, he observed that criminal sanctions play a relatively minor role in the scheme of economic regulatory laws.[30] This, he said, is evident from the applicable legislative scheme, from prosecuting agencies' tendency to pursue civil remedies rather than criminal penalties (despite both being available), and also from the reluctance of judges and juries to convict and punish perpetrators when criminal sanctions are pursued.[31] Kadish's ultimate conclusion was that these three factors operate in combination to undermine the manifestation of a 'sustained public resentment' towards perpetrators of economic regulatory offences.[32] Accordingly, economic regulatory offences, in stark contrast with conventional property crimes, are incapable of being 'regarded as morally reprehensible in the common view'.[33]

There is certainly strength to be found in an argument that economic regulatory offences at least *ought* to be regarded as morally wrong, a point acknowledged by Kadish. He accepted that the conduct proscribed by such offences will often possess hallmark features of immoral conduct – deliberate and rationally contemplated acts with intended or foreseeable economic harm.[34] He also accepted that the magnitude of economic harm caused by an economic regulatory offence is likely to surpass that caused by a conventional property crime.[35] These are all matters which would suggest moral wrong-doing at a criminal level.[36] However, Kadish's approach to morality was implicitly

[28] Ibid.
[29] Ibid 425-6.
[30] Ibid 426.
[31] Ibid.
[32] Ibid 437.
[33] Ibid 436.
[34] Ibid 435.
[35] Ibid 436.
[36] See discussion above Chapter 3 Part IV(B).

descriptive, not normative.[37] His argument was directed towards explaining the absence of prevailing public perception of moral wrong-doing in relation to economic regulatory offences, rather than dismissing the validity of the theoretical conceptions of their moral wrongfulness. His claims of moral neutrality were based on his own empirical observations of social reality, or what he refers to as 'the common view', that economic regulatory offences simply do not provoke the moral senses of members of the community at all. Normative theories that may be advanced about the moral wrongfulness of certain conduct, he suggests, count for very little if they do not translate into a corresponding set of moral norms to which the community subscribes.

Kadish explained the failure of the community to perceive the moral wrongfulness of economic regulatory offences as being due to the immorality of such conduct being unclear.

> Typically the conduct prohibited by economic regulatory laws is not immediately distinguishable from modes of business behavior that are not only socially acceptable, but affirmatively desirable in an economy founded upon an ideology (not denied by the regulatory regime itself) of free enterprise and the profit motive.[38]

Responding to the argument that it is possible to perceive distinctions between perfectly acceptable business behaviour and that which is economically harmful, he stated:

> These perceptions require distinguishing and reasoning processes that are not the normal governors of the passion of moral disapproval, and are not dramatically obvious to a public long conditioned to responding approvingly to the production of profit through business shrewdness, especially in the absence of live and visible victims. Moreover, in some areas, notably the antitrust laws, it is far from clear that there is consensus even by the authors and enforcers of the regulation – the legislators, courts and administrators – on precisely what should be prohibited and what permitted, and the reasons therefore. [39]

Similar observations have been made by a number of other commentators.[40] It is therefore

[37] See above Chapter 3 Part II(A)(1) for an explanation of the distinction between normative and descriptive notions of morality.

[38] Kadish, above n 8, 436.

[39] Ibid 436-7 (citations omitted).

[40] See for example Packer, above n 8, 359, describing such business behaviour as failing 'to excite the

no surprise that Kadish's conclusions have been explicitly drawn upon in the debate about criminalising cartel conduct in Australia.[41] Competition laws, or 'antitrust laws' as they are known in the United States, are specifically referred to by Kadish in support of his argument as they are archetypical of the economic regulatory offending he identified as being morally neutral.

C *Green's Theory of White Collar Crime*

More recently, Stuart Green attempted to provide a comprehensive and systematic account of the factors that tend to affect ordinary people's moral perceptions of white collar crime.[42] Drawing upon his predecessors' scholarship in the area, Green enumerated ten 'overlapping and interrelated factors' that he believed were particularly significant. Several of these factors are essentially restatements of factors that had earlier been identified by Sutherland and Kadish:[43]

1. *Difficulty Distinguishing Criminality from 'Merely Aggressive' Behaviour:* There can be a fine line between the behaviour that is sought to be impugned by a white collar crime, and behaviour that would otherwise be deemed to be legitimate business activity. This was essentially Kadish's point, although Green expressed the issue as one involving 'subtle differences in the facts and the interpretation of those facts that determine moral judgements'.[44] It draws attention to the difficulty that many of us have in distinguishing between 'tax evasion' and 'tax avoidance', 'fraud' and 'creative accounting', and 'cartel conduct' and a 'mutually beneficial business arrangement'.[45]

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necessary sense of indignation and outrage that it takes for criminal sanctions to be unsparingly applied.'; Stephen Yoder, 'Criminal Sanctions for Corporate Illegality' (1978) 69 Journal of Criminal Law & Criminology 40, 41, referring to 'a basic theoretical problem' in using criminal sanctions for corporate illegality where the is no clear correlation between commercially acceptable behavior and legally acceptable behavior; Karen Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23 Melbourne University Law Review 440, 459, asserting that 'considerably less moral stigma' attaches to the commission of economic regulatory offences when contrasted with traditional crimes; Luna, above n 8, 716 (quoting Kadish).

[41] See in particular Castle and Writer, above n 13.

[42] Stuart P Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame Journal of Law, Ethics and Public Policy 501.

[43] Ibid 503.

[44] Ibid 507.

[45] Ibid 506-7.

2. *Gap between Law and Community Perceptions:* With many regulatory offences, 'over-criminalisation' has resulted in there being a gap between what the law regards as morally wrongful, and what a significant segment of society actually perceive about the prohibited conduct.[46] Green's point here reflects earlier observations about white collar offences tending not to evoke the moral senses because they are *mala prohibita* rather than *mala in se*.
3. *Conceptual Complexity:* The underlying conduct prohibited is usually conceptually complex, with victims and harm being particularly difficult to identify and define.[47]
4. *Diffusion of Responsibility:* White collar offences are most likely to occur by or within complex institutions such as corporations. The decision-making that gives rise to an offence may be shared amongst several individuals who occupy various rolls at different levels within an organisation. As a result, there is a diffusion of responsibility for the wrongful conduct. The moral blame that tends to be attributed to an individual actor is often less than the blame the community attributes to an individual actor who commits ordinary street crime.[48]
5. *Conflation of Inchoate and Completed Offences:* Historically, the criminal law has treated 'complete' offences more seriously than 'incomplete' offences. Accordingly, a completed act of theft will generally be treated more severely by the law than attempted theft, with that distinction reflected in the maximum penalties applicable to each.[49] This legal distinction coincides with our own intuitive moral sensibilities that suggest that causing actual harm is more reprehensible than creating a mere risk of harm. However, there is a prevailing tendency for legislators to conflate these two kinds of offence in relation to white collar crime.[50] For example, the applicable punishment for a 'conspiracy' to commit a white collar offence may be the same as that which is applicable for commission of the offence itself. When this occurs, the legal system 'dilutes the seriousness with which certain white collar offenses are

[46] Ibid 507-8.

[47] Ibid 508-9.

[48] Ibid 510-11.

[49] See for example *Crimes Act 1958* (Vic), s 321P which sets out a general rule that the maximum term of imprisonment applicable for an 'attempted' offence is five years less than the maximum term applicable for the corresponding complete offence.

[50] Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 511.

perceived.'[51]

6. *Absence of Mens Rea:* The mental element or *mens rea* of a crime has traditionally been regarded as one of its defining moral elements. However, many white collar offences have no mental element required to be proven at all because the law holds offenders 'strictly liable' for their actions. Where no mental element is required, it is difficult to see offenders as being morally blameworthy in the criminal sense.[52]
7. *Value of Surrounding Legitimate Conduct:* White collar offences are often committed in the course of conduct that is otherwise legitimate and socially productive.[53] The offender may therefore appear to be acting with both propriety and impropriety at the same time. The same cannot be said about the common thief or burglar whose conduct has no value whatsoever.[54]
8. *Legislative Attitudes:* Like Kadish and Sutherland before him, Green considered the 'hybrid' nature of white collar crimes, in terms of how they are treated by the legislature, as having a significant on our moral perceptions. They are regarded as a specialised area of regulatory law, rather than as part of the 'criminal law proper'. Both criminal and civil proceedings are available as an enforcement option at the election of the regulator, making the distinction between criminal and non-criminal cases 'blurred, even arbitrary'.[55]
9. *Prosecutorial and Judicial Attitudes:* Prosecutors and judges are reluctant to treat white collar offenders with the same level of moral disdain as common street criminals. The public 'takes its cues' from judges and prosecuting agencies, just as they do from legislators.[56] If the institutions primarily responsible for the legal enforcement of white collar crimes do not do so with moral certitude, it is to be expected that the public will also treat them less seriously.[57]
10. *Other Institutional Influences:* White collar offenders often have the resources to engage powerful advocates to maximise their interests by minimising their

[51] Ibid.
[52] Ibid 512.
[53] Ibid 513.
[54] Ibid.
[55] Ibid 514-15.
[56] Ibid 515.
[57] Ibid.

accountability for their wrong-doing.[58] This includes hiring well-resourced lawyers, adept at reducing the prospects of a conviction and mitigating the risk of harsh court penalties.[59] Public relations firms may also be engaged to downplay the offence and to defend the client's reputation.[60] These kinds of resources are not ordinarily available to common criminals. Furthermore, mainstream media organisations are not inclined to report on 'dull' white collar offending to a general public that is more interested hearing about street level crimes.[61] Professional and academic institutions also play a role in understating the seriousness of white collar offending, either by characterising such behaviour as mere 'violation' rather than 'crime', or by failing to address the subject matter altogether.[62]

For any given white collar offence, Green argued that one or more of these factors potentially operate to obscure our moral perceptions. However, Green did not go so far as to suggest that a failure to perceive its moral wrongfulness renders a white collar crime morally neutral. He instead postulated the hypothesis that the factors obfuscating the moral content of a white collar offence generated a situation of moral *ambiguity*.[63] The distinction is important because, whereas Kadish's conclusion of moral neutrality implies that the impugned conduct has no moral content, Green's conclusion of moral ambiguity implies that such conduct is morally wrong but only more difficult to see. White collar crime is conceptually complex and difficult to prove, 'yet it is also some of the most harmful conduct our society faces'.[64] In this regard, Green's overall perspective is similar to that of Sutherland. Both saw the merit in in regarding white collar crimes as morally reprehensible yet also recognised the difficulties faced by ordinary people in perceiving them as such. Green went further by suggesting that the solution to the problem lay primarily at the feet of legislators, judges, and prosecutors.[65] They need to modify their own attitudes in relation to white collar crime and provide greater clarity to the laws that

[58] Ibid 516-17.
[59] Ibid.
[60] Ibid 517.
[61] Ibid.
[62] Ibid 517-18.
[63] Ibid 502.
[64] Ibid 519.
[65] Ibid 518.

sanction it.[66] They must 'seek out certainty where ambiguity now prevails'.[67] Perhaps only then will perspectives of the wider public begin to change.

IV MORALLY RELEVANT FEATURES OF CARTEL CONDUCT

The extent to which cartel conduct, as a species of economic regulatory offending, displays the features identified in Part III above is now considered. The matters specifically raised by Sutherland, Kadish and Green have been consolidated to produce a list of 15 overlapping factors that potentially operate to obscure the moral perceptions of ordinary people in relation to cartel conduct. These 15 factors and their application to cartel conduct are considered below, and summarised in Table 2.

A *Moral Feelings*[68]

Sutherland referred to the lack of 'organised resentment', Kadish observed the lack of 'sustained public resentment', while Green referred to a 'gap' between the legal prohibition and actual community perceptions. These are all references to the apparent absence of negative moral sentiments manifesting in the minds of ordinary people when they are presented with a situation of economic regulatory offending. Intuitively, ordinary members of the community simply do not 'feel' the moral wrongfulness in relation to such conduct. The available empirical evidence strongly suggests that this general proposition applies to cartel conduct.[69] The moral sentiments of ordinary people towards cartel conduct are equivocal at best, as compared to the clearly negative moral sentiments generated in relation to cases of theft and fraud.

[66] Ibid.

[67] Ibid 519.

[68] See Sutherland, above n 2, 51; Kadish, above n 8, 436-7; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 507-8.

[69] See above Chapter 1 Part IV(B).

Table 2

Comparison of Moral Features: Conventional Property Crimes, Economic Regulatory Offences and Cartel Conduct in Australia

	Feature	Conventional Property Crimes	Economic Regulatory Offences	Cartel Conduct
1	*Moral Feelings*	Community perceives feelings of moral disapproval upon occurrence of offence.	Feelings of moral disapproval less easily generated despite apparent violation of the law.	Moral sentiments of public towards cartel conduct equivocal.
2	*Harm*	Readily identifiable economic harm caused to victim in nature of property loss.	Economic harm caused to victims but not dramatically obvious.	Economic harm takes form of price overcharge and economic inefficiencies, discernable only with reference to economic principles.
3	*Victim*	Identifiable victim aware of victimhood status.	Victims not easily identifiable and unaware of victimhood status.	Victims unaware of victimhood status because harm not subjectively perceived without explanation.
4	*Value Violated*	Tangible property right.	Perpetrators use own private property rights in advancement of own business interests to violate economic order.	Perpetrators offer products for sale with hidden price overcharge, violating economic value of competition by doing so.
5	*Duration*	Discrete episode of offensive conduct giving rise to discrete amount of harm.	Non-episodic. Offence constituted by pattern of business conduct over time.	Cartel arrangements entered into then implemented over long period, often lasting several years.
6	*Separating Good from Bad*	No redeeming qualities.	Prohibited conduct not immediately distinguishable from acceptable aggressive business behaviour.	Transactions arising out of cartel conduct not immediately distinguishable from cartel participants' other legitimate commercial activity. Concealed commercial mischief.
7	*Individual Perpetrator's State of Mind*	Deliberate actions. Intention to cause harm. Knowledge of property right violation.	Deliberate actions primarily motivated by sense of profit-making duty necessarily incidental to legitimate business activity.	Deliberate/calculated actions necessary to plan/enter into/maintain cartel arrangement. Aware of illegality and wrongfulness.
8	*Corporate Perpetrator & Diffusion of Responsibility*	Usually one individual perpetrator.	Usually committed by many individuals acting through corporate entity.	Corporate entities principal offenders. Many individuals operating within corporations coordinating cartel arrangement.
9	*Character & Reputation of Perpetrator*	Perpetrator typically of average or mediocre repute, or a common criminal.	Perpetrator typically of relatively high social and economic status.	Perpetrators employees/owners of business at managerial/executive level, well regarded by community.
10	*Fault Element*	Mental elements of 'intention' or 'dishonesty' must be proven.	Mental elements not always required to be proven; some 'strict liability' offences.	'Intention' or 'knowledge' of cartel agreement and its terms required to be proven.
11	*Inchoate & Complete Offences*	Complete offences punished more severely than attempts.	Complete/inchoate offences often conflated into a single offence.	Separate offences of 'making' and 'giving effect to' a cartel agreement, but same maximum penalty applicable to each.
12	*Law Enforcement Responsibility*	Police and public prosecution agencies responsible for enforcement.	Specialised public agencies (not responsible for enforcing criminal law generally) responsible for enforcement.	ACCC principally responsible for investigating and pursuing civil or criminal cases against cartel perpetrators. Commonwealth Director of Public Prosecutions takes over criminal cases.
13	*Legislative Attitudes*	Unequivocally criminal in the scheme of the law.	Not exclusively criminal. Civil sanctions applicable for same conduct. Criminal sanction seen as last resort. Checkered legislative history.	Not exclusively criminal. Civil sanctions and criminal sanctions applicable at initial election of government regulator. Checkered legislative and political history. Only recently criminalised.
14	*Prosecutorial & Judicial Attitudes*	Seen as well-established crimes, well-entrenched in the moral code. Moral reprehensibility not in doubt.	Not seen as well-established crimes; not entrenched in the moral code.	Not consistently regarded as 'criminal' or morally reprehensible.
15	*Other Institutional Perspectives*	Other social institutions consistently express moral condemnation.	Other social institutions do not consistently express moral disapproval.	Social institutions do not consistently express moral disapproval.

Feature **accentuating** moral wrongfulness

Feature **obfuscating** moral wrongfulness

B *Harm*[70]

From the point of view of an individual consumer, the realisable economic harm arising from cartel conduct takes form as the price overcharge.[71] Such harm is impossible to discern without reference to economic principles, and its significance is only appreciated in its aggregation over a period of time.[72] Other harms, such as the damage generated by economic inefficiencies and to the market as a social institution, are even less tangible.[73] Compared to the tangible loss caused by the common thief who steals a single item of property, the harm caused by cartel conduct is much more complex and difficult to perceive.

C *Victim*[74]

The immediate victims of cartel conduct – the customers of the cartel participants – are unaware of their victimhood status because the harm incurred is not able to be perceived until the cartel has been discovered. Until then, the total price paid by the customer for the cartelist's products, which includes the hidden price overcharge, will be seen by the customer as a cost incurred voluntarily. It is only when they are made aware of the cartel that the 'voluntary' nature of the transactions might be questioned. But even then, the victim will only understand the full extent of the wrongful violation and the harm they have suffered by applying economic principles and reconciling conflicting commercial imperatives.[75] By contrast, in cases of common theft, victims realise that their personal rights have been violated immediately upon discovering that their item of property is missing. Victims of cartel conduct simply do not react in the same way.[76] The path to understanding one's victimhood status in cases of cartel conduct is mired in conceptual complexities.

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[70] See Sutherland, above n 2, 50; Kadish, above n 8, 436; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 508-9.

[71] See above Chapter 2 Part V(D)(2); Chapter 3 Part V(B).

[72] See above Chapter 2 Part V(D)(3).

[73] See above Chapter 2 Part V(D)(1); Chapter 3 Part V(B).

[74] See Sutherland, above n 2, 50; Kadish, above n 8, 436; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 508-9.

[75] See above Chapter 3 Part III(C)(2).

[76] See discussion above Chapter 3 Part V(A)(3).

D *Value Violated*[77]

Conventional property crimes involve a direct violation of a private property right. The value of private property is well entrenched in the community's moral code.[78] Cartel participants, by contrast, take advantage of their property rights by offering products for sale at a price that incorporates a hidden price overcharge, violating the 'economic order' by doing so. More precisely, they violate the principle of competition, a value that does not have the same level of moral entrenchment as private property and is more difficult for ordinary people to understand.[79]

E *Duration*[80]

Conventional property crimes are typically 'episodic' in that they occur over a relatively short and discrete period.[81] From the time it takes for the robber to break into the bank, to clear out the vaults and to flee the scene, the crime is complete. The total harm caused by the robbery is also relatively discrete and can be determined reasonably quickly. On the other hand, cartels tend to operate for many years before they are discovered.[82] It is usually only after examining the many customer transactions that occurred during that time that a complete picture of their economic impact is obtained. The length of time involved in completing the offence is therefore another aspect of cartel conduct adding to its complexity.

F *Separating 'the Good' from 'the Bad'*[83]

There are no redeeming features about the commission of conventional property crimes. The thief's misappropriation of private property may be characterised as a flagrant and

[77] See Sutherland, above n 2, 50; Kadish, above n 8, 436; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 508-9.

[78] Harry Ball and Lawrence Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View' (1965) Stanford Law Review 197, 205.

[79] See however the discussion below Part V(B).

[80] See Sutherland, above n 2, 50; Kadish, above n 8, 426.

[81] Kadish, above n 8, 426.

[82] See above Chapter 2 Part V(D)(3).

[83] Kadish, above n 8, 436; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 506-7, 513.

despicable act, clearly falling outside the scope of any legitimate relationship that he might have had with his victim. To the unschooled observer, the wrongfulness to be found in cartel conduct is much more difficult to discern. Cartel agreements, and the tainted consumer transactions that flow from them, are not immediately distinguishable from the many other legitimate business transactions that a cartel participant engages in. A considered analysis of the transactions is needed, to separate 'the good' from 'the bad', so that the concealed commercial mischief can be exposed.[84]

Yet even when the mischief has been revealed, the wrongfulness of cartel conduct may still be difficult to perceive when attention is drawn to the motivations of those involved. Unadulterated greed is not necessarily the main cause. One or more of the businesses that are party to a cartel agreement may have been suffering economically as a result of fierce competition between them, with the very survival of the businesses ending up imperiled.[85] The cartel agreement may have been conceived out of a genuine belief that it was the most pragmatic means by which commercial catastrophe could be averted. The livelihoods of individuals involved in the running of the businesses, including employees and others depending on their ongoing operation, may have been saved by the cartel conduct. Others in the community may also believe that their own interests are better served by the commercial stability that cartel conduct creates than by the collapse of businesses caused by rampant competition. For many people, these are tangible and apparent 'goods' that are easily perceived.

While economists, lawyers and policymakers will look past any such short-term benefits and focus their attention on the more significant wrongs associated with cartel conduct,[86] ordinary people are likely to have more difficulty doing so. The situation here is more complicated than that of Robin Hood. In Robin Hood's case, most would agree that he remains a dishonest thief even when he steals from the rich to give to the poor because the morally virtuous end (charity) does not justify the morally offensive means (stealing). The moral calculus is swift once it is realised that absolving the thief who steals for

[84] See discussion above Chapter 3 Part III(C)(2), concerning the kind of conceptual analysis that would need to be applied to the transactions of a business in order to separate the cartel conduct from legitimate business activity.

[85] See discussion above Chapter 2 Part V(C); Chapter 3 Part V(C).

[86] See discussion above Chapter 2 Part V(C).

benevolent purposes sets a dangerous precedent and a very 'slippery slope' that would have the tendency to undermine the security of everyone's personal property. By contrast, the 'slippery slope' argument is less obvious when directed at cartel participants who are trying to save their struggling businesses from commercial annihilation. Public empathy may lie with the cartel participants, and the lives of those who depend on them, when attention is drawn to their self-preserving purpose. It is a purpose that is characterisable as benevolent, and perhaps even noble, particularly when it is demonstrated that the businesses would not have survived if the cartel conduct had not occurred. Certainly, there is likely to be some disquiet when the public is apprised of the fact that saving the business has also meant customers of the business have been forced to pay a price overcharge. However, for reasons outlined above,[87] this harm is already difficult to perceive as a moral offence without the cartel participants' self-preserving commercial imperative and arguably noble motivations being thrown into the analysis mix. Separating the wrongful cartel conduct from the legitimate business activity is made all the more difficult.

