Cartel output restrictions – Construction and common sense collide and particularity of "persons" under the Trade Practices Act 1974

I S Wylie*

This article examines parallel civil and criminal prohibitions on output restrictions which came into force on 24 July 2009, extending the previous law in ss 45, 4D and 45A of the Trade Practices Act 1974. As the new cartel prohibitions are untested, the relevant principles of construction are first noted, followed by analysis and construction of the relevant parts of s 44ZZRD and following sections in the Act. Reference is made to the extent to which conduct must be directed towards particular persons to give rise to other per se contraventions of the Act to inform that construction exercise. Finally, the scope of potential overreach of the output restriction cartel prohibitions to proscribe legitimate commercial activity, and the position in other jurisdictions, is considered.

INTRODUCTION

New parallel civil and criminal prohibitions, ostensibly for so-called "serious cartel conduct" (the cartel prohibitions), were introduced into Pt IV of the *Trade Practices Act 1974* (TPA) by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (the Cartel Act) and came into force on 24 July 2009. The cartel prohibitions raise many challenges for business, advisers and the courts. Substantial concerns as to their form, overlap and reach were raised prior to passage of the Cartel Act, and have been much written about since.[1] This article aims not to repeat or address all those concerns, but rather to focus on the new prohibitions on output restrictions which extend the previous law, and to explore what the scope of that extension is.

Starting, however, with the basics, it should be noted that the introduction of the cartel prohibitions has, quite apart from the introduction of criminal liability, significantly changed the scope of restrictive trade practices liability for horizontal conduct in Australia. Prior to 24 July 2009, only provisions which had the purpose or likely effect of fixing, controlling or maintaining price (via s 45A), or which had a substantial purpose of preventing, restricting or limiting actual supply or acquisition directed towards particular persons or classes (via s 4D), gave rise to per se liability (ie liability established without further regard to anticompetitive purpose, effect or likely effect). All other forms of horizontal conduct contravened only[2] if there was a substantial purpose or likely effect of substantially lessening competition in a market in Australia under s 45. Now per se liability (both civil and criminal) extends to all output restrictions, allocation of customers, suppliers and territories, and bid-rigging which fall within the purpose and competition conditions set out in s 44ZZRD(3) and s 44ZZRD(4) of the TPA.

Arguably most, if not all, allocation and bid-rigging conduct previously fell within s 4D and/or s 45A, but the same is not true of all output restrictions, certainly not as now broadly defined in s 44ZZRD(3)(a) of the TPA. Output restrictions have not previously generally been the subject of per

* Barrister, Blackstone Chambers, L62 MLC Centre, Sydney, i.wylie@blackstone.com.au.

[1] See eg, the submissions referred to in the Senate Report of the Standing Committee on Economics on the Cartel Bill dated 26 February 2009 tabled in the Senate on 10 March 2009 at http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_cartels_09/report/index.htm viewed 23 December 2009.

[2] With the theoretical exception of s 46, as pursuant to s 46(3D) more than one corporation may have a substantial degree of power in a market for the purpose of s 46, and s 46(3A) provides that in assessing "substantial market power" a court may take into account any market power resulting from contracts, arrangements or understandings with other corporations, so that two competitors could contravene by using their respective market power collusively for the purpose of eliminating or substantially damaging a competitor, preventing market entry or deterring or preventing competitive conduct within the meaning of s 46(1).

se prohibition under the TPA. Those which were aimed at fixing, maintaining or controlling price or which had that likely effect would of course be deemed to have a substantial purpose of substantially lessening competition and so have contravened s 45, but otherwise per se prohibition only extended under s 4D to restrictions on supply or acquisition of goods or services directed towards particular persons or classes of persons. That prohibition was itself contentious as to its precise scope, and regarded by some commentators as excessive in its reach.[3]

Since 24 July 2009, civil and criminal exposure has extended further pursuant to s 44ZZRD(3)(a) of the TPA to all provisions in contracts, arrangements or understandings[4] which have a substantial purpose of not only direct but also:

- indirect prevention, restriction or limitation;
- on production or capacity as well as supply;
- on a possibility of production, capacity or supply which is not remote;
- on production or capacity without any requirement that the limitations be directed towards anyone; and
- on actual or possible supply to "persons or classes of persons" rather than "particular persons or classes of persons".[5]

This article addresses briefly each of the above elements of extended liability, but given other recent commentary on the first three elements, focuses on the last two. As to them, various per se and other sections in Pt IV of the TPA proscribe provisions and conduct directed towards "persons". They do so in forms which vary from section to section and accordingly present challenges in construing their scope of operation. The article accordingly also notes the nature of the "person" in those sections, and attempts to obtain a clearer picture of the scope of both those prohibitions and the cartel prohibitions in that regard, given the unqualified extensions in relation to production and capacity limitations, and doubt as to the scope of the "persons" qualification on the supply restriction prohibition.

As the new legislation is untested, the relevant principles of construction are first noted, followed by analysis of the recently enacted cartel prohibitions in s 44ZZRD and following sections in the TPA. The extent to which conduct must be directed towards other particular persons to contravene ss 4D, 45(2)(a)(i), 45(2)(b)(i), 46, 47 48, 96 and 96A is then considered by way of comparison and to inform that construction exercise, and finally the scope of potential overreach of the output restriction cartel prohibition and position in other jurisdictions is summarised.

PRINCIPLES OF CONSTRUCTION OF THE TPA

The relevant sections should be strictly construed as they are penal in character so that doubt or ambiguity should be resolved in favour of the party exposed to contravention: *Trade Practices Commission v Service Station Association Ltd* (1992) 109 ALR 465; ATPR 41-179 per Heerey J at 40,456 applying *Murphy v Farmer* (1988) 165 CLR 19 at 28-29 per Deane, Dawson and Gaudron JJ. Specifically, in the context of construction of s 47 of the TPA see *Trade Practices Commission v Legion Cabs (Trading) Cooperative Society Ltd* [1978] 35 FLR 372 per Franki J applying *Beckwith v The Queen* (1976) 135 CLR 569 at 576-577 per Gibbs J.

The courts must strive to give meaning to every word of the relevant provisions to give their words the meaning the legislature intended them to have. That is ordinarily the literal or grammatical

[3] Pengilley W, *Price Fixing and Exclusionary Provisions* (Prospect Media, St Leonards, NSW, 2001) pp 104-105; Fisse B, Submission 5 dated 20 January 2009 at s 3, pp 12-18 referred to in the Senate Report of the Standing Committee on Economics on the Cartel Bill dated 26 February 2009 tabled in the Senate on 10 March 2009 available at http://www.aph.gov.au/SEnate/committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf viewed 30 December 2009; Wylie I S, "What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond" (2007) 35 ABLR 33.

[4] As to the breadth of this phrase see Wylie I S, "Understanding 'Understandings' under the Trade Practices Act – An Enforcement Abyss?" (2008) 16 TPLJ 20.

