CRIMINALISATION OF CARTEL CONDUCT

CAN COMMERCIAL COMPETITION LITIGATORS BECOME CRIMINAL DEFENCE LAWYERS?

ARE PRE-TRIAL AND TRIAL ISSUES DIFFERENT IN CRIMINAL PROCEEDINGS AND IF SO, HOW MIGHT THEY BE DEALT WITH?

Justice Michelle Gordon, Federal Court of Australia*

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Cartel conduct became a criminal offence under Div 1 of Pt IVA of the *Trade Practices Act 1974* (Cth)[1] on 24 July 2009. Jurisdiction to try indictable cartel offences by jury was conferred on the Federal Court of Australia and on the Supreme Courts of the States and Territories[2]. A procedural framework for the Federal Court to exercise jurisdiction over these indictable offences was enacted in December 2009[3].

These reforms have created a highly specialised area of law which combines complex commercial and economic concepts of competition law with the rigours of criminal law. Significant legal and practical issues arise for the Courts, the practitioners and those charged with these cartel offences – offences which carry significant sanctions for companies and individuals, including up to 10 years imprisonment for individuals[4].

Can competition lawyers be criminal defence lawyers for clients being investigated about, and then charged with, cartel offences? Do competition lawyers have the necessary knowledge and skills? How many competition lawyers, for example, are aware of, let alone understand

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1 Introduced pursuant to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth).

2 Section 163 of the *Trade Practices Act* 1974 (Cth) (**TPA**) and s 68 of the *Judiciary Act* 1903 (Cth).

3 See Div 1A of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) as amended by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth) and ss 68A, 68B and 68C of the *Judiciary Act 1903* (Cth) and the amendments to the *Federal Court of Australia Regulations 2004* (Cth) to deal with jurors.

4 Section 79 of the TPA.

criminal investigative procedures, bail, the committal process, the physical elements of a cartel offence, the mental or fault elements of the cartel offence, the matters to be considered at the time of the entry of a plea, pre-trial disclosure … the list is endless. How many competition lawyers know and understand that the answers to those questions may not be uniform and why that is so?

It is beyond the scope of this paper to address all aspects of criminal law that a defence lawyer will face in a cartel prosecution. Instead, the paper seeks to examine some aspects of the criminal law to provoke thought and debate about how a competition lawyer can become a criminal defence lawyer or if they would want to. So far as possible, the paper addresses the issues in the order in which they are likely to arise in the course of a criminal prosecution.

I. INVESTIGATION PROCESS AND THE EVENTS PRIOR TO CHARGES BEING LAID

The Australian Competition and Consumer Commission (the **ACCC**) is responsible for investigating cartel conduct. Some things don't change. Or do they? The ACCC's traditional investigative procedures remain:

- the capacity to issue notices under s 155 of the TPA to require a person or company to provide documents, information and / or to give evidence under oath at an examination; and
- the ability in an appropriate case to seek a search warrant from a Magistrate.

There are however significant aspects of the reforms that affect the nature and scope of the ACCC's investigative processes. First, the reforms introduced into the TPA deal with cartel conduct in the form of a civil prohibition[5] and a cartel offence[6]. Although both outlaw cartel conduct, the law imposes a number of additional requirements to prosecute a cartel offence including "fault elements[7]", the need to prove the offence beyond reasonable doubt and to obtain a unanimous verdict of a jury. Secondly, for the first time, whether the cartel conduct has concluded or is ongoing will affect the investigation procedures. Thirdly, the ACCC has

5 Sections 44ZZRJ and 44ZZRK of the TPA.

6 Sections 44ZZRF and 44ZZRG of the TPA.

7 Section 44ZZRF(2) and s 44ZZRG(2) of the TPA.

announced that *serious*[8] cartel conduct should be prosecuted criminally whenever possible[9]. Fourthly, it is not just the ACCC that will be involved in the investigation. It is *possible* that the Australian Federal Police (**AFP**) will be involved and *more than likely* that the Commonwealth Director of Public Prosecutions (the **CDPP**) will be involved. I will deal with each agency in turn.

If the ACCC becomes aware of *ongoing* cartel conduct that may be subject to a prosecution as a cartel offence, it may enlist the assistance of the AFP to conduct a joint investigation. As part of a joint investigation, the ACCC would be given access to any surveillance evidence and telephone intercepts obtained by way of warrant for use in any criminal proceedings. The AFP, not the ACCC, would apply for those warrants. This kind of evidence raises its own series of issues.

The role of the CDPP is more significant. The ACCC investigates, it does *not* charge. The CDPP is responsible for prosecuting cartel offences and making the decision to lay charges on referral by the ACCC, including the specific charge(s) that might be laid. Formal procedures are now in place between the ACCC and the CDPP which govern the relationship between the two agencies and the processes involved during the pre-charge and investigation phase. Those formal procedures are contained in two documents – Guidelines published by the ACCC in July 2009 entitled *ACCC Approach to Cartel Investigations*[10] and a "Memorandum of Understanding" (**MOU**) which outlines the respective responsibilities of the agencies and acknowledges that "close cooperation and consultation is required to achieve efficient and effective outcomes" [11].

The reality is that the ACCC and the CDPP do and will work closely in relation to matters that *might* be referred to the CDPP by the ACCC for criminal prosecution. The emphasis is on *might*. The ACCC has placed on record that where matters *appear to involve serious* cartel

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8 Defined by the ACCC as those that cause or have the potential to cause large scale or serious economic harm.

9 Australian Competition and Consumer Commission, *ACCC Approach to Cartel Investigations* (July 2009) ACCC <http://www.accc.gov.au/content/index.phtml/itemId/891982> (the **ACCC Cartel Guidelines**).

10 Ibid.

11 *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2009) Commonwealth Director of Public Prosecutions <http://www.cdpp.gov.au /Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf> (**MOU**).

conduct, the ACCC will refer those matters to the CDPP:

- to seek preliminary advice from the CDPP in relation to whether the matter should be pursued with a view to possible criminal proceedings; and
- at a later stage, and upon referral from the ACCC, to seek advice from the CDPP as to whether prosecution should commence[12].