G *Individual Perpetrator's State of Mind*[88]

The state of mind of an individual involved in the perpetration of cartel conduct has been considered above.[89] The deliberate and calculated nature of their actions, the foreseeable harm caused by the price overcharge, and knowledge of the wrongfulness of their actions, are all matters which paint a picture of a corrupted individual. The mind of the common thief may be thought to be similar, and so in this limited respect the morally salient features of cartel conduct and conventional property crimes are aligned. To be clear, the state of mind of the typical cartel perpetrator is one of the few features that accentuates rather than obfuscates the moral wrongfulness of cartel conduct.

H *Corporate Perpetrator and Diffusion of Responsibility*[90]

When we are asked to imagine a situation of theft, we might think of a bag-snatcher

[87] See discussion above Parts IV(B), (C) and (D).

[88] See Sutherland, above n 2, 51; Kadish, above n 8, 435.

[89] See above Chapter 3 Part V(C).

[90] See Kadish, above n 8, 426, 430-5; Green, 'Moral Ambiguity in White Collar Criminal Law', above n

stealing a handbag from an unsuspecting victim walking along the street. Alternatively, we might imagine a shop-lifter slipping a sale item into her bag before discreetly leaving the store without paying. These situations, involving one individual perpetrator who commits the offence in a relatively short time frame, are cases of criminal conduct easy to visualise and to conceptualise as morally wrong.

Envisaging a typical situation of cartel conduct is more difficult. First, the parties to a cartel agreement are businesses which, though not always, usually take form as corporate entities (e.g., companies, corporations, incorporated associations or limited liability partnerships). Corporations are metaphysical entities through which individual human beings may conduct a commercial business. They are deemed by the law to have separate legal status from the human beings controlling them and are therefore regarded as separate legal persons.[91] As a legal 'person', a corporation can enter into transactions with other persons, including other corporations, and these transactions may include cartel agreements. In such cases, it is the corporation, not the individual human beings working within it, that the law sees as being directly involved in the cartel conduct. This means the law regards the corporation as the principal offender. An individual's involvement in the cartel, who is working within or on behalf of the corporation, is less direct. Such individuals, who may include the corporation's officers (company directors and secretaries), senior managers or other employees, may be legally liable for cartel conduct as secondary offenders.

In Australia, the *Competition and Consumer Act 2010* (Cth) ('CCA') recognises corporations as the principal offenders in cases of cartel conduct, and individuals as secondary offenders, respectively.[92] It raises a complexity that presents itself at the outset of determining who might be morally responsible for instances of cartel conduct. If a

42, 510-11.

[91] *Peate v Federal Commissioner of Taxation* (1964) 111 CLR 443, 478.

[92] See the provisions of the CCA referred to above in Part II. This statutory distinction between corporations and individual human beings is borne largely out of constitutional necessity. The power conferred by s 51(xx) of the Constitution permits the Australian Parliament to enact laws regulating the conduct of trading and financial corporations in Australia. Laws which regulate the behaviour of individual human beings, and which are necessarily incidental (or 'secondary') to the maintenance of such 'primary' laws, may also be enacted. It is this 'secondary' basis upon which the criminal penalty provisions in the CCA are directed towards individuals were enacted.

corporation is the principal legal perpetrator, and the individual humans involved are secondary offenders, what is the degree of moral responsibility attaching to each? The extent to which corporate entities may be morally accountable for their actions is controversial given that corporations are metaphysical entities; they are not human beings.[93] Moral agency, as distinct from legal agency, is traditionally associated with being human.[94] A corporation may, however, be seen as having a moral responsibility derived from the collective decision-making processes and actions of all the human beings operating under its auspices.[95] But even then, it is clear that moral responsibility is traceable to the individual human beings involved first, and to the corporation second.

This thesis does not concern itself with the possible attribution of moral responsibility to corporations who may be the principal *legal* perpetrators of cartel conduct. Rather, the present concern lies in considering the moral accountability of the individual human actors whose decisions and conduct underpin any legal wrong doing on the part of the corporation. Conduct of individual human beings is often the subject of moral inquiry as a matter of course in the criminal law.[96] At least to that extent, the current focus on the moral accountability of individuals who have assisted corporations to engage in cartel conduct is uncontroversial. However, the presence of a corporation, as the vehicle through which individuals engage in cartel conduct, adds a layer of complexity to the analysis. Where corporations are involved, the roles played by the individual human actors working within them may be obscured by the corporate 'veil', as may the determination of their individual moral accountability.

The second layer of complexity appears when one moves beyond the corporate veil and considers the particular actions of each individual person involved. A cartel agreement by its nature involves a conspiracy between two or more businesses. Within each corporate entity that is a primary party to that conspiracy, the further question arises as to how many individuals are involved and what role they play in the instigation and

[93] For a recent consideration of the controversy see James Dempsey, 'Corporations and Non-Agential Moral Responsibility' (2013) 30 Journal of Applied Philosophy 334. See also above Chapter 3 Part II(C).

[94] See above Chapter 3 Part II(C).

[95] Ibid.

[96] See discussion above Chapter 3 Part IV.

maintenance of the cartel agreement on behalf of that entity. While it is common for businesses accused of cartel conduct to respond to the allegation by stating that a single 'rogue' employee is responsible,[97] it is more often the case that many individuals within the organisation have had a hand in the illegal activity.[98] In a large business, a cartel's administration processes are likely to be divided and allocated to a number of different individuals within the organisation. The dispersion of responsibility for the cartel may, in turn, make it difficult to pinpoint moral blame when the cartel is discovered and the individual perpetrators called to account. At the very least, it is a factor which obfuscates the moral wrongfulness of cartel conduct as a general social phenomenon.

I *Character and Reputation of Individual Perpetrator*[99]

The common thief tends to have insignificant social standing in the community or has the reputation of being a 'common criminal' due to their history of recidivism. By contrast, those individuals ultimately responsible for entering into and administering cartel agreements tend to be the senior executives or managers of well established businesses.[100] Typically these individuals have worked for the business for many years and have otherwise gained significant experience in dealing with business matters in the world of commerce outside their current role.[101] Prior to becoming involved in a cartel agreement, they are likely to have achieved many commercial successes that have benefited both the businesses they have been working for as well as their own professional reputations.[102] Their contributions to the world of business are highly commendable such that they may generally be regarded as having 'good character'. The typical cartel perpetrator 'is a top

[97] See for example the research and interview responses reported by Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 Law and Society Review 591, 610.

[98] John Connor, *Global Price Fixing* (Springer, 2007) 10.

[99] See Sutherland, above n 2, 46-50; Kadish, above n 8, 436; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 513.

[100] Gary Spratling, 'International Cartels: The Intersection Between FCPA Violations And Antitrust Violations' (Speech delivered at American Conference Institute 7th National Conference on Foreign Corrupt Practices Act, Washington DC, 9 December 1999); James Griffin, 'An Inside Look At A Cartel At Work: Common Characteristics of International Cartels' (Speech delivered at American Bar Association Section of Antitrust Law 48th Annual Spring Meeting, Washington DC, 6 April 2000). See also Connor, above n 98, 10.

[101] Ibid.

[102] Ibid.

executive, who has an unblemished reputation, and in all other respects is a pillar of the community.'[103] An allegation of criminal wrong-doing against such a person is counter-intuitive. The community may therefore be more reluctant to accept any allegation of moral impropriety.

J *Fault Element*[104]

Conventional property crimes include mental fault elements as part of their statutory definition, which the prosecution must prove beyond reasonable doubt to establish criminal liability for commission of the offence. For example, in a case of theft, the prosecution may have to prove that the accused 'dishonestly' took a person's property 'intending' to deprive that person of it permanently.[105] For fraud, the prosecution may have to prove that the accused 'intended' to deceive their victim. [106]

The criminal cartel offence provisions of the CCA include fault definitional elements. The prosecution must prove that accused perpetrators had an 'intention' to make or give effect to a cartel agreement, and that they 'knew' the agreement generated a situation of price-fixing, market-sharing, bid-rigging or output quotas.[107] The inclusion of these fault elements as legal elements of the offence is in keeping with conventional criminal legal theory, which requires the criminal law only to be applied to those with a morally culpable state of mind. For reasons similar to those expressed in section (G) above, this aspect of Australia's criminal offence accentuates rather than obfuscates the moral wrongfulness of cartel conduct.

K *Inchoate and Complete Offences*[108]

There are two distinct criminal cartel conduct offences under the CCA, one being 'inchoate' and the other 'complete'. Section 45AF is the inchoate offence, which provides

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[103] *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169, 176 (Finkelstein J).

[104] See Kadish, above n 8, 440-4; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 512.

[105] *Criminal Code* (Cth), s 131.1.

[106] *Criminal Code* (Cth), s 133.1.

[107] CCA, ss 45AF and 45AG. See discussion above Chapter 2 Part II.

[108] See Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 511.

that it is an offence to 'make' a cartel agreement. All that is needed to establish the crime is proof that the accused reached an agreement to engage in cartel conduct at some point in the future. Proof of carrying out the agreement and harming consumers is not required because that is not the concern of the offence. Section 45AF identifies the agreement itself as the mischievous act deserving of criminal punishment, not the conduct flowing from it. The carrying out or 'giving effect' to the cartel agreement is the exclusive concern of s 45AG, which is the 'complete' offence. This offence would require proof of the subsequent consumer transactions that arise from the cartel agreement and which incorporate the hidden price overcharge. The actual harmful effects of cartel conduct are therefore a significant concern of s 45AG.

Because s 45 AG targets the preparatory steps associated with cartel activity, and s 45AF targets the actual occurrence of cartel activity, our moral and legal intuitions would suggest that cases of the latter are more deserving of greater punishment than the former. However, the CCA provides identical maximum penalties for both the inchoate offence under s 45AF and the complete offence under s 45AG. Somewhat counter-intuitively, the law therefore makes no attempt to draw a moral distinction between them. The inchoate and the complete offences are 'conflated' leading to the moral implications of cartel conduct being obfuscated.[109]

L *Law Enforcement Responsibility*[110]

The government authority responsible for the investigation and prosecution of cartel conduct in Australia is the ACCC, although any decision to prosecute criminally is made in consultation with the Commonwealth Director of Public Prosecutions ('CDPP').[111] The ACCC is an independent statutory agency whose specialist function is to enforce the CCA

[109] That is not to suggest that a point of distinction would not be made in sentencing the two different types of offender who are both found guilty. As matter of practical sentencing reality, though the statute might prescribe the same maximum for both the inchoate and the complete offence, the offender who has committed the 'complete' the offence will most likely be treated more harshly by a sentencing judge because the offender has done more harm.

[110] See Sutherland, above n 2, 51; Kadish, above n 8, 426; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 508-9

[111] See generally 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).

and other legislation that aims to promote competition, enhance fair trading and regulate Australia's national infrastructure for the benefit of the public. The prosecution of criminal offences, including cartel conduct, represents only a very small part of the ACCC's overall functions. Unlike state and federal police, the ACCC's investigators also do not have a visible 'street' presence that could remind the public of the very important job they are doing. Instead, the ACCC is best described as operating mostly behind the scenes and away out of the public eye, and its investigators as government officials in suits enforcing a public policy commercial agenda which very few ordinary people might care to understand. The ACCC is certainly not seen as the state-sanctioned enforcer of the moral order.

M *Legislative Attitudes*[112]

The crime of theft is unequivocally 'criminal' in the scheme of the law. A victim of stealing will complain to the local police who, upon investigation, may conclude that there is sufficient evidence and that it is in the public interest to justify the laying of a criminal charge.[113] There is no discretion to prosecute the matter in the civil jurisdiction. Theft is proscribed as a criminal offence only. In all cases prosecuted, with a criminal conviction comes the implicit finding that the conduct of the accused was unquestionably immoral. The accused who is acquitted is considered blameless in the eyes of the law. The law reflects an 'all or nothing' approach with respect to conventional property crimes. Alleged acts of theft, burglary and fraud are either clearly criminal, or deserving of no state-sanctioned response at all.

Cartel conduct has always been treated very differently by the legislature. In Australia, the CCA provides for both a criminal and civil cartel offence.[114] Prior to the criminal cartel offence provisions coming into force in 2009, Australia had only a civil cartel offence. The scheme of the CCA therefore invites a moral distinction to be drawn between

[112] See Sutherland, above n 2, 51; Kadish, above n 8, 426; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 514-15.

[113] See generally the Honourable Justice Mark Weinberg, 'Judicial Oversight of Prosecutorial Discretion: A Line in the Sand?' (2016) 13 The Judicial Review 99, 101-5.

[114] See above Chapter 2 Part II. Other countries, including the United States and the United Kingdom, have comparable statutory schemes that provide for cartel conduct to be prosecuted in both the criminal or civil courts.

two different types of illegal cartel conduct. It presumes that there is one type of cartel conduct that is sufficiently reprehensible to be prosecuted as a criminal offence, and another less offensive kind that will only occasion civil proceedings. It is a hybrid system that is atypical of the conventional criminal law.

Attention may also be drawn to other aspects of the CCA that tend to undermine a clear message being sent about the moral reprehensibility of cartel conduct. First, there are the many types of anti-competitive behaviour, other than cartel conduct, that are prohibited by civil prohibitions (but not criminal) under the CCA. These include tacit collusion,[115] collective boycotts,[116] predatory pricing,[117] and several other types of anti-competitive behaviour.[118] Such conduct is often constituted by a deliberate abuse of market power and a clear intent on the part of the alleged perpetrator to inflict economic harm upon another business. For the ordinary person, the question that must then be asked is why has the legislature chosen to sanction cartel conduct with criminal penalties but not these other forms of anti-competitive behaviour? While subtle distinctions may be drawn between cartel conduct and these other types of behaviour by economic, legal and policy experts, these distinctions may carry very little weight for the purposes of explaining the moral differences between them to the ordinary person. To many people, there would appear to be a moral hypocrisy with the legislature seeking to characterise one form of anti-competitive as criminal but not another when their levels of moral wrongfulness are equivalent. It is arguably an arbitrary legislative distinction that serves to contribute to the moral ambiguity of cartel conduct.

Secondly, there are the specific statutory exemptions that the CCA creates in relation to criminal liability for cartel conduct. Certainly, most ordinary people understand and accept that the law typically creates exemptions from criminal liability where the circumstances of a *prima facie* offence are established. But such exemptions are usually clearly morally justified. For example, a person who has intentionally killed another will be excused from liability for murder if it is established that the killing was done in self-

[115] CCA, s 45(1)(c). See also discussion above Chapter 2 Part IV(D).

[116] CCA, ss 45(1)(a) and (b).

[117] CCA, s 46.

[118] See generally CCA, Part IV Division 2.

defence. Likewise, a person who deliberately takes another person's property will be excused from stealing if it is demonstrated the person was acting on an honest but mistaken belief that they had the owner's permission to take the property. For cartel conduct, however, the CCA creates a series of exemptions from criminal liability the moral justifications for which are unclear. A defendant prosecuted for criminal cartel conduct will be exempted from liability if any of the following circumstances are established:

- the parties to the cartel agreement have sought authorisation from the ACCC to engage in the agreed cartel conduct;[119]
- the parties to the cartel agreement are related entities (e.g. the corporate entities are all substantially owned entities by a singular parent company); [120]
- the cartel agreement has been created for the purposes of a 'joint venture' between the parties, and not for the purposes of substantially lessening competition; [121]
- the cartel agreement relates to the collective acquisition of goods or services by the parties;[122]
- the cartel agreement involves exclusive dealing but does not substantially lessen competition.[123]

These statutory exemptions are designed to 'carve-out' from the CCA conduct that would otherwise be considered criminal behaviour by the operation of the cartel offence provisions. While the legal, economic and policy justifications for these exemptions may be well-founded, explaining to the ordinary person the moral distinction between cartel conduct which is protected by a statutory exemption and that which is not may be difficult. On what moral basis is the ACCC able to 'authorise' cartel conduct when the police cannot do the same for murder or theft? These kinds of statutory exemptions constitute another point of distinction with traditional crime which, without considerable technical explanation, serve to accentuate cartel conduct's moral ambiguity

Finally, it should be noted that arguments about the moral wrongfulness of cartel conduct

[119] CCA, s 45AM.
[120] CCA, s 45AN.
[121] CCA, s 45AO.
[122] CCA, s 45AU.
[123] CCA, s 45AR.

in Australia are significantly burdened by Australia's general legislative history in relation to it. This is discussed further in Chapter 5 below.[124]

N *Prosecutorial and Judicial Attitudes*[125]

Prosecution authorities and the judiciary have, historically, not been consistent in their treatment of cartel conduct as a moral problem. These are discussed further in Chapter 5 below.[126]

O *Other Institutional Perspectives*[127]

Beyond legal institutions, other social institutions have played a significant role in influencing community perceptions of the moral implications of cartel conduct. In particular, economists and other industry professionals who are influenced by modern economic philosophies, are resistant to the proposition that cartel conduct is capable of being perceived to be a moral problem. These perspectives are discussed further in Chapter 5 below.[128]

V CARTEL CONDUCT: A CASE OF CORRIGIBLE MORAL AMBIGUITY

Cartel conduct bears many of the features common to economic regulatory offences, which would appear to explain why the Australian community does not clearly perceive it to be morally wrong. Kadish's general approach would invite a conclusion that the moral neutrality of cartel conduct is an immutable fact. However, it would be a mistake to capitulate to this view and let the matter rest there. The more considered position is to view cartel conduct as a morally ambiguous economic regulatory offence, a corrigible situation that may be resolved with effective moral education. The reasons for adopting this position have been touched on in Chapter 3. They are now elaborated upon below

[124] See below Chapter 5 Part III(B)(3).

[125] See Sutherland, above n 2, 46-8; Kadish, above n 8, 436-7; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 515.

[126] See below Chapter 5 Parts IV and V.

[127] See Sutherland, above n 2, 50, 247-51; Green, 'Moral Ambiguity in White Collar Criminal Law', above n 42, 516-18.

[128] See below Chapter V Part VI.

with specific reference to the morally relevant features of cartel conduct.

A *Not All Regulatory Offences Are Morally Neutral*

There is an unfortunate tendency to view many regulatory offences as devoid of moral content simply because an assessment has been made that they carry the 'regulatory' label. A cursory evaluation of the legislative context in which any given regulatory offence appears would seem to justify that view. First, the offence proscribes conduct that falls within a delineated area of complex economic or social activity that the legislature has seen fit to 'regulate'. Secondly, the offence is seen to be one of many 'regulatory' laws contained in a single piece of legislation, some of which attract criminal sanctions, and others civil, and still others both types of sanction. Thirdly, the legislation is administered and enforced by a specialist public agency which, for those who practice in the field, simply goes by the name of 'the regulator'. Certainly, these are all features of Australia's criminal cartel offence provisions, which account for only a few of the CCA's several hundred statutory provisions, and so they are bundled with the rest for analytical convenience. The moral peculiarities of the criminal cartel offence provisions, whatever they might be, are then overlooked because a more global perspective has been adopted in relation to the legislative scheme. Because the CCA appears to be aimed at regulating conduct that is amoral and less serious than conventional crime, the criminal cartel offence provisions are classified as morally neutral without specific analysis of their moral content. Other regulatory crimes in other legislative schemes are treated similarly. It is a practice which has resulted in the 'regulatory' label being habitually associated with the 'morally neutral' label.[129] Insofar as cartel conduct is concerned, this means that Australia's criminal cartel offences are considered morally neutral because of a general assumption that all regulatory offences are morally neutral.

Accepting this assumption is problematic. Andrew Ashworth has argued that 'the concept of regulation must be approached with some care' and that '[i]t is important … not to pre-judge the moral content of all regulatory laws'.[130] There are many regulatory laws

[129] See generally Andrew Ashworth, 'Concepts of Overcriminalization' (2008) 5 Ohio State Journal of Criminal Law 407, 419-20.

[130] Ibid. See also Denis J Galligan, *Law in Modern Society* (Oxford University Press, 2007) 231.

designed to uphold standards, goals and moral values of sufficient importance to warrant criminal sanction if they are violated.[131] Political and legal history also tends to explain the association that has developed between regulatory criminal offences and moral neutrality, which suggests the 'regulatory' label is not in itself causative of the morally neutral characterisation of such offences.[132] Since the middle of the nineteenth century, the criminal law began to shift its focus from the protection of individual victims' interests to the protection of broader public and social interests in order to regulate human behaviour in rapidly developing areas of complex social activity.[133] Legislatures created criminal offences that omitted from their statutory formulation one or more hallmark elements that criminal legal theory had traditionally demanded. In particular, the usual requirements that a criminal offence demonstrate the occurrence of actual harm and that the accused had a culpable state of mind were often dispensed with.[134] The 'strict liability' offence, which does not require proof of a morally culpable state of mind, became commonplace amongst these specialised regulatory laws.[135] Increasingly, concerns were raised that the criminal law was being used to sanction morally neutral conduct.[136] Regulatory offences as a category of crime became synonymous with this apparent problem. Nevertheless, while the moral content of many regulatory offences may have been diluted through this legislative practice, other criminal offences created within the same regulatory framework do not necessarily defy conventional legal norms. The assumption that all regulatory offences are morally neutral is therefore incorrect. Not all regulatory offences are created morally equal.

Green's insights challenge the assumption that a criminal offence is morally neutral simply on the basis that the 'regulatory' label can be easily affixed to it.[137] The moral content of any given regulatory offence must be determined on a case-by-case basis by

[131] Ashworth, above n 129, 420.

[132] Sayre, above n 2, 56-67

[133] Ibid. See also Kadish, above n 8, 440-4.

[134] Sayre, above n 2, 67; Kadish, above n 8, 440-4. See also Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', above n 5, 1557-8.

[135] Sayre, above n 2, 68-9; Kadish, above n 8, 440-4.

[136] Sayre, above n 2, 67.

[137] Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', above n 5. See discussion above Chapter 3 Part IV(B).

considering its unique features. The extent to which the proscribed conduct violates a moral norm, causes harm, and is committed by an individual who is morally culpable, are matters which must be evaluated in combination to obtain an accurate assessment of the conduct's overall moral wrongfulness.[138] An analysis of the morally relevant features of cartel conduct, and Australia's criminal cartel offence provisions has been conducted in Chapter 3 above.[139] The analysis reveals that criminal cartel conduct in Australia arguably bears all the essential hallmarks of morally reprehensible conduct. Cartel conduct is therefore not just another economic regulatory offence devoid of moral content. It is an offence that has been declared criminal on a reasonably objective moral basis. The matters that tend to obfuscate the immorality of cartel conduct therefore need to be considered more closely.