[5] In considering the expanded prohibitions on which this article focuses, it should also be noted that related entities are deemed to be parties to arrangements involving their related entities, and that giving effect after the commencement of the amendments to arrangements entered into prior to them is caught.

meaning, but informed by the consequences of a literal or grammatical construction and the purpose of the TPA and its provisions: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382[71] and [78] per McHugh, Gummow, Kirby and Hayne JJ.[6] Where there is a departure from a definite form of expression in the same Act the legislature will be taken to have had a different intention.[7]

Provisions of the TPA intended to govern and affect business decisions and commercial behaviour should, if such a construction is fairly open, be construed in such a way as to enable the business person, before he or she acts, to know with some certainty whether or not the act contemplated is lawful.[8]

Construction should be informed by the object of the TPA as set out in s 2 "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection", and the placement of the relevant sections within the restrictive trade practices part of the TPA should be remembered. The courts should adopt a construction of the relevant sections which achieves the purposes of the TPA by furthering the objectives of Australian competition law: see in the context of s 45 in *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 24 [70]-[78] per Kirby J and *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447 at 533-534 per Burchett J.

The court is required to be mindful in particular of the interests of consumers: *O'Keeffe Nominees Pty Ltd v BP Australia Ltd* [1990] ATPR 41-057 at 51,741 per Spender J, and *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at [383]-[387] per Kirby J. However, there is a tension between principles of stricter construction of penal statutes and broader construction of remedial legislation to effectuate its purposes. Thus, for example in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32, Mason CJ at 43-45 (in dissent on the ultimate outcome) concluded that s 45D(1) should be construed to give the fullest relief which the fair meaning of its language will allow notwithstanding penal exposure.

Finally and more specifically, how is construction aided by the *Acts Interpretation Act 1901*?

- Unless the contrary intention appears "person" includes a body politic or corporate as well as a natural person: s 22(1)(a).
- "Persons" include the singular and "person" includes the plural unless the contrary intention appears: s 23(b).
- A construction which promotes the purpose or object of the TPA is to be preferred to a construction which would not: s 15AA.
- Extrinsic material (in particular in the current context the Explanatory Memoranda, Second Reading speeches, Senate Committee Report and matters set out in the printed Act which do not form part of it) may be used to confirm the ordinary meaning conveyed or to determine meaning if the provision is ambiguous or obscure or ordinary meaning leads to a result that is manifestly absurd or is unreasonable: s 15AB.

CONSTRUCTION OF THE CARTEL PROHIBITIONS GENERALLY

What is the legislative purpose or object of the new cartel prohibitions under consideration here? The Explanatory Memoranda[9] suggest that they are only intended to attach to "serious cartel conduct" or "hard core" cartel conduct as defined by the Organisation for Economic Cooperation and Development

[6] See also *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 per Gleeson CJ and Callinan J at 62[8].

[7] *Scott v Commercial Hotel Merbein Pty Ltd* [1929] VLR 25 at 30.6 per Irvine CJ, Macfarlan and Lowe JJ concurring at 31.

[8] See *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at [8] per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 at 403, 406.

[9] A Supplementary Explanatory Memorandum and Correction to the Explanatory Memorandum was issued in the Senate prior to passage of the Cartel Bill explaining amendments to the joint venture exceptions to liability but not further clarifying the matters addressed in this article. They are available at http://www.parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r4027%22 viewed 30 December 2009.

(OECD) in 1998, and that they only cover conduct which was already prohibited under existing Australian civil prohibitions mentioned in the Explanatory Memorandum general outline and financial impact on pp 3-4 and cll 1.1, 1.3 to 1.7 and Second Reading Speeches.[10] The "main point" of the Explanatory Memorandum's Regulation Impact Statement (p 4) is as follows:

> [T]his Bill criminalises conduct that was already prohibited under existing civil prohibitions. There is no ongoing compliance cost impact and a minimal transitional impact on businesses with lawful business arrangements, and the economy more generally.

The first problem of construction which arises is that the Explanatory Memorandum makes no mention of the form of the OECD's definition on which it relies. That definition relevantly "included only anticompetitive arrangements" between competitors to establish output restrictions or quotas, and had a particular limitation which *excluded* from that definition *conduct* "reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies".[11]

In this context it should perhaps be remembered that the cartel prohibitions are the ultimate outcome of the Government's *Review of the Competition Provisions of the Trade Practices Act, January 2003* (Dawson Review).[12] The Dawson Review recommended that criminal sanctions should be introduced for "serious, or hard core" cartel behaviour, including fines against corporations and imprisonment and fines for individuals, "provided that such serious cartel behaviour was effectively defined" and a workable method of combining a clear and certain leniency policy with a criminal regime found.[13]

Competition regulators worldwide have themselves recognised for many years the difficulties inherent in effective definition of cartel conduct. For example, following a comprehensive survey of members and mindful of the earlier OECD recommendation, in 2005 the International Competition Network (ICN) published a report defining "hard core cartel conduct" which recognised consensus only insofar as such conduct involves (1) an agreement, (2) between competitors, (3) to restrict competition, and that it includes some form of output restrictions. Beyond that, the ICN recognised the degree of variability in more precise prescription, and in the extent (if at all) to which competitive effects and efficiencies were relevant in different jurisdictions.[14] The ICN went on[15] to note the following:

> There is widespread agreement among jurisdictions that the essence of hard core cartel conduct is that the consumer believes he or she is making a purchase in a competitive market when, in reality, conspirators secretly agreed not to compete.

None of the limitations on liability considered by the OECD or ICN, or as applied in other major jurisdictions and described below, have found their way into the cartel prohibitions now in force in Australia.

What, then, is it that the Australian Competition and Consumer Commission (ACCC) considers to be cartel conduct by output restriction? Its thoughts have been evolving, with its guide on cartels published in 2005 making no reference to output restrictions at all, and specifying only "three types of conduct that are especially damaging": price fixing, market sharing and collusive tendering.[16] The

[10] Australia, House of Representatives, Hansard (11 February 2009) pp 922-924; Senate Hansard (15 June 2009) pp 3191-3192.

[11] Organisation for Economic Cooperation and Development Recommendation of the Council Concerning Effective Action against Hard Core Cartels, adopted by the Council's 921st session on 25 March 1998, paras 1A(a) and 1A(b)(i).

[12] It should also be noted that the *Review of the Competition Provisions of the Trade Practices Act, January 2003* (Dawson Review) advocated the watering down of per se prohibitions and encouragement of collective bargaining and business collaboration, quite to the contrary of the new per se output restriction prohibition, see eg Kench J, "Collective Bargaining: The Dawson Review's Assistance Package for Business Cartels" [2003] UNSWLawJl 16; (2003) 26(1) *University of New South Wales Law Journal* 257.

[13] Dawson Review, Ch 10, in particular Recommendation 10.1.

[14] ICN Working Group on Cartels, *Part I Defining Hard Core Cartel Conduct* (ICN 4th Annual Conference, 6-8 June 2005) p 9 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf viewed 30 December 2009.

[15] ICN Working Group on Cartels, n 14, p 15.

[16] Australian Competition and Consumer Commission, *Cartels: What You Need to Know: A Guide for Business*, (ACCC,

Senate Economics Committee explicitly emphasised at para 4.10 of its report "the importance of the ACCC publishing guidelines on what is and is not acceptable activity in relation to cartels". The ACCC has not effectively done so, although it did in July 2009 published generalised guidelines on the factors likely to lead to criminal prosecution for contravention of the cartel prohibitions which were recommended by the Senate on February 2009.[17] The publication say nothing specific about output restrictions, and would not in any event be determinative of legal liability or the issues of construction raised here.

In July 2009, the ACCC also published a more specific guide on cartel conduct for procurement officers[18] which does give a description of output restrictions beyond mere reference to the words. It describes such conduct as follows.

> Output restrictions occur when the participants in an industry agree to reduce or restrict supply with the aim of creating scarcity. The purpose of the arrangement is to prop up or increase prices. Generally speaking, the action needs to be industry wide to achieve the cartel's desired result.

