BETWEEN A ROCK AND A SOFTER PLACE: CARTEL SETTLEMENTS IN AUSTRALIA AND CANADA

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The concept of defendants in cartel cases making admissions, outside of immunity programs, is relatively undeveloped, except in the US. However, as the number of cartels under investigation has increased (due to the significant increase in penalties and the offer of full immunity to the first whistleblower to come forward and cooperate with the regulator) and the time and resources that must be deployed in a full adversarial disposition of a case makes litigation impractical in most cases, both regulators and defendants are seeking ways to expeditiously resolve disputes through settlements or leniency deals. The release of a number of important policy discussion papers and the recent adoption of a formal settlement process in the European Commission, suggest there is momentum for change. This paper discusses the risks and benefits of the use of such procedures and then moves to a comparison of the approaches to leniency in Canada and Australia. It is an opportune moment for such a comparison because both jurisdictions have similar legal and institutional arrangements and have recently passed similar important amendments to their cartel laws. The Canadian regulator seized the moment and embraced policies designed to encourage defendants to cooperate in exchange for leniency. In contrast, the Australian regulator passed up its chance, preferring to retain its discretion and reject the notion that it will openly cut deals. This paper argues that the ACCC should take seriously its Canadian counterpart's response and reconsider its approach.

I INTRODUCTION

There is a broad consensus amongst lawmakers and regulators on the need to eradicate 'hard core' cartel conduct.[1] To achieve this obvious (but perhaps illusory)

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1 Although there is no international agreement on the meaning of the adjective, the Organisation for Economic Cooperation and Development ('OECD') definition of 'hard core' conduct is well-accepted: 'an anticompetitive agreement … by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce …': OECD Council, 'Recommendations of the OECD Council Concerning Effective Action against Hard Core Cartels' (Recommendation C(98)35/FINAL, OECD, 14 May 1998) 3 <www.oecd.org/dataoecd/39/4/2350130.pdf>. The Canadian and Australian definitions referred to below are virtually identical: see below n 4.

objective,[2] regulators in most jurisdictions have at their disposal very similar investigative powers and weaponry, including virtually identical immunity programs. When it comes to enforcement, however, the story is quite different: individual variations in constitutional, structural and procedural arrangements mean that each jurisdiction is effectively sui generis. This is particularly so in relation to leniency and settlement policy: the global convergence that characterises immunity programs dissipates when regulatory agencies consider how to deal with those who missed out on the main prize but nevertheless wish to cooperate in exchange for leniency.[3]

In the face of this diversity, the extent to which Australian and Canadian policy makers have converged is remarkable. In both jurisdictions a federal statute established an independent regulator responsible for the administration and enforcement of the legislation; each has recently introduced significant reforms including a dual-track system of criminal and civil offences[4] with a separate prosecutorial branch responsible for the prosecution of criminal offences referred to it by the regulator;[5] in both jurisdictions, individuals and corporations may be prosecuted and it is for the court to either impose a penalty (which may include

2 Despite the regulators' rhetoric (see below n 46) which suggests that anything less than eradication would be politically, perhaps morally, unacceptable, there is a recognition that eradication may be the impossible dream. See Neelie Kroes, 'Tackling Cartels — A Never-ending Task' (Speech delivered at the Anti-Cartel Enforcement: Criminal and Administrative Policy — Panel session, Brasilia, 8 October 2009) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/454>:

> 'We are prosecuting more cartels and preventing more consumer harm than ever before. Some say, however, we are only witnessing the tip of the iceberg. Clearly, there is so much more to do. Tackling cartels is — quite literally — a never-ending task. … Our task is made harder because cartels are always changing shape — adapting like viruses to fight our attempts to kill them off. Always building up resistance, always trying to outsmart us'.

3 The terms 'immunity', 'leniency' and 'settlement' are not terms of art. In this paper, 'immunity' refers to the offer of full immunity to the first person to confess to cartel conduct and satisfy the criteria, 'leniency' refers to offers made to second and later cartel participants who come forward and cooperate and 'settlement' refers to the negotiated resolution of a case through a formal or informal bargaining process. Leniency negotiations may elide with settlements or the latter may be administered formally and entirely separately. Whilst leniency/settlement programs may be conceptually similar to immunity programs (cooperation exchanged for discounts) the difference is in the timing — an immunity applicant is rewarded for providing information that triggers an investigation or gives momentum to an existing one, whereas leniency and settlement deals reward defendants who plead guilty and/or agree not to challenge charges so as to hasten the end of what might otherwise have been a long, resource-intensive trial with an uncertain outcome.

4 In Canada the amendments to the *Competition Act* RSC 1985 c C-34 ('*CA*') came into force on 12 March 2010. In Australia the *Trade Practices (Cartel Offences and Other Measures) Amendment Act 1974* (Cth) came into force on 29 September 2009. As part of a further raft of amendments to the *Trade Practices Act 1974* (Cth) that took effect on 1 January 2010, that Act has been renamed and is now the *Competition and Consumer Act 2010* (Cth) ('*CCA*').

5 Under the *CCA*, a corporation commits a criminal offence if it makes or gives effect to a contract, arrangement or understanding that contains a cartel provision, defined as an agreement to fix prices, restrict capacity or output allocate customers, suppliers or territories or rig bids: ss 44ZZRD–44ZZRG. Under the *CA* s 45 these same agreements are now treated as per se offences. Agreements that fall outside the new per se offences may be prosecuted under a new civil provision, but only where the agreement is likely to substantially limit competition: *CA* s 90.1. Ironically, before adopting the dual-track system, in Canada, cartel offences were criminal offences only; in Australia, they were civil prohibitions only.

imprisonment for individuals)[6] or, in the event of a plea or negotiated settlement, to approve the terms of the settlement.

In one important respect, however, the Canadian Competition Bureau ('Bureau') has chosen a different path to its Australian counterpart, the Australian Competition and Consumer Commission ('ACCC'). As part of the package of amendments referred to above, the Bureau has embraced a more transparent and predictable approach to leniency and settlements. The evidence for this can be seen in two non-binding but important documents that have been produced as part of the criminalisation reforms: first, a *Memorandum of Understanding* ('*MOU (Can)*')[7] that explains the roles and responsibilities of the Bureau and the Public Prosecution Service of Canada ('PPSC') and, second, the Bureau's *Information Bulletin on the Leniency Program* ('*Bulletin*'),[8] released on 29 September 2010, which sets out the factors and principles that the Bureau takes into consideration in making a recommendation to the PPSC for lenient treatment of those individuals or business organisations accused of criminal cartel offences under the *CA*. By comparison, Australia's Leniency and Settlement Policy remains deliberately enigmatic: the ACCC tightly controls the leniency process in relation to civil prosecutions through its generic 2002 *Cooperation Policy for Enforcement Matters*[9] and has not seen fit to supplement this with a Canadian-style cartel-specific policy. The ACCC and the Commonwealth Director of Public Prosecutions ('CDPP') also entered into a *Memorandum of Understanding* ('*MOU (Aus)*')[10] but, unlike the Canadian equivalent, it makes no reference to these options and offers no guidance as to how the two agencies would collaborate on such matters.

The aim of this article is to examine the current state of the leniency and settlement debate, compare the approaches of the Australian and Canadian regulators and consider whether Australia should, in this respect, as it has in so many others, align itself with the Canadian model.

6 In Canada, as part of the reforms, the fine has been increased to C$25 million and the maximum prison sentence is 14 years: *CA* s 45(2). In Australia, for individuals, the cartel offence is punishable by imprisonment for a maximum of 10 years and/or fines of up to A$220 000: *CCA* s 79(1). For breaches of the civil prohibition the penalty for individuals is a fine of up to A$500 000 (*CCA* s 76(1B)) as well as other forms of relief including injunctions (*CCA* s 80), disqualification orders (*CCA* s 86E) and community service orders (*CCA* s 86C(2)). Sanctions against corporations for both civil and criminal offences are the greatest of either A$10 million, or (where the value of the benefit can be determined) three times the value of the benefit gained, or (where it cannot be determined) 10 per cent of its annual turnover during the preceding 12 month period: *CCA* s 76(1A)(aa), (b).

7 Competition Bureau of Canada and Director of Public Prosecutions, *Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions* (10 May 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html>.

8 The Bureau updated a number of its bulletins to reflect the new law and this release was part of this process. See Competition Bureau Canada, *Bulletin — Leniency Program* (2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/LeniencyProgram-sept-2010-e.pdf/$FILE/LeniencyProgram-sept-2010-e.pdf >.

9 ACCC, *Cooperation Policy for Enforcement Matters* (31 July 2002) <http://www.accc.gov.au/content/item.phtml?itemId=459482&nodeId=e8e554f0fed6c4139e99fb67c9f75eae&fn=ACCC%20cooperation%20policy%20July%202002.pdf>.