At a practical level, the ACCC will seek preliminary advice throughout its investigation of a matter. It will be the CDPP which will assess whether the evidence obtained by the ACCC is sufficient for a criminal prosecution. If not, it will be the CDPP which will advise the ACCC of the defect(s) in the evidence and what further investigations the ACCC will need to undertake to seek to remedy those defects[13].

This form and level of cooperation between the investigating agency and the prosecuting authority is not new. For example, the CDPP has a similar MOU with the Australian Securities and Investments Commission (**ASIC**) governing the investigation and prosecution of "corporate and financial services wrongdoing"[14].

But that is not the only change. A competition lawyer will also notice significant changes to the way in which the ACCC uses its own investigative tools. A cartel offence is a different creature to a civil prohibition. Each contains different elements to be proved and to different standards. At the start of an investigation, the ACCC often will not know whether the matter will proceed as a criminal prosecution or as a civil proceeding. Commercial lawyers and their clients can expect the ACCC investigators to conduct investigations into cartel contravention to a criminal standard so that the ACCC retains the ability to refer the matter to the CDPP for criminal prosecution. For example, the ACCC investigators will as a matter of practice:

- caution each witness that their responses may later be given in evidence against them;
- conduct voluntary interviews consistent with Pt IC of the *Crimes Act 1914* (Cth); and
- preserve evidence.

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12 ACCC Guidelines, above n 9.

13 MOU, above n 11, paras 4.5 and 4.6.

14 *Memorandum of Understanding between the Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions* (March 2006) Australian Securities and Investments Commission <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mou_dpp_mar_2006.pdf/$file/mou_dpp_mar_2006.pdf>.

These arrangements have serious consequences for any lawyer retained to act for a person subject to investigation by the ACCC or even subject to a notice pursuant to s 155 of the TPA. The lawyer will need:

- to ascertain whether the witness is subject to a criminal investigation or a potential criminal investigation;
- to ensure the client is accompanied by legal representation when the client is interviewed;
- to ensure they are aware of and understand the extent to which the ACCC is entitled to question a witness: see for example ss 155 and 159 of the TPA in relation to self-incrimination; and
- where appropriate, explore and negotiate any immunity from prosecution. In the criminal sphere, two agencies have a role to play in immunity from prosecution – the ACCC and the CDPP[15]. Their policies are different[16]. Importantly, the ACCC can only *recommend* that an individual be granted immunity from criminal prosecution. Only the CDPP has the power to grant that immunity[17].

II. CHARGE TO COMMITTAL

Charge Sheet / Commencement of Criminal Proceedings

If the CDPP decides to lay charges, criminal proceedings will be commenced. How criminal proceedings are commenced varies between the States.

In Victoria, for example, proceedings are commenced through filing a charge-sheet[18], in New South Wales through issuing and filing a court attendance notice[19]. Although the form of the documents may vary, the accused is entitled to a degree of specificity in the charge, so that it

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15 Australian Competition and Consumer Commission, *ACCC Immunity Policy for Cartel Conduct* (July 2009) ACCC <http://www.accc.gov.au/content/index.phtml/itemId/879795> see also para 2.3 of the MOU, above n 11.

16 Ibid; Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (November 2008) <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>.

17 Section 9(6D) of the *Director of Public Prosecutions Act 1983* (Cth).

18 Section 6 of the *Criminal Procedure Act 2009* (Vic).

19 Section 47 of the *Criminal Procedure Act 1986* (NSW).

is possible to prepare a defence. This will include, for instance, particulars of the offence[20]. In the context of cartel offences, the particulars will be important, and are likely to be voluminous. Demanding and then securing proper particularisation of the charges will be a critical task for any defence lawyer. What will constitute "proper particularisation" will be an issue which will vary from case to case and, I suspect, depend upon experience over time.

Applicability of the Criminal Code Act 1995 (Cth)

The key distinguishing feature between civil cartel behaviour and criminal cartel behaviour is that criminal cartel behaviour involves the application of the *Criminal Code Act* 1995 (Cth) (the **Criminal Code**). The Criminal Code sets out the general principles of criminal responsibility.

Chapter 2 of the Criminal Code governs the physical and mental (or "fault") elements of an offence. A physical element of an offence may be (a) conduct, (b) a result of conduct or (c) a circumstance in which conduct, or a result of conduct, occurs: cl 4.1 of the Criminal Code. Taking s 44ZZRF of the Criminal Code as an example, subsection (1) provides that a corporation commits an office if (a) the corporation makes a contract or arrangement or arrives at an understanding (**CAU**) and (b) the CAU contains a cartel provision. The physical element here is 'conduct' as it requires an act, omission to perform an act or a state of affairs: see cl 4.1(2) of the Criminal Code.

No fault element is specified for s 44ZZRF(1)(a). Under the Criminal Code, where an offence does not specify a fault element for a physical element that consists only of conduct, *intention* is the fault element for that physical element: cl 5.6 of the Criminal Code. 'Intent' is defined in cl 5.2(1) of the Criminal Code to mean that '[a] person has intention with respect to conduct if he or she means to engage in that conduct'. Accordingly, there must be an *intention* to make a contract or arrangement or arrive at an understanding.

Section s 44ZZRF(2) of the TPA provides that the *fault element* for subsection (1)(b) (requiring the contract to contain a cartel provision) is "knowledge or belief". Clause 5.2 of the Criminal Code states that a person has "knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events". Belief is not defined in the

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[20] See, for example, Schedule 1 of the *Criminal Procedure Act 2009* (Vic) and s 50 of the *Criminal Procedure Act 1986* (NSW).

Criminal Code or the TPA. It will bear its ordinary meaning[21].