Then in October 2009, the ACCC published a further guide[19] which described (offending) output restrictions in the following somewhat different and broader terms:

> Output restrictions occur when the participants in an industry agree to prevent, restrict or limit supply. The purpose is to create scarcity in order to increase prices (or counter falling prices) while also protecting inefficient suppliers.
>
> Any business may independently decide to reduce output to respond to market demand. What is prohibited is an agreement with competitors on the coordinated restriction of output. Generally, the action needs the support of key market participants to achieve the cartel's desired result.

The ACCC's general statements in relation to participation are not controversial and reflect conventional economics. In other circumstances, corporations have described the issue as the "OPEC Problem" – restraining output is only profitable if all competing firms cooperate.[20] Unfortunately no such limitation found its way into the cartel prohibitions.

Moreover, when the ACCC announced the new provisions coming into effect, it asserted by way of explanation[21] inter alia as follows:

> The per se prohibition on price fixing contained in ss 45 and 45A of the TPA has been repealed and replaced by the new cartel provisions. Conduct that was captured by s 45A will be captured by the new provision. Section 45 of the TPA otherwise remains and will continue to prohibit a CAU that contains an exclusionary provision or provisions that have the purpose, effect or likely effect of substantially lessening competition. The prohibition of exclusionary provisions by ss 45 and 4D is retained as a backstop for the new cartel provisions, primarily because the new cartel provisions do not capture the same breadth of conduct as s 4D.

The second problem of construction is accordingly that the ACCC's public statements suggest that at least it perceives some intended limitations on the scope of the new provisions and that it agrees with the assertion in the Explanatory Memorandum that only conduct previously captured civilly is caught

October 2009) http://www.accc.gov.au/content/index.phtml/itemId/897448 viewed 29 December 2009.

[17] Senate Committee Report (26 February 2009) at paras 4.10, 4.11, 4.17 and 4.18; Australian Competition and Consumer Commission, *Approach to Cartel Investigations* (ACCC, July 2009) http://www.accc.gov.au/content/index.phtml/itemId/891982 viewed 30 December 2009.

[18] Australian Competition and Consumer Commission, *Cartels: Deterrence and Detection – a Guide for Government Procurement Officers* (ACCC, April 2009) p 12, available at http://www.accc.gov.au/content/index.phtml/itemId viewed 29 December 2009.

[19] ACCC, *Cartels: What You Need To Know: A Guide For Business*, n 16, p 9.

[20] See eg, the report of the United States Federal Trade Commission's concerns over the conduct of CSL and other blood plasma producers in Maiden M, "CSL Saga Compulsory Viewing in the Plasma", *Sydney Morning Herald Business Day* (25 November 2009) p 3.

[21] Important Notice *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (ACCC, July 2009) http://www.accc.gov.au/content/item.phtml?itemId=717078&nodeId=feda740e39f8ef706f88f67626945aeb&fn=Important%20Notice_Trade%20Practices%20Amendment%20Act%202009%E2%80%94long%20notice.pdf viewed 29 December 2009.

by the cartel prohibitions. That is, however, cold comfort for anyone seeking to construe as a matter of law the legislation to ascertain whether conduct is in fact legal or not.

The ACCC's statements may have some bearing on the practical likelihood of criminal prosecution, but they are quite irrelevant to the task of construction. Of course, for a range of good legal and commercial reasons including certainty in contracting, the enforceability of agreements, and exposure for acting beyond power or civilly under the TPA, what is critical is what the cartel prohibitions in fact as a matter of construction proscribe, not how the body charged with enforcing the prohibitions might exercise its discretion to prosecute itself or refer to the Director of Public Prosecutions, or what it says the legislation means.

The third problem of construction is that the Explanatory Memorandum (and the ACCC's apparent concurrence with it) is simply wrong. Leaving aside a typographical error in para 1.6, it asserts in paras 1.6-1.7 inter alia that output restrictions were already prohibited per se as exclusionary provisions subject to civil penalties. Does this mean that the cartel prohibition should be read down to whatever the true scope of the exclusionary provision prohibition on output restrictions was? That is not likely because resort to extrinsic materials to confirm meaning or resolve ambiguity is one thing, resort to erroneous statements of the law when ordinary meaning of the words of the TPA is clear is quite another.

What then do the other extrinsic materials tell one as to what the Australian Parliament thinks is covered by the cartel prohibition on output restrictions? The short answer is that the Parliament does not know. Party politics has trumped the doctrine of separation of powers, with the responsible Senate Committee which reviewed the Bill addressing outstanding issues only by blurring the respective roles of legislature, executive and judiciary. It has thus exacerbated difficulties for advisers by effectively abrogating its legislative responsibility and deferring to the discretion of the regulator. In particular, the Senate Committee concluded when recommending passage of the Cartel Act as follows:

> 4.8 The committee is concerned that any attempt to legislate what it is in all cases that constitutes a criminal cartel offence risks restricting the judgment of the regulator. The ACCC's case-by-case judgments are important because they are contextual and weigh various factors, one against others. It is the ACCC's judgment that will authorise a doctor's rostering arrangement which does not raise prices or restrictive agreements between franchisors and franchisees. This flexibility is valued by both the government and the ACCC.

The Second Reading Speeches give no better guide to what is intended to be covered. Both proceeded on the assumption that the new provisions only cover serious cartel conduct which is already prohibited civilly by the pre-existing provisions of Pt IV of the TPA,[22] propositions which are unfounded on a plain reading of the primary provisions of the TPA. The genesis of the prohibitions in the Dawson Review likewise provides no useful pointer.

The fourth problem of construction is that notwithstanding the general statements of principle of our politicians, our legislature has not taken the path of a broad (and understandable) form of proscription to be interpreted and enforced by the courts. Rather, our parliamentary draftsperson has adopted the familiar "Tax Act" approach to drafting by specific proscription, thereby risking that our courts will be unable to see the wood for the trees. At its most rudimentary, the new cartel prohibitions do not on any literal reading require many of the matters previous reviews and regulators have noted as being central to serious cartel conduct, or indeed many of the matters adverted to in the ACCC's current guides as to what offends the new prohibitions. In particular, the prohibitions do *not* require for contravention *any* of the following:

- an agreement to restrict competition;
- an aim of creating scarcity;
- a purpose of propping up or increasing prices;
- a purpose of protecting inefficient suppliers;
- coordinated restrictions;
- industry wide participation or the support of key market participants; or

[22] House of Representatives, n 10.

- a secret agreement not to compete (or secrecy at all).

Rather, the cartel prohibitions will be automatically contravened without regard to the above (or issues of magnitude) if particular specified purpose, effect and competition conditions are satisfied. For the reasons summarised above and detailed below the new prohibitions on their face clearly extend beyond existing civil prohibitions. The Explanatory Memorandum is simply wrong in asserting at para 1.33 that, in relation to output restrictions, a test adapted from ss 4D and 45 applies and that the courts have interpreted those sections as prohibiting such conduct. That error gives no guide as to how the new prohibitions should be construed.

The overarching and final problem of construction generally is that it is only if the ordinary meaning conveyed is ambiguous or obscure or leads to a result that is manifestly absurd or is unreasonable that the extrinsic materials become relevant in any event. The words used are generally not ambiguous or obscure, and to the extent if at all that they are, the extrinsic materials take the matter no further. Likewise, assuming that one could mount a respectable argument that a construction leading to a pro-competitive collaboration contravening is manifestly absurd or unreasonable, once again the extrinsic materials are insufficiently specific to be of assistance in determining meaning.