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

II THE CURRENT STATE OF THE SETTLEMENT DEBATE

A *From Immunity to Leniency and Settlement*

For regulators engaged in cartel enforcement the usual anti-competitive issues, essentially economic in nature, relating to market impact or abuse of a dominant position do not arise. Instead, because cartel conspiracies are illegal per se and clandestine in nature, it is problems of exposure and detection, issues of proof and, when there is overlap with the criminal law, questions of due process and fair trial that preoccupy the regulator. It was not always thus, but as regulators moved from a more quiescent, morally neutral (European) era of consensual notification, compromise and negotiated resolutions to the tougher (US) model (where the rhetoric (and the sanctions) have been ratcheted up significantly), cartel operators have been forced to conduct their activities covertly.[11]

In the US in the 1970s and 1980s, the regulator had limited success in detecting these cartels despite increased penalties, greater investigative powers and a nascent (but flawed) immunity offer. It was not until 1993 that the US Department of Justice ('DOJ') Antitrust Division designed an effective Leniency Program based around 'severe sanctions, heightened fear of detection and transparency in enforcement policies'.[12] The revised offer has been characterised as 'irresistible',[13] deriving its irresistibility by playing on the inherent instability of cartels: it offered the sweetest carrot (an offer of full immunity to the first, but only to the first, individual and/or corporation to blow the whistle) made all the sweeter because of the fear that regulators have a very big stick in their knapsack (the accomplices left behind faced the very real prospect of massive fines and, for individuals, lengthy prison terms). The policy worked: indeed, the Antitrust Division frequently attributes its success in cracking cartels to its immunity program.[14] As a result of the DOJ's success, important parts of the US immunity model (and most of the rhetoric) were copied elsewhere so that, by the end of the 20th century, regulators

11 See especially Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2nd ed, 2010) 41–63. See also David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, 2001) 16.

12 Scott D Hammond, 'The Evolution of Criminal Antitrust Enforcement over the Past Two Decades' (Paper presented at the 24th Annual National Institute on White Collar Crime, Eden Roc Renaissance, Miami, Florida, 25 February 2010) 3 <http://www.justice.gov/atr/public/speeches/255515.pdf>.

13 Harding and Joshua, above n 11, 232–6.

14 For an historical overview see Scott D Hammond, 'The US Model of Negotiated Plea Agreements: A Good Deal with Benefits for All' (Competition Working Party No 3, OECD, October 2006) <http://www.justice.gov/atr/public/speeches/219332.pdf>. In a recent paper, Scott Hammond noted that in the decade since 1996, after the introduction of the revised Leniency Program, companies had been fined over $5 billion for antitrust conduct, with over 90 per cent tied to investigations assisted by leniency applicants. Furthermore, the Antitrust Division typically has approximately 50 international cartel investigations open at any one time and more than half of these investigations were initiated, or are being advanced, by information received from a leniency applicant: see Hammond, above n 12, 3. For a recent endorsement, see also Carl Shapiro, 'Update from the Antitrust Division' (Speech delivered at the American Bar Association Section of Antitrust Law Fall Forum, Washington DC, 18 November 2010) <http://www.justice.gov/atr/public/speeches/264295.pdf>.

across the globe regularly proclaimed immunity programs as the pre-eminent tool for cartel detection.[15]

However the rhetoric surrounding immunity programs should, perhaps, be tempered by 'the more ambiguous actuality'.[16] Although it is beyond the scope of the paper to discuss immunity policy in detail,[17] there are scholars who question the morality and efficacy of immunity[18] and there is evidence that defendants may be wise to test the law and/or the regulator's evidence, particularly evidence provided by their erstwhile co-conspirators and accomplices.[19] Recently the first contested cartel case brought by the Office of Fair Trading ('OFT'), the United Kingdom's competition regulator, against four British Airways ('BA') executives collapsed. The executives were accused of conspiring with Virgin to fix the price of fuel charges. The conspiracy was revealed when Virgin applied for corporate immunity. The OFT imposed fines on BA and then prosecuted the four executives. After the trial had begun, Virgin's lawyers (who did much of the investigative work for the OFT) produced thousands of new emails that were previously believed to be corrupted and unrecoverable. One of these indicated that Virgin had decided to raise fuel surcharges *before* any contact with BA. As neither side had had time to review the correspondence and with the trial judge unwilling to delay the trial any further, the OFT had no alternative but to drop the case. A directed not guilty verdict was entered before any witnesses gave evidence.[20] Leaving aside broader questions about the OFT, at the very least the result suggests that the OFT's decision to grant immunity to Virgin and to issue civil proceeding against British Airways (which resulted in a fine of £121 million) and, later, initiate criminal proceedings against its executives, before it

15 Over 50 jurisdictions across the globe now have an immunity program in place. The most recent statistics from the European Commission indicate that six of the seven cartel decisions that were adopted in 2010 were triggered by an immunity application. The customer benefits derived from these decisions were between €7.2 billion to €10.8 billion: European Commission, *Annual Activity Report 2010 — DG Competition* (2010) 5 <http://ec.europa.eu/atwork/synthesis/aar/doc/comp_aar.pdf>.

16 Christopher Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 359, 372. Harding contrasts the 'rhetoric of strong action' (which, inter alia, promotes leniency programs because of the beneficial effects on clearance rates) with the 'realist interpretation' (where sanctions have little effect on the prevalence of cartels).

17 For a general overview, see Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) 378–420.

18 For criticism of the DOJ policy, see Christopher R Leslie, 'Trust, Distrust and Antitrust' (2004) 82(3) *Texas Law Review* 515.

19 Graham Reynolds and Janet Bolton, 'Defending a Cartel Case in Canada' (2011) 25(2) *Antitrust* 91.

20 See Office of Fair Trading, 'OFT Withdraws Criminal Proceedings against Current and Former BA Executives' (Press Release, 47/10, 10 May 2010) <http://www.oft.gov.uk/news-and-updates/press/2010/47-10>; Michael Peel and Jane Croft, 'British Airways Price-fixing Trial Collapses', *Financial Times* (London), 10 May 2010. For an excellent analysis of the case and its implications, see Julian Joshua, 'DOA: Can the UK Cartel Offence be Resuscitated?' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 129. For a more general critique of the difficulties confronting the regulator in prosecuting cartel offences, see also Andreas Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) 6 *Criminal Law Review* 446, 453–4.

had satisfied itself that there was full disclosure and all elements of the offence made out, was premature.

In the US, the result of the trial of Gary Swanson may inspire other accused to put the regulator/prosecutor to the test. Swanson, with others, was indicted for conspiring to fix the price of Direct Random Access Memory ('DRAM') chips. The DOJ's investigation began in 2002 and, by the time of Swanson's trial in 2008,[21] four corporations and fourteen individuals had pleaded guilty resulting in fines and penalties of US$731 million. Swanson contested the charges and his four week trial ended in a hung jury after seven days of deliberation. A mistrial was declared. It was later revealed that 10 jurors favoured acquittal and none found the key prosecution witness (who had received immunity) credible.[22]

In Australia, in *ACCC v Leahy Petroleum Pty Ltd*,[23] one of few contested cartel cases run by the ACCC, the application was dismissed. The trial judge, reflecting on the evidence gathered from immunity applicants, whose immunity depended on them not being ringleaders or coercers, said:

> It can be seen that the provisions of the (immunity) agreement entered into … have the disadvantage that they provide an incentive to each to give evidence maximising the role of persons other than themselves as ringleaders or originators of any relevant conduct.[24]

Further, perhaps indicating a willingness to test the evidence against them, 8 of the 15 airlines alleged to have been involved in the air cargo price fixing cartel in Australia are contesting the charges. The other parties have settled. In relation to the same cartel's operation in Europe, in November 2010, the European Commission ('EC') fined 11 carriers a total of almost €800 000 000 but, at the same time, announced that it had also dropped charges against another 11 carriers who had previously received a Statement of Objections.[25]

Despite these cautionary tales, it is clear that immunity programs have generated a significant increase in the number of cartels coming to the attention of regulators. This success has produced what, in medicine, would be regarded as an iatrogenic illness: here, the unintended consequence of the 'practitioner's' medicine or therapy (ie the regulator's offer of immunity) is that more cartels have been

21 *US v Gary Swanson* (ND Cal, No CR-06-00692 PJH, 18 October 2006).

22 For an excellent review of the case and the ramifications for defence lawyers considering contesting criminal cartel charges, see Robert H Bunzel and Howard Miller, 'Defending "Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial United States v Swanson' [2008] (June) *The Antitrust Source* 1 <http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun08_FullSource.pdf>.

23 (2007) 160 FCR 321.

24 Ibid [136].

25 A Statement of Objections is a written communication that contains all the objections on which the Commission intends to rely in its final decision. Persons or undertakings served with such a statement are given rights to respond before the Commission can make a decision that negatively affects their rights.

detected than regulators can realistically handle.[26] Such consequences should not have been unexpected — time and resource deficiencies are the normative state of affairs for public agencies engaged in law enforcement and that is unlikely to change, even where 'hard-core' cartels are the quarry. However, as some commentators argue, the extent of overload has been exacerbated by the clear shift to an adversarial and judicial model, increasingly involving the criminal justice system, moving away from an administrative and bureaucratic one:

> As enforcement moves from a softer model of consensual and administrative examination and negotiated outcomes, to one involving a higher degree of condemnation, more invasive powers of investigation, and the imposition of punitive and compensatory sanctions … [t]he process is necessarily more rigorous, more careful, more evidence-based and evidence-tested, and, because more is at stake in the imposition of sanctions, then defence rights and appeal procedures come to dominate the process. … [Such a model] requires more time and greater resources and the regulators are then caught in a trap of their own making, and in a sense pinned down by their own accumulation of power and apparent success.[27]

This shift may have been underway before the breakthrough on immunity policy in the early 1990s but its success has added to the caseload pressure on regulators which, as noted above, has reduced their capacity (and perhaps willingness) to engage in full adversarial proceedings and, instead, provided momentum to settle.