A criminal trial by indictment is "a very different creature" to civil proceedings[22]. The physical and fault elements of cartel offences is yet another challenge to commercial lawyers seeking to defend criminal cartel cases. The complex and interrelated physical and fault elements will need to be grasped in addition to sifting through the complex economic evidence that will need to be adduced to show, for instance, that the CAU in fact contains or does not contain a cartel provision. These concepts and elements will take centre stage in the proper particularisation of the charge or charges faced by an accused. Absent proper particularisation, it will not be possible to defend the charges. Unlike most civil cases, the absence of these particulars will be critical.

Bail

One of the first areas a lawyer will face after criminal charges are laid will inevitably be an application for bail[23].

At the committal level, s 68A(5) of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) provides that the State or Territory committal Court has the power to grant bail to a person whom that Court commits to trial or sentence before the Federal Court. That power is governed by the laws of the State or Territory committal Court[24].

Once the matter is referred to the Federal Court, Pt VIB of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**) applies. Section 58DA(1) of the FCA provides that during indictable primary proceedings or criminal appeal proceedings the accused can apply to the Federal Court for bail. That right is limited by s 58DB(2), which provides that if the bail application is refused, the accused cannot apply again for bail for the offence "unless there has been a material change in the circumstances since the refusal". The FCA prescribes the criteria the Federal Court must consider when deciding whether to grant bail. Section 58DB(2) provides:

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21 See, for example, *George v Rockett* (1990) 170 CLR 104 at 116 who considered the ordinary meaning of 'belief' to be 'an inclination towards assenting'.

22 Justice Mark Weinberg, 'Criminalisation of Cartel Conduct - Some Pre-Trial Management Issues' (Paper presented at the joint Federal Court of Australia and Law Council of Australia workshop, Adelaide, 3 April 2009) 5-8 (**Weinberg J Cartel Paper**).

23 See, for example, Weinberg J Cartel Paper, above n22 at 5-8; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Federal Court of Australia (Criminal Jurisdiction) Bill 2008*, 16 January 2009, 4-8 (**Law Council of Australia Submission**).

24 ss 68A(5) and 68(1) of the *Judiciary Act 1903* (Cth).

(2) In deciding whether to grant bail, the Court must consider the following:

(a) whether the accused will appear in court if bail is granted;

(b) the interests of the accused;

(c) the protection of any other person;

(d) the protection and welfare of the community, including whether there is a risk that the accused will commit offences if bail were granted;

(e) whether there is a risk that the accused will approach witnesses or attempt to destroy evidence.

Further, s 58DB(2A) of the FCA provides that an accused is entitled to be granted bail in relation to an offence under ss 44ZZRF (making a CAU containing a cartel provision) and 44ZZRG (giving effect to a cartel provision) of the TPA unless the Court "decides otherwise after considering the matters mentioned in subsection (2)".

If an accused is granted bail, the Court and practitioners will need to consider what bail conditions are appropriate. In the Federal Court, such conditions are contained in s 58DC of the FCA. Such conditions include that the accused: reside at a specified place, report to a specified person at a specified time, surrender any passport held and agree not to approach a point of international departure and provide security for forfeiture if the accused fails to appear.

The bail provisions in Pt VIB of the FCA differ from the bail provisions in State and Territory jurisdictions, which themselves differ between each other. For instance, the limitation on applying for bail in s 58DA(2) exists in a similar form in New South Wales and Western Australia, and to a lesser extent Queensland, but is not reflected in other jurisdictions[25]. Although in contrast to many State and Territory jurisdictions[26] there is no *general* presumption in favour of bail under s 58DB(2) of the FCA, there *is* an entitlement to bail for the cartel offences identified earlier. Some jurisdictions, such as South Australia[27], have broader criteria than s 58DB(2) that a bail authority must consider.

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[25] Law Council of Australia Submission, above n 23 at 5 citing the *Bail Act 1978* (NSW) s 22A, *Bail Act 1982* (WA) s 7 and *Bail Act 1980* (Qld) s 10(3). The Law Council notes that South Australia, the Northern Territory and the Australian Capital Territory do not preclude subsequent applications if bail is refused: see *Bail Act 1985* (SA) s 12(2), *Bail Act 1982* (NT) s 19 and *Bail Act 1992* (ACT) s 19.

[26] See e.g. *Bail Act 1985* (SA) s 10, *Bail Act 1982* (NT) s 8(1) and (2), *Bail Act 1978* (NSW) ss 8 and 51, s 4(2)(a) of the *Bail Act 1977* (Vic).

[27] *Bail Act 1985* (SA) s 10.

What consequence will these differences have on the profession? First a person's right to bail will depend on whether that person is committed to the Federal Court or a State or Territory Court[28]. Secondly, and perhaps more significantly, there is a risk that the practice of granting bail, at the committal stage, will differ between the States and Territories and, after committal, will differ between the States and Territories and the Federal Court, and potentially between registries of the Federal Court. It also means that a lawyer for a client faced with cartel charges may wish to consider negotiating with the CDPP where the criminal proceedings are commenced and if committed to stand trial, in which Court the CDPP files the indictment.

Committal

The *Judiciary Act* has been amended so that a State or Territory committal Court can commit a person for trial or sentence as appropriate, to either the Federal Court or the superior Court of the State or Territory: s 68A(2). The procedure at committal is governed by State Courts. It is this process that causes me most concern about the potential for inconsistent practice when dealing with criminal cartels. Each State has different and inconsistent legislation regulating committal procedure[29].

If criminal cartel proceedings are commenced in Victoria, for instance, the committal procedure would be governed by Chapter 4 of the *Criminal Procedure Act 2009* (Vic). This Chapter requires, for instance, that the Prosecutor serve on the accused a hand-up brief, which must include a notice containing information about the committal proceeding, a copy of the charge-sheet, a summary of material facts, any information, document or thing on which the prosecution intends to rely in the committal proceeding and any other information, document or thing in the prosecution's possession that is relevant to the offence[30]. If in the Magistrates' opinion there is "sufficient weight to support a conviction for the offence with which the accused is charged", then the Magistrate must commit the accused for trial[31].