B *Value of Private Property Not So Distinctive*

Kadish made much of an apparent distinction between the nature of the interests protected by conventional property crimes and economic regulatory offences. Conventional property crimes protect a private property interest, whereas economic regulatory offences are said to be a product of considered economic policy and 'seek to protect the economic order of the community against harmful use by the individual of his property interest'.[140] The point he was making, it would seem, was that the value to be found in protecting private property is recognisable as a moral norm, whereas the value in protecting the economic order is not. The negative moral feelings that manifest when presented with a situation of theft, and the absence of such feelings when presented with a situation cartel conduct, are facts consistent with Kadish's hypothesis in this respect. However, there are two critical assumptions underpinning the moral distinction which are not necessarily correct.

First, Kadish appears to have assumed that the value of private property is a moral norm that is not the product of considered economic policy. Private property and the values derived from considered economic policy 'to protect the economic order' are assumed to

[138] See above Chapter 3 Part IV(B).

[139] Ibid Part V.

[140] Kadish, above n 8, 425.

be mutually exclusive. But this assumption seems illogical and counter-intuitive having regard to the important role that private property has historically played in sustaining the integrity of free market economies. The notion of private property is one of the earliest economic ideas developed in human civilisations, being a norm adopted by primitive societies in order to secure individual possession of basic resources and to facilitate exchanges of such resources.[141] The sanctity of private property is now a fundamental feature of modern free market economies because it is a value that facilitates entrepreneurialism and the individual pursuit of material wealth. It is an operating principle implicit in all areas of law that touch on issues of economic exchange. It has been enshrined in religious texts and the criminal law for centuries, with criminal offence formulations evolving over time to deal with novel and more complex violations of individual property rights.[142] With history on its side, the value of private property is now regarded as a legal and moral imperative.[143] It is so entrenched in the social order that Kadish seems to have overlooked that the value of private property is an economic requirement as much as it is a moral requirement.[144] To suggest that conventional property crimes are morally distinguishable on the basis that they protect private property rather than the economic order is therefore somewhat misrepresentative of the true situation. Conventional property crimes and economic regulatory offences both share the 'economic' characteristic. The suggestion that economic regulatory offences are morally neutral because of their economic nature cannot be correct. The point of moral distinction must be traceable to some other cause.

An alternative explanation for the moral distinction lies in the moral priority afforded to each value, a possibility that draws attention to Kadish's second assumption. However, this is also problematic. Kadish appears to have assumed that the value of private property underpinning conventional property crimes is morally superior to the other values underpinning economic regulatory offences. This assumption arises from Kadish's observation that economic regulatory offences protect the economic order 'against

[141] William Redmond, 'Formal Institutions in Historical Perspective' (2008) 42 Journal of Economic Issues 569.

[142] Kadish, above n 8, 425.

[143] Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, above n 2, 88.

[144] See the discussion in Ball and Friedman, above n 78, 205.

harmful use by the individual of his property interest'.[145] The implication, if accepted, is that all economic regulatory offences give rise to a conflict of interest that the law resolves in a way that defies our moral sensibilities. Certainly, it is true that economic regulatory offences disclose underlying conflicts between the interests of individuals and the broader community. There is an obvious interest that individuals have in being able to use their property to their own economic advantage. On the other hand, and for the sake of better 'economic order', there is also a community interest in not having individuals use their property interest in a manner that causes harm to others. These two interests sometimes conflict. Economic regulatory offences are created to resolve the conflict in favour of the community.

The criminal cartel offence is a case in point. The offence prohibits individual businesses from engaging in anti-competitive cartel conduct. By doing so, it deprives businesses of the ability to maximise the sale price of their products using a method that the community considers economically undesirable. The community's interest in having businesses compete rather than collude is afforded legal priority. For Kadish, this represents a situation that is morally counter-intuitive. The legal priority given to the community's interest in competition ahead of the individual's private property interest does not coincide with what Kadish believes to be the correct order of moral priorities. In his view, the individual ought to be able sell their product at a more profitable price without the restriction that a cartel offence creates. This, he would suggest, explains why feelings of moral resentment do not arise in relation to cartel conduct. Kadish assumes that the value of competition is morally inferior to the value found in an individual's private property interest.

This assumption is difficult to accept given that the value of private property has never been absolute in the eyes of the law.[146] The criminal law has always regulated economic exchanges in the broadest sense, reflecting the fact that individuals have never had an unqualified moral right to use as they please the resources they happen to control.[147] Historically, the criminal law has placed restrictions on the types of commodity that may

[145] Kadish, above n 8, 425.

[146] Ball and Friedman, above n 78, 205.

[147] Ibid.

be possessed and sold, and the manner in which exchanges may be negotiated and given effect.[148] The offences of possessing a firearm, trafficking illicit drugs, prostituting sexual services, bribing a public official, blackmail, gambling, and obtaining the benefit of an exchange by deceiving another person can all be seen as crimes of this sort. These crimes, each in their own way, seek to protect the community 'against harmful use by the individual of his property interest.' Of course, any argument suggesting these crimes are morally neutral is likely to be met with significant resistance.[149] Each of these offences has an underlying value which, at some stage in the history of society, has manifested into a moral imperative sufficiently compelling to result in legislative intervention and the creation of a criminal offence.[150] Moral primacy would appear to have been given to such values, ahead of the individual's right to make use of their own resources.[151] If other values protected by the traditional criminal law are capable of supplanting the moral imperative to protect private property and its use, then it is reasonable to conclude that the values underlying economic regulatory offences are capable of doing likewise. Accordingly, to explain the moral neutrality of economic regulatory offences as being attributable to their economic character, and to distinguish them from conventional property crimes on this basis, is not persuasive. The difficulties associated with perceiving cartel conduct as a moral problem must be traced to some other cause.

C *Limitations of Descriptive and Intuitionist Framework*

While Kadish adopted an analogical framework, in many respects his notion of moral neutrality reflects a descriptive and intuitionist understanding of morality.[152] He placed primary importance on the presence of negative emotions for the purposes of determining whether given conduct is immoral.[153] The identification of moral feelings therefore

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[148] Ibid.

[149] That is not to suggest that crimes such as gambling and prostitution are without moral controversy, given that many jurisdictions have now decriminalised these activities.

[150] This has been referred to as 'blocked exchanged', whereby the legislature has prohibited or restricted monetary exchange of certain objects or services for moral reasons alone. See Jens Beckert, 'The Ambivalent Role of Morality on Markets' in Nico Stehr, Christoph Henning and Bernd Weiler (eds), *The Moralization of the Markets* (Transaction Publishers, 2006) 109, 117-18.

[151] Ibid.

[152] See generally the discussion concerning the concepts of descriptivism and intuitionism above Chapter 3 Parts II(A)(1) and II(B)(3).

[153] Kadish, above n 8, 437

represents the starting point of the analysis. A conclusion that economic regulatory offences are morally neutral is immediately reached because they do not tend to generate a negative emotional response. The absence of feelings then tends to be seen as a static and immutable fact from which all other moral truths derive. The morally salient features of economic regulatory offences are enumerated and explained in a manner that is logically consistent with there being an absence of negative moral sentiments generated by such offences. The main drawback of this approach is that when discrepancies in the logic are discovered, such as those identified in sub-parts (A) and (B) above, the moral neutrality argument starts to come undone.

Kadish's approach is also backward-looking from the point of view of moral learning theorists because the identification of moral feelings represents the commencement of his moral analysis rather than the end.[154] He did not specifically consider the normative conceptualisation of the moral wrongfulness of economic regulatory offences, effectively treating the issue as incidental to his main concern. In his defence, Kadish drew attention to the significant harm and deliberate actions of perpetrators that are ordinarily associated with economic regulatory offences, being factors which he acknowledged are usually demonstrative of moral wrongfulness.[155] He also accepted that attitudes can change and that it is possible that the community could eventually come to perceive economic regulatory offences to be morally offensive. This, he suggested, could be achieved by the implementation of a more rigorous criminal enforcement regime.[156] Government attention could be directed towards the 'inculcating the sentiment of moral disapproval in the community', which could possibly be achieved by mounting a campaign 'to give widespread publicity to successful convictions and to shape the public conscience in other ways'.[157] It was an acknowledgement by Kadish that ordinary people could potentially be morally educated about the evils of economic regulatory offending, even though they may not see such offending as morally reprehensible now. He seems to have recognised that the primary responsibility for changing community moral attitudes towards economic regulatory offences lies with society's fundamental social institutions. Ultimately,

[154] See generally above, Chapter 3 Part III.

[155] Kadish, above n 8, 435.

[156] Ibid 438.

[157] Ibid 438-9.

however, Kadish was pessimistic about the prospect of this ever being achieved. In his view, any attempt to change the morally neutral status of economic regulatory is 'problematical'.[158]

D *Corrigible Moral Ambiguity*

The more optimistic view is to regard economic regulatory offences as being morally ambiguous. In contrast to moral neutrality, the concept of moral ambiguity is more fluid because it connotes an apparent lack of certainty surrounding the moral status of the conduct in question. It implicitly contemplates the possibility of a given economic regulatory offence being morally wrong, while also contemplating that not everyone is able to perceive the wrongfulness because of the operating 'ambiguities' surrounding it. These ambiguities include all those factors that have been identified in Table 2 above. Green's explanation of moral ambiguity, unlike Kadish's description of moral neutrality, does not presuppose that conduct of a particular kind has a fixed moral status perceptions of which are unlikely to change. Green was also more open to the idea that the moral uncertainty surrounding economic regulatory offences is capable of being resolved, provided that sufficient institutional resources are directed towards addressing the issue.

The problem of moral ambiguity may therefore be a corrigible situation for many economic regulatory offences. For a given offence, the critical issue is whether the moral ambiguity can be resolved, a process that involves several stages of analysis. First, the type of conduct proscribed by the offence needs to be isolated and precisely defined. Second, its moral content needs to be identified and evaluated so that a reasonably objective determination can be made as to whether the offence is capable of being regarded as morally wrong. Third, on the basis that immorality has been objectively discerned, the factors that might tend to obscure ordinary people's perceptions of its moral wrongfulness need to be identified and explained. The causes of the moral ambiguity may then become known and targeted steps can be taken to educate the community about the wrongfulness of the offence. Moral education could generate a shift in community attitudes, so that eventually there will manifest a sustained public resentment towards the

[158] Ibid 439.

conduct that is proscribed by the economic regulatory offence.[159]

With specific application to cartel conduct, the first step in the process is certainly attainable, the general concept of cartel conduct having been addressed in Chapter 2 above. A precise definition of cartel conduct may be produced in different ways. For present purposes, the defining elements of Australia's criminal cartel offence will suffice.[160] The second step in the process, which involves an objective assessment of the moral content of cartel conduct, has also been undertaken in Chapter 3.[161] That assessment resulted in a determination that cartel conduct is indeed morally reprehensible. The third step in the moral disambiguation process requires consideration of the matters that have been addressed in the present chapter. Part IV and Table 2 above sought to identify and explain the 15 morally salient factors that may be operating to obscure people's perceptions of the moral wrongfulness of cartel conduct. What remains to be considered in more detail are those factors that have the most significant impact on community perceptions.

For those contemplating the task of educating the public about the evils of cartel conduct and curing any prevailing misconceptions, the sheer number of factors listed in Table 2 may initially appear to be a formidable obstacle to overcome. However, it would be wrong to assume that the number of factors is indicative of the nature and extent of the task at hand. In the first place, two of the 15 morally relevant factors listed in Table 2 do not obscure the moral wrongfulness of cartel conduct. The individual perpetrator's state of mind (*Feature No. 7*) and the legal fault elements (*Feature No. 10*) are likely to accentuate rather than obfuscate perceptions of moral wrongfulness. That leaves 13 morally obfuscating impediments that need to be overcome in the moral learning process. Those remaining factors may be conveniently divided into three categories for the purposes of understanding what needs to be addressed to inculcate the sentiment of moral disapproval in the community. The first category *(Feature Nos. 2-6,* and *8*) includes all those features of cartel conduct that bear upon the conceptual complexity of cartel conduct. They are features which, in their aggregation, make cartel conduct a type of behaviour that is

[159] See generally the discussion above Chapter 3 Part III.

[160] See above Chapter 2 Part II.

[161] See above Chapter 3 Part V.

particularly difficult for ordinary people to understand and to perceive as immoral. They include:

- the harm caused by cartel conduct (*Feature No. 2)*;
- the identity of the victim (*Feature No. 3)*;
- the particular value violated (*Feature No. 4)*;
- the duration of the offending (*Feature No. 5)*;
- the difficulty of separating the 'good' conduct from the 'bad' in the analysis of the perpetrator's behaviour (*Feature No. 6*);
- the corporate perpetrator and diffusion of responsibility (*Feature No.8)*; and
- the character and reputation of the perpetrator (*Feature No. 9*).

The second category (*Feature Nos. 11-15*) includes those factors of moral obfuscation that derive from the roles that various social institutions play in educating people about cartel conduct and its immoral nature. This includes:

- how the law expresses the cartel offence (*Feature No. 11*);
- who the law makes responsible for enforcing the cartel offence (*Feature No. 12*);
- the attitudes expressed by lawmakers towards cartel conduct *(Feature No. 13)*;
- the attitudes expressed by prosecutors and judges *(Feature No. 14*); and
- the views expressed by other social institutions that seek to influence public perceptions on the subject matter (*Feature No. 15*).

The sole feature of the third category is the absence of a sustained public resentment directed towards cartel conduct (*Feature No. 1*). For many people, the manifestation of negative emotions is likely to be the primary indicator of conduct being morally wrong. Overcoming this obfuscating feature in relation to cartel conduct would therefore appear to be a priority. However, from a moral learning perspective this feature stands apart from all the others. Unlike those features falling within the first and second categories, the absence of negative moral feelings is not in itself a contributing cause of the community failing to perceive the moral wrongfulness of cartel conduct. Rather, it is the result and primary symptom of a moral learning process that has failed to be effective in inculcating the sentiment of moral disapproval. Attention must therefore turn to addressing the complex nature of cartel conduct, and the role that fundamental social institutions play in explaining it and conditioning individuals to understand its immoral nature. If these

institutions were to become more effective in conveying the moral message about cartel conduct, the manifestation of negative moral feelings would naturally follow. Only then will the moral ambiguity surrounding cartel conduct be resolved.

VI CONCLUSION

Cartel conduct is not just another economic regulatory offence devoid of moral content. It is able to be conceived as being sufficiently morally reprehensible to justify the intervention of the criminal law. While the community's democratically elected representatives may have an adequate understanding of cartel conduct and its moral reprehensibility, such that they are motivated to enact criminal laws condemning it, there remains a problem with community perceptions. For most ordinary people, the immorality is difficult to see. There are two general causes of this problem in moral perception. First, there is the inherent complexity of cartel conduct. Secondly, there is the limited extent to which society's institutions have effectively educated the community about the immorality arising from it. As this chapter has demonstrated, there are a range of factors stemming from each of these general causes of moral obfuscation that can be specifically identified.

Each of these factors does not represent an insurmountable obstacle in a futile quest for moral enlightenment. Cartel conduct is not in a fixed state of moral neutrality – it is morally ambiguous. As such, the morally ambiguous features of cartel conduct may be regarded as impediments in the moral learning process that may be overcome with more effective moral education. Understanding the nature and extent to which a specific factor impedes the community's ability to become more attuned to the moral wrongfulness of cartel conduct would be an essential first step in any moral education campaign. A closer examination of the most significant morally obfuscating factors is the subject of the next chapter.

CHAPTER 5

THE MOST SIGNIFICANT MORALLY OBFUSCATING FEATURES OF CARTEL CONDUCT

I OVERVIEW

This chapter draws attention to arguably the most significant morally obfuscating features that have impeded the development of a sustained public resentment towards cartel conduct in Australia. These factors were raised in Chapter 4 but are now considered more closely for the purposes of understanding the nature and extent of their stifling effect on the community's moral perceptions. Part II addresses general misconceptions and the lack of understanding about cartel conduct. Part III considers legislative attitudes towards cartel conduct. Part IV considers judicial attitudes. Part V reviews the attitudes of those charged with the responsibility of investigating and prosecuting cases of cartel conduct. Finally, Part VI considers the significant role that economists have played in preventing the broader community from coming to understand the immorality of cartel conduct. Part VII concludes this chapter.

II GENERAL MISCONCEPTIONS, INDIFFERENCE AND IGNORANCE

Ordinary people are likely to have difficulty understanding cartel conduct at a fundamental level. There are two main causes of the problem. The first issue arises out of a misconception of 'cartel conduct'. Many ordinary people associate 'cartel conduct' with 'drug cartels', and certainly not the economic phenomenon that is the subject of this thesis. The second issue relates to people failing to have a basic understanding of the economic phenomenon altogether. These are fundamental problems arising from the conceptual and economic complexity of cartel conduct, as well as from fact that cartel conduct is a phenomenon far removed from the personal life experience of most ordinary people.

A *Fundamental Misconceptions*

'Cartel', as it is currently used in western liberal democracies, has a 'predominantly sinister' tone and '[w]hat the word would now suggest for many people would be the idea of threatening organised crime, as encapsulated in the phrase 'drug cartel'.[1] The expression 'drug cartel' refers to 'an illicit cartel formed to control the production and distribution of narcotic drugs.'[2] This compound expression may have originally been applied to describe agreements reached between the largest illegal drug trafficking organisations in Colombia and Mexico relating to the coordinated production and supply of cocaine.[3] In this original sense, its meaning largely corresponds with the dictionary definition of 'cartel' although, with the inclusion of the word 'drug', it is distinguished from a cartel simpliciter in that its critical defining feature becomes the illegal drug trafficking activities of each business that is party to the cartel agreement. It would seem, however, that this defining feature has become so central to the meaning of 'drug cartel' that the essential original meaning of the singular concept 'cartel' has disappeared from the compound concept entirely.[4] Marc Lacey observed that 'these so-called cartels are not really cartels, in an economic sense of the word' and that '[w]hatever cooperation these cartels once had has now largely broken down.'[5] Lacey's view is shared by others, such that it may be fairly said that the expression 'drug cartel' now simply denotes a criminal drug trafficking organisation.[6] Some even complain that the word is now 'inaccurately'

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[1] Christopher Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 Critical Criminology 181, 183. Of course, it must be acknowledged that in command-based economies such as those of the OPEC member nations, cartel conduct may be regarded as perfectly acceptable. As such, there may be no confusion associated with the *cartel* concept in those nations, and certainly no sinister tones associated with it. See discussion above Chapter 3 Part II(B)(1), concerning how the immorality of cartel conduct must be argued on a relativistic basis.

[2] *WordNet® 3.0.* (Princeton University, 2004) <https://www.thefreedictionary.com/drug+cartel> (accessed 15 September 2018).

[3] Marc Lacey, 'Drug Wars: When a "Cartel" Really Isn't', *The New York Times* (New York), 21 September 2009. See also Wikipedia contributors, 'Drug cartel,' *Wikipedia, The Free Encyclopedia* (2018) <https://en.wikipedia.org/wiki/Drug_cartel> (accessed 15 September 2018); June Beittel, *Mexico's Drug Trafficking Organizations: Source and Scope of the Rising Violence* (Congressional Research Service, 7 September 2011) 1.

[4] Lacey, above n 3.

[5] Ibid.

[6] See Beittel, above n 3, 1; Colleen Cook, *Mexico's Drug Cartels* (Congressional Research Service, 16 October 2007) 1; Harding, above n 1, 183.

and ‘improperly’ used by mainstream media.[7]

An explanation for this misconception may lie in the linguistic proposition that a word is understood in accordance with the accumulated experiences of the contexts in which the person has seen and heard the word used.[8] More precisely, the meaning of a word is determined by ‘facts concerning utterances which contain the word in question’[9] and ‘is constituted by its contextual relations’.[10] Drug ‘cartels’ are a popular feature of Hollywood movies in which illegal drug trafficking features as a central part of the plot.[11] The expression ‘cartel’ is also often used by mainstream news media organisations when reporting on stories of illegal drug trade.[12] In these contexts, the word is being used as a referent for a criminal organisation and not, as the dictionary might otherwise demand, as a referent for an agreement between separate businesses.[13]

B *General Indifference and Ignorance*

Putting aside any misconceptions, there remains the issue of how familiar ordinary people are likely to be with the economic phenomenon of cartel conduct. The conceptual complexities associated with coming to understand cartel conduct and its immorality have been explained in Chapter 4.[14] Understanding these complexities may be especially problematic for ordinary people. The experiences of most people would not include first-hand knowledge of everyday dealings that occur between businesses, and would certainly not include involvement in the administration of a cartel agreement. Most people are

[7] See for example Lacey, above n above n 3 (quoting Rodolfo Sosa-Garcia, a Mexican economist, who has stated: ‘The term drug cartel is inaccurate and improperly used by media, based exclusively on strict economic fundamental theory’); Beittel, above n 3, 1; Cook, above n 6, 1.

[8] D A Cruse, *Lexical Semantics* (Cambridge University Press, 1986) 10.

[9] Ibid.

[10] Ibid 16.

[11] See for example *Scarface* (Directed by Brian De Palma, Universal Films, 1983); *The French Connection* (Directed by William Friedkin, 20th Century Fox, 1971), *The Godfather* (Directed by Francis Ford Coppola, Paramount Pictures, 1972); *Clear and Present Danger* (Directed by Phillip Noyce, Paramount Pictures, 1994).

[12] Beittel, above n 3, 1; Cook, above n 6, 1; Lacey, above n 3, 1. See for example Paul McGeough, ‘Mexico’s Days of the Dead’, *The Age* (Melbourne), 31 December 2011, documenting a Mexican priest’s account of ‘turf wars ... waged by Mexico’s drug cartels.’; ‘Mexican drug cartel blamed for massacre of 72 migrants’, *The Australian* (Sydney), 27 August 2010, 1 – All-round Country, 10.

[13] Beittel, above n 3, 1; Cook, above n 6, 1; Lacey, above n 3.