It is to settlements that we now turn.

B *Settlements: A Cost–Benefit Analysis*

Settlement policy has been the subject of considerable debate over recent years.[28] In the face of the increase in cartel exposure and the highly resource-intensive (and uncertain) nature of full adversarial processes, regulators and policy makers

26 For EU statistics and commentary, see Andreas Stephan, 'The Direct Settlement of EC Cartel Cases' (2009) 58 *International and Comparative Law Quarterly* 627, 636. The European Commission's statistics in relation to its 2006 Leniency Notice tell the story that up until December 2008 the Commission received 50 applications for immunity and 30 applications for a reduction in fine. The extent of the backlog is clear when, on average, the Commission issues about 6–8 prohibition decisions per annum (28 for the period 2005–09). See European Commission, *Cartel Statistics* (14 July 2011) <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

27 Harding and Joshua, above n 11, 304–5.

28 The OECD Competition Committee produced a policy Roundtable Report that includes an excellent executive summary and contributions from OECD members, including Canada and Australia, on settlement policy: OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Experience with Direct Settlements in Cartel Cases' (Policy Roundtable, OECD, 1 October 2009) <http://www.oecd.org/dataoecd/11/9/44178372.pdf>. For a comprehensive discussion of the benefits of settlements, see OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Plea Bargaining/Settlement of Cartel Cases' (Policy Roundtable, OECD, 22 January 2008) 9–13 <http://www.oecd.org/dataoecd/12/36/40080239.pdf>. See also Cartel Working Group, 'Cartel Settlements' (Report to the ICN Annual Conference, International Competition Network, April 2008) < http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf>. For a discussion of developments at the European Commission, see Stephan, above n 25. For a discussion of the Australian context, see Beaton-Wells and Fisse, above n 17, 433–8.

are moving towards a more achievable and limited objective of informal or formal settlement even if, in so doing, the anticipated deterrent effect of ever-more severe sanctions may be compromised.[29]

There is broad agreement that settlement policies are a good fit for cartel offences provided that the process is transparent, the inducements sufficiently predictable and the defendant has confidence that the regulator's commitments will be honoured.[30] The law itself is generally well-settled so that the regulator's principal concerns relate to matters of detection, investigation and proof. Now that powerful competition regulators, such as the EC,[31] have followed the US lead[32] and introduced formal settlement programs, the momentum can be expected to build.

The potential benefits are clear: for the public agency, settlements have obvious appeal. They provide obvious efficiency gains, allowing the regulator to deploy its scarce resources in the detection and prosecution of other cartel activity. They also allow agencies to claim more impressive productivity gains with (short-term) improvements in clearance rates. They may also provide momentum in the original investigation and lead to further prosecutions. The overall effect should be an increase in the overall level of deterrence. From the defendant's perspective, a settlement also provides efficiency gains, allowing the corporation and its management to conserve resources, including the time and energy that would otherwise be devoted to the investigation and defence of the charges. It also eliminates uncertainty and anxiety about trial outcomes and penalties and restricts the damage to reputation, customer relations and market value.[33] Conversely, uncertainty about the process or incentives, lack of confidence in the

29 Harding, above n 16, 372.

30 International Competition Network, above n 28.

31 In 2008 the European Commission published a Commission Notice on the conduct of settlement procedures and an amending Regulation: *Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases* [2008] OJ C 167/1; *Commission Regulation (EC) No 773/2004* [2004] OJ L 123/18.

32 The US, at one end of the spectrum, advantaged by a single regulatory agency with integrated investigatory and prosecutorial functions, has a formalised, highly developed and structured plea agreements process. Settlement plays a central part in the resolution of all litigation, including antitrust. Statistics from the Administrative Office of the United States Courts show that for the 12 months leading up to 30 September 2009, only 1.2 per cent of the 263 049 cases that were filed reached trial. The court either disposed of the rest before a decision was made or they were settled. Of the 33 criminal antitrust offences that were brought, three resulted in acquittals and 30 were settled. See United States Courts, *Table D4: US District Courts — Criminal Defendants Disposed of, by Type of Disposition and Major Offense, During the 12-Month Period Ending September 30, 2009* (2009) <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/D04Sep09.pdf>.

33 International Competition Network, above n 28, 9–10. In its report to the ICN Annual Conference in 2008, the Cartel Working Group reported that two jurisdictions responded to its survey on settlement by commenting that 'the benefits do not end with the investigation that is resolved through a settlement — not only are resources freed to investigate other cartels, but the swift prosecution of more cases leads to an increased fear of detection, resulting in future self-reporting and ultimately increased deterrence': International Competition Network, above n 28, 8.

ability of regulators to honour commitments and informational asymmetries will deter defendants from coming forward.[34]

There are, of course, risks associated with settlements. The first results from over-reliance. The obvious efficiencies resulting from the use of settlements (especially in complex cartel cases) may create dependency issues for the regulator, leading to 'prosecutorial complacency'[35] or 'bureaucratic work habits'.[36] The recent experience of the OFT in the UK in its prosecution of British Airways may be a case in point.[37] In a climate where the regulator is more concerned with the risk of fallout from a trial that goes 'badly' than with the conduct itself, it is more likely to negotiate a settlement.[38] In a comment on this kind of risk-aversion, the Canadian Bureau's Commissioner of Competition recently made the case, ironically, given the stated objectives contained in the *Bulletin*,[39] for 'selective non-consensual resolutions':

> we should not be paralysed by the fear of losing a case. Jurisprudence brings clarity. It sharpens the lines and marks the bounds of acceptable conduct. Provided the case is responsible, whether we win or lose, we will achieve three objectives that are important to us … First, we shed light on the issues before the courts. This attention alone will help deter anti-competitive conduct. Second, we clarify and provide transparency. Guidelines on complex enforcement issues are important, but can only go so far. Greater clarity and transparency comes from jurisprudence. Third, we demonstrate we have the will to responsibly enforce the law. There is no substitute for this message as an effective deterrent to other individuals or companies that might contemplate anti-competitive practices.[40]

The recently appointed Hearing Officer for competition cases at the EC, Wouter Wils, agrees, arguing that the regulator should, from time to time, demonstrate that it has the will and the capacity to win contested cases, if only because it strengthens its ability to negotiate better settlements in the future.[41]

34 OECD, above n 28, 8.

35 Rebecca Williams, 'Cartels in the Criminal Law Landscape' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 289, 311.

36 Albert Alschuler, 'An Exchange of Concessions' (1992) 142 *New Law Journal* 937, 941–2.

37 See Office of Fair Trading, above n 20.

38 For example, Thomas Reed Powell's perceptive contribution to the debate about what it means to 'think like a lawyer' includes: 'If you think you can think about a thing that is hitched to other things without thinking about the things that it is hitched to, then you have [learned to think like a lawyer]', quoted in Peter R Teachout, 'Uneasy Burden: What it Really Means to Learn to Think like a Lawyer' (1996) 47 *Mercer Law Review* 543, 543.

39 *Bulletin*, above n 8.

40 Melanie L Aitken (Speech delivered at the Canadian Bar Association, Competition Law Section, 2009 Spring Forum, Toronto, Ontario, 12 May 2009) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html>.

41 Wouter Wils, 'Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual* (Hart Publishing, 2008) 27, 39.

It is also clear that in order to maximise the efficiency gains that settlements generate the regulator may wish to reach a negotiated settlement sooner rather than later. However, if it does so, the defendant may be in a position to negotiate a deal that has sub-optimal deterrent value. If minimisation of informational asymmetries were a priority, settlements in cartel cases should not occur until most of the evidence has been gathered.[42] A federal court judge in Australia recently cautioned against engaging in premature dispute resolution processes: a settlement which is 'based on asymmetric information will likely result in justice not being done'.[43]

Many argue that strong public support is necessary, particularly where the cartel offences are criminal in nature and individuals found guilty are punishable by a term of imprisonment.[44] A full, well-publicised (and successful) trial, in which evidence is led of the cartel participants' motivations and covert actions, and the sanctions imposed are not the result of a 'deal' between the prosecutor and the defendants, may promote public awareness that cartel conduct offends not only economic but also normative values.[45]

At this stage, despite the moralistic rhetoric often used by regulators[46] and the criminalisation of the offence, there is little evidence that the public is convinced. While it may regard cartel behaviour as reprehensible, a majority do not view it as 'criminal' nor, *a fortiori*, believe that a person should be imprisoned if convicted of

42 See OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Plea Bargaining/ Settlement of Cartel Cases', above n 28, 10, 34. See also John M Taladay, 'Implications of International Cartel Settlements for Private Rights of Actions' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual* (Hart Publishing, 2008) 317, 318.