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28 See Weinberg J Cartel Paper, above n 22 at 7.

29 Qld: *Justices Act 1886* ss 104-108; WA: *Criminal Procedure Act 2004* s 41 ff; Tas: *Justices Act 1959* ss 53, 56A-63; NT: *Justices Act* ss 100A-119; NSW: *Criminal Procedure Act 1986* ss 47-96; Vic: *Criminal Procedure Act 2009* Pt 4.1; SA: *Summary Procedure Act 1921* ss 103-107; ACT: *Magistrates Court Act 1930* ss 90-92.

30 Section 110 of the *Criminal Procedure Act 2009* (Vic).

31 Section 141 of the *Criminal Procedure Act 2009* (Vic).

This approach stands in stark contrast with Western Australia. In Western Australia, traditional committal hearings were abolished by the *Criminal Procedure Act 2004* (WA) and replaced with prosecution pre-trial disclosure requirements. The form of preliminary hearing that remains is far more limited in scope than in Victoria. At that hearing, if the Magistrate is satisfied that the Prosecutor has given "full disclosure" then he or she must commit the accused for sentence or trial, as the plea requires[32]. Unlike Victoria, there is no requirement to consider the sufficient weight of the evidence.

This lack of uniformity will make it difficult for a consistent practice to be adopted. Should the committal proceeding for a criminal cartel offence be a form of 'filtering' out cases that should not proceed further? Or is there enough 'filtering' at earlier pre-charge stages already? The hand-up brief, or pre-trial disclosure, as the case may be, is likely to be voluminous and complex. How will the Magistrate be in a position to judge its sufficiency if it is required to do so? Again, a lawyer for a client faced with cartel charges will need to consider, and if possible negotiate, venue with the CDPP taking into account this additional set of issues.

Dual Proceedings and Double Jeopardy

Principles of double jeopardy will also need to be considered. The expression "double jeopardy" is not always used with a single meaning: *Pearce v The Queen* (1998) 194 CLR 610 at [9] and *Island Maritime Limited v Filipowski* (2006) 226 CLR 328 at [41]. It reflects a value, not a single principle, from which deductions can be made. The expression can encompass pleas in bar of *autrefois acquit* and *autrefois convict,* and the principle that no one should be punished twice for the same matter. The expression can be, and is, employed at different stages of the criminal justice process – prosecution, conviction and punishment: *Pearce* 194 CLR 610 at [9].

The principles can be summarised as follows. At the prosecution stage, *autrefois acquit* is a species of estoppel by which the Crown is precluded from reasserting the guilt of an accused when that question has previously been determined against it. *Autrefois convict* is akin to merger where the conviction, not the harassment, is the bar[33]. At the sentencing stage, considerations of double jeopardy are relevant to the extent that it would be wrong to punish an offender twice for

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32 Section 44 of the *Criminal Procedure Act 2004* (WA).

33 Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata* (3rd ed, 1996) [309] and [429].

the commission of elements that are common (subject to any contrary legislative intention)[34].

How is double jeopardy addressed in the new legislative regime? The amendments to the TPA have introduced a form of protection against double jeopardy. Section 76B(2) of the TPA prevents subsequent pecuniary penalty orders for contravention of Pt IV (which includes the cartel conduct provisions) if the person has already been convicted of an offence constituted by conduct that is "*substantially the same*" as the conduct constituting the contravention. Section 76B(3) of the TPA provides that proceedings for a pecuniary penalty orders for contravention of Pt IV are stayed if criminal proceedings are commenced where the offence for the pecuniary penalty order is "substantially the same as conduct alleged to constitute the contravention". However, there are other aspects of the TPA which specifically allow for dual liability. Section 76B(4) provides:

> Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of Part IV … regardless of whether a pecuniary penalty order has been made against the person in respect of the contravention.

Further, although s 76(3) of the TPA prevents a person being liable to more than one pecuniary penalty if conduct constitutes a contravention of two or more provisions of Pt IV, that provision specifically excludes s 44ZZRF and s 44ZZRG from its operation.

Concerns that a person may be subject to criminal proceedings following civil proceedings, as envisaged in the TPA, may be more apparent than real. Although the ACCC acknowledges that some cartel matters "may warrant both criminal and civil proceedings", the circumstance of criminal cartel prosecutions following civil proceedings would be rare because, consistent with the terms of the MOU discussed earlier, it is likely that the ACCC would not have referred the matter at an early stage to the CDPP as the conduct was relatively minor or, if a referral was made, the CDPP would have advised that criminal proceedings should not be taken[35]. In any event, such proceedings would not occur concurrently by virtue of s 76B(3) of the TPA. That is not to say that the risk of criminal proceedings following civil proceedings does not exist.

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34 *Pearce v The Queen* (1998) 194 CLR 610.

35 See ACCC Cartel Guidelines above n 9.

III. PRE-TRIAL ISSUES

Entry of Plea and Pre-Trial Hearings

Section 23FD of the FCA governs the Federal Court procedure for entering a plea. That section provides that an accused may enter a plea of guilty or not guilty to a count in the indictment and that the accused is taken to have entered a plea of not guilty to a count in the indictment if the accused fails to enter a plea to the count when directed by the Court. The procedure governing changing pleas is outlined in s 23FG of the FCA. Under s 23CA of the FCA, this plea is likely to be entered at a pre-trial hearing that the Court must hold as soon as practicable after the indictment is filed in the Court.