[14] See above Chapter 4 Part IV.

otherwise unlikely to have learnt about such matters, the study of microeconomics not forming part of the general curriculum in primary and secondary schools. As adults, most people are also not sufficiently interested in the world of business to educate themselves about commercial matters that do not have an obvious bearing on their daily lives.[15] The word 'cartel', used in its correct commercial context, is rarely encountered by most ordinary people. The 'facts concerning utterances' of the word suggest that there are very few situations in most people's individual accumulated experiences where the word 'cartel' has been correctly used. Consequently, a proper understanding of the meaning of the word is likely to be undeveloped.

An absence of knowledge about what cartel conduct denotes will inevitably lead to ordinary people having difficulties with what it morally connotes. If they do not know what cartel conduct is, they can hardly be expected to have a well-developed moral perspective in relation to it.[16] That is not to suggest that ordinary people are incapable of understanding what cartel conduct is were it to be explained to them. Nevertheless, if a large section of the community does not understand the very basics of cartel conduct, that is one of the first challenges that must be overcome if an appreciation of the moral wrongfulness of cartel conduct is to be engendered.

III LEGISLATIVE ATTITUDES

By maintaining a hybrid system of civil and criminal prohibitions, Australia's legislature has weakened the effect of any moral message about cartel conduct that may have been intended.[17] If cartel conduct is so bad, why was it not made exclusively criminal like other conventional crimes? Moral equivocality reverberates throughout Australia's legislative history in relation to cartel conduct. Since federation in 1901, there have been several

[15] See the data collected and discussion concerning people's general interest in business in Caron Beaton-Wells et al, *The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement* (The University of Melbourne, December 2010) 56, 65; Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour' (2009) 42 Australian and New Zealand Journal of Criminology 218, 229, in which the authors suggested that the Australian public may have an inadequate understanding of cartel conduct. See also Oliver Black, *Conceptual Foundations of Antitrust*, (Cambridge University Press, 2005) 128. See also Edward Griew, 'Dishonesty: The Objections to *Feely* and *Ghosh*' [1985] Criminal Law Review 341, 345.

[16] See discussion above Chapter 3 Part III(C)(1).

[17] See discussion above Chapter 4 Part IV(M).

legislative reforms aimed at regulating anti-competitive business behaviour. While some of the earlier anti-cartel legislation included criminal penalties, these laws were found to be ineffective in practice.[18] In the 30 years that immediately preceded criminal cartel laws being introduced in 2009, there were no criminal laws sanctioning anti-competitive practices operating at all – only civil sanctions applied. The lack of a sustained hostile attitude towards cartels held by Australian lawmakers is a significant contributing factor to the moral ambiguity surrounding the cartel offence.

The irony of Australian legislators' vacillations is that they have always looked to the United States for guidance in this particular area of law, a nation whose lawmakers have been much more certain in their views. Since the passing of the *Sherman Act* in 1890, cartel conduct has always been criminal in the United States. Some reference therefore needs to be made to the attitudes of legislators in the United States before moving to consider more closely the discernable views of Australian lawmakers.

A *America's Resolve*

Section 1 of the *Sherman Act 1890* (US) provides that '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.'[19] Cartel conduct in form of price-fixing, market-sharing, bid-rigging and output quotas falls within the scope of this legal prohibition.[20] Cartel agreements are deemed *per se* illegal under this provision 'because of their pernicious effect on competition and lack of any redeeming virtue'.[21] As such, once a court has found cartel conduct to have occurred, no further inquiry into the particular harmful effects caused by the cartel is made in order to establish legal liability.[22]

[18] See discussion below Part III(B).

[19] 15 USC §1.

[20] Douglas Broder, *US Antitrust Law and Enforcement* (Oxford University Press, 3rd ed, 2016) [3.05].

[21] *N Pac Ry v United States*, 356 US 1, 5 (1958); *National Society Professional Engineers v United States*, 435 US 679, 692 (1978); *Broadcast Music, Inc v Columbia Broadcasting System*, 441 US 1, 19-20 (1979); *National College Athletic Assn v Board of Regents (NCAA)*, 468 US 85, 100 (1984).

[22] Broder, above n 20, [3.22]-[3.33].

Violation of § 1 attracts both criminal and civil liability.[23] To prove the criminal offence, the prosecution must establish: (1) a cartel agreement (or 'conspiracy', to use the language of § 1) was knowingly formed; (2) the accused knowingly joined the conspiracy; (3) the conspiracy substantially affected interstate or foreign trade; and (4) the accused intended or knew of the probable consequences of their actions and their anti-competitive effects.[24] Because cartel conduct is categorised as a per se legal violation, an accused's knowledge of its anti-competitive effects is readily inferred upon proof of the cartel agreement.[25] For this reason, cartel conduct has often been regarded as an offence of 'strict liability' in the United States.[26] When the *Sherman Act* was originally enacted, a breach of § 1 constituted a misdemeanour punishable by a fine of up to $5000 or imprisonment of up to one year. As a result of successive legislative amendments, today the criminal offence is now classed as a felony and attracts maximum penalties of a $100 million fine for corporations, a $1 million fine for individuals, or 10 years' imprisonment.[27]

The progressive increase in maximum criminal penalties would appear to reflect an ever-increasing concern on the part of American lawmakers that cartel conduct is a reprehensible crime and ought to be punished accordingly. The author of the *Sherman Act*, Republican senator John Sherman, was unwavering in his view that the criminalisation of cartel conduct was morally justified. In the course of debating the bill, Senator Sherman described cartels as 'a great wrong to the people'[28] and 'an evil we have to deal with.'[29] He stated that those who engaged in cartel conduct 'should be punished as criminals'.[30] Fellow Republican senator George Edmunds described cartels as

[23] See generally ibid [8.01]-[8.109].

[24] American Bar Association, *Criminal Antitrust Litigation* Handbook (ABA Publishing, 2nd ed, 2006) 259. See also *United States v United States Gypsum Co*, 438 US 422, 444 (1978).

[25] *United States v United States Gypsum Co*, 438 US 422, 444 (1978).

[26] *Norris v United States* [2008] UKHL 16; [2008] 1 AC 290, [4].

[27] See the discussions concerning the legislative and enforcement history relating to cartel conduct in the United States in Donald I Baker, 'Punishment for Cartel Participants in the US: A Special Model?' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 27; William Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from US Experience' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 45.

[28] 21 *Congressional Record* 2461 (John Sherman) (1889, Senate).

[29] Ibid 2457.

[30] Ibid.

'grinding tyrannies'[31] and 'great evils in the social progress of the country'.[32] He also suggested that public protests against cartel conduct were completely justified 'in the moral sense'.[33] Democrats also supported the bill, Senator Henry Teller declaring that 'we all admit [cartels] are offensive to good morals'.[34] The new laws received overwhelming support from both sides of politics. In the end, the *Sherman Act* was passed with only one dissenting voice in the Senate,[35] and it received unanimous support in the House of Representatives.[36] The moral resolve of American lawmakers in relation to the reprehensibility of cartel conduct was clear.

B *Australia's Equivocation*

Australia's legislative history in relation to cartel conduct is more chequered. It may be separated into three distinct periods, which align with a discrete number of significant legislative reforms enacted by Parliament. Legislators' attitudes toward cartel conduct during each of these periods are considered below.

1 *Early Legislation (1906-1974)*

The first statutory prohibitions against cartel conduct were introduced by the *Australian Industries Preservation Act 1906* (Cth) ('AIPA'). An aim of the AIPA was to sanction monopolistic practices, which included cartel conduct. The AIPA's provisions were influenced by both the common law doctrine of restraint of trade as well as the United States statutory prohibitions contained in the *Sherman Act*.[37] Sections 4 and 5 of the AIPA prohibited individuals and corporations from entering into any contract or combination

[31] 21 *Congressional Record* 2726 (George Edmunds) (1889, Senate).

[32] Ibid.

[33] Ibid.

[34] 21 *Congressional Record* 2562 (Henry Teller) (1889, Senate)

[35] The Act passed the Senate by a vote of 51-1 on 8 April 1890. See 21 *Congressional Record* 3152-3 (1890).

[36] The Act passed the House of Representatives by a unanimous vote of 242-0 on 20 June 1890. See 21 *Congressional Record* 6314 (1890).

[37] The influence of the United States on Australian lawmakers is evident in the parliamentary debates. See in particular Commonwealth, *Parliamentary Debates*, House of Representatives, 14 June 1906, 243-57 (Sir William Lyne, Minister for Trade and Customs). See also Simon Peart, 'Australia and New Zealand: Their Competition Law Systems and the Countries' Norms' in Eleanor Fox and Michael Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2013) 60, 60-1.

'with intent to restrain trade or commerce within the Commonwealth to the detriment of the public.'[38] Sections 7 and 8 prohibited individuals and corporations from monopolising, combining or conspiring to monopolise any part of trade or commerce 'with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity.'[39] Any such conduct constituted a criminal offence and was punishable by a fine of up to £500.[40] Individuals who were knowingly involved in the commission of such offences were also liable to be prosecuted and fined up to the same amount.[41]

The AIPA bill was introduced in 1905 by a Protectionist Party minority government led by Alfred Deakin. Addressing Parliament about the proposed new laws, the Minister of Trade and Customs proclaimed that cartels had 'menaced the industries of Australia for a considerable time … and must be dealt with.'[42] Fellow Protectionist Party member Carty Salmon joined the supporting chorus, referring to the 'evils brought about in America' by cartels and described them as a 'means by which the public can be completely hood-winked'.[43] The Labour Party also supported the proposed new laws on the basis that they were designed to address the well-known 'evils' of cartels.[44] However, there was strong opposition to the legislation from the Free Trade Party. Leader of the opposition, Joseph Cook, referred to the AIPA bill as 'specious Yankee legislation, for which there [was] no need in Australia.'[45] Cook queried whether it was even appropriate to characterise cartel conduct as inherently wrong.[46] While the AIPA was passed into Australian law, support for the legislation was divided along party lines.

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[38] AIPA, ss 4 and 5.

[39] AIPA, ss 7 and 8.

[40] Ibid.

[41] AIPA, s 9.

[42] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 1905, 6819 (Sir William Lyne, Minister for Trade and Customs).

[43] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 December 1905, 6990 (Charles Carty Salmon).

[44] See Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1906, 464 (Chris Watson).

[45] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 December 1905, 6983 (Joseph Cook).

[46] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 1906, 367 (Joseph Cook).

It was only a few years after they came into force that sections 5 and 8 of the AIPA were held to be constitutionally invalid by the High Court.[47] A few years later, the High Court was called upon to interpret section 4 in the case of *Adelaide Steamship Co Ltd v Attorney-General of the Commonwealth of Australia*.[48] A price-fixing and output quota agreement between a group of independent coalmine and ship owners led to the owners of these businesses being charged under section 4 and, alternatively, section 7 of the AIPA. The High Court held that for an offence under s 4 or s 7 to be established it was essential that the prosecution prove that the defendant had a specific intent to cause detriment to the public.[49] Mere intent to restrain trade or commerce by entering into an agreement which had the effect of raising prices, without the further intent to cause detriment to the public, was found not to be sufficient.[50] The practical outcome of these court proceedings was to render the statutory prohibitions against cartel conduct operationally ineffective and an ordinary case of cartel conduct in Australia insusceptible to criminal prosecution.[51]

The AIPA Act was eventually repealed by a Coalition government led by Sir Robert Menzies in 1965. It was replaced with the *Trade Practices Act 1965* (Cth) ('TPA 1965'). While the Menzies government saw competition as a hallmark feature of a proper functioning market economy, it did not see competition as unassailable. Restrictions placed on competition were seen to be 'unavoidable' and sometimes even desirable.[52] The government chose not to restate the general prohibitions against cartel conduct that formed part of the AIPA. In their place, the TPA 1965 contained only one specific prohibition against big-rigging agreements.[53] Bid-rigging was punishable by a fine of up to $10 000 for corporations, or $4000 or six months imprisonment for individuals involved in the commission of the offence.[54] Price-fixing, market sharing and output quota agreements were not presumptively illegal under the Act. Rather, they were

[47] See *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330.

[48] *Adelaide Steamship Co Ltd v Attorney-General of the Commonwealth of Australia* (1912) 15 CLR 65.

[49] Ibid 72-3.

[50] Ibid. The High Court's decision was upheld on appeal to the Privy Council: *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd* (1913) 18 CLR 30 (PC).

[51] Peart, above n 37, 61.

[52] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 May 1965, 1655 (Bruce Snedden, Attorney-General).

[53] TPA 1965, s 85.

[54] Ibid.

'examinable' agreements which Australia's regulatory body at the time, the Trade Practices Commission, could seek to have terminated if they were thought to be contrary to the public interest.[55] The reforms represented a significant step backwards in terms of Australian law recognising the moral reprehensibility of anti-competitive cartel conduct. The Australian Labor Party, then in opposition, argued that new laws would be as effective as a 'toothless lion' in combatting 'the immorality of big business.'[56]

The TPA 1965 was declared constitutionally invalid by the High Court only six years after its enactment.[57] The *Restrictive Trade Practices Act 1971 (Cth)* was then enacted to replace it, restating the operating provisions of the 1965 Act, but without any constitutional defect.[58] During the years that these Acts operated, the Trade Practices Commission examined many price-fixing agreements between competing businesses and managed to secure their termination.[59] The effect of this administrative action has been suggested to have engendered within the Australian business community a perception that price-fixing arrangements were a 'discredited' business practice.[60] However, the lack of comprehensive criminal sanctions undermined any suggestion that cartel conduct was to be regarded as truly reprehensible in the moral sense.

2 Trade Practices Act 1974 *(Cth)*

When the Whitlam Labor government came to power in 1973, it recognised that anti-competitive business practices had 'long been rife in Australia'.[61] The *Trade Practices Act 1974* (Cth) ('TPA') introduced into Australian law provisions that comprehensively regulated anti-competitive behaviour. Although there were no provisions that specifically targeted cartel conduct, ss 45, 46 and 47 (together with ss 4D and 45A) operated to capture, among other things, cartel conduct in the nature of price-fixing, market sharing,

[55] See TPA 1965, Part IV (ss 35-39).

[56] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1965, 3294 (Gilbert Duthie).

[57] *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

[58] See generally David Merrett, Stephen Corones and David Round, 'The Introduction of Competition Policy in Australia: The Role of Ron Bannerman' (2007) 47 Australian Economic History Review 178.

[59] Ibid 189.

[60] Ibid.

[61] Commonwealth, *Parliamentary Debates*, Senate, 27 September 1973, 1013 (Lionel Murphy, Attorney-General).

and bid-rigging and output quota arrangements.[62] In particular, section 45 prohibited competing corporations entering into or giving effect to agreements which contained an 'exclusionary provision' or which had the purpose or likely effect of substantially lessening competition. An 'exclusionary provision' was defined by s 4D to include a provision designed to restrict the supply of goods or services to the competing corporations' customers 'in particular circumstances or on particular conditions'.[63] All cartel agreements fell within the scope of the s 4D definition. Price-fixing provisions contained in such agreements were also expressly deemed to substantially lessen competition for the purposes of the section 45 prohibition.[64] As a matter of practice, section 45 became the principal statutory provision most often invoked by litigants who alleged the existence of an anti-competitive cartel.

Contraventions of the TPA's Part IV provisions only gave rise to civil liability. Private claims for damages or injunctive relief could be sought against cartel members by persons who could show that the cartel had caused them loss or damage.[65] The ACCC otherwise had primary responsibility for enforcing the TPA's competition provisions. Preventative statutory remedies, such as injunctions, could be sought against persons who had engaged in cartel conduct or against those who were planning to do so.[66] Rehabilitative remedies, such as community service orders[67] or probation orders,[68] could also be used to teach the offender not to engage in cartel conduct again.[69] Punitive sanctions included adverse publicity orders,[70] orders disqualifying responsible individuals from managing

[62] Ibid 1016. See also Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, report dated 31 January 2003, report released 16 April 2003) 148.

[63] Section 4D, TPA.

[64] TPA, s 45A.

[65] TPA, ss 80, 82.

[66] TPA, s 80.

[67] TPA, s 86C(2)(a).

[68] TPA, s 86C(2)(b).

[69] Rehabilitative orders of this sort might have include, for example, an order that the offending corporation conduct a community awareness program that highlighted the benefits of complying with the competition laws. A court may also order that an offending corporation and its employees participate in a compliance program.

[70] TPA, s 86D. An adverse publicity order typically requires a cartel offender to publish, by way of public advertisement, the fact that it has contravened the Part IV provisions and noting any other court imposed sanctions it received.

corporations,[71] and pecuniary penalties.[72] As against offending corporations, a pecuniary penalty could be up to $10 million, three times the value of the benefit the corporation received from the cartel conduct, or 10% of the corporation's annual turnover. As against individuals found to have been involved in the corporation's wrong-doing, a court could impose a penalty of up to $500 000.[73]

Criminal liability was expressly precluded under the TPA.[74] The distinction between criminal and civil liability was particularly apparent because criminal penalties were applicable to breaches of other consumer protection provisions contained in the Act.[75] However, breaches of the competition provisions, including those which prohibited cartel conduct, could only ever attract civil sanctions.

The decision to include criminal penalty provisions in the TPA, but not extend their operation to cartel conduct, indicates that Australian legislators did not regard cartel conduct as sufficiently reprehensible to warrant criminal condemnation. Civil penalties are a comparatively feeble substitute. While adverse publicity orders may publicly shame businesses,[76] and the pecuniary penalty bears some resemblance to the criminal fine, the civil sanction was never designed as society's primary legal means of expressing moral censure.[77] The condemnatory effect flowing from the imposition of a civil sanction is fleeting when compared to that which attaches to a criminal sanction. A finding of guilt in a criminal court, even if accompanied by only a small fine, generates a moral stigma that a person may have to carry with them for the rest of their life.[78] Civil sanctions are incapable of producing a comparable moral outcome. Accordingly, the civil penalty

[71] TPA, s 86E.

[72] TPA, s 77.

[73] TPA, s 76.

[74] TPA, s 78.

[75] For example, see the Part VC offence provisions relating to 'unfair practices'.

[76] See generally Karen Yeung, 'Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?' (Paper presented at the Australian Institute of Criminology Conference, Current Issues in Regulation: Enforcement and Compliance, Melbourne, 3 September 2002).

[77] See Australian Law Reform Commission ('ALRC'), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 87.

[78] Ibid 80. See also *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152; Karen Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23 Melbourne University Law Review 440, 454.

regime that was applicable to cartel conduct under the TPA for more than 30 years until 2010 conveyed the impression that Australia placed cartel conduct in a different moral league to traditional criminal offending. Australian lawmakers did not see cartel conduct as being sufficiently reprehensible to be criminal.

3 *Current Statutory Penalties*

Australia's new penalty regime under the *Competition and Consumer Act 2010* ('CCA'), which now includes criminal sanctions, was summarised at the outset of this thesis.[79] By criminalising cartel conduct, the Australian Parliament can be seen as having sent a clear message that cartel conduct is to be regarded as morally reprehensible, given that the marking of moral opprobrium is an essential function of the criminal law.[80] The maximum penalty of 10 years' imprisonment puts cartel conduct into the same category of offending as theft, fraud and other property crimes to which comparable statutory penalties attach in various Australian jurisdictions.[81] The required fault elements of intention and knowledge or belief also indicate that the Australian Parliament's intention was for the criminal laws to target only those individual wrong-doers who have turned their mind to making or giving effect to a cartel agreement and who have clearly understood its anti-competitive nature.[82]Accordingly, these aspects of the criminal cartel offence provisions indicate that the Australian Parliament has expressed a desire to have cartel offenders now held morally accountable for their morally wrongful actions.

Many of Australia's political leaders threw their support behind the criminalisation proposal leading up to its legislative enactment, with public statements strongly suggesting they believed criminal penalties were appropriate on moral grounds. Peter Costello, the Federal Treasurer responsible for commissioning the Dawson Committee's

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[79] See above Chapter 2 Part II.

[80] See discussion above Chapter 3 Part IV(A).

[81] See for example *Crimes Act 1900* (NSW), s 117 (offence of larceny punishable by maximum of 5 years imprisonment), s 192E (offence of fraud punishable by maximum of 10 years imprisonment); *Crimes Act 1958* (Vic), s 74 (offence of theft punishable by maximum of 10 years imprisonment), s 81 (offence of obtaining property by deception punishable by maximum of 10 years imprisonment); *Criminal Code* (Cth), s 131.1 (offence of theft from Commonwealth punishable by maximum of 10 years imprisonment), s 134.1 (offence of obtaining property by deception from Commonwealth punishable by maximum of 10 years imprisonment).

[82] See the elements of the criminal cartel conduct offence above Chapter 2 Part II.

inquiry into Australia's competition laws, had already publicly stated his firm belief that competition represents 'the lifeblood of the economy.'[83] When he presented the then government's response to the Dawson Committee's recommendations, he extended the moral metaphor by stating that cartel conduct 'cripples' the economy.[84] Later, when the Coalition government announced its intention to enact criminal penalties for cartel conduct, he described cartel conduct as 'dishonest' and 'deceitful'.[85]

When a bill was eventually introduced into Parliament in 2008, a new Labor government was in power. The Labor Party prosecuted the case for criminalisation of cartel conduct on moral grounds. The Minister for Competition Policy and Consumer Affairs, Chris Bowen, described cartels as being equivalent to stealing, theft and fraud,[86] and referred to them as 'widely condemned as the most egregious forms of anticompetitive behaviour.'[87] As the bill progressed through Parliament, other law makers expressed similar sentiments.[88] Cartel conduct was described by other Labor Party parliamentarians as 'nefarious',[89] 'the white-collar version of organised crime',[90] 'a scourge on our society',[91] 'highway robbery',[92] and 'completely unethical, immoral and wrong.'[93] Members from the cross-benches also supported the passage of the legislation on moral

[83] Peter Costello, 'Competition Law – A Political Perspective' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, 2000) iii.

[84] Peter Costello (Treasurer), 'Commonwealth Government response to the review of the competition provisions of the Trade Practices Act 1974' (Media Release, 16 April 2003).

[85] Peter Costello (Treasurer), 'Criminal Penalties for Serious Cartel Behaviour' (Media Release, 2 February 2005)

[86] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12309-12 (Chris Bowen, Minister for Competition Policy and Consumer Affairs). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 67 (Chris Bowen, Minister for Competition Policy and Consumer Affairs).