43 Remarks reported to have been made by Finkelstein J in the context of a hearing in which liquidators of Sonray Ltd foreshadowed a lengthy mediation involving several parties associated with the failed financial trading house: Leonie Wood, 'Judge Warning in Sonray Case', *Business Day*, *The Age* (Melbourne), 13 December 2010, 3.

44 Andreas Stephan, '"The Battle for Hearts and Minds": The Role of the Media in Treating Cartels as Criminal' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 381, 382–3.

45 For a detailed discussion of the development of criminal enforcement norms in the US, see William E Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from the US Experience' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 45, 63–4.

46 For instance, the US Supreme Court has described collusion as the 'supreme evil' of antitrust: *Verizon Communication Inc v Law Officers of Curtis v Trinco LLP*, 540 US 398, 408. Drawing on the same metaphor, the European Commission has referred to cartels as 'cardinal sins': European Commission, 'XXX11nd Report on Competition Policy 2002' (Report No 467, European Communities, 2003) 28 [26] <http://ec.europa.eu/competition/publications/annual_report/2002/en.pdf>. The Chair of the Australian regulator, the ACCC, has described cartels 'as a silent extortion of the economy': Graeme Samuel, 'The Enforcement Priorities of the ACCC' (2006) 14 *Trade Practices Law Journal* 71, 77. In an effort to establish that cartel operators are nothing special, Samuel said recently that they are like 'common crooks — they steal from consumers and bully their competitors while wearing flash suits and shiny shoes': Graeme Samuel, 'ACCC: Breaching the Trade Practices Act Has Never Been More Costly' (News Release, 028/10, 25 February 2010) <http://www.accc.gov.au/content/index.phtml/itemId/915872/fromItemId/927069>. Using the same 'common thief' imagery, at the conclusion of a petrol price-fixing investigation that has resulted in criminal charges being laid against 25 individuals and three corporations, the Commissioner of the Canadian Competition Bureau emphasised that cartelists are just like thieves who 'cheat honest taxpayers out of their money': Competition Bureau Canada, 'Criminal Charges Laid by Competition Bureau in Gas Price-fixing Case Announcement' (Announcement, 22 July 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03262.html>.

it.[47] This may be because competition law is primarily seen to be about achieving economic goals, rather than criminal conduct,[48] and, in particular, cartel conduct, now characterised as well beyond the pale, is not intrinsically 'criminal' nor 'dishonest'.[49] There is empirical evidence to support the view that the community, business leaders and powerful members of the political and judicial classes have a benign view of criminal conduct[50] which may have led to a caution by a federal court judge of the danger of allowing 'too great an emphasis to be placed on the 'respectability' of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so'.[51] Judges, too, may be in awe of power and respectability — this was one of the reasons for the introduction of the Sentencing Guidelines in the US in 1987

47 A major survey conducted as part of Melbourne University's Cartel Project (see Melbourne Law School Cartel Project, *Cartel Project* (27 February 2012) The University of Melbourne <http://cartel.law.unimelb.edu.au/go/the-cartel-project>) has recently reported that whilst a substantial majority support the view that cartel conduct is unacceptable in the sense that it should be against the law, only 44.1 per cent think that cartel conduct should be a criminal offence and even less (15.8 per cent) support the view that individuals should be imprisoned if convicted of engaging in such conduct: see Cartel Project, *Report on a Survey of the Australian Public regarding Anti-Cartel Law and Enforcement* (December 2010) 96, 133 <http://cartel.law.unimelb.edu.au/download.cfm?downloadfile=DD510AD4-5056-B405-51C79EAE014513CB&typename=dmFile&fieldname=filename>. The results are similar to a recent UK survey which indicates that only 60 per cent of people felt strongly that price fixing was 'dishonest' and only 1 in 10 believed a person should be imprisoned if found guilty of price-fixing: Andreas Stephan, 'Survey of Public Attitudes to Price-fixing and Cartel Enforcement in Britain' (2008) 5(1) *Competition Law Review* 123, 130–5.

48 Karen Yeung, *Securing Compliance — A Principled Approach* (Hart Publishing, 2004) 102. See also Williams, above n 35, 299, where the author asks what it is that is morally delinquent about cartel behaviour and begins to answer by asserting that 'few of us will have had sufficient experience to develop … intuitions [of moral delinquency] about [cartel conduct]'.

49 The House of Lords ruled, in accordance with established precedent, that a collusive agreement to fix prices is not per se 'dishonest' (and therefore does not constitute the common law crime of conspiracy): *Norris v Government of the United States of America* [2008] UKHL 16. This is not to suggest that dishonesty is a required element in criminal offences generally. In particular, it is not an element in either the US or the Australian cartel offence. It has been argued that what gives cartel conduct its delinquent status is not the conduct itself but 'the combination of conscious defiance, collusive conduct, and trickery (in the sense of pretending to be good competitors and duping the system) …': Harding and Joshua, above n 11, 277.

50 For example, in Australia, after the record fine handed out to Richard Pratt's privately owned company, Visy Pty Ltd (see *ACCC v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673), for its part in the cardboard box cartel, the then Prime Minister described him as being a 'very good citizen' and the then Premier of Victoria said: 'I would be happy to have Richard Pratt for dinner': Rick Wallace and Michael Davis, 'Howard, Costello at Odds over Pratt', *The Australian*, 10 October 2007. After his death the same Premier offered the family a state-sponsored funeral. For an excellent discussion of the effect of this kind of response on the criminalisation debate, see Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour' (2009) 42 *Australian and New Zealand Journal of Criminology* 218, 221. Similarly, in the UK, a senior British Airways executive facing the threat of jail for fixing fuel prices was promoted to the company's management board less than two weeks before the trial was due to begin. This could be seen as a remarkably prescient action (the trial ultimately collapsed in circumstances described in Office of Fair Trading, above n 20), or as 'an unusual vote of confidence' in an executive charged with a serious criminal offence, or as an indication that the company did not regard the offence seriously: see Michael Peel, 'BA Executive Facing Charges Is Promoted', *Financial Times* (London), 27 November 2008, 15. For a fuller discussion see Stephan, above n 44.

51 *ACCC v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, [28].

which treated antitrust felonies as very serious offences, 'making imprisonment an immediate remedy for the sentencing court in an antitrust case'.[52]

Finally, the challenge for the regulator is to balance the need for an attractive leniency offer against the need to ensure that the increased penalties achieve optimal deterrence. As discussed earlier, there is considerable evidence that leniency and immunity programs work, having been at least partly responsible for the increased number of cartel investigations and prosecutions. However, there is concern that the deterrence objective is being compromised by large, often cumulative, discounts.[53] For instance, in the EU, from 1990–2007, discounts have eroded the value of fines levied by €3.8 billion or 62 per cent of the actual fines imposed.[54] Similarly, in the US, discounts for leniency from 1993–2007 'are estimated to be $2 to $3 billion or 50 to 70% of the actual total fines imposed'.[55] As one scholar has said, 'forgiveness on such a scale undermines the deterrence value of the fines'.[56] Others agree that unless the state offsets the settlement-related discount in deterrence by increasing the level of sanctions, a defendant's desire to settle must be because the disutility of sanctions is reduced for them.[57]

There are a number of assumptions that underpin the 'deterrence' argument.[58] The first is that cartelists, certainly price-fixers, are rational wealth-maximisers and are only deterred from their illegal conduct when the expected costs exceed the gains, which include the magnitude of the likely punishment adjusted for the likelihood of the cartel being detected.[59] At any point in the life of a cartel, the theory is that the moment that costs exceed benefits, a rational actor will withdraw and seek immunity or, if immunity is no longer available, attempt to do a deal. Similarly, if the illegal conspiracy has yet to bear fruit, the plan would be abandoned at the same point. In other words, the penalties that can be imposed on a wrong-doer can, with a political eye focused on eradication of cartels by employing maximum deterrence, be made optimal.[60]

52 Donald I Baker, 'Punishment for Cartel Participation in the US' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 30.

53 International Competition Network, 'Defining Hard-core Cartel Conduct: Effective Institutions, Effective Penalties' (Report to the ICN Annual Conference, Working Group on Cartels, 2005) 51–3 <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>.

54 Cento Veljanovski, 'Penalties for Price Fixers: An Analysis of Fines Imposed on 43 Cartels by the EC' (2006) 27 *European Competition Law Review* 510.

55 John M Connor, 'Anti-cartel Enforcement by the DOJ: An Appraisal' (2008) 5(1) *Competition Law Review* 89, 104.

56 Ibid.

57 A Mitchell Polinsky and Steven Shavell, 'The Economic Theory of Public Enforcement of Law' (2000) 38 *Journal of Economic Literature* 45, 65.

58 Maurice E Stucke, 'Am I a Price-fixer? A Behavioural Economics Analysis of Cartels' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 263. For a general discussion on the deterrence model, see Ingeborg Simonsson, *Legitimacy in EU Cartel Control* (Hart Publishing, 2010) 283–8.