Section 23CB of the FCA provides that during a pre-trial hearing the Court may make orders and determinations for the efficient management and disposal of a trial on the indictment. This includes, for instance, hearing and determining objections on the indictment, determining the admissibility of evidence or ruling on a matter of law that may arise during a trial on indictment. According to the Explanatory Memorandum to the FCA amendments, the purpose of the pre-trial hearing is:

> [T]o ensure that the Court is in a position to take control of the proceedings at an early stage and that it is made clear from that stage whether the accused pleads guilty or not. This is one of a set of provisions designed to ensure that pre-trial procedures can be used effectively to narrow the range of issues that will have to be dealt with at trial and to reduce the length of criminal trials.[36]

This provision makes clear that the Court will have the power to ensure that pre-trial procedures are effective and that issues are identified and narrowed at any early stage, consistent with the reforms discussed earlier. But will they be effective given the complexities of a cartel prosecution.

Management of Pre-Trial Processes

In the Second Reading Speech for the amendments to the FCA providing the framework for the Court's criminal jurisdiction, the Attorney-General stated:

> [t]rials for the serious cartel offences are likely to be long and hard fought. It is therefore

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[36] Explanatory Memorandum, *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008* (Cth), at 9 (**Explanatory Memorandum**).

> important that as much as possible is done at the pre-trial stages to determine what matters are in issue and narrow down the issues which need to be considered by the jury[37].

In recent years, the Federal Court has sought to effectively manage the pre-trial process to reduce delays and inefficiency in such a way to make the dispensation of justice cheaper and more flexible, without making unacceptable compromises in terms of accuracy or fairness[38]. As of December 2009, the Court is required to operate with these overarching purposes in mind[39]. Undoubtedly this can be achieved more readily in civil proceedings than criminal proceedings. How will the new regime impact these reforms or, more importantly, how does a Court rationalise the reforms with the accused's right to a fair trial? Are the pre-trial and trial management issues different and if so, how might they be dealt with?

One important pre-trial issue will be the methods, if any, to be adopted to protect a corporation's commercially sensitive information. As the triers of the facts, it is unlikely that relevant confidential information will be able to be kept from the jurors. Does a corporation not the subject of charge have a right to be heard and how will it seek to protect its confidential information? How will it know what confidential information is intended to be relied upon either by the crown or the accused?

Pre-Trial Disclosure

The FCA provides for a mechanism for pre-trial disclosure to facilitate the efficient management of the criminal proceedings in the Court. The FCA requires:

- the prosecutor to provide notice of the prosecution case[40];
- the accused to produce a statement setting out, for each fact and matter, those facts and matters with which it agrees and those with which the accused takes issue (and the general basis for taking issue, where relevant)[41]; and
- the prosecutor to respond to the matters in the accused's response[42].

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37 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, p 12295.

38 For example, the introduction of the Fast Track or "rocket docket".

39 See Pt VB of the FCA.

40 Section 23CE of the FCA.

41 Section 23CF of the FCA.

42 Section 23CG of the FCA.

The duty of disclosure on the part of the prosecution and the accused is ongoing[43]. The Court is empowered to make orders it thinks appropriate if a party fails to comply with the pre-trial disclosure requirements, provided it would not jeopardise the accused's right to a fair trial[44]. Practitioners from Victoria and New South Wales will note the similarities between the pre-trial disclosure requirements under the FCA and their respective State legislation (although in NSW it is reserved for complex matters)[45]. It is also consistent with the developments of the disclosure regime in the United Kingdom[46].

When the FCA amendments were before the Senate Legal and Constitutional Affairs Committee, the Law Council of Australia (**LCA**) observed that the FCA amendments were inconsistent with the practice of other States and that the provisions "[went] too far in requiring the defence to disclose the details of its case and not just the nature of the issues which are in dispute"[47]. These concerns stem from a perception that the pre-trial disclosure would abrogate the right of the accused to remain silent. In my view, the LCA concerns are misplaced. The pre-trial disclosure regime is both appropriate and necessary in the federal criminal jurisdiction. The provisions specify that the accused is *not required* to disclose details of their proposed defence. As noted by Justice Weinberg, the Court "cannot allow trials to meander along for months on end, without any structure, or proper identification of issues genuinely in dispute"[48]. Nowhere is this more relevant than in criminal cartel proceedings, where the proceedings are likely to be lengthy and complex. The pre-trial management provisions also allow for a degree of consistency between Courts in their case management of civil proceedings and the criminal proceedings.

Notwithstanding the general need for the pre-trial disclosure process, it is likely to present some difficulties. The provisions are different to formal pleadings in civil cases. Criminal practitioners from jurisdictions lacking the same pre-trial disclosure process will need to adapt to the Federal regime. Commercial litigators will similarly need to adapt: the duties of pre-

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43 Section 23CH of the FCA.

44 Section 23CM. This provision was modelled on s 148 of the *Criminal Procedure Act 1986* (NSW).

45 See s 183 of the *Criminal Procedure Act 2009* (Vic) and s 137 of the *Criminal Procedure Act 1986* (NSW).

46 See the *Criminal Procedure and Investigations Act 1996* (UK) as amended by the *Criminal Justice Act 2003* (UK), the *Crime and Disorder Act 1998* (UK) and the *Criminal Justice and Immigration Act 2008* (UK); see especially ss 3, 5, 6A, 6B (not yet in force), 6C, 6D (not yet in force), 6E, 7A, 11 of that Act.

47 Law Council of Australia Submission, above n 23 at 4.

48 Weinberg J Cartel Paper, above n 22 at 14.

trial disclosure are onerous and, unlike discovery, cannot be limited[49]. Unlike discovery, the Prosecutor in criminal cartel proceedings must disclose any material that is potentially exculpatory.

Multiple Counts and Multiple Defendants

An indictment under the FCA can include multiple counts in a single indictment and may include counts against more than one accused for the same or different indictable offices[50]. The general rule is that these indictments must be filed within three months of the committal order[51]. Consequences of non-compliance are significant: the Court may discharge the accused and make other orders as it thinks appropriate (excluding acquitting the accused or proceeding as if the indictment had been filed)[52]. Under s 23BH of the FCA, the Prosecutor may amend or replace an indictment at any time during the proceedings before the start of the trial (being when the accused is arraigned before a jury). During the trial on an indictment the Prosecutor may only amend with leave of the Court.