[87] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12309 (Chris Bowen, Minister for Competition Policy and Consumer Affairs).

[88] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 914 (Brett Raguse); 923 (Tony Zappia); 927 (Nick Champion); 929 (David Bradbury); 955 (Daryl Melham).

[89] Ibid 890 (Shayne Neumann).

[90] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 2009, 788 (Mark Butler).

[91] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 897 (Chris Hayes).

[92] Ibid 957 (Sid Sidebottom).

[93] Ibid 904 (Bernie Ripoll).

grounds.[94] There was otherwise no significant opposition to the proposed legislation, with the Coalition parties now in Opposition facilitating passage of the bill without objection.[95]

However, the moral imperative for the new criminal cartel laws is a message that has never been consistently conveyed by Australia's political leaders. That moral equivocality can be traced to the Dawson Committee's original recommendations. The Dawson Committee recommended criminal penalties on the basis that they would provide the most effective deterrent against cartel conduct.[96] The marking of moral opprobrium was not an articulated reason. On the contrary, the Dawson Committee expressed concerns about 'dishonesty' being a defining element of an Australian criminal cartel offence because of the difficulties that juries might have in applying this moral concept to cartel conduct.[97] The Dawson Committee implicitly recognised that there was an apparent reluctance, on many fronts, in perceiving cartel conduct as a moral problem. Rather than leading the way to change others' perceptions in this regard, the Dawson Committee instead chose not to commit to a moral position at all. As a result, the moral uncertainty surrounding the criminalisation of cartel conduct remained unresolved.

There was also a lack of moral resolve from Australia's political leaders. While Treasurer Costello described cartel conduct as dishonest and deceitful,[98] his Liberal Party colleagues were much more ambivalent. Some were even resistant to the criminalisation proposal. When prominent businessman Richard Pratt admitted his involvement in cartel conduct prosecuted under the old civil penalty provisions in 2007, Prime Minister John Howard himself spoke out in support of Mr Pratt, describing him as 'generous' and a 'very good citizen'.[99] At the same time, Victorian Premier John Brumby publicly commended Mr Pratt for his 'generosity over decades', and further stated 'I would be

[94] Ibid 906 (Rob Oakeshott); 918 (Bob Katter).

[95] See generally the comments made about the Opposition's support for the bill in Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 963-5 (Chris Bowen, Minister for Competition Policy and Consumer Affairs).

[96] Trade Practices Review Committee, above n 62, 153, 163.

[97] Ibid 155.

[98] Costello, 'Criminal Penalties for Serious Cartel Behaviour', above n 85.

[99] Rick Wallace and Michael Davis, 'Howard, Costello at odds over Pratt', *The Australian* (Sydney), 10 October 2007.

very happy to have Richard Pratt for dinner'.[100] In the context of Mr Pratt's cartel case, these comments were 'completely at odds' with the view of Treasurer Costello.[101] Neither the Prime Minister nor the Victorian Premier suggested Mr Pratt was to be likened to a common thief or fraudster. Indeed, it would have been unprecedented for an Australian political leader to express support for a person who had just admitted their guilt to such a serious crime. It was therefore reasonably clear that some senior members of the government did not see cartel conduct in the same moral vein as traditional crimes. Ultimately, the clearest indication that the Howard government lacked the moral resolve to criminalise cartel conduct can be found in the fact that it failed to enact new criminal cartel laws altogether. After having more than four years to consider the Dawson Committee's criminalisation recommendation, the Coalition government was ousted from power following a general election in 2007 before even introducing a draft bill for consideration.

The incoming Labor government was quick to introduce the proposed new criminal laws into Parliament in 2008.[102] It was just as quick to point out that the previous government had moved at a 'glacial pace' on the issue.[103] Yet despite Labor lawmakers' numerous expressions of moral condemnation directed towards cartel conduct,[104] they too had their own peculiar moral equivocations arising out of the criminalisation process. When the government released a draft bill and discussion paper about the proposed new criminal offence, the draft included 'dishonesty' as an express element of the offence.[105] It was

[100] Ibid.

[101] Ibid. See also the discussion of the apparent political hypocrisy in Adrian Hoel, 'Crime does not pay but hard-core cartel conduct may: Why it should be criminalised' (2008) 16 Trade Practices Law Journal 102, 112-13; Julie Clarke, 'The increasing criminalization of economic law – a competition law perspective' (2012) Journal of Financial Crime 76, 77; Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour' (2009) 42 Australian and New Zealand Journal of Criminology 218, 233.

[102] The proposed new criminal laws were first introduced into Parliament on 3 December 2008. See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12309 (Chris Bowen, Minister for Competition and Consumer Policy).

[103] See Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 881-3 (Mark Dreyfus).

[104] See above n 93-100 and accompanying text.

[105] Department of the Treasury (Competition and Consumer Policy Division), 'Criminal Penalties for Serious Cartel Conduct – Draft Legislation' (Media Release, 11 January 2008); Department of the Treasury (Competition and Consumer Policy Division), 'Discussion Paper: Criminal penalties for serious cartel conduct', above n 86; Department of the Treasury (Competition and Consumer Policy Division), *Trade*

proposed that a person would commit the criminal offence only where that person engaged in cartel conduct 'with the intention of dishonestly obtaining a benefit' from it.[106] The element of dishonesty was a feature of the British criminal cartel offence, from which the Australian government apparently drew inspiration.[107] By including dishonesty, it was thought that legislators would send a clear signal to the community that the law would now regard cartel conduct as morally reprehensible.[108] Dishonesty is a pejorative label that clearly connotes moral wrong-doing when it is used.[109] There was therefore some sense in legislators using it, if only to assist in cultivating a sustained public resentment towards cartel conduct. However, many commentators expressed their disapproval towards this aspect of the proposed Australian offence.[110] Their concerns echoed those which had previously been expressed by the Dawson Committee about juries having difficulty in seeing cases of cartel conduct as dishonest.[111] In the end, the government yielded to these concerns and withdrew the dishonesty element proposal.[112] In doing so, many may have been left with the impression that the Labor government was no longer so sure about its own moral convictions in relation to cartel conduct.

Nevertheless, the decision to remove dishonesty as a defining element was a prudent

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Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 – Exposure Draft Bill (2008).

[106] *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 – Exposure Draft Bill* (2008), ss @45ARA, @45AF, @45AG.

[107] See *Enterprise Act 2002* (UK), s 188 as it was originally enacted. See also the discussion in Trade Practices Review Committee, above n 62, 154-5.

[108] United Kingdom, *Parliamentary Debates*, House of Commons, 10 April 2002, vol 383, col 47 (Patricia Hewitt, Secretary of State for Trade and Industry). See also John Lever and John Pike, 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence": Part 2' (2005) 26 European Competition Law Review 164, 167.

[109] Kenneth Campbell, 'The Test of Dishonesty in *R v Ghosh'* (1984) 43 Cambridge Law Journal 349, 350.

[110] See in particular Julian Joshua and Christopher Harding, Submission to Department of the Treasury (Competition and Consumer Policy Division), *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 29 February 2008, 2-9; Caron Beaton-Wells and Brent Fisse, Submission to Department of the Treasury (Competition and Consumer Policy Division), *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 7 March 2008, 6; International Bar Association, Submission to Department of the Treasury (Competition and Consumer Policy Division), *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 10 March 2008, 2-3; Julie Clarke, Submission to Department of the Treasury (Competition and Consumer Policy Division), *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, 29 February 2008, 2. See, also, Brent Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 Australian Business Law Review 235.

[111] Trade Practices Review Committee, above n 62, 154-5.

[112] The element of dishonesty did not form part of the legal definition that was eventually passed into Australian law the following year. See above Chapter 2 Part II.

move. While dishonesty is well established in the criminal law as one of the hallmark fault elements of the more conventional property offences, its application is potentially problematic in relation to cartel conduct. It requires a jury to evaluate an accused's conduct in two steps. Known as the *Ghosh* test after the case from which it is derived,[113] the first step is to determine what is objectively honest according to the standards of ordinary people, and whether the accused's conduct fell short of that standard.[114] The second step involves a determination as to whether the accused subjectively knew his or her conduct was dishonest according to that standards.[115] The *Ghosh* test would have been applicable to the criminal cartel offence, had dishonesty been retained as an element.[116] For conventional property crimes such as theft and fraud, which involve stealing and deception, the application of the first step in the *Ghosh* test presents few problems. Jurors would have little difficulty in accepting that an act of stealing or deception is dishonest according to the standards of ordinary people. Rules against stealing and deception are, after all, universal moral norms with descriptive and normative notions of their wrongfulness coinciding.[117] By contrast, if a jury is to consider whether cartel conduct is dishonest, it must grapple with the kinds of conceptually difficult questions that have been raised in this thesis. The vexed question of whether cartel conduct is immoral would be a fact in issue in every case that proceeded to trial. It would be a mentally challenging feat for a jury, with the prosecution's burden of having to prove the element of dishonesty beyond reasonable doubt a potentially insurmountable hurdle.[118] It comes as no surprise,

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[113] *R v Ghosh* [1982] QB 1053. See also *Peters v R* (1998) 192 CLR 493, 504 (the High Court of Australia adopting the first limb, but rejecting the second limb, of the *Ghosh* test for the purposes of Australian common law); *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'), s 130.3 (effectively codifying the two-limb *Ghost* test for the purposes of Australian commonwealth statutory offences that incorporate the element of dishonesty).

[114] *R v Ghosh* [1982] QB 1053.

[115] Ibid.

[116] The *Ghosh* test has effectively been codified under Australia's commonwealth criminal law. See *Criminal Code*, s 130.3.

[117] See above Chapter 3 Part II(B)(4).

[118] On the particular difficulties associated with applying the concept of dishonesty to cartel conduct in the context of a jury trial, see Andreas Stephan, 'How Dishonesty Killed the Cartel Offence' [2011] Criminal Law Review 446; Brent Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 Australian Business Law Review 235; Department for Business, Innovation and Skills (UK), *A Competition Regime for Growth: A Consultation on Options for Reform* (URN 11/657, 2011) 61-71. On the application of the element of dishonesty more generally, see David Ormerod, *Smith and Hogan Criminal Law* (Oxford University Press, 12th ed, 2008) 785-6; Law Commission (UK), 'Fraud' (Law Com No 276 Cm 5560, 2002) 39-52; Griew, above n 15.

therefore, that dishonesty was eventually removed as an element from the UK offence.[119] It never made it into the final formulation of Australia's criminal cartel offence provisions.

In the end, Australian lawmakers created a criminal cartel offence unencumbered by the practical difficulties that the element of dishonesty would have represented. However, they still chose to implement a hybrid system containing both civil and criminal prohibitions. The hybrid system is a classic symptom of economic regulatory offending that is likely to contribute significantly to the continuing moral ambiguity of cartel conduct.[120] It means that cartel conduct is not regarded as exclusively 'criminal' under Australia's statutory regime. Some cases will be prosecuted criminally, while others civilly. In the first instance, it will be a matter for the ACCC to proceed against the alleged perpetrators in either the civil or criminal jurisdiction. A decision to prosecute criminally is made in consultation with the Commonwealth Director of Public Prosecutions ('CDPP'),[121] and brings with it all the procedural burdens commonly associated with that jurisdiction. This includes the requirements to prove the mental elements of 'intention' and 'knowledge',[122] and to prove every element of the offence 'beyond reasonable doubt.'[123] A decision to launch civil proceedings involves a significantly lesser burden, with the ACCC being obliged to prove each element 'on the balance of probabilities'.[124] There is also no requirement to prove that a civil defendant had a certain state of mind at the time of offending.[125] The penalties in each jurisdiction are commensurate with the standard of proof applicable to each offence. Proof of the criminal offence beyond reasonable doubt entitles the prosecution to seek forms of punishment that have a significant moral and retributive function, including

[119] Section 47 of the *Enterprise and Regulatory Reform Act 2013* (UK) removed the element of 'dishonesty' from the criminal cartel offence provisions contained in s 188 of the *Enterprise Act 2002* (UK), with the amendment coming into effect on 1 April 2014.

[120] See discussion above Chapter 4 Part IV(M).

[121] See generally 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).

[122] See above Chapter 2 Part II.

[123] *Evidence Act 1995* (Cth), s 141.

[124] *Evidence Act 1995* (Cth), s 140.

[125] See above Chapter 2 Part II.

imprisonment. Proof of the civil offence on the balance of probabilities allows the prosecution to seek less severe penalties, the most significant of which is the pecuniary penalty that is largely bereft of moral content.[126]

While there are clear differences in the legal burdens and procedures associated with each jurisdiction, the same evidence that discloses a civil violation is also likely to disclose a violation of the criminal offence. The only substantive difference between the two types of legal violation is to be found in the appearance of fault elements of 'intention' and 'knowledge' that form part of the criminal offence.[127] The inclusion of these fault elements in the criminal prohibition reflects a long-standing legal convention that, for criminal offences, the prosecution should be obliged to prove a culpable state of mind as part of the formal legal requirements to establish the commission of an offence.[128] The civil prohibition does not have these elements because there is no equivalent legal convention in the civil jurisdiction. However, for reasons that have been discussed in Chapter 3, intention and knowledge are likely to be present in almost every case of cartel conduct that occurs.[129] Practically speaking, this means it will be left to prosecutorial discretion in determining which cases of cartel conduct are deemed 'civil' and which are deemed 'criminal'. Although the ACCC and CDPP have made it reasonably clear that criminal prosecutions will only be launched in the most 'serious' cases,[130] that objective guidance only serves to aggravate the moral dilution of cartel conduct that a hybrid penalty regime represents.

IV JUDICIAL ATTITUDES

The attitudes of the courts are to be found principally in the judicially-determined outcomes of matters that become the subject of court proceedings. Courts, constituted by individual judges, express their opinions when they are called upon to adjudicate a

[126] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 87 [2.107].

[127] See above Chapter 2 Part II.

[128] See above Chapter 3 Part IV(B)(3).

[129] See above Chapter 3 Part V(C).

[130] Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 121.

dispute, whether of a civil or criminal nature, and finally come to pronounce the rights and liabilities of the parties involved. In delivering their decisions, judges will apply the relevant legal rules and principles to the facts of the case as determined by the evidence adduced in the proceeding. In relation to cartel conduct, cases have involved the application of rules and principles sourced from both the common law and statute. The legal rules themselves are not often expressed in morally pejorative terms. It is therefore left to the discretion of an individual judge in determining a case to express their own moral view as they apply the relevant legal principles to the case at hand. At common law, and under Australia's statutory civil penalty regime, judges have occasionally been called upon to make moral judgments about cartel conduct, with very limited success. By contrast, the judiciary of the United States, in applying the criminal provisions of the *Sherman Act*, would seem to be more willing to denounce cartel conduct in moral terms. Judicial views expressed in these three jurisdictions are reviewed below.

A *Common Law*

The common law has been always been reluctant to regard cartel conduct as unlawful, although there is some very limited authority in support of the proposition.[131] The origins of a common law prohibition arose out of the application of the common law doctrine of 'restraint of trade'.[132] In more recent times, in the United Kingdom it has been recognised that cartel participants may, in very limited circumstances, be charged and prosecuted for committing the common law indictable crime of 'conspiracy to defraud'.[133] These two areas of the common law will be outlined and discussed below, with specific consideration being given to the extent to which courts have tended to make pronouncements as to the moral wrongfulness of cartel conduct.

1 *Restraint of Trade*

The modern concept of restraint of trade evolved within the context of the more general

[131] See generally John Dyson Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed, 2008) 255-62.

[132] See in particular the discussion of the House of Lords concerning the origins of the restraint of trade doctrine in *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290, [7]-[23].

[133] *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290.

body of common law principles governing the legality and enforceability of private contracts.[134] The doctrine was typically invoked by a party to a contract who sought to impugn the contract, and have it declared unenforceable, because the terms of the contract imposed an unreasonable restraint upon the party's ability to carry on business.[135] All cartel agreements are arguably of this nature. By the terms of any cartel 'contract', each cartel participant privately agrees with the other cartel participants to 'restrain' themselves by refusing to deal with such customers on an independent and competitive basis.

A contract that contains a term of restraint is presumed to be void and unenforceable.[136] The presumption may be rebutted if the court considers the restraint to be justified or reasonable.[137] The 'reasonableness' of the restraint is usually the critical issue which a court is asked to resolve.[138] It is a question of law to be answered by applying a two-limb test.[139] First, for the contractual restraint to be valid the court must be satisfied that it is a restraint that is reasonable in the interests of the parties to the contract themselves.[140] Second, the restraint must also be considered to be reasonable in the interests of the public.[141] In the case of a cartel agreement, the two-limb test essentially obliges a judge to consider the benefits and detriments generated by the anti-competitive effects of the

[134] See, generally, Heydon, above n 131, 7-32; LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [110-7160]-[110-7260].

[135] Heydon, above n 131, 34, 52; *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, 180.

[136] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 294-5, 299; *Buckley v Tutty* (1971) 125 CLR 353 at 376; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd*(1973) 133 CLR 288, 306-7, 315; *Bridge v Deacons* [1984] AC 705, 713; *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290, [8]. See also LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [110-7165].

[137] *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290, [8]; LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [110-7165].

[138] Heydon, above n 131, 51.

[139] LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [110-7170]; *Herbert Morris v Saxelby* [1916] AC 707; *Norris v United States of America* [2008] UKHL 16, [8].

[140] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535; *Herbert Morris v Saxelby* [1916] AC 707; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288; *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290, [8]. See also LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [110-7170].

[141] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535; *Herbert Morris v Saxelby* [1916] AC 707; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288; *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290, [8]. See, also, LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [110-7170].

agreement and their specific impact on two discrete classes of person. The court must first consider the reasonableness of the effects of the cartel on the cartel participants themselves, and then the reasonableness of its effects on the public at large.

Early cartel cases that involved the application of the restraint of trade doctrine suggest that courts did not see the inimical nature of cartel conduct. In *Jones v North*,[142] a bid-rigging agreement between four quarry owners was held to be 'perfectly lawful'.[143] The Court described the agreement as 'a very honest one' and that it was inappropriate to characterise the arrangement as some kind of 'conspiracy'.[144] The cartel arrangement was seen to be an acceptable means by which the four quarry owners could protect their own legitimate business interests.

In *Attorney General of the Commonwealth of Australia v Adelaide Steamship Co Ltd*,[145] the Privy Council ruled that a price-fixing and output quota agreement between a group of independent coalmine and ship owners was legally valid for similar reasons:

> The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others.[146]

Nevertheless, some judges began to recognise that the public interest may be injuriously affected by cartel arrangements. In *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd*, Farwell LJ in the Court of Appeal described the effect of a price-fixing and market sharing arrangement between two competitors as amounting to 'hoodwinking' members of the public into believing that they actually had a real choice between traders.[147]

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[142] *Jones v North* (1875) LR 19 Eq 426.

[143] Ibid, 430.

[144] Ibid, 429.

[145] [1913] AC 781.

[146] *Attorney General of the Commonwealth of Australia v Adelaide Co Ltd* [1913] AC 781, 797 (citing *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1888) 21 QBD 544 in support of this proposition). See also discussion of the evolution of the common law principles in *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290, [17].

[147] *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422 (this part of Farwell LJ's judgment is not included in the law report, but unreported parts of Farwell LJ's judgment are quoted at length in the appeal decision of the House of Lords: *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, 465.

However, that decision was overturned on appeal to the House of Lords, it being found that there was no evidence that the public interest had been damaged by the arrangement.[148] The House of Lords held that the cartel participants were presumptively entitled to combine to regulate the supply and prices of their products.[149] The agreement reached between them had not been shown to be unreasonable and so was held to be legal and enforceable.[150]

Disagreement between judges is also to be found in *Rawlings v General Trading Company*.[151] In that case, the trial judge found that a bid-rigging was void on the grounds of public policy, although it was acknowledged that the law was not entirely clear on the issue.[152] The trial judge reasoned that two bidders at a public auction who combined without disclosing that fact, such that the goods being sold were priced considerably below the fair value, amounted to the public being 'defrauded'.[153] However, this decision was reversed on appeal.[154] The decision of the Court of Appeal, constituted by a bench of three judges, was split. Lord Justice Scrutton (dissenting) mostly agreed with the trial judge, finding that the bid-rigging agreement was contrary to the interests due to its anti-competitive nature and was therefore unenforceable.[155] His Lordship, however, refrained from characterising the agreement as an act of fraud and emphasised that the conduct of the defendant was not criminal – the bid-rigging agreement was merely unenforceable.[156] But the majority of the Court held that the agreement was perfectly legal and therefore enforceable. Lord Justice Bankes held that intending buyers at an auction are entitled to agree not to compete with one another.[157] In a separate judgment, Lord Justice Atkin expressed bewilderment as to why it should be illegal for two competing bidders to enter

[148] *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, 469-71.

[149] Ibid 471 (Viscount Haldane LC), 480 (Lord Parker).

[150] Ibid 473 (Viscount Haldane LC), 478 (Lord Parker).

[151] *Rawlings v General Trading Company* [1920] 3 KB 30 (Shearman J); [1921] 1 KB 635 (Court of Appeal, decision of Shearman J reversed).

[152] *Rawlings v General Trading Company* [1920] 3 KB 30, 34.

[153] Ibid 35.

[154] *Rawlings v General Trading Company* [1921] 1 KB 635.

[155] Ibid 642-47.

[156] Ibid 643.

[157] *Rawlings v General Trading Company* [1921] 1 KB 635, 641 (his Lordship citing, amongst other authorities, *Galton v Emuss* (1844) 1 Coll 243; *In re Carew's Estate* (1858) 26 Beav 187; *Dollubdass v Ramloll* 5 Moo Ind App 133.

into such an agreement, especially in the absence of any evidence of an express or implied misrepresentation made by the bidders with the intent to deceive the seller.[158] His Lordship considered that the agreement in this case was 'plainly reasonable'.[159]

The variety of outcomes in the cases referred to above demonstrate a lack of resolve by the courts to treat cartel conduct as unlawful under the common law restraint of trade doctrine.[160] Certainly, there are very few judges who have suggested cartel conduct to be morally reprehensible within the context of the common law doctrine. Dyson Heydon has argued that the traditional common law approach to cartel agreements, at least outside the United States, is presumptively 'to uphold them unless there is some specially harsh feature in them.'[161] Judges have been slow to embrace competition as an economic imperative, resulting in a judicial preference for seeing cartel agreements as leading to 'stable and efficient satisfaction' of the public's economic needs.[162] The proposition that that they are morally wrong receives little support at common law.