59 Polinsky and Shavell, above n 57, 65.

60 Stucke, above n 58, 264. Stucke goes on to test the limits of neoclassical theory by applying behavioural economics (with its focus on various dispositional and situational factors) and concludes that people do not behave as neoclassical economic theory predicts.

These and other assumptions that underpin the neoclassical economic model are contestable.[61] Certainly, questions may be asked about the costs associated with pursuing sanctions designed to achieve optimal deterrence. Harding argues that the neoclassical model

> has been used to justify, first, very large corporate fines as optimally deterrent and, second, the imprisonment of individuals … and has been reflected in the rhetoric of 'sentencing milestones' calculated in either the amount of financial penalty or totals of annual jail days imposed on executives. Such optimal deterrence theory … is inspired by considerations of economic efficiency rather than normative judgment … There is clear evidence … that such sanctions are not effective as deterrents of cartel activity generally.[62]

At a more practical level, even if the rational wealth-maximiser sits at the cartel table, there are considerable difficulties with the quantitative side of the equation — for instance, empirically measuring deterrence (for executives as well as corporations) and determining with some precision the extent of the harm and the probability of detection and deciding on an optimal fine for a global conspiracy.[63]

One question that is important to a coherent enforcement policy in general, and to settlement policy in particular, arises because cartel conduct has both an individual and a collective dimension. In jurisdictions where there is discretion as to whether to prosecute the corporation and/or individual actors,[64] it is critical to consider who it is that should be held 'responsible' for the conduct, what sanctions should be applied and for what purpose? Because corporations and their executives and employees are distinct actors, capable of autonomous and separate control, the task of the regulators/prosecutors is to differentiate, in each case, between the respective corporate and individual roles and allocate responsibility and impose sanctions accordingly.[65]

It is generally assumed that deterrence is increased with individual accountability. This assumption has underpinned the introduction of criminal penalties, including imprisonment, for individuals convicted of certain cartel offences.[66] However, outside the US, which has a long history of 'energetically' prosecuting individual cartel participants,[67] the record is uneven. In Australia, for instance,

61 Ibid 264–9.

62 Christopher Harding, 'Cartel Deterrence: The Search for Evidence and Argument' (2011) 56(2) *The Antitrust Bulletin* 345, 358–9.

63 Maurice E Stucke, 'Morality and Antitrust' [2006] *Columbia Business Law Review* 443, 475–84.

64 In the EU, for instance, unlike in Canada, the UK, the US and Australia and many other jurisdictions, only the 'undertaking' is responsible: *Council Regulation (EC) No 1/2003* [2003] OJ L 1/1, art 23. Article 23(2) permits the Commission to impose fines (of an administrative, not criminal nature) on an undertaking for infringements of arts 101(1) or 102 of the *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993).

65 See Harding and Joshua, above n 11, 256–65.

66 See Caron Beaton-Wells, 'Cartel Criminalisation and the ACCC' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 186.

67 Baker, above n 52, 28–9.

the record indicates that where a guilty plea or settlement has been negotiated, the individual directors, managers or other employees are rarely held to account: it is the corporation that pays the price.[68] Scholars argue that in Australia, where the relevant agencies now have a broad discretion, not enough consideration has been given to achieving a balance between corporate and individual liability.[69] There are several examples where the regulator has taken action against both individuals and the corporation but, when the matter settled, imposed sanctions on the corporation alone.[70] In the international air cargo price-fixing cartel, the ACCC prosecuted 15 corporations but not a single executive was joined as a party, despite the fact that the Federal Court, which approved the settlements, noted the role of particular individuals.[71] In Canada, the Competition Bureau has a mixed record. In the air cargo price-fixing conspiracy just referred to, it has accepted guilty pleas from six corporations; no executives were charged.[72] However, in several other cases, the Bureau has demonstrated a willingness to pursue individual participants.[73]

The problems associated with the predisposition of regulators to either not prosecute individuals or to prosecute both individuals and the corporation, but, ultimately, to negotiate a settlement deal in which the corporation alone is found guilty and sanctioned, has prompted calls for reform from leading academics.[74] The most relevant (for the purposes of this paper) is that the key policy documents

68 Although there are examples of corporations that have ruthlessly shifted the blame onto individuals. A recent example arose during the prosecution of airlines, including Qantas, for participating in the international air cargo cartel. Bruce McCaffrey, who was in charge of Qantas freight in the US for 26 years, was offered up as a sacrificial lamb by Qantas in its plea deal with the US Department of Justice, when it realised that those more senior to McCaffrey, who had instructed him at Qantas in Sydney, could not be extradited to the US. McCaffrey, to limit the costs and risks associated with defending the allegations, did a deal with the DOJ and was fined US$20 000 and sentenced to 6 months imprisonment: see *United States of America v McCaffery* (D Wash, No 08-CR-135 JDB, 15 May 2008). For a report on the *McCaffrey* case, see Geoffrey Arend and Flossie Arend, 'Facing Air Cargo Price Fix Jail Time Qantas Freight's Bruce McCaffrey Is Undefeated' (2009) 8(3) *Air Cargo News* 1 <http://www.aircargonews.com/090112/FT090112.html>.

69 Beaton-Wells and Fisse, above n 17, 191.

70 A good example is *ACCC v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673. In its submission to the Court, the regulator called for a fine to be imposed on the corporation alone; Pratt was not held personally accountable. For a fuller discussion see Beaton-Wells and Fisse, above n 17, 193.

71 See, eg, *ACCC v Qantas Airways Ltd* (2008) 253 ALR 89.

72 See Competition Bureau Canada, 'Cargolux Pleads Guilty in Air Cargo Price-fixing Conspiracy' (Announcement, 28 October 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03304.html>. Similarly, in the refrigeration compressors price-fixing case, guilty pleas have been accepted from Panasonic and Embraco; no individuals were charged: Competition Bureau Canada, 'Panasonic Corporation Pleads Guilty to Price-fixing Conspiracy' (Announcement, 3 November 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03310.html>.

73 For example, in the Quebec petrol price-fixing conspiracy, up until June 2011 the Bureau accepted guilty pleas from 13 individuals and six corporations: Competition Bureau Canada, 'Two Individuals Plead Guilty in Quebec Gasoline Price-fixing Cartel' (Announcement, 10 June 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03382.html>.

74 See Beaton-Wells and Fisse, above n 17, 194–5.

— the ACCC's *Compliance and Enforcement Policy*,[75] the Prosecution Policy of the Commonwealth ('Prosecution Policy')[76] and the *MOU (Aus)* between the CDPP and the ACCC — should address the important questions of individual and corporate liability, outlining the role and importance of each in cartel enforcement and the circumstances in which it might be appropriate to pursue the corporation and/or the individual. Currently, by default, the matter is left entirely to the discretion of the ACCC and/or the CDPP. The position in Canada on this issue is similar: there is no indication concerning the policy considerations that will influence the decision of the Competition Commissioner to recommend prosecution of (or the PPSC's decision to prosecute) an individual or corporation for breaches of the cartel prohibition.

Thus, although there is momentum to embrace transparent and predictable settlement and leniency arrangements, that path is not without risks and challenges. We move now to an examination of the approach adopted by Australia and Canada.

III THE CANADIAN APPROACH TO LENIENCY

A *Background*

As noted earlier, the amendments to the *Competition Act*, which came into effect on 12 March 2010, involved radical reform, including the introduction of a per se criminal conspiracy offence[77] and a dual-track criminal and civil regime.[78] Other forms of competitor agreements, such as predatory pricing, price maintenance and price discrimination are now reviewable under a civil provision that prohibits agreements only where they are likely to substantially lessen competition. The amending legislation also introduced more severe sanctions to support the new criminal offences, with increased maximum prison terms of 14 years for individuals and a maximum fine of C$25 million per offence, for both individuals and corporations.[79]

75 Australian Competition and Consumer Commission, 'Compliance and Enforcement Policy' (Organisational Policy, Commonwealth of Australia, 21 December 2010) <http://www.accc.gov.au/content/index.phtml/itemId/867964>. The purpose of the general compliance and enforcement policy is to achieve compliance with the law and to outline the ACCC's enforcement powers, functions, priorities and strategies. It was updated in December 2010 to take into account recent amendments to the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) but contains no reference to the question of individual and corporate liability.

76 Office of the Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth — Guidelines for the Making of Decisions in the Prosecution Process' (Guidelines, Commonwealth of Australia, November 2008) <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>.

77 See *CA* s 45. Previously cartel conduct was a criminal offence but was only illegal if it could be proven that the conspiracy had undue anti-competitive effects, as determined under a partial rule of reason analysis.

78 Agreements that fall outside the new per se offences may be prosecuted under a new civil provision, but only where the agreement is likely to substantially limit competition: *CA* s 90.1.

79 *CA* s 45(2).