Advisers are accordingly left with statements from the ACCC which suggest some sensible limitation to the scope of the prohibitions but are irrelevant to the question of statutory construction. Likewise statements in the extrinsic materials at the most general level suggest some intended limitations, but they do not address the meaning of the particular prohibitions and do not suggest that one should look beyond ordinary, literal or grammatical meaning. What then is that ordinary meaning?

The ordinary meaning of output restrictions under ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the TPA

The Cartel Act introduced a new Div 1 to Pt IV of the TPA which has been in operation since 24 July 2009. Sections 44ZZRF and 44ZZRG provide that it is a criminal offence to make a contract, arrangement or understanding which to the person's knowledge or belief contains a "cartel provision" or to give effect to such a provision. Sections 44ZZRJ and 44ZZRK make a person liable to a civil penalty for making a contract, arrangement or understanding containing such a provision or giving effect to such a provision.

A "cartel provision" is one in relation to which the "purpose/effect" condition in s 44ZZRD(2) or the "purpose" condition in s 44ZZRD(3) is satisfied, and in relation to which the "competition" condition in s 44ZZRD(4) is also satisfied. The competition condition requires likely competition broadly as required under the pre-existing prohibitions and is accordingly not further addressed here.

The focus here is on the prohibitions for output restrictions which are defined by the purpose condition in s 44ZZRD(3)(a) which provides in terms as follows:

> (3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:
>
> (a) preventing, restricting or limiting:
>
> (i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or
>
> (ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangements or understanding to supply services; or
>
> (iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding.

The previously existing per se prohibitions in ss 4D and 45 covered a substantial (direct) purpose of preventing, restricting or limiting (limitations) particular supply or acquisition.[23] The new prohibition extends further to:

[23] Curiously, for reasons which are unclear the new output restriction prohibition is narrower than the prohibition in ss 4D and 45 in one respect. It does not proscribe the *acquisition* of goods or services from particular persons or classes (or at all), so that in many respects buyer cartel conduct is not caught by that cartel prohibition. It remains to be seen how far the new price fixing prohibition in s 44ZZRD(2) (or other prohibitions in ss 44ZZRD(3)(b) and 44ZZRD(3)(c)) will criminalise such activity. Presumably, at least a naked agreement on maximum prices cartel members will pay for inputs would fall within s 44ZZRD(2)(a) and 44ZZRD(2)(d) and contravene as it would in the United States: see eg *Mandeville Island Farms v American Crystal Sugar Co* 334 US 219 (1948).

- a substantial purpose of indirect limitations: see s 44ZZRD(3);
- limitations on production which is defined expansively to include all processes conceivably involved in the production chain: see Explanatory Memorandum para 1.36 and s 44ZZRB and s 44ZZRD(3)(a)(i);
- limitations on capacity which is not defined: see s 44ZZRD(3)(a)(ii);
- limitations on a possibility of production, capacity or supply which is not remote: see s 44ZZRB and s 44ZZRD(3);
- limitations on production or capacity without any requirement that the limitations be directed towards anyone: see s 44ZZRD(3)(a)(i) and 44ZZRD(3)(ii); and
- limitations on supply to persons or classes of persons (as opposed to particular persons or classes): see s 44ZZRD(3)(a)(iii).

WHAT ARE PRODUCTION LIMITATIONS?

Production is defined, but its expansive definition may pose problems. Curiously, "capacity" is specified only in relation to services, and not in relation to production where it finds a more natural home. Presumably, a restriction on production capacity is intended to be caught by the prohibition on production limitations whether or not production is in fact limited. However, given the expansive definition of "production", albeit to "include" the matters specified, it can at least be argued that only actual agreed limitations of the examples of production specified in s 44ZZRB are caught and not the capacity to achieve them which is not specified, given the requirement of strict construction in favour of the person exposed to a penalty.

That aside, the prohibition on production limitations is clearly broader than s 4D. Its plain words and ordinary meaning attach to any limitation on the possibility of production which is not remote, regardless of its magnitude, how much of the relevant market is affected and who it might affect or be directed towards. Any arrangement short of joint venture contract by which any actual or potential competitors share assets or resources with or otherwise have a substantial purpose of limiting the possibility of production of competitive goods to anyone will be caught, regardless of the magnitude of possible limitation or whether it actually occurs or was more probable than not to occur (see the section on "What is 'likely'?" below).

In relation to construction of this and the other prohibitions discussed below, the challenge for advisers and risk for business is as described by Mason CJ in *Devenish v Jewel Food Stores Pty Ltd* (at 45):

> When a provision in a statute is intended to be protective and remedial and to that end proscribes certain conduct, strong reasons are required to justify an interpretation of the provision which would narrow the scope of the provision and exclude conduct falling within its literal terms.

WHAT ARE CAPACITY LIMITATIONS?

Capacity is not defined, and can be an uncertain value-laden term, but its meaning is perhaps tolerably clear here. Although explicit reference to capacity is new to the TPA, capacity restrictions have been prosecuted as per se offences in the United States and European Union. For example, in *Competition Authority v Beef Industry Development Society Ltd Case* C-209-07 [2008], the European Court of Justice held on 20 November 2008 that an arrangement to reduce beef and veal production overcapacity to rationalise Irish industry had the object of restricting competition so that it was unnecessary to consider competitive effects to find contravention of Article 81(1) of the *European Community Treaty*[24] which prohibits agreements between businesses that prevent, restrict or distort competition or are intended to do so and which affect trade.

That said, while production capacity is a well understood term in economics and as a matter of common sense, it is less clear what precisely is embraced in the cartel prohibition by having a

[24] Incorporated by Member State legislation and also mirrored in it, eg in the United Kingdom given legal effect by s 291 of the *European Communities Act 1972* (UK) and mirrored in Ch 1 prohibitions in the *Competition Act 1998* (UK).

substantial purpose of indirectly limiting a possibility of the supply of services which is not remote (See the section on "What is an 'indirect purpose'?" below).

Certainly, the ordinary meaning of the prohibition on capacity limitations goes beyond the pre-existing law on exclusionary provisions. For example, at least according to the High Court, an agreement to reduce restaurant capacity by two competing restaurants would not contravene s 4D as its purpose would not be to reduce the facilities available to any particular person or class, although it would clearly have the effect of reducing accommodation for diners generally.[25] Such an arrangement would clearly limit capacity within the meaning of the new prohibition in s 44ZZRD(3)(a)(ii) which does not require that the purpose or limitation be directed at or towards anyone.

Capacity restrictions have not been the subject of extensive judicial consideration in Australia to date, but they have at least by consent in one case been held to contravene ss 45(2)(a)(ii) and 45(2)(b)(ii) of the TPA. In *Australian Competition and Consumer Commission v Tasmanian Salmonid Growers Assn Ltd* [2003] ATPR 41-954, the bare facts were that the Association's Board, with knowledge of a forecast price decrease due to production increase, decided to reduce members' capacity/production by grading out stock that would otherwise have reached market. Heerey J made consent declarations and other orders on the basis that the Board agreement had the likely effect of controlling or maintaining price within the meaning of s 45A thereby per se contravening ss 45(2)(a)(ii) and 45(2)(b)(ii). No claim was pursued for breach of ss 45(2)(a)(i), 45(2)(b)(i) and 4D.