2 *Conspiracy to Defraud*

The common law has long recognised the indictable offence of conspiracy to defraud.[163] The offence is committed when two or more persons enter into an agreement 'to prejudice or imperil' the legal rights or interests of another by the use of 'dishonest means'.[164] Such an agreement does not have to involve the parties expressly agreeing to cause economic

[158] *Rawlings v General Trading Company* [1921] 1 KB 635, 648 ('Why it should be illegal for two possible competitors to agree to a joint adventure in the purchase of an article offered for sale in any of the ways I have mentioned I cannot discern').

[159] *Rawlings v General Trading Company* [1921] 1 KB 635, 652.

[160] See generally the discussion in Heydon, above n 131, 255.

[161] Heydon, above n 131, 261.

[162] Ibid 255-6, citing a number of cases in support of this proposition, including: *Adelaide Steamship Co Ltd v Attorney-General of the Commonwealth of Australia* (1912) 15 CLR 65, 77, 80; *New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75, aff'd 1936 TPD 296; *Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd* 1946 WLD 140; *Oliver v Gilmore* 52 F 562, 569 (CCD Mass, 1892).

[163] LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [130-7440]. See also the discussion in Jeremy Lever and John Pike, 'Cartel Agreements, Criminal conspiracy and the Statutory "Cartel Offence": Part 1' (2005) 26 European Competition Law Review 90, 93; *Peters v R* (1998) 192 CLR 493; *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290.

[164] LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [130-7440]; *Peters v R* (1998) 192 CLR 493, [30], [33], [74], [75]; *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290.

loss to others.[165] It is enough that the parties realise that their agreement may have that effect.[166]

In all cases of cartel conduct, there is an agreement between two or more businesses that has the effect of prejudicing the economic interests of their customers by way of a price overcharge attaching to the products sold to these customers. Once the cartel arrangement is exposed, the detrimental impact on the customers is obvious to all concerned.[167] While the cartel participants' primary aim is to increase their own profits, they are well aware that these increased profits must necessarily come at the economic expense of their customers. For this reason, the first essential elements of the common law offence of conspiracy to defraud would appear to be readily satisfied in a typical cartel conduct case.[168] They are 'bound to be present'.[169]

It has been held that, ordinarily, 'dishonest means' requires proof a defendant making a representation known to be false, concealing facts where there is a duty to disclose, or engaging in conduct knowing there is no right to do so.[170] Ultimately the question of whether dishonest means have been used is a question to be decided according to the 'standards of ordinary, decent people'.[171] In the relatively recent case of *Norris v United States of America*,[172] the issue of the adaptability of the 'dishonest means' element to cartel conduct was considered by the House of Lords. The argument advanced by the prosecution effectively involved analogising cartel conduct with acts of deception, similar to the kind of moral reasoning that was considered in Chapter 3.[173] However, the House of Lords unanimously rejected the argument, finding that 'it would be dangerous and

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[165] LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [130-7440]; *Peters v R* (1998) 192 CLR 493, [25]; *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290.

[166] LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [130-7440]; *Peters v R* (1998) 192 CLR 493, [25].

[167] See above Chapter 2 Part V(D).

[168] Lever and Pike, above n 163, 90.

[169] Ibid.

[170] LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [130-7440]; *R v Ghosh* [1982] QB 1053, 1064; *Peters v R* (1998) 192 CLR 493, [33], [84].

[171] LexisNexis, *Halsbury's Laws of Australia*, vol 6, 110 Contract, 'Contracts in Restraint of Trade' [130-7440]; *Ghosh* [1982] QB 1053, 1064; *Peters v R* (1998) 192 CLR 493, [33], [84].

[172] *Norris v United States of America* [2008] UKHL 16; [2008] 1 AC 290, [17].

[173] See above Chapter 3 Part V(A)(4).

impractical, particularly for the judges, to introduce a general principle that there is some sort of implied representation that the price at which goods are offered has been arrived at on a certain basis.'[174] Their Lordships concluded that, if cartel conduct is to be prosecuted as the offence of conspiracy to defraud, an aggravating feature would need to be present in order to establish the dishonesty element (eg, lying to prospective purchasers about the existence of the cartel agreement, or positively misrepresenting that their prices had been set independently and competitively).[175] But in such a case, it is the deceit, not the cartel conduct that constitutes the dishonesty resulting in criminal conduct.[176] In short, the House of Lords held that cartel conduct in itself cannot be regarded as dishonest for the purposes of the conspiracy to defraud offence.[177]

The decision in *Norris* arguably represents the culmination of much uncertainty regarding the legality and reprehensibility of cartel conduct at common law. At least in the United Kingdom, the position would now appear to be reasonably well settled. Cartel conduct is not dishonest and not morally reprehensible. Australian courts, which have historically tended to be significantly influenced by English case law developments in relation to this particular common law offence,[178] are likely to follow suit if the issue were ever to be agitated here.[179]

B *United States*

Courts in the United States have been much more prepared to use morally pejorative language when describing cartel conduct that falls foul of §1 of the *Sherman Act*. Cartel

[174] Ibid [61].

[175] Ibid [51].

[176] Ibid [49].

[177] Ibid [52], [62], [100].

[178] See generally Barbara Hocking, 'The Fame, Fortunes and Future of the "Rump of the Common Law": Conspiracy to Defraud and Australian Law (Part 2)' (2000) 64(6) Journal of Criminal Law 602.

[179] See Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 24, suggesting this would presumably be the case in relation to an application of the codified version of the common law offence contained in the s 135.4 of the *Criminal Code*.

conduct has been described as 'evil',[180] 'abominated',[181] and 'unethical if not highly immoral'.[182] Cartel conduct has even been suggested to be as morally offensive as crimes such as murder and arson.[183] In the most recent authoritative statement about cartel conduct from the United States Supreme Court, Justice Scalia described collusive price-fixing as the 'supreme evil of antitrust'.[184]

Yet some judges, influenced by neoclassical economic analysis in anti-trust law and policy, have taken the contrary view that criminal violations of the *Sherman Act* do not involve any moral impropriety at all.[185] Other judges have been more measured, recognising that there are competing viewpoints on the issue. In *United States v Alton Box Board Co*,[186] District Judge Parsons acknowledged the prosecution's view that price-fixing cases represent 'immoral, antisocial, and calculated conduct.'[187] However, Judge Parsons also acknowledged the contrary argument that criminal violations of antitrust laws 'are not the traditional *malum in se* crimes involving moral turpitude.'[188] His Honour

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[180] *United States v Joint Traffic Association* 171 US 505, 571 (1898); *United States v Trenton Potteries Co*, 273 US 392, 398 (1927), referring to the *Sherman Act*'s purpose of addressing the 'evil consequences' of private corporations being allowed to freely enter into cartel arrangements; *Atlantic Cleaners & Dyers v United States*, 286 US 427, 435 (1932), referring to the fact that it was the intention of Congress to 'deal comprehensively and effectively with the evils' of cartel conduct; *United States v Socony-Vacuum Oil Co*, 310 US 150, 218 (1940); *United States v Danilow Pastry Co, Inc*, 563 F Supp 1159, 1170 (1983), referring to a case where price-fixers, found guilty of the criminal cartel offence, were ordered 'to make a dozen speeches to civic groups about the evils of price-fixing' as part of their sentence; *United States v Seville Industrial Machinery Corporation*, 696 F Supp 986, 994 (1988), where the court considered severe penalties were appropriate to impose on members of a bid-rigging cartel because of the 'blatant and continuous nature of the conduct' and that the 'failure of the parties to recognize and acknowledge the evil of their conduct [was] as disturbing as the conduct itself"; *United States v Gravely*, 840 F 2d 1156, 1161 (1988), describing price fixing as 'a root evil forbidden by the Sherman Act'; *United States v Manischewitz*, WL 86441 (United States District Court, District of New Jersey) (1990), referring to 'the fact that price-fixing has always been considered a serious and evil offense with no redeeming value whatsoever'; *United States v Romer*, 148 F 3d 359, 365 (1998).

[181] *Freeman v San Diego Association of Realtors*, 322 F 3d 1133, 1144 (2002).

[182] *United States v Standard Sanitary Mfg Co*, 191 F 172, 189 (1911).

[183] Ibid.

[184] *Verizon Communications Inc v Trinko*, 540 US 398, 408 (2004).

[185] *United States v United Shoe Machinery Corp*, 110 F Supp 295, 345 (1953), stating that '[t]he violation with which United is now charged depends not on moral considerations, but on solely economic considerations', aff'd 347 US 521 (1954); *United States v Safeway Stores*, 20 FRD 451, 454-5 (1957). See also the arguments in Herbert Hovenkamp 'Antitrust Violations in Securities Markets' (2003) 28 Journal of Corporation Law 607, 609.

[186] WL 1374 (ND Ill, 1977).

[187] Ibid 4.

[188] Ibid, citing John J Flynn, 'Criminal Sanctions Under State and Federal Anti-trust Laws' 45 Texas Law Review 1301, 1312.

appeared to reject both points of view as lying at either extreme of the moral spectrum, adopting instead a position that was more in keeping with a 'middle-ground' perspective:

> The sentencing judge must be very careful in an economic crime case that he does not get swept away in a surge of mass hysteria and administer punishment that fails to relate either to the defendant or to the actual injury to society that results from his conduct.[189]

Judicial perspectives therefore vary in the United States. However, unlike cases decided under the English common law, there appears to be a significant level of judicial support for the proposition that cartel conduct is morally reprehensible.

C *Australia*

Australian judicial perspectives developed within the context of courts applying the civil penalty provisions under the TPA. In *Rural Press Ltd v Australian Competition and Consumer Commission*, the High Court considered that the prohibitions against cartel conduct under the TPA reflected Parliament's view that cartels are 'so generally offensive to the competitive goals underlying the Act that they are to be condemned without [further] consideration'.[190] However, that is the only occasion on which Australia's highest court has engaged in any kind of discourse on the moral wrongfulness of cartel conduct specifically. The High Court is yet to explicitly declare that such 'condemnation' amounts to the kind of moral condemnation well known to the criminal law.

A handful of Australian judges in lower courts have been more forthright in expressing a view about the morality of cartel conduct within the context of the TPA's civil penalty regime. Former Federal Court judge Justice Finkelstein, speaking extra-curially, described cartel conduct as 'morally offensive'.[191] In *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd*, Justice Heerey, while acknowledging that the competition provisions derive from economic policy and theory,

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[189] Ibid.

[190] *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, [82] (Gummow, Hayne and Heydon JJ).

[191] Justice Ray Finkelstein, 'Criminalising Hard-core Cartels: Competitive Law Enters the "Moral Universe"' (Paper presented at the ACCC Cracking Cartels Conference, Sydney, 2004).

considered that the TPA's penalty provisions import 'into the penalty fixing process concepts of moral responsibility long known to the criminal law' and that 'penalties for contraventions are to be applied in a moral universe.'[192] Justice Heerey considered the attempted bid-rigging perpetrated by the defendants in that case to be a 'form of cheating'.[193] In *Australian Competition and Consumer Commission v Visy* Justice Heerey again emphasised the need to determine the appropriate level of pecuniary penalty to be imposed against cartel offenders with reference to 'concepts of moral responsibility long known to the criminal law'.[194] His Honour appeared to regard those individuals involved in a carboard box manufacturing cartel as having engaged in seriously reprehensible conduct who needed to be held morally accountable for their actions.

But the weight of judicial opinion in Australia lies with the contrary view that cartel conduct is not immoral. The decision of Justice Heerey in the *McPhee* case was appealed.[195] In the appeal decision, the Court made it clear that the TPA is 'not designed to regulate or proscribe moral conduct, but … calculated and intended to proscribe particular aspects of commercial conduct'.[196] The Court referred to earlier authorities, including *Trade Practices Commission v CSR Ltd*, where Justice French considered that morality 'within the sense of the Old and New Testament moralities that imbue much of our criminal law' had no part to play in economic regulation of the kind contemplated by the TPA's competition provisions.[197] Reference was also made to the case of *Queensland Wire Industries Ltd v Broken Hill Pty Co Ltd*,[198] a High Court decision which held that 'essential notions with which s 46 [of the TPA] is concerned and the objective which the section is designed to achieve are economic and not moral ones',[199] and that, ultimately, the application of this provision does not involve 'some distinct examination of the

[192] *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd* [1998] ATPR ¶41-628, 40,891.

[193] Ibid.

[194] *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673, [304].

[195] *J McPhee & Son (Aust) Pty Ltd v Australian Competition and Consumer Commission* [2000] FCA 365.

[196] Ibid [163]-[172].

[197] *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152.

[198] *Queensland Wire Industries Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

[199] Ibid 194 (Deane J), 202 (Dawson J).

morality or social acceptability of the conduct involved.'[200] While the *Queensland Wire* case did not concern cartel conduct, it remains one of the most influential High Court judgments on the proper approach to be taken towards competition law in Australia more generally.[201]

The prevailing judicial attitude in Australia, at least within the context of the TPA's civil penalty regime, is that cartel conduct does not have any moral implications. A possible explanation for this view is that Australian judges have been significantly influenced by the attitudes of economists in all matters that come before the courts involving the application of competition law and policy. Modern economists take an amoralistic approach towards economic behaviour, and this includes an amoralistic attitude towards those who engage in cartel conduct.[202] Judges understandably place a great deal of reliance on economic expertise when assessing the anti-competitive effects of conduct alleged to contravene Australia's competition laws. As a result, the economist's amoral philosophy may affect a judge's legal (and moral) assessment of the case at hand.

Another explanation for Australian judges being reluctant to pass moral judgment is that they have felt constrained by legal positivism and the moral limitations of a civil penalty regime. Many judges may have been disinclined to declare cartel conduct to be morally reprehensible simply because Parliament had not enacted laws declaring it to be criminal. This view assumes that Parliament must use the criminal law, not the civil law, for the purposes of instructing the courts that certain conduct is to be morally condemned. There is certainly merit to be found in this view when regard is paid to the different purposes which criminal and civil penalties respectively serve.[203] If accepted, it means that most Australian judges are only likely to consider making moral pronouncements as to the reprehensibility of cartel conduct when criminal sanctions are applicable.

In Australia there is currently only one decided case in which a judge has applied the

[200] Ibid 194.

[201] Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour' (2009) 42 Australian and New Zealand Journal of Criminology 218, 221.

[202] Ibid. See the discussion below Part VI.

[203] See discussion above Part III(B)(2), and Chapter 3 Part IV(A).

criminal cartel offence provisions.[204] Japanese shipping company Nippon Yusen Kabushiki Kaisha ('NYK') pleaded guilty to a criminal charge for its involvement in an international shipping cartel over a four year period. NYK was convicted and fined $25 million. The case represents Australia's first successful criminal prosecution for cartel conduct. In sentencing NYK, Justice Wigney referred to the principal rationale upon which criminal sanctions for cartel conduct were enacted, namely that '[c]artels are widely condemned as the most egregious forms of anticompetitive behaviour.'[205] His Honour noted that the NYK staff who administered the cartel were deliberate, systematic and covert in carrying out their prohibited actions.[206] The cartel conduct giving rise to the charge amounted to 'an extremely serious offence'.[207] It was carried out by senior management, over a lengthy period, and involved a large number of transactions that generated in excess of $15 million in profit value for NYK.[208] Only a small part of that profit constituted the illegal price overcharge which was not able to be quantified. However, Justice Wigney emphasised that it was not a 'victimless' offence because no specific individual or quantified loss could be identified:

> Our economic system is based on the philosophy that private enterprise and competition will foster productivity, efficiencies and innovation for the greater good of the community. Cartel conduct, like other anti-competitive behaviour, is inimical to and destructive of our markets and economic system. It leads to a loss in public confidence in our markets and economic system, which can itself harm the economy.[209]

While these words do not amount to a clear moral denunciation of cartel conduct, they may at least be regarded as laying the foundations for other judges coming to consider the moral implications of cartel conduct in future Australian criminal cases.

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[204] *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (3 August 2017).

[205] Ibid [1], quoting from Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12309 (Chris Bowen, Minister for Competition Policy and Consumer Affairs).

[206] *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (3 August 2017) [239]-[243].

[207] Ibid [7].

[208] Ibid [212].

[209] Ibid [252].

V PROSECUTORIAL ATTITUDES

The importance of the attitudes of the investigating and prosecuting authorities cannot be overstated. While judges occupy an exclusive position in being able to deliver public messages of moral condemnation, their ability and willingness to do so is usually dependent on certain decisions being made by investigating and prosecuting authorities beforehand.

First, the investigating authority must decide to commence an investigation if a matter of alleged cartel conduct is brought to its attention. It must then commence proceedings to enliven the court's jurisdiction to make a pronouncement on the cartel offender's wrong-doing. If there are no proceedings, there can be no formal legal and moral judgment published to the community.

Secondly, the prosecuting authority must decide to commence criminal rather than civil proceedings in relation to any given case. If civil proceedings are commenced, it sends a clear signal to the court that the prosecuting authority itself did not regard the cartel conduct in the case at hand as sufficiently reprehensible to warrant a criminal prosecution. In circumstances where Parliament has created a hybrid penalty regime, that is a reasonable inference for the judge to draw. The legislative regime effectively creates a de facto binary moral classification system in relation all cartel proceedings commenced – criminal proceedings implicitly allege moral wrong-doing, whereas civil proceedings do not. Judges may only be inclined to express a moral viewpoint on cartel conduct that is subject of criminal proceedings, given that criminal penalties are the standard means by which courts mark moral opprobrium,[210] and civil penalties are not.[211]

Thirdly, assuming criminal proceedings are commenced, prosecuting counsel must be prepared to articulate the moral basis for having the court impose criminal penalties. The judge's primary role is to adjudicate a dispute between the state's prosecuting agency and the defendant. A judge will usually look to the counsel for guidance before passing the court's own judgment. If there is no submission by the prosecution suggesting cartel

[210] See discussion above Chapter 3 Part IV(A).

[211] See discussion above Part III(B)(2).

conduct is morally reprehensible, a judge may be more reluctant to deliver the moral message of their own volition. Accordingly, if there are no moral arguments advanced, there is a significantly reduced possibility of courts adopting a habit of clearly conveying the message that cartel conduct is morally wrong in their formal judgments. The attitudes of prosecuting counsel are therefore crucial for maximising delivery of the moral message to the community, particularly at the sentencing stage of the criminal cartel prosecution process.[212]

The attitudes of two independent government agencies towards cartel conduct need to be considered. First, there is the ACCC, being the government agency responsible for conducting investigations into cartel conduct that occurs in Australia. The ACCC is also responsible, at least in the first instance, for determining if the evidence uncovered in an investigation discloses a case to answer. Secondly, there is the Commonwealth Director of Public Prosecutions ('CDPP'). With the introduction of criminal penalties into the CCA's legislative scheme, any inclination that the ACCC may have towards launching criminal proceedings following an investigation necessarily leads to the involvement of the CDPP.[213]

A *The ACCC*

The ACCC's attitude towards cartel conduct is reasonably clear. It has always championed the argument that cartel conduct is morally wrong, and that criminal penalties are entirely appropriate to sanction cartel offenders for this reason.[214] In its submission to the Dawson Committee, the ACCC described cartel conduct as 'morally reprehensible', 'abhorrent' and 'criminal'.[215] It also likened cartel conduct to 'theft' and 'blatant

[212] See discussion below Part V(A)(2).

[213] See generally Commonwealth Director of Public Prosecutions and the 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).

[214] Australian Competition and Consumer Commission, Submission No 56 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2 July 2002, 8, 24-5. See also the discussion above Chapter 1 Part III(C).

[215] Australian Competition and Consumer Commission, Submission No 56 to Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2 July 2002, 20-25.

fraud',[216] and described it as 'dishonest'[217] and 'most egregious'.[218] It considered that cartel conduct is appropriately characterised as 'hard-core collusion'[219] because it involves 'calculated', 'malevolent' and 'clandestine' behaviour of a kind clearly contemplated by the criminal law.[220] It is truly 'insidious'.[221]

Prior to 2018, there may have been a justified concern about the ACCC possibly having lost interest in its moral pursuit of cartel offenders in the criminal jurisdiction. Since criminal penalties had come into effect in Australia in 2009, the ACCC had launched only two criminal prosecutions. Both prosecutions followed the investigation of an international shipping cartel involving Japanese corporations.[222] Both prosecutions also targeted the Japanese corporations only, and not the individuals involved. Only one of those prosecutions has been finalised.[223] Is the lack of criminal prosecutions launched in the last eight years indicative of a general lack of moral resolve by the ACCC to hold cartel offenders morally accountable for their reprehensible conduct?

That question is probably best answered in the negative. Having regard to the four criminal cartel prosecutions that have been launched in 2018, against both Australian corporations and individuals,[224] the ACCC appears to have displayed a much clearer moral resolve to pursue cartel offenders. It is noteworthy that 2018 is the first year in which the ACCC has commenced cartel conduct proceedings only in the criminal jurisdiction, avoiding civil proceedings in relation to cartel conduct altogether. Whether this represents a shift in the prosecutorial attitude of the ACCC remains to be seen. The

[216] Ibid 24.

[217] Ibid 45-6.

[218] Ibid 22.

[219] Ibid 20.

[220] Ibid 25.

[221] Graeme Samuel, 'Foreword' in A Australian Competition and Consumer Commission CCC, *Cartels – Deterrence and Detection: A Guide for Government Procurement Officers* (Australian Competition and Consumer Commission, 2009) 1.

[222] See discussion above Chapter 1 Part III(A). Criminal proceedings were commenced against NYK in July 2016: see Australian Competition and Consumer Commission, 'Australia's first criminal cartel charge laid against NYK' (Media Release, 18 July 2016). Criminal proceedings against K-Line were commenced in November 2016: see Australian Competition and Consumer Commission, 'Criminal Cartel Charges Laid against K-Line' (Media Release, 15 November 2016).

[223] See *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (3 August 2017).

[224] See discussion above Chapter 1 Part III(A).

sudden increase in criminal prosecutions may certainly be explicable on the basis that there would inevitably be a long lead-up time from the commencement of the new criminal laws to the first criminal prosecutions. From the limited information that has been published about these cases, one may tentatively infer that the ACCC is only now able to display its moral resolve to prosecute cartel conduct criminally.