The new per se offence and the increased penalties have substantially increased the risks for certain kinds of cartel conduct[80] and made the immunity program even more attractive. However, while the immunity process is transparent and the benefits are clear and predictable, this has not been the case for those who miss immunity but nevertheless wish to cooperate in exchange for a reduced sentence. It must be acknowledged that the Bureau has a significant but limited role in the leniency and sentencing process: it can only make recommendations to the CDPP which, in turn, makes its recommendations to the court (which usually accepts the recommendations). However, statements by the Commissioner indicate the Bureau's intention, within its remit, to pursue leniency and settlement in appropriate cases: '[the Bureau's] first choice will always be to reach a principled, expeditious, consensual settlement that resolves our concerns. That approach accords well with the best traditions of a public enforcement mandate to effect the right difference and reserve resources for when one must engage further'.[81]

A few months later, in May 2010, the Commissioner reiterated her view of the settlement process: 'Our goal is to provide a fair and principled approach to settlement in order to resolve complex matters in a more timely manner'.[82]

B *The Memorandum and the* Bulletin

In the two significant documents produced after the amendments came into effect in March 2010 the Bureau has confirmed its intentions. First, in May 2010, recognising that the reforms made it imperative that the two agencies work together effectively, the CDPP and the Commissioner of Competition signed the *MOU (Can)*.[83] In the words of the Commissioner, the *MOU (Can)* 'simply reinforces our excellent working relationship, and will enhance the transparency of criminal competition law enforcement in Canada'.[84] The *MOU (Can)* is a model of high aspiration, tempered by reality. On the one hand, it sets out in commendable detail the separate functional and operational roles and responsibilities of the Bureau and the PPSC[85] during the investigative and prosecutorial stages and in the implementation of the Bureau's Immunity and Leniency programs,[86] and affirms that each respects the other's independence

80 For the purposes of the *Bulletin*, above n 8, cartel offences include conspiracy (*CA* s 45), foreign directives (*CA* s 46) and bid rigging (*CA* s 47).

81 Melanie L Aitken, 'Keynote Dinner Address' (Speech delivered at the Competition Law and Policy Conference, Cambridge, Ontario, 3 February 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03205.html>.

82 Melanie L Aitken, 'Remarks to CBA Spring Competition Law Conference' (Speech delivered at the CBA Spring Competition Law Conference, Toronto, Ontario, 17 May 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03247.html>.

83 *MOU (Can)*, above n 7.

84 Aitken, above n 81, 2.

85 The PPSC is responsible for prosecutions on behalf of the Attorney-General of Canada and represents the CDPP in criminal cases in Canada.

86 For the Bureau's roles and responsibilities, see *MOU (Can)*, above n 7, [2.4]–[2.14] and [2.16]–[2.35] for the PPSC's roles and responsibilities.

in the exercise of their respective mandates.[87] In particular, the exercise of independent prosecutorial discretion is not compromised by the *MOU (Can)*.[88] On the aspirational side, there is a recognition that the roles of the two agencies are interdependent and that achieving one of the purposes of the *MOU (Can)* ('to improve the efficacy of prosecutions and to implement strategies to enhance the quality of investigations and the cases presented at trial')[89] depends on there being a high level of consultation and cooperation between the agencies.[90]

This carefully calibrated approach is also evident in relation to the immunity and leniency programs. Whilst the *MOU (Can)* specifically endorses both immunity *and* leniency programs[91] and permits the Bureau the right to make recommendations for immunity or leniency to the PPSC (to which it will give 'due consideration'),[92] a decision to grant immunity or leniency is a matter for the PPSC which must exercise its discretion in accordance with the principles in the *FPS Deskbook* ('*Deskbook*').[93] Although it remains to be seen how the relationship works in practise, the *MOU (Can)* provides clarity and guidance to the agencies (and parties) about processes and functions and, importantly, indicates that both agencies recognise the need to enter the new era with goodwill and a cooperative intent.

The second document, released to coincide with the reform package, is the *Bulletin*, published in September 2010.[94] The *Bulletin* complements the immunity program and operates where a cartel participant does not qualify for immunity but nevertheless wishes to cooperate with the investigator. After briefly reiterating the roles of the Bureau, the PPSC/CDPP and the courts in the investigation, prosecutorial and sentencing stages of a prosecution,[95] the *Bulletin* sets out the factors that the Bureau considers in making recommendations to the PPSC regarding leniency and sentencing.[96]

The Commissioner begins with an acknowledgement of the limits on the Bureau's power:

> The guidelines in this Bulletin are not intended to … constitute a binding statement of how the Commissioner or the PPSC will exercise discretion in a particular situation. The enforcement and prosecutorial decisions of

87 Ibid [2.1].

88 Ibid [2.28], [2.31].

89 Ibid [1.1].

90 For examples of the Bureau's commitment to cooperating with the PPSC, see ibid [2.8], [2.9], [2.11]–[2.15]. The PPSC has committed itself to providing advice and assistance to the Bureau on request during the investigative phase (at [2.19]–[2.25] for example) and to consulting with the Bureau in the prosecution phase (at [2.31], [2.33]–[2.34] for example).

91 Ibid pt 3.

92 Ibid [3.5], [3.7].

93 Federal Prosecution Service — Department of Justice Canada, *The Federal Prosecution Service Deskbook* (Federal Prosecution Service, 2005) <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html>.

94 *Bulletin*, above n 8.

95 Ibid pt 2.

96 Ibid pt 3.

> the Commissioner and the PPSC respectively, and the ultimate resolution of issues, will depend on the particular circumstances of the matter in question.[97]

However, the Commissioner then explains the objectives and rationale for the *Bulletin*:

> This Bulletin sets out the factors and principles that the Bureau considers in making a recommendation to the PPSC for lenient treatment in the sentencing of individuals or business organizations accused of criminal cartel offences under the *Competition Act* ("Act").
>
> A transparent and predictable Leniency Program complements the Bureau's Immunity Program and supports the effective and efficient enforcement of the Act. Individuals and business organizations are more likely to come forward, cooperate, and plead guilty (rather than litigate) when they are aware of the relevant leniency considerations and when they are confident that the Bureau will follow them in its leniency recommendations to the PPSC. … While the Bureau cannot guarantee specific sentencing outcomes in cartel cases, this Bulletin sets out the principles that the Bureau will follow in developing leniency recommendations to the PPSC. I am confident that the Information Bulletin on the Leniency Program will advance the transparency and predictability of the Bureau's enforcement policies and practices, while promoting the effective deterrence of criminal cartel activity in Canada.[98]

In essence, the Bureau's intention is to provide leniency applicants with the same procedural transparency and certainty (if not quite the same inducements) long enjoyed by immunity applicants. It does so through the *Bulletin*, which outlines the main features of the Leniency Program,[99] the eligibility criteria,[100] the nature of the required cooperation,[101] the extent of the leniency discount,[102] the aggravating and mitigating factors[103] and a clear explanation of the impact on directors and others where a corporation is the leniency applicant.[104] Finally, there is a clear and detailed explanation of the leniency process itself from the initial contact to the final court proceedings.[105]

The eligibility criteria are the same as for immunity — the individual or business organisation must have terminated its participation in the cartel, agreed to cooperate

97 Ibid 4.
98 Ibid 3.
99 Ibid pt 2.
100 Ibid [8]–[10].
101 Ibid [11].
102 Ibid [12]–[15].
103 Ibid [16]–[17].
104 Ibid [21]–[23].
105 Ibid [24]–[32].

fully and in a timely manner with the investigation, and any subsequent prosecution of the other cartel participants by the PPSC, and agreed to plead guilty. [106]

'Full, frank and timely' cooperation is of 'paramount importance' — the Bureau will recommend a more substantial mitigation of a sentence for parties that approach the Bureau at early stages of an investigation, but once the Bureau has referred a matter to the PPSC for the purposes of a prosecution, the Leniency Program will no longer be available.[107]

The program offers discounting of fines and the ability to protect cooperating individuals for the first party to make a leniency application after full immunity has been granted and, thereafter, diminishing incentives to later applicants. Overall economic harm is the key factor in the Bureau's recommendation of sentence to the PPSC. The first applicant is entitled to receive a discount of 50 per cent of the fine that would have been imposed (in establishing the base level of a recommended fine the Bureau will generally use a proxy calculation of 20 per cent of the cartel participant's volume of commerce in the product in Canada over the time the cartel operated). Where the first-in leniency applicant is a business organisation, 'the Bureau will recommend that no separate charges be laid against the applicant's current directors, officers or employees, provided that such individuals cooperate with the Bureau's investigation in a full, frank, timely and truthful fashion'.[108] A second leniency applicant is eligible for a 30 per cent reduction of the fine provided it meets all the conditions referred to earlier. 'For the second and any subsequent leniency applicant, current and former directors, officers, employees and agents may be charged depending on their role in the offence'.[109] Subsequent leniency applicants may also be eligible for reductions in the amount of fines payable, although these reductions will not generally be greater than the discount given to earlier applicants.[110]

The fine level may be adjusted up or down depending on the weight assigned by the Bureau to relevant aggravating or mitigating factors. These factors include the degree to which the individual benefited from the offence, whether the individual is a recidivist, was an instigator, leader or coordinator of the cartel and whether the individual used coercion, or monitored or encouraged compliance with the illegal arrangement by other participants.[111]

The Bureau has explicitly recognised the importance of protecting the confidentiality of information provided in the course of resolution or settlement discussions.[112]

106 Ibid [9].

107 Ibid [10]–[11].

108 Ibid [21].

109 Ibid [23].

110 Ibid [12]–[15].

111 The final *Bulletin* excluded sections that were in the Revised Draft, including detailed descriptions of the aggravating and mitigating factors that could influence the Bureau's sentencing recommendations. Many of these matters are now covered in the Bureau's Leniency Program FAQs. See especially: Competition Bureau Canada, *Leniency Program — FAQs* (21 October 2011) Competition Bureau, FAQ 22 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03289.html>.