It is of course easy to accept that such capacity limitations agreed by the growers which are intended to affect price are cartel conduct to be condemned and subject to severe penalty; they would clearly fall within the new cartel prohibition. However, what was found to be required for liability in the Salmon Growers case is instructive as to the lower threshold now in operation under the cartel prohibition. No such intended price effect, or participation industry wide or at least by the key players, is now required for civil or criminal liability under the TPA.

As with production limitations, the plain words and ordinary meaning of s 44ZZRD(3)(a)(ii) attach to any limitation on the possibility of capacity which is not remote, regardless of its magnitude, who it might affect or be directed towards or whether it actually occurs or was more probable than not to occur (See the next section, "What is 'likely'?" below).

WHAT IS "LIKELY"?

It remains to be seen whether the new definition of "likely" as including "a possibility that is not remote" expands pre-existing law in practice.[26] Certainly in theory it might, as some authority suggests a mere possibility is not sufficient,[27] and a minority of authority had suggested a requirement of "more probable than not", at least in some circumstances.[28] The prevailing view on the authorities prior to its inclusion as a defined term in s 44ZZRB was generally that it means "a real chance or possibility", or "a significant finite probability or 'real chance'".[29] Accordingly, the new definition is silent as to the difference between a remote and real possibility, and would appear to catch anything more than "remote" but less than "real". The Explanatory Memorandum at para 1.51 suggests that the new definition is intended to clarify the position, but it notably bypasses the sensible substantive

[25] *News Ltd v South Sydney Rugby League Football Club Ltd* (2003) 215 CLR 563 at [20]-[23] per Gleeson J; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [84] per Gummow, Hayne and Heydon JJ.

[26] The Explanatory Memorandum at para 1.51 suggests that it is intended to clarify the position.

[27] *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437; 44 ALR 557 at 564.

[28] *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305 at 340 per Northrop J; *Australian Gas Light Co v Australian Competition and Consumer Commission* (2003) 137 FCR 317; [2003] ATPR 41-966 at [344] per French J and the cases there cited.

[29] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2005) ATPR 42-066 at [633] per Allsop J and the cases there cited; *Australian Gas Light Co v Australian Competition and Consumer Commission* [2003] ATPR 41-966 at 47,704 [343] per French J.

approach of the current Chief Justice of the High Court. That approach required that "likely" does not encompass a mere possibility and must operate in the real world to operate at a level which is commercially relevant or meaningful.[30]

WHAT IS AN "INDIRECT PURPOSE"?

As to the extension to attach to a provision which has a substantial purpose of indirectly limiting output, it is with respect hard to give meaning to the words. One can of course sell or acquire directly or indirectly as is provided for in s 47, and one can understand a provision having an indirect effect, for example in fixing, controlling or maintaining price. It is not easy to understand how one can have a purpose of indirectly limiting output. One either has a purpose to limit output or one does not; how that is achieved (whether directly or indirectly) is another matter.

It should also be noted that use of the phrase may perpetuate confusion as to the distinction between/relevance of immediate and ultimate purpose which has occurred in construing s 4D.[31] It may be that the reference to "indirect" has the effect that contravention occurs either if there is a direct or immediate purpose, or if there is an indirect or ultimate purpose of limiting production, capacity or supply. If that is the case then the 14-member team term ultimately found by the High Court not to contravene ss 4D and 45 in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 could now lead to civil and criminal contravention.

Moreover, use of the word "indirect" suggests that there may be contravention where the parties to a provision do not share the same explicit contravening purpose. In *Seven Network Ltd v News Ltd* [2007] FCA 1062 (C7), Sackville J (the judge at first instance) found no s 45 liability in part because the parties to the relevant provision did not share the same anticompetitive purpose.[32] If the correct test is to consider the subjective purposes of all the parties to the provision, what happens in applying the new prohibitions where one party has a purpose of directly limiting output which satisfies the purpose condition but one does not have that purpose? The latter presumably may still be liable if it has a purpose of indirectly limiting output, assuming those words to have meaning. Likewise, both or all participants could have different direct objectives but be liable for purposes of indirectly limiting output in different ways if the proper test (as enunciated by the majority on appeal in C7) does not require shared purpose and focuses on the purpose of the party responsible for including the provision.

WHAT SUPPLY LIMITATIONS CONTRAVENE: THE MEANING OF "PERSONS OR CLASSES OF PERSONS"?

In relation to the supply limitations proscribed in s 44ZZRD(3)(a)(iii), layered on top of the uncertainties of indirect purpose and "not remote" possibility is the meaning of "person" in the phrase "persons or classes of persons". The phrase appears five times in s 44ZZRD, giving rise to two contraventions for fixing the price of goods or services actually or possibly resupplied by such persons (s 44ZZRD(2)(e) and 44ZZRD(2)(f)), a contravention for limiting actual or possible supply to such persons (s 44ZZRD(3)(a)(iii)), and two contraventions for allocating such persons who are actual or possible customers or suppliers (s 44ZZRD(3)(b)(i) and 44ZZRD(3)(b)(ii)).

The first draft of the Cartel Bill contained the expression "particular persons or classes of persons". The Explanatory Memorandum does not help in perpetuating reference to "particular" in apparent error in para 1.35. The word "particular" was apparently deleted from the final form of the

[30] *Australian Gas Light Company v Australian Competition and Consumer Commission* [2003] ATPR 41-966 at [343] per French J at 47,705 [348].

[31] *News Ltd v South Sydney Rugby League Football Club Ltd* (2003) 215 CLR 563 at [18] per Gleeson J; cf Finn J at first instance at (2000) 177 ALR 611.

[32] On appeal Mansfield J agreed, while Dowsett and Lander JJ were of the view that the purpose of the party responsible for including the provision was sufficient for contravention and that a shared purpose is not required: *Seven Network Ltd v News Ltd* [2009] FCAFC 166 (2 December 2009).

Cartel Act to avoid concerns that it was necessary to be able to identify all of the persons in the "class of persons" for that part of the condition to be satisfied.[33]

Thus, ss 44ZZRD(5) states that it is "immaterial whether the identities of the persons referred to in … s 44ZZRD(3)(a)(iii) … can be ascertained", and the Explanatory Memorandum suggests (para 1.45) that the clarification provided by this subsection was to make clear in relation to the reference to "classes of persons" that "it is not material to identify the persons falling within the class for the purpose condition to be satisfied". That paragraph also suggests that the provision in s 44ZZRD(3)(a)(iii) was concerned with "persons or classes of persons" who must be identified in some way although in the case of "classes of persons" the identification did not have to be of all of the members of the class. There is nothing in the Supplementary Explanatory Memorandum which contradicts this or explains why "particular" was deleted.

However, its removal raises the question whether "persons" when first used in the expression is to be understood as referring to "any persons" or to specific persons. Although the position is not made clear by the extrinsic material, that material is arguably more consistent with s 44ZZRD(3)(a)(iii) requiring a purpose directed at specific persons or at classes of persons as distinct from at any persons.

Notably, the Parliament has not in s 44ZZRD(3)(a)(iii) removed all references to persons or classes of persons as the object of the proscribed purpose as it has done in relation to production and capacity limitations in ss 44ZZRD(3)(a)(i) and 44ZZRD(3)(a)(ii). If "persons" is read as any persons, it would be unnecessary to refer to "classes of persons" or to refer to "persons or classes of persons" at all because supply or acquisition will always be to or from persons. Ordinary principles of construction require that those words be given work to do; they are not mere drafting verbosity.[34] Arguably then, the words only have work to do if they require that the purpose be directed to specific persons or classes of persons.