Even so, for any given future cartel investigation, there remains a concern as to how exactly the ACCC will proceed. As Australia's criminal cartel offence provisions are relatively new and untested, there is no established history from which a pattern of predictable prosecutorial decision-making may be discerned. If the ACCC concludes that there is sufficient evidence of cartel conduct having occurred, what exactly is it likely to do? With traditional crimes such as theft, the investigating authority's decision-making task in this respect is relatively straightforward because it is binary – the authority (typically, the police) either lays a criminal charge or it does not. The public also has a general presumption that the police will lay a charge if there is sufficient evidence to sustain a conviction, the offence is sufficiently serious, and there are no countervailing public interest considerations that outweigh the factors justifying a prosecution.[225] However, for the ACCC and cartel conduct, the decision-making process is necessarily more multifaceted. First, the ACCC has an additional substantive option to consider – the issuing of civil proceedings. If there is any uncertainty surrounding the criteria by which the ACCC distinguishes 'criminal' from 'civil' cartel cases, or equivocation or inconsistency when it comes to applying those criteria, the moral ambiguity of cartel conduct is likely to be exacerbated. Secondly, the ACCC's decision-making process is further complicated by the fact that it must consult with the CDPP before laying a criminal charge.[226] Similarly, if there is lack of method and transparency surrounding this consultation process, that too may contribute towards the moral ambiguity of cartel conduct.

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[225] See generally the Honourable Justice Mark Weinberg, 'Judicial Oversight of Prosecutorial Discretion: A Line in the Sand?' (2016) 13 The Judicial Review 99, 101-5. See also Director of Public Prosecutions (Vic), 'Policy of the Director of Public Prosecutions of Victoria', URL = <http://www.opp.vic.gov.au/Resources/Policies> (accessed 30 December 2018); Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth', URL = <https://www.cdpp.gov.au/prosecution-process/prosecution-policy> (accessed 30 December 2018).

[226] See discussion below Part V(B).

The ACCC has publicly stated that it will pursue criminal penalties 'wherever possible'.[227] It has entered into a joint 'Memorandum of Understanding' ('MOU') with the CDPP, providing some degree of guidance as to the situations of cartel conduct that will lead to criminal prosecution.[228] Beyond the consideration that needs to be given to the sufficiency of evidence, the MOU specifies that the decision to prosecute will be significantly conditioned by matters bearing upon the 'seriousness' of the cartel conduct in question.[229] The presence of one or more of the following factors will be more likely to indicate that the cartel conduct is sufficiently serious to justify a criminal prosecution:[230]

i. covert cartel conduct;
ii. large scale or serious economic harm (or potential for such harm);
iii. longstanding cartel conduct;
iv. significant impact (or potential impact) in the market;
v. significant detriment (or potential detriment) to the public;
vi. significant loss or damage (or potential loss or damage) to one or more customers;
vii. previous court findings of cartel conduct against the perpetrators (i.e. recidivism);
viii. senior corporate personnel were involved in the cartel;
ix. the government was a victim (i.e. a government entity was a customer of one of the perpetrators);
x. other crimes committed in connection with the cartel activity.

These factors may initially appear to constitute an impressive list of principled and specific criteria designed to target the kind of morally reprehensible cartel conduct deserving of criminal punishment. However, some concerning observations may be made. The first concern is that seven out of the ten criteria listed above (i-vi, and viii) are

[227] Australian Competition and Consumer Commission, 'ACCC referral of matters for possible criminal prosecution', URL = <https://www.accc.gov.au/business/anti-competitive-behaviour/cartels#accc-referral-of-matters-for-possible-criminal-prosecution> (accessed 30 December 2018).

[228] Commonwealth Director of Public Prosecutions and the 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).

[229] Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 121, [4.1].

[230] Ibid [4.2].

features symptomatic of cartel conduct generally and are likely to be exhibited in most cases that come to the ACCC's attention.[231] Cartel conduct is inherently serious. These seven criteria are therefore unremarkable and would add very little to the discretionary considerations bearing upon the decision to launch criminal, as opposed to a civil, proceedings. The second concern is that the other three criteria (vii, ix and x) are factors appear to introduce additional elements to the criminal cartel offence not contemplated by the legislation itself. The MOU therefore suggests that ACCC and CDPP may have to satisfied of aggravating features before they will lay a criminal charge, even though the evidence uncovered otherwise discloses the commission of the criminal cartel offence. This concern would appear to be confirmed by the third concern raised by the terms of the MOU, namely that it creates no presumption that criminal charges will be laid if an investigation leads to conclusion that there is sufficient evidence to sustain a charge. While the sufficiency of evidence is obviously a primary consideration, it is clear from the MOU that it is not determinative for the purposes of instituting criminal proceedings.[232]

For the common thief caught red-handed stealing an item of clothing from a retail store, the public expects the thief to be charged by the police. That expectation is most likely to be met. However, for the cartel offender that has been the subject of an ACCC investigation, much remains unclear. The terms of the MOU raise a real concern that the criminal cartel offence will be treated differently by prosecuting authorities as compared to how traditional criminal offending is treated. In the absence of an established history of prosecutorial decision-making, however, it remains to be seen whether such concerns are justified. Consistent and robust criminal prosecutions by the ACCC of all those cartel offenders who, on the available evidence, appear to have committed the criminal cartel offence will inevitably allay such concerns. On the other hand, a series of inconsistent and inexplicable decisions to institute civil rather than criminal proceedings, or not to institute proceedings at all, will almost certainly contribute to the moral ambiguity of cartel conduct in Australia.

[231] See discussion above Chapter 2 Part V(D)(3); Chapter 3 Part V(C); Chapter 4 Part IV(I).

[232] Commonwealth Director of Public Prosecutions and Australian Competition and Consumer Commission, above n 121, [4.1].

B *The CDPP*

The CDPP's involvement in the criminal prosecution of cartel conduct in Australia is necessitated by its exclusive statutory role as the Commonwealth's independent criminal prosecution service. Cartel conduct is an indictable criminal offence under the CCA.[233] Only the CDPP has authority to prosecute persons for indictable offences committed against the Commonwealth.[234] The ACCC has no such power, and so must defer to the discretion of the CDPP in relation to any decision to proceed against cartel offenders in the criminal jurisdiction following an ACCC investigation. It must also defer to the CDPP in relation to how the criminal case is argued by the prosecution in court.

The attitude of the CDPP towards cartel conduct remains unclear in two respects. First, there is the lack of clarity and transparency surrounding the exercise of prosecutorial discretion in bringing a criminal proceeding. In that regard, the same issues that have been raised and discussed in relation to the ACCC discussed above are applicable to the CDPP.[235] Secondly, assuming a criminal prosecution is brought, there remains the issue of whether the CDPP will tend to treat the criminal cartel offence as morally reprehensible. Some of the factors relevant to the exercise of discretion in deciding whether to bring a criminal prosecution are relevant for the purposes of considering moral-wrong doing.[236] The MOU itself does not use morally pejorative language to characterise the kind of cartel conduct that is amenable to criminal prosecution. However, it would be inappropriate for the CDPP to make morally suggestive statements at this stage of the prosecution process. The opportunity for the CDPP to make submissions as to the reprehensibility of cartel would present itself at a sentencing hearing, following a defendant being found guilty of a criminal cartel offence. Principles of denunciation, just desert and retribution become important considerations in the sentencing process. They are moral concepts and provide a solid foundation for prosecuting counsel to express moral outrage towards cartel conduct on behalf of the Australian community in the

[233] See CCA, ss 45AF(4), 45AG(5).

[234] See *Director of Public Prosecutions Act 1983* (Cth), ss 6(a), 9(1).

[235] See above Part V(A).

[236] See the discussion in relation to harm and culpability above Chapter 3 Part V(B), V(C).

appropriate case.[237]

The *NYK* case is the only case in which the CDPP has made submissions to a court in a criminal cartel prosecution that has reached the sentencing stage. The characterisation of the cartel conduct by the judge gives some indication as to how the CDPP may have articulated its case.[238] Very little argument would appear to have been advanced about how cartel conduct may be characterised as morally reprehensible. The absence of such submissions might be explained by the criminal defendant in *NYK* being a metaphysical amoral corporate, not an individual. Whether the CDPP takes a different approach when individual cartel offenders come to be sentenced following a finding of guilt remains to be seen. A consistently robust approach to the characterisation of criminal cartel conduct as morally reprehensible at the sentencing stage will undoubtedly assist the general public in being educated about its moral wrongfulness.

VI ECONOMIC ATTITUDES

Lastly, consideration must be given to the role that economists play in obfuscating the moral wrongfulness of cartel conduct. Debates about the merits of having laws against cartel conduct have involved different types of people making different assumptions and holding different values.[239] Economists and lawyers occupy the two major camps in this regard. The assumptions adopted by experts within each of fields are very different.[240] Economists and lawyers 'both play around, in different ways, with the concept and definition of the cartel, and how the evidence may be used to fit the concept or definition.'[241] Economist Philip Newman appears to have identified one of the essential differences between the respective approaches taken by economists and lawyers in this

[237] See the discussion above Chapter 3 Part IV(A).

[238] See discussion above Part IV(C).

[239] Thomas J Horton, 'Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy' (2006) 51 The Antitrust Bulletin 195, 201.

[240] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2nd ed, 2010) 2.

[241] Christopher Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2010) 359, 363.

regard:

> To a lawyer [cartel conduct] connotes restrictive or abusive practices; to an economist it means control of the market … Terms like conspiracy and collusion, are on the whole outside the scope of [the economist's] analysis, which concerns itself with price determination and the equilibrium of the firm or industry.[242]

Newman's observation reflects a fundamental philosophical difference between lawyers and economists in the analysis of social phenomena. Lawyers are prepared to inquire into the morality of conduct within the context of a more general inquiry about whether the law should be used to sanction such conduct. In stark contrast, morality has no part to play in an economist's analysis. The economist and the lawyer do not readily appreciate one another's approach in evaluating cartel conduct. Newman himself was somewhat disdainful towards the legal profession having so much to say about cartel conduct, arguing that cartels are 'primarily economic and marketing problems' and that they should not be 'handled by uninformed amateurs – lawyers and judges'.[243]

From the criminal lawyer's perspective, it would be convenient at this point to simply ignore such gratuitous comments and dismiss them as being confined to the economist's own academic arena. However, the economist has a very loud and persistent voice in relation to cartel conduct. As cartel conduct is perceived as being economically harmful, and a principal task of economists is to describe and explain behaviour that may either positively or negatively impact on the economy,[244] economists have understandably had much to say about it. They have sought to define cartels, identify their common characteristics, explain their occurrence, and describe the economic harm they cause. Most significantly, economists have also sought to inform and influence the formulation of legal policy in relation to the proscription of cartel conduct. Competition lawyer Stephen Corones has explained the general importance of economic viewpoints in coming

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[242] Philip C Newman, *Cartel and Combine: Essays in Monopoly Problems* (Foreign Studies Institute, 1964) 289. See also Christopher Harding, 'Business Collusions as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 Critical Criminology 181, 183-6.

[243] Ibid 283.

[244] Bruce Caldwell, 'Positivist Philosophy of Science and the Methodology of Economics' (1980) 14 Journal of Economic Issues 53, 60. See generally Herbert Hovenkamp, 'Positivism in Law & Economics' (1990) 78 California Law Review 815; Richard G Lipsey, 'Positive Economics' in *The New Palgrave Dictionary of Economics* (Palgrave Macmillan, 3rd ed, 2018) 10512-16.

to understand anti-competitive conduct as a legal problem:

> Economic theory provides the policy rationale for competition law, but, more importantly economic concepts form part of the law itself …. The discipline of economics helps to explain why business people engage in certain conduct and adopt certain strategies.[245]

It is inevitable therefore that economic concepts and principles will be relevant and necessary points of reference in any discussion about cartel conduct and the law. For the purposes of this thesis, a major concern arises when economists speak out against the proposition that cartel is immoral. As both lawyers and economists purport to occupy the superior position in this particular area of law and policy, the peculiar attitudes of economists need to be examined and properly understood.

A *The Economist's Amoral Mission*

Unlike lawyers, economists are not in the business of formulating and applying principles that facilitate the passing of judgment on individuals responsible for socially undesirable conduct. Nor are they concerned with the question of how such individuals should be held accountable for their actions. The primary mission of the economist is to study the objective causes and effects of marketplace phenomena, and to make generalisations and put forward theories that may explain and predict the occurrence of these phenomena.[246] If a marketplace phenomenon is seen to be economically undesirable, they may also propose corrective regulatory measures that would address the problem.[247]

Economists approach the problem of cartel conduct in the same way that they approach other phenomena falling within the scope of economic inquiry. They assume that individuals and businesses make rational choices to maximise their own welfare.[248] Cartel

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[245] Stephen Corones, *Competition Law in Australia* (Thomson Reuters, 6th ed, 2014) 2-3.

[246] Milton Friedman, 'The Methodology of Positive Economics' in *Essays in Positive Economics* (University of Chicago Press, 1953) 3-16.

[247] See the discussion in Eleanor Fox and Lawrence Sullivan, 'Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?' (1987) 62 New York University Law Review 936, 982-3. See also Harry Trebing, 'Public Control of Enterprise: Neoclassical Assault and Neoinstitutional Reform' (1984) 18 Journal of Economic Issues 353.

[248] See generally the discussion in Warren Gramm, 'Chicago Economics: From Individualism True to Individualism False' (1975) 9 Journal of Economic Issues 753.

conduct is facilitated by the convergence of a variety of market conditions.[249] Individuals working within a business respond to this convergence of conditions by making a rational assessment that the business will benefit more by colluding, rather than competing, with its rivals. The economic analysis of the decision-making processes of the individuals concerned goes no further. The economist is not interested in making a moral evaluation of the conduct. Economic assumptions and observations, particularly those from the neoclassical positivist schools of economic thought, are characterisable as immutable scientific truths lacking any kind of ethical or moral dimension.

B *An Anathema to the Criminal Law*

In their quest to identify a moral justification for cartel criminalisation, criminal lawyers are confronted with a methodological anathema that the economic perspective represents. The economist asserts that howsoever the cartel conduct problem is conceived, it is a problem incapable of having any moral implications. The assumption is that it is simply not possible to engage in a moral analysis of matters that fall within the ambit of economic study. If that assumption is accepted, cartel conduct is immune from moral scrutiny and the arguments considered in this thesis are otiose.

For the purposes of this thesis, it is not appropriate simply to dismiss and ignore the economist's amoral perspective because it is philosophically incompatible with the methodology employed by the criminal lawyer. The problem would remain that the economic view concerning the morality of cartel conduct appears to have infected the perspectives of the judiciary,[250] as well as members of the legal profession.[251] Commercial lawyers in particular, whose professional experiences tend to draw them into the world of economics and commerce, are perhaps more receptive to adopting the amoral

[249] See above Chapter 2 Part V(E).

[250] See above Part IV(C) and the particular references to the cases of *J McPhee & Son (Aust) Pty Ltd v Australian Competition and Consumer Commission* [2000] FCA 365; *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152; *Queensland Wire Industries Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

[251] See the implicit economic assumptions adopted in Louise Castle and Simon Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition in Australia' (2002) 10 Competition and Consumer Law Journal 1. Castle and Writer argued against the criminalisation of cartel conduct from their perspectives as legal practitioners working in a commercial law firm. See also the discussion in Maurice Stucke, 'Morality and Antitrust' (2006) Columbia Business Law Review 443, 445.

assumptions underpinning the economic approach. Their memories of principles of criminal liability learnt at law school may have long been forgotten, having no relevance to the commercial problems encountered daily in their professional practice. And so many commercial lawyers will adopt the perspective that cartel conduct is an 'economic' problem, not a 'moral' one.[252] The two kinds of problem are assumed to be mutually exclusive. The cause of the economist's aversion towards the moralisation of cartel conduct needs to be examined more closely.

C *Economics as a Quantitative Science*

The economist's unwillingness to venture into such a moral analysis may be traced to the fundamental underpinnings of the general economic methodology. One of these underpinnings relates to the modern economist's objective and quantitative approach to the analysis of marketplace phenomena. Qualitative evaluation is avoided. Objective factors which may assist in the quantification of predictable economic outcomes will therefore be considered in the course of their analysis whereas unquantifiable, intangible and subjective variables will not.[253] This means that economists will limit their analysis to consideration of only those objective market and individual business conditions that are likely to bear on the objective and rational decision-making process of a business that is contemplating the option of engaging in cartel conduct.

Certainly the economist would accept that empirically-based generalisations may be made as to the existence of other features of cartel conduct that are not factored into their analysis.[254] For example, it may generally be the case that any individual involved in the decision-making processes of a business that engages in cartel conduct will always take into account a host of variables, including moral considerations, before that decision is made.[255] It may also be the case that cartel participants have a tendency to exhibit certain general characteristics and display particular behaviours when engaging in cartel

[252] Castle and Writer, above n 251, 10-11.

[253] Frederick Scherer, *Industrial Market and Economic Performance* (Houghton Mifflin, 2nd ed, 1980) 225.

[254] See for example the comments and opinions of economist John Connor, *Global Price Fixing* (Springer, 2007) 1-52.

[255] See discussion above Chapter 3 Part V(C).

conduct.[256] But on such matters, the economist will express no opinion. These features are seen by economists as either having no bearing on the economic analysis of cartel conduct or being too variable and intangible such that it becomes impractical for the economist to draw any sensible economic conclusions from them. They are features that are unquantifiable in terms of their economic effect, and are more relevant for the purpose of making subjective qualitative judgments about cartel conduct rather than quantitative economic analysis.[257] Accordingly, such features are placed in the economist's 'black box' and omitted from their considered analysis altogether.[258]

D *Economics as a Positivist Science*

Perhaps the more confronting assumption underpinning the modern economist's approach arises from the influence of neoclassical economic positivism. Insofar as the qualitative issues arising from cartel conduct involve moral concerns, mainstream economics would deny the existence of such concerns altogether. That is because the positivist nature of neoclassical economic theories discourages the making of normative judgments about economic and commercial activity. The only motivation that is assumed to be relevant in commercial decision-making is that of 'wealth maximisation', which effectively refers to the personal desire to accumulate and consume products the value of which are quantifiable in monetary terms.[259] It would be considered irrational for a business to turn its mind to an ethical or moral issue in the course of making a commercial decision, as such considerations serve only to derogate from the wealth maximisation principle.[260] Neoclassical economists also consider the study of economic behavior to be a formal science that is primarily concerned with describing and explaining behaviour that may either positively or negatively impact on the efficient operation of the market.[261]

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[256] Ibid.

[257] Scherer, above n 253, 225. See also Wayne Baker and Robert Faulkner, 'The Social Organization of Conspiracy: Illegal Networks in the Heavy Equipment Industry' (1993) 58 American Sociological Review 837, 841-842; George Hay and Daniel Kelley, 'An Empirical Survey of Price Fixing Conspiracies' (1974) 17 Journal of Law and Economics 13, 25; John Piderit, *The Ethical Foundations of Economics* (Georgetown University Press, 1993) 9-10.

[258] Baker and Faulkner, above n 257, 841.

[259] John Dobson, 'The Role of Ethics in Finance' (1993) 49 Financial Analysts Journal 57, 58.

[260] Ibid.

[261] Ibid. See also Herbert Hovenkamp, 'Positivism in Law & Economics' (1990) 78 California Law Review 815.

The focus of concern is on market trends and forces, and assessing and predicting the causative effects that these variables have on market efficiency and failure, with efficiency being regarded as an end in itself.[262] Traditional notions of morality, ordinarily applicable in the analysis and assessment of individual human behaviour, are said to have been displaced by these market forces.[263]

By importing neoclassical economic ideas into legal policy analysis, behaviour in the marketplace is insulated from moral scrutiny.[264] Neoclassical economists would maintain that insofar as the law should concern itself with market activity, it should be used for the exclusive purpose of ensuring market efficiency and correcting behaviours that might otherwise undermine well-considered economic policy.[265] An economic regulatory law should say nothing about the 'goodness' or 'badness' of the conduct it proscribes.[266] In the neoclassical economic analysis, notions of 'morality', 'fairness', 'good' and 'evil', ordinarily applicable in the analysis and assessment of individual human behaviour, are irrelevant because they 'are judgmental, not descriptive, [and] deemed outside the discourse of economic theory's self-described positivism.'[267]

For criminal lawyers to grasp the rational basis of this amoral perspective, they must understand that for neoclassical economic positivists the study of economics is akin to the study of the physical and biological sciences.[268] Positive science, which emphasises

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[262] T A Hemphill, 'Antitrust, Dynamic Competition and Business Ethics' (2004) 50 Journal of Business Ethics 127, 128.

[263] Andrew Sayer, 'Approaching Moral Economy' in Nico Stehr, Christoph Henning and Bernd Weiler (eds) *The Moralization of the Markets* (Transaction, 2006) 77, 79.

[264] Stucke, above n 251, 445.

[265] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (first published 1978, 1993 edition) 91.

[266] Castle and Writer, above n 251, 10-11. See also Herbert Hovenkamp, 'Antitrust Violations in Securities Markets' (2003) 28 Journal of Corporation Law 607, 607.

[267] Stucke, above n 251, 446. See also James Alvey, 'An Introduction to Economics as a Moral Science' (2000) 27 International Journal of Social Economics 1231, 1231; K W Rothschild, *Ethics and Economic Theory* (Edward Elgar, 1993) 16; S A Drakopoulos, 'Origins and Development of the Trend towards Value-Free Economics" (1997) 19 Journal of the History of Economic Thought 286, 286; Piderit, above n 257, 16-17; Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 Melbourne University Law Review 675, 676-7; Barry Smart, 'Freedom with Responsibility: The Culture of the Market and The Demoralization of Social Life' in Nico Stehr, Christoph Henning and Bernd Weiler (eds) *The Moralization of the Markets* (Transaction Publishers, 2006) 29; Andrew Sayer, above n 263, 79.