There is also scope for one or more accused included in single count in an indictment to be tried separately either (a) in the same proceedings on a different count in the same indictment; or (b) in separate proceedings on one or more further indictments; if the Court is satisfied that it is expedient to do so in the interests of justice[53]. Further, under s 23BD of the FCA the Prosecutor may, on a single indictment, include counts against more than one accused for the same or different indictable offences if those counts (a) are founded on alleged facts that are the same or substantially the same; or (b) are, or form part of, a series of alleged indictable offences of the same or similar character or committed in pursuit of a single purpose. Thus there is scope for multiple defendants in criminal cartel proceedings – something which is likely given the large – scale nature of cartel conduct.

It will not be as simple as in civil proceedings where multiple defendants are represented by a single Counsel. The risk in criminal proceedings of potential conflicts of interests when

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49 Weinberg J Cartel Paper, above n 22 at 18.

50 Section 23BD of the FCA.

51 Section 23BF of the FCA.

52 Section 23BG of the FCA.

53 Section 23BC of the FCA.

representing co-accused is significant. For instance there will be ethical issues, particularly where there is an argument as to the respective roles individuals played in the cartel behaviour.

Voir Dire and Basha Inquiries

A *voir dire* involves the giving of oral evidence of a witness to the trial Judge who will then decide if that evidence is to be heard by the jury. The power of the Court to hold a *voir dire* is governed by s 189 of the *Evidence Act 1995* (Cth) (the ***Evidence Act***). Serious criminal cartel cases may involve evidence obtained through search and seizure powers under Pt XID of the TPA and information gathering powers under Pt XII of the TPA. Evidence in criminal cartel cases may also be obtainable through covert means (such as telephone interception) in accordance with the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth). Criminal cartel cases are also likely to involve evidence that contains commercially sensitive information. In light of this, it is likely that a *voir dire* will be held to determine the admissibility of that evidence. The Court may hear and determine the admissibility of evidence in the pre-trial hearing by virtue of s 23CB of the FCA, discussed above.

Notwithstanding that a *voir dire* will be held in the absence of a jury, issues of probity and prejudice will be of far greater significance given that the consequence of admitting or not admitting evidence will have a direct consequence on the jury trial. While hearings on the admissibility of evidence will be familiar to commercial competition lawyers, issues that are often relevant in a *voir dire*, such as voluntariness, impropriety or unfairness in the case of confessions by an accused, will be new territory.

Similarly, the Court has power to direct that a prosecution witness appear before the Court or a Judge or Registrar in the absence of a jury[54]. This procedure is often referred to as a "Basha Inquiry". Either party may apply for such a direction. The witness must not have been examined in the committal proceedings, and the applicant must satisfy the Court it would be contrary to the interests of justice to proceed to trial without the witness being examined[55]. I expect that defence counsel may well seek such a direction in relation to any expert evidence that is served after the committal hearing and therefore not examined prior to trial.

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54 Section 23CQ of the FCA.

55 Section 23CQ(1) of the FCA.

However, what of those States that have abolished committal proceedings? Section 23CQ of the FCA provides that the absence of committal proceedings does not, of itself, mean it will be contrary to the interests of justice to proceed to trial without the person being examined. Although this section is not an alternative to a committal hearing (because of the "contrary to the interests of justice" requirement), it does relieve some concern about the discrepancies between committal procedures outlined above. Once again, an awareness of the different practices between States will be paramount when considering whether a Basha direction is required or should be sought.

IV. TRIAL

Jury

Perhaps one of the most significant changes will be the introduction of trial by jury for unlawful cartel conduct. A full analysis of the extensive new jury provisions is outside the scope of this paper. In summary, the FCA has been amended to include provisions for appointing jurors[56], as well as mechanisms for the Court to assist the jurors to understand the issues. I will focus on the latter. Section 23EC of the FCA empowers the Court to order such things as it thinks appropriate in the circumstances to be given to the jury to assist the jury to understand the issues during the trial. In cartel cases, which are likely to be lengthy and complex, this will be critical. Making sure the jury are aware of the issues at the start of the trial and continual refreshing will be necessary. There must be orderly education of jurors. A roadmap will need to be produced so that jurors appreciate the significance of the evidence as it is led. Model jury instructions will need to be established. To that extent, the experience of the United States may be useful – in 2009, the Antitrust Law section of the American Bar Association published revised Model Jury Instructions in Criminal Antitrust Cases which sets out model jury instructions and, for practitioners, contains explanatory commentary and references to supporting case law[57]. There are instructions for matters varying from taking notes during the trial, to explanations about the burden of proof, to descriptions of the sections. Such instructions are useful and would be necessary in criminal cartel proceedings in Australia. From a commercial lawyer's perspective, the challenge will be communicating the issues and evidence *clearly and succinctly* to the jury in such a way that the evidence can be understood.

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[56] See subdiv D of Pt III of the FCA.

[57] American Bar Association, *Model Jury Instructions in Criminal Antitrust Cases* (2009).

Impact and Presentation of Complex Evidence and the Evidence Regime

The *Evidence Act 1995* (Cth) will be applicable to criminal cartel prosecutions under the TPA. This will present challenges for a number of reasons.

First, given that criminal cartel proceedings will involve the most serious examples of cartel conduct, the evidence will undoubtedly be voluminous and complicated. As noted earlier, for commercial litigators, the challenge will be presenting the evidence to the jury in a form that can be understood. The *Evidence Act* provides some guidance as to how this could be achieved. Section 29(4) of the *Evidence Act* provides that other evidence in the form of charts, summaries or other explanatory material may be given as an aid to comprehension of evidence. Recourse may also be made to s 50 of the *Evidence Act* which allows the Court to direct a party to adduce evidence of the contents of two or more documents in question in the form of a summary because of the volume or complexity of the documents in question.