It is accordingly to be hoped that in s 44ZZRD(3)(a)(iii) the reference to "persons or classes of persons" is to be read as referring to a specific person or persons or class (albeit both singular and plural and whether natural or bodies corporate or politic) as distinct from "any" persons. However, this conclusion is not clear-cut as it is not confirmed by the example given in the legislative note to the subsection and the ACCC has recently taken a more expansive approach to the meaning of "another person" in s 47(6) of the TPA.

As with other aspects of expansion of the previously existing law, the notes to the legislation do not assist. First of course, they are not determinative of the question of construction, as they do not form part of the TPA and the provision in the TPA prevails over any example given: ss 13(3) and 15AD of the *Acts Interpretation Act 1901*. Secondly, in any event the example given in Note 1 to s 44ZZRD(3)(a)(iii) is quite unhelpful.

Note 1 to the section seeks to explain that the section will not apply in relation to a roster for the supply of after-hours medical services *if* the roster does not prevent, restrict or limit the supply of services. That of course begs the question whether a provision in fact so limits supply. Bearing in mind that contravention will occur if the provision has a substantial purpose of indirectly limiting a possibility of supply of such services which is not remote, it seems likely on a literal reading of the words of the section that a provision rostering some doctors and not others with whom they compete to supply their services at particular times will contravene. Moreover, in the current context, the example does not suggest that there will be no contravention by reason of the persons or classes of persons the potential subject of the roster being insufficiently particular, so that to the extent if at all that the note is relevant it suggests that the section does not require the restriction to be directed towards particular persons or classes. Section 44ZZRD(5) likewise does not assist with the preferred construction postulated above.

[33] See eg, *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at [75]; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [87]; and Explanatory Memorandum at para 1.45.

[34] See *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 per Gummow, Hayne and Heydon JJ at [8].

It is likely to be some time before there is any judicial determination of the scope of this aspect of the section, so that the only remaining current guidance is how the same or similar words have been used and interpreted judicially elsewhere in the TPA.

DOES THE MEANING OF "PERSONS" ELSEWHERE IN THE TPA ASSIST?

Sections 4D, 45(2)(a)(i) and 45(b)(i) of the TPA

The purpose of the per se prohibition on exclusionary provisions in s 4D is to avoid an unfair exercise of power against a targeted person or class of persons or collective economic bullying.[35]

Section 45(2) of the TPA prohibits the making of a contract or arrangement or understanding which contains an "exclusionary provision" and the giving effect to of such a provision. A provision of a contract, arrangement or understanding is taken to be an "exclusionary provision" if the contract was made between persons any two or more of whom who are competitive with each other and the provision has the purpose of preventing, restricting or limiting the supply to or the acquisition of services from particular persons or classes of persons or particular persons or classes of persons in particular circumstances or on particular conditions by all or any of the parties to the contract or arrangement (s 4D(1)). Persons are deemed to be competitive with each other if they or related bodies corporate are or are likely to be, but for the relevant provision, in competition with each other in relation to the supply or acquisition of the services to which the provision relates (s 4D(2)).

The prohibition attaches to any substantial purpose being the subjective purpose of the parties. Purpose is the effect that the parties sought to achieve by including the provision in their arrangements, ie the end they had in view from the operation of the provision.[36]

Section 4D attaches only to provisions directed towards "particular persons or classes of persons", but although it is necessary to be able to define the class of persons to whom the exclusionary provision is applied, it is not necessary to be able to identify each such person.[37] The precise extent to which particularity or person or class is required remains a matter of debate.[38]

The particular person/class requirement for contravention of s 4D/45 is accordingly consonant with the purpose of the prohibition and general abhorrence of boycotts, and an appropriate limitation on liability given the per se nature of the prohibition. As is suggested below, it is also consistent with the approach in other sections of the TPA. Here and elsewhere, where liability is per se, at least some particularity of person affected is required.[39]

SECTION 46 OF THE TPA

The primary purpose of s 46 is the protection of consumers – it is only when consumers will suffer as a result of the practices of a business firm that s 46 is likely to require courts to intervene.[40]

Section 46 relevantly proscribes the taking advantage of market power for a substantial purpose of preventing market entry of or deterring competitive conduct by "a person". The references there to "a person" explicitly include persons generally or a particular class or classes of persons: s 46(1A)(b).

Accordingly, plainly enough the section explicitly contemplates that such conduct directed at anyone or everyone can contravene, a common sense outcome given the purpose of the section, and consistent with the fact that s 46 does not in substance give rise to per se contravention.

[35] *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [82] per Gummow, Hayne and Heydon JJ; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at [113]. [115] and [118] per Kirby J.

[36] *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at [18] and [60].

[37] *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53.

[38] See the examples given by the High Court in *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [83]-[86] and the various authorities referred to in Wylie I S, *What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond*, n 3.

[39] Except in the case of price fixing where the nature of the conduct proscribed by ss 44ZZRD(2)(a)-(d). is such as not to require any such particularity.

[40] *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2001) 215 CLR 374 at [261] per McHugh J.

SECTION 47 OF THE TPA

Most of s 47 prohibits corporations from engaging in the practice of "exclusive dealing" if the relevant conduct has a substantial purpose or the effect or likely effect of substantially lessening (including preventing or hindering) competition in any market in which a corporation engaging in the conduct supplies or acquires services: ss 4F, 4G, 47(1)-(5), 47(8)-(9), 47(10)(a), and 47(13)(b).

Each of those subsections focus on limitations on acquisition from or supply to "particular persons or classes of persons or to persons other than particular persons or classes of persons" (ss 47(2)(f)(i), 47(3)(f)(i), 47(4)(c), 47(5)(c), 47(8)(b)(i), and 47(9)(c)(i)), or from or to "any person" (ss 47(2)(f), 47(3)(f), 47(4)(b), 47(8)(b)). One must of course ask in relation to the former why the draftsperson saw the need to use so many words when their effect is that "any person" is covered, but in any event the outcome is once again sensible. Here, no particular class or person is required, but contravention is not per se and depends on a substantial purpose or likely effect of substantially lessening competition in a market.

On the other hand, those subsections are to be distinguished from the per se prohibitions on third line forcing in ss 47(6), 47(7), 47(8)(c) and 47(9)(d) which focus on forced acquisition from "another person" (which is not a related corporation) rather than "any person".

It accordingly seems clear that in relation to all exclusive dealing which is subject to a competition test, conduct restricting dealings with anyone can contravene. On the other hand, in relation to the per se prohibition on third line forcing it might be thought that some degree of particularity in the person must be required as it would have been easy to use the same words "any person" if that was the intent of the legislative draftsperson, so that "another person" should be an identified person or persons, but should be noted that the ACCC maintains that "another person" means any (unrelated) person.[41] A concerning corollary of this approach is that the regulator will presumably also take the view that "persons or classes of persons" in the cartel prohibitions covers anyone and everyone so that no particularity is required for contravention.

The ACCC's position in relation to s 47(6) is that the legislative history and context and ordinary meaning of the words coupled with s 23(b) of the *Acts Interpretation Act 1901* compel the conclusion that "another person" includes any unidentified unrelated person. The ACCC also relies on *Kam Nominees v AGC Ltd* (1994) 51 FCR 338 at 343G-344A and 345F in which Drummond J suggests[42] that "another person" includes a class of persons nominated by the corporation as that with which alone the person could deal and accordingly may not require specific identification of "another person".