112 *Bulletin*, above n 8, [36]–[44].

In Canada, communications in the course of resolution or settlement discussions are 'settlement privileged',[113] which prevents the admissibility of documents and communications that were created for the purpose of achieving settlement.[114] Information provided in the course of the leniency process may be used by the Bureau to pursue its investigations and by the PPSC in any subsequent prosecution against other parties, but will not be used against the leniency applicant or its cooperating individuals and will be treated as confidential, thus also reducing the exposure of the cooperating defendant to third party damages actions.

The critical point is reached when the Bureau advises the PPSC of the evidence that the applicant has proffered during the proffer stage and makes its recommendation to the PPSC.[115]

The decision to grant immunity or leniency rests solely with counsel who exercises his or her independent discretion in accordance with the *Deskbook*;[116] a generic policy document that does not refer to cartels specifically. It encourages 'resolution discussions' which include matters such as charge negotiations, appropriate sentences and issue resolution,[117] and urges counsel to reach agreement on these issues as soon as possible whilst bearing in mind the guiding principles of 'fairness, openness, accuracy, non-discrimination and the public interest in the effective and consistent enforcement of the criminal law'.[118] The *Deskbook* goes on to provide very extensive guidelines to counsel as to how to engage in 'meaningful discussions' in relation to these negotiations,[119] but the lack of guidance on what the PPSC takes into account in making its decisions has been criticised. For this reason it was recommended, during the draft stages of the *Bulletin*, that there be an explanation of the principles that the CDPP will use in exercising its discretion in order that defendants can be certain that the outcome negotiated with the Bureau will be honoured.[120] This has not happened and although this injects a level of uncertainty into the negotiations, the concerted attempt in the *Bulletin* to provide a 'transparent and predictable' Leniency Program[121] makes it likely that parties who are under investigation or have been charged will be induced to cooperate and make admissions.

113 Ibid [36].

114 John Sopinka, Sidney N Lederman and Alan W Bryant, *The Law of Evidence in Canada* (Butterworths, 2nd ed, 1999) 817.

115 *Bulletin*, above n 8, [26].

116 Federal Prosecution Service, above n 93.

117 Ibid [20.1]. Discussions may concern issues such as charge negotiations, appropriate sentences and issue resolution. Any agreement is subject to the overriding discretion of the court to accept or reject any submission by counsel.

118 Ibid [20.2].

119 Ibid [20.3].

120 American Bar Association Section of Antitrust Law et al, 'Comments of the American Bar Association Section of Antitrust Law, Section of International Law, Section of Business Law, and Criminal Justice Section on the Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases Issued by the Competition Bureau of Canada' (Comments, American Bar Association, 29 May 2009) 7–8 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03091.html>.

121 *Bulletin*, above n 8, 9 [2].

IV AUSTRALIAN APPROACH TO LENIENCY

A *The Background*

The reforms that occurred in Australia with the passage of the *Trade Practices Amendment (Cartel and Other Measures) Act 2009*,[122] taking effect from 24 July 2009, were as far-reaching as the Canadian reforms discussed above. The amendments created a dual-track system of indictable criminal offences and civil penalty prohibitions directed at so-called 'serious' cartel conduct.[123] The ACCC and CDPP have agreed to cooperate with each other in order to achieve efficient and effective outcomes but recognise each other's separate responsibilities for investigation and prosecution, respectively. The ACCC retains responsibility for prosecuting breaches of the civil prohibitions. Penalties have been substantially increased and, significantly, include imprisonment for up to 10 years for individuals convicted of the serious cartel offence.[124]

The amendments were accompanied by a number of ACCC publications intended to provide guidance on how the new bifurcated system would operate. The ACCC published a guide as to how it would approach cartel investigations,[125] updated its immunity policy[126] and published guidelines on its interpretation ('*Guidelines*').[127] The new dual track arrangements inevitably involved the CDPP and the ACCC in a significant amount of cooperation and for this reason the agencies entered into the *MOU (Aus)*. Beyond the motherhood recitals that they 'recognise each other's respective roles in the criminal investigation and prosecution process and that close cooperation and consultation is required to achieve efficient and effective outcomes',[128] the *MOU (Aus)*, unlike its Canadian counterpart, provides a cursory description of these roles and responsibilities. In it the agencies have

122 *Trade Practices Amendment (Cartel and Other Measures) Act 2009* (Cth).

123 A cartel provision is a provision to fix prices, restrict capacity or output in the production or supply chain, to allocate customers, suppliers or territories or to rig bids: ibid ss 44ZZRD(1)–(2). A corporation commits a criminal offence if it makes a contract or arrangement or arrives at an understanding that contains a cartel provision provided it has the requisite fault element: ibid s 44ZZRF(4). The *Criminal Code Act 1995* (Cth) s 3.1 provides that an offence against the law of the Commonwealth consists of both physical and fault elements. For the purposes of s 44ZZRF the 'fault element' is 'knowledge or belief': *CCA* s 44ZZRF(2).

124 An individual convicted of a cartel offence may be imprisoned for a maximum of 10 years or fined up to $220 000, or both: *CCA* s 79(1). A corporation found guilty of an offence may be fined up to the greater of $10 million or three times the total value of the benefit derived from the conduct, or, if the latter value cannot be determined, then the greater of $10 million or 10 per cent of its annual turnover: *CCA* s 44ZZRF(3). An individual who contravenes the existing civil prohibition may be liable to pay a pecuniary penalty of up to $500 000 per contravention: *CCA* s 76.

125 *ACCC Approach to Cartel Investigations* (14 July 2009) <http://www.accc.gov.au/content/index.phtml/itemId/1010860>.

126 The ACCC updated its Immunity Policy. See ACCC, *Immunity Policy for Cartel Conduct* (2009) <http://www.accc.gov.au/content/item.phtml?itemId=879795&nodeId=f66a352b170982e5308039195ba68521&fn=Immunity%20policy%20for%20cartel%20conduct.pdf>.

127 ACCC, *ACCC Immunity Policy Interpretation Guidelines* (2009) <http://www.accc.gov.au/content/item.phtml?itemId=879795&nodeId=eb2cc256f6140a0f6a026e3b9aae9db9&fn=Immunity%20policy%20interpretation%20guidelines.pdf>.

128 *MOU (Aus)*, above n 10, [2.1].

agreed that the ACCC is responsible for investigating and gathering evidence of cartel conduct, managing immunity applications and referring 'serious' cartel conduct to the CDPP for possible prosecution.[129] The CDPP is responsible for the prosecution of such offences.[130] Serious cartel conduct is conduct of a type that can cause 'large scale or serious economic harm', as determined by reference to a non-exhaustive list of factors.[131]

Once a matter has been referred to the CDPP for possible prosecution, the Director will decide whether to prosecute having regard to the criteria in the Prosecution Policy[132] (which contains no provisions for *cartel* prosecutions per se) and the same factors that the ACCC considers when deciding whether to refer a matter to the CDPP in the first place.[133]

B *Settlement and Leniency for Criminal Cartel Offences*

In the *MOU (Aus)* the agencies have agreed on the process for dealing with immunity applications in relation to possible serious cartel conduct.[134] They have agreed that the ACCC receives and processes immunity applications and then makes recommendations to the CDPP, which makes the decision. Ironically, the agencies accept that effective immunity programs rely on the 'maximisation of certainty and minimisation of discretion as far as reasonably possible'.[135] The irony derives from the failure of the agencies to mention leniency or settlement processes in the *MOU (Aus)*, quite unlike the approach adopted in Canada. This 'glaring omission'[136] is compounded because the ACCC has no equivalent to the Bureau's *Bulletin*. Thus, where the regulator is considering referral to the CDPP for possible prosecution, there are no transparent leniency guidelines to induce cooperation with the regulator in exchange for discounted penalties.

This void is symptomatic of the ACCC's general scepticism regarding pre-referral negotiations because it may be accused of using referral as a bargaining chip to get a swift (civil) resolution. The Chairman of the ACCC has made it clear that it will push hard for criminal prosecutions where the criteria are met and has indicated that the ACCC will not negotiate until the decision on referral has been made:

> the ACCC will always support a criminal prosecution … there will be no point trying to negotiate resolution of a serious cartel matter in the way

129 Ibid [2.3].

130 Ibid [2.2].

131 Ibid [4.4]. These factors include whether the conduct was longstanding, or had a significant impact on the market, or caused significant detriment to one or more customers, or whether one or more of the parties had prior convictions for cartel conduct or, finally, whether the value of the affected commerce exceeded $1 million within a 12 month period or, in the case of bid rigging, the value of the bid exceeded $1 million within a 12 month period.