Secondly, the use of experts will be necessary and inevitable. To that extent s 79 of the *Evidence Act* is relevant. That section provides that opinion evidence must be wholly or substantially based on specialised knowledge based on training, study or experience and presented in a form which makes it possible to answer that question. Often in civil trials questions of the admissibility of expert evidence are ordinarily resolved by conditionally admitting the opinion evidence and considering questions of admissibility and weight in writing the judgment (see *Sydneywide Distributors v Red Bull* (2002) 55 IPR 354 at [6]–[18] per Branson J; at [81]–[94] per Weinberg and Dowsett JJ). However, it cannot be said that the same assumption can be made for criminal trials.

I would also note that the use of expert evidence under the Court's criminal jurisdiction will be different to proceedings in the civil jurisdiction. In civil proceedings, the *Federal Court Rules* allow the Court, at any stage of the proceeding, to appoint an expert and, under O 34A, may direct that expert witnesses confer and produce a joint report identifying matters or issues in dispute. These Rules do not apply to matters to be tried before a jury[58]. Matters such as the identification of questions to be put to an expert, the list of materials to be used and relied upon by an expert will need to be addressed at the pre-trial hearings. Section 23CE(f) of the FCA requires the Prosecutor to disclose any expert report on which it intends to rely in its pre-trial

[58] See O 34 r 1 and O 34A r 2 of the *Federal Court Rules.*

disclosure of its case. Is it open to a defence lawyer to keep his or her powder dry about the deficiencies with an expert's report to be relied upon by the Crown? Section 23CF of the FCA requires the accused to give notice, as part of its pre-trial disclosure requirement, of whether the accused accepts or contests the opinions expressed in the expert report and whether the report can be tendered at trial without the expert being called. But does that require an accused to explain the basis of his or her objections? If the accused proposes to call an expert at the trial, the accused must provide a copy of any report to the Prosecution under s 23CF(k) of the FCA.

Finally, as with the committal and bail procedures, the rules of evidence differ across the State and Federal jurisdictions. Many States, such as New South Wales[59], Victoria[60] and Tasmania[61], have adopted the Uniform Evidence Laws and therefore the evidentiary rules will be similar to and consistent with the Commonwealth *Evidence Act*. For other Australian jurisdictions, the evidence laws are different. If the cartel proceedings occur in the State Court, by virtue of s 79 of the *Judiciary Act* the State evidence laws will apply in exercising Federal jurisdictions.

Again, the potential for inconsistency is significant. A criminal cartel trial held in Queensland will apply different evidence laws to a trial held in Western Australia, which will again be different to a trial held in Victoria or the Federal Court. If one takes business records as an example, s 69(2) of the *Evidence Act* provides that the hearsay rule does not apply to documents that either form part of the records of the business or at any time formed part of such a record, and contain a previous representation made or recorded in the document in the course of (or for the purposes of) the business. However, s 69(3)(a) of the *Evidence Act* provides that the exception does not apply to representations prepared or obtained for the purpose of conducting, or for in contemplation of or in connection with, an Australian overseas proceeding. Further and relevantly, s 69(3)(b) of the *Evidence Act* provides that that section does not apply if the representation "was in connection with an investigation relating or leading to a criminal proceeding".

No such limitation exists in Queensland. In addition, in Queensland the availability of the maker of the representation is a relevant consideration. In criminal proceedings in Queensland

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59 *Evidence Act 1995* (NSW).

60 *Evidence Act 2008* (Vic).

61 *Evidence Act 2001* (Tas).

the evidence is admissible only if the maker is not available. Although the *Evidence Act 1977* (Qld) has the same underlying policy as the *Evidence Act* concerning business records, in Queensland there is not a single section concerning 'business records' (like s 69) but rather business records are admissible under different (and overlapping) provisions such as 'book of accounts' provisions (s 84) or, where documents are electronic, under 'admissibility of statements produced by computers' (s 95).

Privilege is another example of inconsistency, even between the States that have adopted the Uniform Evidence Laws. For instance, s 131A of the *Evidence Act* extends the operation of Pt 3.10 (which governs privilege) to Div 1A to apply to disclosure requirements such as subpoenas, discovery orders, notices to produce and interrogatories. In New South Wales and Victoria, a form of s 131A applies to the whole of Pt 3.10 (other than ss 123 and 128) to a disclosure requirement. Queensland is again different, as privilege is governed by common law.

V. SENTENCING

Principles of Sentencing

In criminal cartel cases, committing an offence under s 44ZZRF or s 44ZZRG of the TPA is punishable (on a corporation) by a fine not exceeding the greater of $10,000,000 or, if the Court can determine the total value of the benefits that have been obtained and are reasonably attributable to the commission of the office, three times that total value. If the Court cannot determine the total value of those benefits - the offence is punishable by conviction by a fine of 10% of the corporation's annual turnover during the 12 month period ending at the end of the month in which the corporation committed the offence.

For individuals, s 79 of the TPA provides that a person who contravenes a cartel offence provision is punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both. Principles of sentencing, therefore, will need to be understood by commercial competition litigators seeking to practice in the criminal jurisdiction. The Federal Court often considers principles of sentencing, for instance in the context of industrial relations cases but that has been limited to the imposition of pecuniary penalties[62]. The introduction of Court jurisdiction over indictable offences will necessitate application of s 16A of the *Crimes Act*

[62] See, for example, *Cahill v Construction, Forestry, Mining and Energy Union* [2010] FCAFC 39.

1914 (Cth), which sets out the criteria for Commonwealth sentencing. This non-exhaustive list includes things such as the nature and circumstances of the offence (s 16A(2)(a)), deterrence (s 16A(2)(j)), a guilty plea (s 16A(2)(g)), character and antecedents (s 16(2)(m)).

It may prove difficult to reconcile the existing Commonwealth sentencing criteria with the cartel offences. For instance, the "character and antecedents" factor will be unlikely to be of much use in cartel cases as many, if not most, individuals prosecuted for criminal cartel behaviour are likely to be "politically and socially prominent"[63] and are unlikely to have a criminal record. The most relevant sentencing criteria, in my view, will be deterrence: the benefits of any cartel regime should be significantly undone through the envisaged penalties under the TPA.