The contrary view might be considered supported by the following matters.

- The purpose of s 47 of the TPA is to proscribe conduct which creates a restrictive trade practice which may affect adversely persons competing with the favoured person.[43] Consistent with that approach, Drummond J summarised the purpose of the per se prohibitions on third line forcing in s 47 in *Australian Competition and Consumer Commission v IMB Group Pty Ltd (in liq)* [2002] FCA 402 at [56] and [58] and concluded at [58] that "Parliament's concern in s 47(6) and (7) is with anti-competitive conduct … many, if not most instances of third line tying will be anti-competitive".

[41] The ACCC is testing this proposition in the Federal Court proceeding *ACCC v Link Solutions Pty Ltd* NSD 1473 of 2008 in which judgment is currently reserved by Bennett J.

[42] *Kam Nominees v AGC Ltd* (1994) 51 FCR 338 was not a final judgment but only a decision that the case should be permitted to go to trial on an application for summary dismissal where the stringent requirements of *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 applicable to the application under FCR O 20 r 2(1) as then in force applied. *Kam* apparently never proceeded to final hearing and judgment.

[43] *SWB Family Credit Union Ltd v Parramatta Tourist Services Pty Ltd* (1980) 32 ALR 365 at 381.6 per Smithers J.

- ss 47(6) and 47(7) reach both direct and indirect acquisition, and it has accordingly been argued that they should be construed to reach only acquisition from an identified source, so that the section prevents only arrangements promoting the acquisition of particular services exclusively from a particular and designated person.[44]
- Davies J noted in *Trade Practices Commission v Tepeda Pty Ltd (t/as Metro Motor Market)* [1994] ATPR 41-319 at 42,246.8, that "by the reference to 'another person', the section has in mind a specific person, otherwise the reference would be unnecessary. The section does not prohibit a requirement such as, eg that the customer will acquire finance or insurance from a reputable company. The vice with which the section deals is a corporation's requirement that such goods or services shall be obtained from a specified source. Such a requirement tends to have anti competitive effects". A requirement only that a person acquire from one of a range of or any unrelated competitive supplier is unlikely to have anticompetitive effects.
- In *Australian Competition and Consumer Commission v Universal Music* (2001) 115 FCR 442 at 546 [459], Hill J noted "it is not likely that Parliament intended to proscribe third line forcing in relation to any unidentified person".

SECTIONS 48, 96 AND 96A OF THE TPA

The object of the resale price maintenance prohibitions in the TPA is to "create conditions in which the public will benefit from traders competing with each other in respect of prices unfettered by price restraints imposed by supplier of goods (and now services) on retailers".[45]

Contravention only occurs where the supplier engages in certain conduct by reference to "a" or "the" and "second" person. They are the same person, whether or not "second person" can include the plural.[46] The second person is a reseller, and it must be shown that that person was induced by the conduct or that the supplier intended to bring about that result by reference to a particular reseller or identified resellers.[47] Once again, particularity of person affected is required for this, the last of the per se prohibitions, consistent with its nature and object.

CONCLUSION ON "PERSONS OR CLASSES OF PERSONS" IN SS 44ZZRD(3)(A)

Conformable with the reasons above, the approach to "persons" affected in relation to the other pre-existing per se prohibitions outlined immediately above suggests "persons or classes of persons" in ss 44ZZRD(3)(a)(iii) should require some particularity.[48]

That of course leads to the conundrum that one must take first the clear words of the section. As it is arguably plain on the ordinary meaning of the words used that there is no such limitation, it may not be possible as a matter of construction to read them down so as to impose one, however sensible such a limitation is. Moreover, in terms of certainty for and risk assessment by business, the ACCC's recent approach to the scope of s 47(6) suggests that the words cannot safely be read down as suggested.

CONSIDERATION OF OVERREACH OF S 44ZZRD(3)(A)

One interesting comparator is the position in the United Kingdom. The Australian Parliament consciously chose to depart from the requirement of the dishonesty element in the parallel United

[44] *SWB Family Credit Union Ltd v Parramatta Tourist Services Pty Ltd* (1980) 32 ALR 365 per Smithers J at 375.5-9, considered and applied by Wilcox J in *Williams & Hodgson Transport Pty Ltd v Castlemaine Tooheys Ltd* (1985) 64 ALR 521 at 532.1.

[45] *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR 40-091 at 17,895-6 per Smithers J.

[46] See eg, *Trade Practices Commission v Sony (Aust) Pty Ltd* [1990] ATPR 41-031 at 51,490.5 per Pincus J.

[47] *Australian Competition and Consumer Commission v Mayo International Pty Ltd (No 1)* (1998) 85 FCR 327; [1998] ATPR 41-653 at 41, 276 per Keifel J.

[48] Generally where the same words are used in an Act they will be construed consistently so that meaning of the phrase elsewhere in s 44ZZRD should be the same.

Kingdom offence which it had in the original draft of what became the Cartel Act embraced.[49] Notably, however, in addition to the lower hurdle here of a fault element of knowledge or belief,[50] the definition of the relevant cartel provision is in most respects wider in Australia. In the United Kingdom, s 188 of the *Enterprise Act 2002* (UK) attaches only to dishonestly making or implementing an arrangement intended to limit or prevent supply or production in the United Kingdom by one competitor of a product or service with another competitor at the same level in the production/supply chain.[51] There is no reference to possibilities or indirect purposes, no reference to capacity, and dishonesty and intent are required, although interestingly in that context in the United Kingdom there is also no limitation as to the target of the restriction beyond identifying the relevant level of the production/supply chain.

The other obvious comparator is the United States which has long imposed per se liability for naked output reduction[52] under s 1 of the *Sherman Act 1890* (US), 15 USC (which prohibits every 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), including criminal liability without any dishonesty requirement. In the United States, however, the utility of competitor collaborations has long been recognised so that collaborations which have incidental effects on output have been subject to Rule of Reason analysis to determine their overall competitive effect,[53] and only bare output fixing and reduction is per se illegal.[54]

For example, in *Texaco Inc v Dagher* 547 US 1 (2006), the United States Supreme Court held that it is not per se illegal under s 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products. Section 1 is intended to outlaw only unreasonable restraints, eg *State Oil Co v Khan* 522 US 3 at 10. Under rule of reason analysis, antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive, with per se liability being reserved for "plainly anticompetitive" agreements: *National Society of Professional Engineers v United States* 435 US 679 at 692.

Most recently, the scope of application of s 1 to competitor collaborations is currently being tested in the United States Supreme Court in *American Needle Inc v National Football League No 08-661l* in which judgment was reserved at the time of publication. Notably, the joint amicus brief filed by the United States Department of Justice and Federal Trade Commission[55] in that case builds on the Supreme Court's decision in *Dagher*, and proposes a standard that would expand single-entity treatment to legitimate joint ventures among competitors in the following way.

- The *formation* of a collaboration, or a decision to expand its field of operations or impose new restrictions on its participants' competitive freedoms, is subject to s 1 scrutiny.
- The *decision-making* of the collaboration (no matter what internal processes lead to those decisions, eg even if the decision is made by a vote of separate shareholders), is exempt from challenge under s 1 when two conditions are satisfied:

[49] *Exposure Draft Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth).

[50] Sections 44ZZRF(2) and 44ZZRG(2).

[51] Sections 188(2)(b), 188(2)(c), 188(4), 189(2) and 189(3).