[268] See Milton Friedman, above n 246, 3-16; Alvey, above n 267; Caldwell, above n 244, 60.

the need for the scientist to focus exclusively on descriptions and explanations of real world phenomena, has been broadly expressed as follows:

> The scientific objective is to identify relatively enduring structures and to understand their characteristic ways of acting. Explanation ... entails providing an account of those structures, powers and tendencies that have contributed to the production of, or facilitated, some already identified phenomenon of interest. It is by reference to enduring powers, mechanisms and associated tendencies, that the phenomena of the world are explained.[269]

In relation to cartel conduct, the economic scientist identifies the organisation of society's resources as the relevant 'phenomenon of interest'. The free market and the legal institutions that support it would be seen as 'relatively enduring structures … that have contributed to the production of, or facilitated' this phenomenon of interest. Individual human beings, who function within and as part of the enduring structure, are regarded as having 'characteristic ways of acting'. Rationality is seen to be the principal common human trait. Rationality leads individuals to act either co-operatively by way of a cartel arrangement, or antagonistically and competitively. Whatever the situation, all human behaviour is objectively explicable on the basis that individuals continue to act rationally in the pursuit of maximising their own personal welfare.

By characterising the interactions of individuals in this way, positivist economic theory entails 'a specification of the human agent as the passive receptor of atomistic events'[270] which is 'entirely reactive' to the environment.[271] This has led to scientific metaphors being applied to human economic activity. For example, if economics is seen as akin to a physical science, it seeks 'to describe human beings and their interactions as if they were a deterministic, mechanical system characterised by equilibrium – by the Newtonian metaphor.'[272] For the economist, the particularly appealing aspect of this metaphor is that it makes it very clear that an individual's particular course of economic activity is reasonably predictable, based on the known relevant variables specific to that individual's

[269] Tony Lawson, *Economics and Reality* (Routledge, 1997) 23.

[270] Ibid 39.

[271] Lee Boldeman, *The Cult of the Market: Economic Fundamentalism and its Discontents* (Australian National University E-Press, 2007) 46, 105, 231.

[272] Ibid 105, 213.

situation. Alternatively, if a biological scientific metaphor is used, the economy as a whole may be conceived of as a 'chaotic' living system, of which individual human beings form a constituent part, similar to a colony of ants.[273] The biological metaphor, like the Newtonian metaphor, maintains that individual human beings are rational creatures desirous of advancing their own personal welfare. However, unlike the Newtonian metaphor, it portrays the behaviour of the economic system, as a whole, as constantly evolving with the complexity of this system making human economic activity 'impossible to predict in the long run'.[274]

Whatever scientific metaphor is applied to human economic activity, the moral implications of likening the study of economics to the study of science are of particular significance. Scientists do not make moral judgments about the phenomena they study. Where, for example, the biologist observes a physically superior organism kill and devour a defenceless inferior organism, it is not for the biologist to condemn the predator and feel pity for its prey. Biologists also do not see it as their role to intervene and prevent the occurrence of such brutal realities of nature as Darwin's amoral evolutionary maxim 'survival of the fittest' prevails. The physicist, on the other hand, may be inclined to intervene and make recommendations as to how to improve perceived deficiencies in the performance a man-made machine. However, ultimately the physicist does not ascribe any moral worth to the ability of the machine to perform its intended function and, for that reason, the physicist is as amoralistic as the biologist. The same amoralistic attitude is adopted by positive economists in relation to their specialist field of study. The essential concern of the positive economist is that the free market economy operates efficiently, in the sense that society's resources are allocated to those who value them most, so that society's net benefit obtained from their use is maximised. If there are perceived inefficiencies, caused perhaps by certain individual market participants engaging in anti-competitive behaviour, this in no way calls for the making of moral judgments.

One may query whether the goal of allocative economic efficiency is truly bereft of moral content, given that it functions as the positive economist's chosen means by which to

[273] Ibid 237-8; Paul Ormerod, *Butterfly Economics: A New General Theory of Social and Economic Behaviour* (Faber and Faber, 1998) 40; Horton, above n 239.

[274] Ormerod, above n 273, 40.

achieve the chosen end of maximising society's total economic welfare. The chosen end is apparently utilitarian in nature, so it would seem that the economist's essential concern does have, at least implicitly, basic moral underpinnings.[275] However, it is important to recognise that positive economists maintain the view that morality plays no part in economic analysis. They do not make normative judgments about the way in which individual human economic actors behave towards one another, and how society's resources are distributed amongst them as a result of such behaviour. In the absence of wealth distributional disparities between individuals having a detrimental impact on the efficiency of the economy as a whole, the issue of whether one individual ends up with more or less personal wealth than another is not the positive economist's concern.

The economist's rationale that there is nothing morally wrong with cartel conduct is now clear. The amoralistic attitude derives from a denial of the existence of human agency.[276] Individuals are deemed to be atomistic and biological automatons that respond rationally and predictably to the various economic stimuli encountered in the marketplace. As such, they do not have 'free will' and cannot be held morally accountable for their actions.[277] It is a perspective that is fundamentally inconsistent with the philosophy of the criminal law.[278]

E *Alternative Economic Perspectives*

Other philosophical approaches within the field of economics do not incorporate the same amoralistic attitude. Indeed, and perhaps ironically, moral philosophy underpins much classical economic theory from which modern day neoclassical positive economic theory derives.[279] In particular, Adam Smith's economic treatise that gave rise to modern capitalism explained the workings of the free market economy within a moral philosophical framework.[280] The market was conceived to be an institution that facilitated

[275] See discussion above Chapter 3 Part V(A)(1). See also Robert Solo, 'Neoclassical Economics in Perspective' (1975) 9 Journal of Economic Issues 627, 629-30.

[276] Boldeman, above n 271, 46, 105.

[277] Ibid.

[278] See discussion above Chapter 3 Part IV.

[279] See generally Roger Backhouse, *The Penguin History of Economics* (Penguin, 2002) 112-36.

[280] See generally Athol Fitzgibbons, *Adam Smith's System of Liberty, Wealth, and Virtue: The Moral and Political Foundations of the Wealth of Nations* (Clarendon Press, 1995). See also Backhouse, above n 279,

individuals pursuing their own self-interest through the process of mutual exchange. This process tended to improve the wealth, and hence the standard of living, of almost everyone in the community.[281] The market created a system of 'natural liberty' leading to 'universal opulence'.[282]

Smith's observations were premised on an assumption derived from the Enlightenment that an improvement in the wealth of individual members of society advanced their material well-being and that this, in turn, led to an improvement in worldly happiness which must ultimately be for the greater good.[283] The operation of the free market economy involves 'the happy coincidence of non-economic political or moral ends and economic means'.[284] Ensuring that businesses are free to compete with one another 'is both intrinsically and instrumentally desirable, both just and expedient'.[285] An economic system based on private enterprise and free trade was seen to maximise human satisfactions in society, and it for this reason that Smith's conception of the free market economy is founded fundamentally in basic notions of utilitarian moral theory.[286] The free market was seen to lead to an increase in the total wealth of the society and an equitable distribution of life's basic necessities.[287] The free market was therefore viewed as being instrumental in advancing the 'common good'.[288]

From these classical economic foundations, the conception of competition as moral virtue, and cartel conduct as a moral vice, become reasonably well-founded economic propositions. However, as discussed above, the moral underpinnings of classical economic theory have been abandoned by the neoclassical economic thinking of today.

132; Jerry Muller, *The Mind and The Market: Capitalism in Western Thought* (Anchor Books, 2003) 51-2; Alvey, above n 267.

[281] Muller, above n 280, 51-2.

[282] Ibid.

[283] Ibid.

[284] T D Campbell, 'Adam Smith and Natural Liberty' (1977) 25 Political Economy 523, 523.

[285] Ibid.

[286] Ibid 526.

[287] Ibid. See also Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press, 2014).

[288] Campbell, above n 284; Muller, above n 280, 63.

As Lee Boldeman explained:[289]

> The transition from classical to neoclassical economics brought a new mathematical formalism and the abandonment of interest in the institutional and historical underpinnings of the market system—and an intensification of the belief in the ahistorical, scientific and value-free nature of economic discourse.

Today, relatively few economists are prepared to make judgments about the morality of economic actors and their conduct in the marketplace. However, *normative economics* constitutes a discrete field of economic study in which economists actively seek to do so.[290] Normative economists are acutely aware that their approach to economic analysis is fundamentally different to the approach adopted by their more mainstream positivist contemporaries. Whereas the positive economist limits the scope of their inquiry to how people choose to use, produce and distribute society's resources, the normative economist broadens the inquiry by also considering how people *ought to choose* to use, produce and distribute society's resources.[291] The normative economist demonstrably facilitates the obligations of businesses to compete with one another and to refrain from engaging in cartel conduct being regarded as moral requirements.[292]

While classical notions of economic morality and modern normative economics do not prevail in the mainstream economic thinking of today, they are distinguished for present purposes because they facilitate the making of value judgments about human behaviour and the economic interactions of individuals in a free market economy. In that regard, the methods of classical and normative economics are largely compatible with the general methods of analysis that would be adopted by lawyers and policymakers. A normative economist's approach to the analysis of cartel conduct as an economic problem is therefore to be preferred. As Andrew Horton argued:

> We must recognize that the antitrust laws are inherently values-based, and require a continuing effort to balance competitive values such as competition and collaboration and freedom and fairness. Most importantly, we must keep in mind that

[289] Boldeman, above n 271, 210.

[290] See generally Piderit, above n 257.

[291] Ibid 10.

[292] See generally ibid 12-17.

> the antitrust laws at bottom are designed to regulate human ethics and behavior. Our complex network of interrelated contractual arrangements can only thrive and adapt if we are willing to behave ethically and fairly, and demand the same from others.[293]

In the end, it must be remembered that competition law and policy is not, and never has been, a vehicle for modern day economists to implement their theories into the broader community's social structure so that their peculiar positivist perspectives come to be reflected in mainstream society. The goals of competition law go beyond economics and efficiency.[294] A fundamental purpose of legal regulation of market behavior, including cartel conduct, is to ensure that society's resources are also distributed fairly and equitably.[295] This is certainly true for Australia's competition law legislative regime which is designed 'to enhance the welfare of Australians through the promotion of competition.'[296] Neither competition nor economic efficiency can therefore be seen as amoralistic ends in themselves. Australia's competition laws, and the criminal cartel offence provisions in particular, operate within a moral universe.

VII CONCLUSION

There are many factors operating to hinder the Australian community's acquisition of a sustained moral resentment held towards cartel conduct. This chapter has sought to describe and explain five of those factors. The fact that Australian law now has criminal offence provisions to sanction cartel conduct is conducive to changing community attitudes. However, the community will be in a better position to understand cartel conduct and its harmful consequences when more ordinary people are educated about the basic economic concepts that underpin it. That responsibility rests primarily with society's educational institutions. At the same time, the community will gain a better understanding of the moral implications of cartel conduct if those institutions responsible for prosecuting and enforcing the cartel conduct laws are clear and consistent with the

[293] Horton, above n 239, 214.

[294] See generally Kenneth Elzinga, 'The Goals of Antitrust: Other than Competition and Efficiency, what else Counts?' (1977) 125 University of Pennsylvania Law Review 11.

[295] Ibid.

[296] CCA, s 2. See also Justice R S French, 'Competition Law – Covering a Multitude of Sins' (2004) 12 Competition and Consumer Law Journal 125.

moral message. In this regard, significant responsibility now rests with Australia's prosecuting agencies and the judiciary in creating clear moral narratives associated with the criminal cases of cartel conduct being prosecuted, and being conscious of the moral limitations of economic analysis. With the passage of time, their efforts may evidence the start of a process that eventually resolves the moral ambiguity surrounding cartel conduct.

CHAPTER 6

CONCLUDING REMARKS

I THE GENERAL CONCERN

Australia has begun the transition from a law enforcement regime that sanctions cartel conduct with civil penalties only, to a regime that now has criminal penalties as the most significant punitive measure. While Australian courts are yet to send anyone to jail, they are about to be presented with the opportunity to do so. The first successful criminal prosecution of a corporation in Australia was determined in 2017. That corporation, a Japanese company, was convicted and fined $25 million. Several more criminal prosecutions are now on foot where both corporations and individuals are named as defendants. For the individuals concerned, the prospect of imprisonment is looming. When the first individual defendant is found guilty, the sentencing judge could impose a term of imprisonment of up to 10 years. At this point, the moral controversy that was generated with the introduction of the new laws almost a decade ago is likely to be reinvigorated. The 'elite' moral debates that surrounded the laws back then will take on an even greater significance. Will the Australian public accept that an individual found guilty of cartel conduct behaved so badly that they deserve to go to jail? If not, can the community's understanding of the moral delinquency be improved?

Contemplating the morality of cartel conduct and the use of criminal penalties to sanction it evidently raises complex issues. Morality is itself a complex social and philosophical concept. Cartel conduct, too, is a complex social and economic phenomenon. When both concepts are applied within a criminal legal framework, coming to understand the issues associated with the conception and perception of cartel conduct as an immoral crime may seem like an insurmountable task for many. An appeal to one's own intuitions may provide a quick solution, leading to the conclusion that cartel conduct is not immoral because no negative emotions are generated when contemplating it. The available empirical data, which suggests there is no strong sense of community disapproval held towards cartel conduct, corroborates this kind of intuitive approach. However, as this

thesis has demonstrated, that approach is unlikely to provide an accurate account of the moral content of white collar and economic regulatory offences. Cartel conduct is, quintessentially, a case in point. It is more appropriately characterised as morally ambiguous.

II ANSWERS TO THESIS QUESTIONS

This thesis has moved towards resolving that ambiguity by posing two questions the answers to which are summarised below.

A *Question 1*

How is cartel conduct *conceived* to be sufficiently immoral to justify the use of criminal penalties?

Cartel conduct is constituted by independent businesses colluding with one another so that they can charge customers higher prices for the products they sell. As a result, individual consumers suffer economic harm in the form a price overcharge, calculated as the difference between the price *actually* paid and the price that *would have been* paid but for the collusion. The community also suffers economic harm from by way of a reduction in economic efficiencies, which includes a reduction in allocative efficiency (leading to a 'dead-weight loss'), productive efficiency and dynamic efficiency.

Competition may be regarded as a moral value because it is good for the economic well-being of the community. Businesses that adhere to the principle contribute to the proper and effective functioning of the free market. Competition maximises the total economic welfare of society and achieves a just and fair distribution of economic resources amongst its people. Businesses may therefore be seen to be under a moral obligation to act competitively towards one another due to the community benefits that the competitive process reaps. Conversely, businesses may be seen to be under a moral obligation to refrain from cartel conduct because of its anti-competitive effects. Cartel conduct is bad for the community because it creates inefficiencies and reduces society's total economic output. The price overcharge also results in businesses acquiring a greater portion of individual consumers' economic resources in exchange for their products, which is unjust

and unfair. On this basis, cartel conduct may be regarded as morally wrong.

The conduct of individual cartel perpetrators may be viewed as sufficiently immoral to justify criminal penalties having regard to three material considerations relating to the moral content of cartel conduct:

i. *Moral Wrongfulness:* Once it is accepted that competition is a moral value, cartel conduct may be conceived to be morally wrong by applying a variety of different moral reasoning processes. The immorality may be explained on a normative basis in both consequentialist and deontological terms. It may also be analogised with the established moral wrongs of stealing, deception and cheating, a process of moral reasoning that is probably the most accessible from the ordinary person's perspective.

ii. *Harm:* The economic harm arising from cartel conduct eclipses that which is caused by conventional property crimes. Its significance is often found in the aggregation of transactions over a long period. The price overcharge detrimentally effects individual consumers directly, while the reduction in economic efficiencies has a broader negative impact on the economy. From an institutional perspective, cartel conduct also undermines the integrity of the market as society's chosen mechanism to achieve economic distributive justice.

iii. *Culpability:* Cartel conduct does not occur by accident. It is constituted by the voluntary actions of individuals who have engaged in conscious and considered reasoning processes. These individuals have deliberately chosen to collude rather than compete, aware that their actions will result in economic gain for their businesses and economic loss to their customers. They are aware of the position of power that their businesses occupy in the market that enables them to engage in cartel conduct, and they have abused that position by choosing to do so. They exploit the 'invisibility' of the harm they cause by preying on their customers' ignorance and willingness to part with more money than a competitive market would otherwise demand. They are aware that their actions are wrong and in violation of the law, going to great lengths to conceal their mischief from their own customers, the authorities and the public at large. They tend to engage in their behaviour over a protracted period. It is calculated and sophisticated behaviour

that causes significant expense to the community, borne out of an individual's unjustified self-interest and ill-conceived belief that the value of competition is somehow expendable when it conflicts with their own commercial priorities. Culpability is therefore high and characteristically criminal.

Consideration of these three aspects of cartel conduct in combination lead to the sound conclusion that cartel conduct is sufficiently immoral to justify the intervention of the criminal law. As moral agents, the individuals responsible for involving their businesses in a cartel agreement are morally accountable for their actions. Accordingly, they are appropriately dealt with by the criminal law.

B *Question 2*

What factors operate to inhibit the Australian community's *perception* of that immorality?

Theoretical conceptions of the moral wrong-doing arising out of cartel conduct do not appear to be reflected in the actual moral perceptions of most ordinary Australians. There is no strong sense of moral resentment held towards cartel conduct. People simply do not feel the same sense of moral outrage towards it as they do towards burglars, thieves and murderers.

The absence of negative moral feelings towards cartel conduct is caused by ineffective and incomplete moral education. Moral feelings are the product of moral learning, a complex and life-long process that commences in childhood. Effective moral education depends on the efficacy of social reinforcement mechanisms used to educate individual members of the community about morally proscribed behaviour. For cartel conduct, attention must therefore turn to identifying those factors tending to impede this moral learning process, resulting in the obfuscation of its immorality.

1 *Complexity Factors*

First, there are the 'complexity' factors. Cartel conduct is a complex phenomenon the many nuances of which are not easily understood by most people. These include the following:

i. *Harm:* The harm can only be discerned with reference to economic principles.

ii. *Victim:* Victims are unaware of their 'victimhood' status until the cartel is discovered, and the harm caused properly investigated and explained to them.

iii. *Value Violated:* Competition is a value that does not have the same level of moral entrenchment as a private property right. It is also more difficult for ordinary people to understand.

iv. *Duration:* Cartels tend to operate for many years before they are discovered, with a complete picture of their harmful economic impact being obtained only after examining the many customer transactions that occurred over that time.

v. *Separating 'the Good' from 'the Bad':* Cartel agreements, and the tainted consumer transactions that flow from them, are not immediately distinguishable from the many other legitimate business transactions that a cartel participant engages in.

vi. *Corporate Perpetrator & Diffusion of Responsibility:* The roles played by the individuals working within a business engaging in cartel conduct may be obscured by the corporate 'veil'. This is exacerbated by many individuals within the one business being involved in the administration of the cartel agreement with other businesses, making it difficult to pinpoint moral blame.

vii. *Character & Reputation of Individual Perpetrator:* The typical cartel perpetrator is a top executive, who has an unblemished reputation, and is a pillar of the community. An allegation of criminal wrong-doing against such a person is counter-intuitive.

2 *Institutional Factors*

Secondly, there are the 'institutional' factors. Society's institutions that are best positioned to explain cartel conduct and educate the community about its reprehensibility are yet to do so effectively. In that regard, the following factors also operate to inhibit the Australian community perceiving the immorality of cartel conduct:

i. *Legislative Attitudes:* Historically, Australian lawmakers have lacked the moral resolve to implement a comprehensive and effective criminal penalty regime in relation to cartel conduct. The current criminal penalty regime has only been in place for nine years and operates alongside a parallel civil penalty regime. This

hybrid scheme generates an artificial moral distinction between two types of cartel conduct – that which is sufficiently reprehensible to be prosecuted as a criminal offence, and that will is less offensive and will only occasion civil proceedings. Conventional properly crimes have always been treated as unequivocally criminal, there being no similar hybrid criminal/civil regimes in place for traditional kinds of crime.

ii. *Judicial Attitudes:* Historically, Australian courts have been disinclined to characterise cartel conduct as morally reprehensible. They may have taken their cues from Australian legislators who, until recently, did not deem it appropriate to sanction cartel conduct with criminal penalties. They may also have been influenced by the amoralistic perspectives of economists. It remains to be seen whether judicial attitudes will change as courts come to consider cases prosecuted under the new criminal cartel laws.

iii. *Prosecutorial Attitudes:* The Australian Competition and Consumer Commission ('ACCC'), Australia's primary investigating and prosecuting authority in relation to cartel conduct, has consistently characterised cartel conduct as morally reprehensible. The ACCC has always maintained that cartel conduct is appropriately subject to criminal penalties for this reason. However, with the advent of criminal penalties, the attitude of the independent statutory office of the Commonwealth Director of Public Prosecutions will now play a pivotal role in shaping public perceptions of cartel conduct. While there are several new criminal prosecutions on foot, the extent to which the CDPP will characterise cartel conduct as morally reprehensible is yet to be properly ascertained.

iv. *Economic Attitudes:* Modern economists seek to influence competition law and policy. Their amoralistic approach to the analysis of behaviour in the market would have many people believe that the conduct of individuals who engage in cartel conduct is immune from moral scrutiny. This aspect of the economic analysis of cartel conduct is fundamentally at odds with the approach taken by criminal legal theorists.

III THE WAY FORWARD

Moral perspectives can change over time. The Commonwealth Parliament of Australia clearly signaled that it is time to change Australian perspectives in relation to cartel conduct when it passed the new criminal cartel offence provisions in 2009. The Australian community can eventually come to understand the reprehensible nature of cartel conduct if resources are directed towards educating the community and shifting institutional attitudes. This would give effect to Parliament's intention, and the moral justification for criminalisation would then become much clearer.

Australia's regulator, the ACCC, is arguably best placed to take up the challenge of educating the public and shifting institutional attitudes in relation to cartel conduct. It has a highly specialised regulatory function in relation to cartel conduct and possesses unrivalled institutional knowledge about the subject. It also considers educating the Australian public about competition and consumer laws to be included among its many functions.[1] On the basis that sufficient resources are directed to the ACCC for this purpose, it is submitted that the ACCC would have the capacity to:

- educate the public about basic economic principles that would provide a framework for understanding cartel conduct at a rudimentary level;
- explain competition as a moral concept to the public, the CDPP, the courts and other social institutional influences such as the media; and
- limit the influence of the amoralistic perspectives of economists.

Changing community attitudes towards cartel conduct will inevitably be a slow and drawn-out process. That said, as Australia's 'criminal cartel machine' gathers steam in 2018, now would seem to be the most appropriate time to commit resources to the pursuit of such a very worthy goal. The moral ambiguity surrounding cartel conduct will then eventually be resolved.

[1] Australian Competition and Consumer Commission and Australian Energy Regulator, *Annual Report 2016-17* (Australian Competition and Consumer Commission, 2017) 18.

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