It is also worth noting that, in the event that a criminal cartel trial occurs in a State Court, different considerations to sentencing again apply. For instance, in some States, the practice is that the prosecution submits what it considers to be the appropriate sentence (including an identification, for instance, of an appropriate length of imprisonment) and the accused must respond. In other States, the practice is to identify an appropriate *range* of sentences. The Courts, the CDPP and the accused, therefore, will need to be aware of the different practices and ensure, to the greatest extent possible, that there is consistency in sentencing for criminal cartel offences across the jurisdictions[64].

Conflict between the Individual and the Corporation

If one accepts that deterrence is the ultimate objective of the cartel regime (and therefore a principal factor to be borne in mind when sentencing), it is clear that the decision to pursue a case against an individual or a corporate offender (or both) and the penalty imposed as a result of that choice will be significant. This will raise a number of considerations. If the Court were to impose the maximum penalty on the corporation, this could result in the possible insolvency of a corporation which may in turn pass on *more* loss to the ultimate victims, consumers, from a further reduction in the market. I leave to one side the impact on the employees and others

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63 For an analysis on the appropriateness of custodial sanctions for cartel offences see David K Round and Manish Agarwal 'The Criminalization of Serious Cartel Conduct in Australia' (2010) 6(1) *The CPI Antitrust Journal* and Terry Calvani and Torello Calvani, 'Custodial sanctions for cartel offences: An appropriate sanction in Australia?' (2009) 17 *Competition & Consumer Law Journal* 119.

64 See generally Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, Report No. 102 (2006).

indirectly affected by the continuation of the corporation.

In the case of individuals, similar considerations are relevant. There are a number of other sentencing options against individuals "against which the company cannot indemnify an employee"[65]. This includes suspended sentences[66], probation orders[67], community service orders[68] and, if no other sentence is appropriate, imprisonment[69]. Deterrence will necessarily require that the expected cost of engaging in cartel behaviour will exceed any perceived benefit[70].

VI. APPEALS

The criminalised cartel regime will also impact the appeals procedure in the Federal Court. In summary, s 30AA of the FCA gives the Court jurisdiction to hear and determine appeals. Section 30AB provides that the right to appeal is not automatic – appeals may only be brought where the appeal "involves a question of law alone"[71]. In other cases, leave must be granted by the Court[72].

Under s 30AJ(1) of the FCA, the Court must allow an appeal from a judgment convicting an accused if the Court is satisfied:

(a) that the verdict of the jury (if any) should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) that the judgment should be set aside on the ground of a wrong decision of any question of law; or

(c) that there has been a substantial miscarriage of justice.

However, s 30AJ(1) is subject to s 30AJ(2). That section provides that the Court may dismiss an appeal notwithstanding the Court is satisfied of a matter in s 30AJ(1)(a) or (b) "if the Court is satisfied that there has not been a substantial miscarriage of justice". In relation to appeals against sentence, s 30AJ(3) provides the Court must allow an appeal against sentence by the accused if the Court is satisfied that some other sentence (whether more or less severe) is warranted by law. How these provisions will be interpreted in light of the familiar principles in

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65 Round and Agarwal, above n 63 at 7.
66 *Crimes Act 1914* (Cth) ss 19AC, 20.
67 TPA s 44ZZRI.
68 *Crimes Act 1914* (Cth) s 20AB.
69 See the *Crimes Act 1914* (Cth) s 17.
70 See Calvani and Calvani, above n 63 at 128.
71 s 30AB(1)(b) of the FCA.
72 s 30AB(1)(a) of the FCA.

House v King[73] remains to be seen.

Although s 30AB(1) of the FCA is designed to ensure that the Court's time is not taken up by "unmeritorious appeals"[74], experience of State Courts with similar leave requirements shows that the question of whether leave should be granted is often reserved until consideration of the merits of the appeal.

It will be seen that these provisions are not identical to common form criminal appeal statutes derived ultimately from the English *Criminal Appeals Act 1907*[75]. I am not to be taken as suggesting that there is or is not any significant difference. That is a matter that will have to be subject to argument but it will be important for competition lawyers considering questions of appeal, whether against conviction or sentence, to immerse themselves completely in the considerable body of criminal appeal jurisprudence. It will also be necessary to undertake that task remembering what was said by the High Court in *Weiss* about the determinative significance that must always attach to the text of the relevant applicable statutory appeal provisions[76].

VIII. CONCLUSION

This paper has sought to address some of the issues that will be presented to Courts and practitioners following the introduction of criminalised cartel behaviour. These are just some of the issues. There are others, such as jury selection, principal and accessorial liability, and defences, which I have not addressed.

Ultimately every case will turn on its own facts. However, so far as possible criminal cartel cases should be tried with consistent practice and procedure. As can be seen, it will not simply be a case of competition lawyers familiar with price-fixing cases transferring that knowledge into a criminal trial. A criminal cartel trial will require the highly specialised knowledge of such lawyers *and* an intricate knowledge of the criminal process not only in the Federal Court but also of the various State Courts as well. And it will not simply be a case of transferring knowledge from the first criminal cartel trial to all other criminal cartel trials. The first criminal cartel trial will be instructive – the extent to which it is instructive will vary as a result of the numerous variables I have identified. The challenge for the Courts, for

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73 (1936) 55 CLR 499 at 504-5.

74 See Explanatory Memorandum above n 36 at 41.

75 *Weiss v The Queen* (2005) 224 CLR 300 at [12]ff.

76 *Weiss v The Queen* (2005) 224 CLR 300 at [9] – [11].

practitioners, for the CDPP and for the ACCC will be to learn and then adapt that learning to the circumstances in each particular case. As with the development of the general criminal law, that learning process is not going to occur overnight and unlikely to be settled.