[52] Per se treatment is applied when a practice is "one that would always or almost always tend to restrict competition and decrease output". *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979) at 19-20. Agreements among competitors to restrict their output are thus generally *per se* violations as an agreement on output equates to a price-fixing agreement. See eg, *FTC v Superior Court Trial Lawyers Assn* 493 US 411 (1990) at 423, *Westinghouse Electric Corp v Gulf Oil Corp* 588 F 2d 221, 226 (7th Cir 1978) (restricting production of uranium) and *Virginia Excelsior Mills Inc v FTC* 256 F 2d 538, 539-40 (4th Cir 1958) (agreeing not to increase productive capacity and to allocate orders among themselves based on productive capacities).

[53] See the United States Federal Trade Commission and the Department of Justice *Antitrust Guidelines for Collaboration Among Competitors* (April 2000) at http://www.usdoj.gov/atr viewed 30 December 2009.

[54] See eg, *National Collegiate Athletic Association v Board of Regents* 468 US 85, 109 (1984).

[55] Refer to http://www.abanet.org/antitrust/at-committees/at-ta/pdf/american-needle/090925nflbrief.pdf viewed 23 December 2009.

  - the competitors "effectively merge" some aspect of their operations, "thereby eliminating actual and potential competition" among them, and between them and their joint venture entity, "in that operational sphere;" and
  - the challenged restraint does not "significantly affect actual or potential competition" among the firms or between them and their JV entity "outside their merged operations".
- If these conditions are satisfied, the "collective decision to limit competition" should be analysed as a merger, and "subsequent conduct simply reflecting that limitation", namely "post-'merger' decisions that affect only" the activities that have effectively been merged, should not be subjected to s 1 scrutiny at all.

The proposal is to be applauded in providing additional certainty to pro-competitive collaborations, so that they can compete in the marketplace with other "true single-entity" rivals without having to worry about s 1 antitrust claims being asserted regarding day-to-day decision they might make.[56]

Europe varies as to its treatment of output restrictions, with most countries imposing per se liability but some examining competitive effects and/or including exemptions for efficiency enhancing arrangements.[57] All fell within the general requirements of Article 81(1) of the *EC Treaty* (since 1 December 2009 Article 101 of the *Treaty on the Functioning of the European Union*)[58] which relevantly prohibited "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: … (b) limit or control production, markets, technical development, or investment". Importantly, Article 81(1) (and its successor) "may, however, be declared inapplicable in the case of … any agreement … decision or … concerted practice …which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

None of the limitations on "cartel" liability in the European Union countries, the United Kingdom or the United States highlighted above apply to Australia's cartel prohibitions. Many troublesome examples of potentially contravening conduct were given in submissions opposing the passage of the Cartel Bill relevantly in the form ultimately enacted, and need not be repeated here.[59] The breadth more generally of the cartel prohibitions is summarised above, but it should also be noted generally that many collaborations among competitors will not be protected by the limited joint venture exception which has been introduced, and now give rise to potential criminal liability although they may be benign or even pro-competitive.

Thus, collaborations which allow competitors to offer cheaper goods or services brought to market faster, permit better use of existing assets or incentivise output enhancing investments will automatically contravene where the specific legislative purpose and competition conditions are satisfied. Efficiency gains may flow from combining technical expertise of one competitor with another's manufacturing process to lower production cost or improve quality. Likewise, combining R&D or marketing activities can lower prices or improve quality or the speed of bringing new products to market. Much such collaboration is likely to involve an indirect (or even direct) limitation

[56] Similar to the pricing decisions made by the Equilon venture in *Texaco Inc v Dagher* 547 US 1 (2006).

[57] ICN Working Group on Cartels, n 14.

[58] In identical form as a result of the Treaty of Lisbon 2007 (at http://www.eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML viewed 30 December 2009) coming into effect and available at http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF viewed 30 December 2009.

[59] See eg, the Submissions of Speed & Stracey and of Fisse both dated 20 January 2009 referred to in the Senate Report of the Standing Committee on Economics on the Cartel Bill dated 26 February 2009 tabled in the Senate on 10 March 2009 and available at http://www.aph.gov.au/SEnate/committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf viewed 30 December 2009.

on the possibility of supply of the goods or services which are the subject of the collaboration, and is accordingly at risk of satisfying the purpose condition. If the collaborators share production facilities for reasons of quality and cost and constrain what is produced when, or mothball capacity for genuine reasons of efficiency and costs saving, there will be a direct limitation and the purpose condition will be satisfied. The collaborators will then contravene per se if they are likely to be, or but for the collaboration would be likely to be, in competition with each other in relation to the production of those goods or supply of those goods or services pursuant to s 44ZZRD(4).

Importantly, they will contravene regardless of market share/power. Two small rivals who pool resources to enhance efficiency and compete more effectively with their larger competitors can contravene as surely as dominant or key industry participants. Indeed, their risk may be greater as their larger competitors are more likely to have the legal resources and appreciation of risk to structure and document arrangements so as to fall within the joint venture defence referred to below or seek authorisation.

The proposition that the ACCC will choose not to take criminal action concerning such activity is no solution. Consider the example of two small suppliers of partial product ranges who collaborate by sharing production facilities and/or other resources/expertise for efficiency reasons to produce a full product range and thereby take sales away from a dominant firm which is the only firm in the market capable of itself supplying the full range. Day-to-day limitations on capacity, production or supply for efficiency reasons are likely, in which event the dominant supplier now has available against its small rivals a claim based on contravention of the parallel civil prohibition for damages (profit on sales lost by it to the successful collaborators) and other relief. Such a claim could be pursued strategically for anti-competitive purposes. A similar example given by Fisse[60] is that reciprocal non exclusive but conditional supply agreements between competitors will contravene notwithstanding their pro-competitive effect. This would occur, eg if competitors in the supply of a range of products sourced particular products from each other to enable them to compete more effectively against all other competitors in the supply of those products. Again, dominant suppliers now have a legal avenue to challenge the competitive threat posed to them.

There is of course a joint venture exception to the cartel prohibitions. Unfortunately, it has significant limitations which have been exposed elsewhere[61] and not effectively remedied in the final form of the Cartel Act as passed, so that it appears likely that many forms of collaboration which cannot satisfy the stringent requirements of the joint venture defence in s 44ZZRO will contravene. The joint venture exception will not assist unless the person relying on it can prove that:

- the parties are engaged in a joint venture for the production and/or supply of goods or services, and
- the cartel provision is "for the purposes" of a joint venture which is carried on jointly by the parties to the relevant contract, and
- the cartel provision is contained in a contract or that the parties intended it to be in a contract at the time they entered into the arrangement or understanding.

CONCLUSION

Considerable contortions are required to come to a tolerably sensible construction of the scope of the new per se civil and criminal prohibitions on supply restrictions. Construction principles do not assist in reaching a construction of them, or of the prohibitions on production and capacity restrictions, which limit their scope to what is truly "serious cartel conduct". The detailed proscription in s 44ZZRD(3)(a), and the balance of Div 1 of Pt IV of the TPA which applies it, do not serve their apparently intended purpose.

At a minimum, the relevant purpose condition should be repealed, and replaced with a simplified understandable purpose or effect condition which attaches only to provisions which have a substantial

[60] Fisse, n 3, p 22.

[61] See eg, the Submissions referred to in Senate Report of the Standing Committee on Economics on the Cartel Bill, n 1.

purpose or likely effect of limiting supply, production or capacity to control or maintain price or otherwise lessen competition in a market.