132 Office of the Director of Public Prosecutions, above n 76, [2.1]–[2.14].

133 *MOU (Aus)*, above n 10, [5.1]–[5.2].

134 Ibid [7.1]–[7.2].

135 Ibid [7.1].

136 Caron Beaton-Wells, 'Forks in the Road: Challenges Facing the ACCC's Immunity Policy for Cartel Conduct: Part 2' (2008) 16 *Competition and Consumer Law Journal* 246, 264.

> that may have been done when civil proceedings were the only option. The ACCC will simply not negotiate when a criminal prosecution is available for such conduct. It will never allow the prospect of a criminal prosecution to be traded away by an attractive offer to resolve the matter through civil penalty proceedings and the payment of a large penalty.[137]

Samuel expressed similar views, but with a theatrical flourish, at a recent forum:

> we'll walk out of the room … The position of our investigators is that … once they start a criminal investigation, if someone then says to them, 'Can we discuss?', at that point, the hand goes up and they walk out of the room. They will not even discuss it. The great strength that gives us is this: the prospective defendants know that the moment a criminal investigation has started it cannot be stopped; you can't buy your way out of jail.[138]

This restricted view on the propriety of transparent leniency or settlement or sentencing negotiations reflects a view that Australian businesses and individuals engaged in cartel conduct have historically regarded fines, even heavy ones, as no more than a cost of doing business. The introduction of criminal penalties that include prison sentences has altered the balance in favour of the regulator and it is clearly not intending to trade the advantage it now believes it has.[139]

C *CDPP Policy on Leniency*

The focus of this paper is on the competition regulator's approach to leniency and settlement in cartel cases. However, upon referral, the reality is that it is for the CDPP to decide how to deal with defendants who, though not eligible for immunity, wish to cooperate. The Prosecution Policy makes it clear that only the first application for immunity from criminal prosecution is dealt with under Annexure B of the Prosecution Policy and the *MOU (Aus)*; subsequent applications for immunity/leniency are dealt with by the CDPP in accordance with the Prosecution Policy per se.[140] Not surprisingly, given the CDPP was a party to the *MOU (Aus)*, there are no references to the process or the circumstances in which leniency or settlements will be negotiated and there are no guidelines on sanctions, including discounts for cooperation. Under s 9(6) of the *Director of Public Prosecutions Act 1983* (Cth) the CDPP may in limited circumstances give an undertaking that the person will not be prosecuted. Further, the Prosecution Policy states that:

137 Graeme Samuel, 'The ACCC Enforcement Perspective on Serious Cartel Conduct' (2009) 17 *Trade Practices Law Journal* 244, 249.

138 Barry E Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law 2009* (Juris Publishing, 2010) 67.

139 The ACCC would not want to be cast in the same light as ASIC which came under intense criticism for the deal struck with Steve Vizard, a high profile businessman and director of Telstra, who was charged with improperly using confidential information gained through his role as director, but who, in exchange for not being prosecuted for a criminal offence, pleaded guilty to the lesser civil offence. When the agreed fine was submitted to the Court for approval, the judge in the civil case doubled the penalty.

140 Office of the Director of Public Prosecutions, above n 76, 28 [3.8].

> In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participate in alleged offences in order to secure their evidence in the prosecution of others … However it has long been recognised that in some cases granting an immunity from prosecution may be appropriate in the interests of justice.[141]

The centrepiece is the Charge Negotiation section of the Prosecution Policy.[142] Although negotiations between the defence and prosecution are to be encouraged, and there is a wide range of factors to take into account, the CDPP will not negotiate on the agreed facts to be presented to the court on a guilty plea, nor will it negotiate if the defendant continues to assert innocence with respect to a charge to which he or she has offered to plead guilty.[143] Whilst the CDPP will not agree on a recommendation as to sentence, it may agree to a defence request that the prosecution 'not oppose' a defence submission to the court at sentencing that the penalty fall within a nominated range (provided the penalty or range is considered to be within acceptable limits).[144]

The conclusion to be drawn from this set of policies is that transparency, accountability, certainty and predictability are not hallmarks of Australia's leniency/settlement programs; the preservation of regulatory discretion is the paramount consideration. Similarly, in relation to the impact of plea agreements on sentencing outcomes, the *Crimes Act 1914* (Cth) provides for a guilty plea and the degree to which an offender has cooperated with law enforcement agencies to be taken into account in sentencing, but there is no express provision for a discount nor any guidance on how the discount might be calculated or the factors that might be relevant in any calculation.[145]

D *ACCC and Leniency for Civil Offences*

Where the ACCC decides not to refer a matter to the CDPP (or the CDPP advises that it will not prosecute) the pre-amendment position is resumed: the ACCC may initiate a civil prosecution and assume responsibility for both immunity and leniency applications. Its approach to such applications can be gleaned from the (new) *Guidelines*[146] and the (old) *Cooperation Policy for Enforcement Matters* ('*Cooperation Policy*').[147] After acknowledging in the latter document that 'the efficient use of resources in the public's best interests require the Commission has clear priorities in its selection of matters for enforcement …'[148] the *Guidelines*

141 Ibid 17 [6.5].

142 Ibid 19.

143 Ibid [6.19].

144 Ibid [6.21].

145 *Crimes Act 1914* (Cth) ss 16A(2)(g)–(h). The Australian Law Reform Commission, in its 2006 report on federal sentencing, recommended that there be a statutory prescription of the factors that a court must consider in determining the extent of a discount: Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006).

146 ACCC, above n 127.

147 ACCC, above n 9.

148 Ibid 'Introduction'.

state that the *Cooperation Policy* can provide 'valuable flexibility … without reducing the efficiency of the immunity policy' by allowing the ACCC to 'gather additional evidence that may help in the prosecution of cartel participants and allow the ACCC to negotiate an agreed penalty for recommendation to the court and thus avoid the need for contested litigation'.[149]

Clearly, the *Cooperation Policy* and the *Guidelines* are an attempt to strike a balance between the need, on the one hand, to protect the unique advantages and efficiencies of the immunity offer to the first cartel participant to knock on the regulator's door and, on the other, the need to provide incentives to anyone who lost the race but still wishes to cooperate in exchange for leniency.[150] Any leniency in exchange for cooperation deal 'will both assist the ACCC to gather additional evidence that may help in the prosecution of cartel participants and allow the ACCC to negotiate an agreed penalty for recommendation to the court and thus avoid the need for contested litigation'.[151]

However, the unfortunate truth is that the *Cooperation Policy* does little to advance the notion that leniency deals should be negotiated in a spirit of accountability, openness and predictability. It is the antithesis of the Canadian model: it has not been updated since 2002, it provides a few general guidelines but makes no reference to cartels per se, no commitments about concessions or rewards for cooperation and no reference to any protections that may apply.[152] The regulator is intent on protecting its position and giving nothing away in its dealings with those who have missed the immunity carrot but wish to strike a leniency deal.

The *Cooperation Policy* outlines the circumstances in which leniency is likely to be considered appropriate[153] and, in the event that the regulator acknowledges the cooperation, confirms that the ACCC has discretion as to the form that recognition may take. For example, an individual may receive 'complete or partial immunity from action by the Commission, submissions to the court for a reduction in penalty or even administrative settlement in lieu of litigation'.[154] The ACCC is free to reach an agreement with parties about joint submissions to be placed before the court and exercises this right 'if it is satisfied that a corporation

149 ACCC, above n 127, [95].

150 Ibid [94].

151 Ibid [95].

152 There is no reference to confidentiality of any documents provided, no provision for paperless applications, no reference to whether any documents would be privileged or provided on a 'without prejudice' basis.

153 See ACCC, above n 9, 2:

> Leniency, including immunity, is most likely to be considered appropriate for individuals who:
>
> - come forward with valuable and important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings
> - provide the ACCC with full and frank disclosure of the activity and relevant documentary and other evidence available to them
> - undertake to cooperate throughout the Commission's investigation and complying with that undertaking
> - agree not to use the same legal representation as the firm by which they are employed
> - have not compelled or induced any other person or corporation to take part in the conduct or having been a ringleader or originator of the activity.

154 Ibid 1.

or individual, which has not been granted immunity, has cooperated with it in a substantive way'.[155]

In deciding whether to reach an agreement on penalties and what the agreement should be, the *Cooperation Policy* sets out a range of factors that the ACCC takes into account.[156] However, unlike the approach taken in Canada, there is no guidance on how penalty discounts are calculated and, unlike in the US, there are no external sentencing guidelines.[157] Although the final decision is a matter for the court, it is common practice in a negotiated agreement for the parties to agree on the penalty and make a joint submission to the court which, in virtually all instances, endorses, although this should not be taken for granted.[158]

Despite its shortcomings as a policy document, in practice, many negotiated settlements and joint submissions to the court on penalties flow from the operation of the *Cooperation Policy*. So much so that since 1994, settling cases by way of a negotiated settlement has become the standard practice.[159] The settlement process has typically required the defendant to withdraw denials of liability (if not admit guilt) after which both parties sign an agreed statement of facts with the recommended penalties that is then tendered jointly to the court for endorsement. This approach, of seeking settlement ahead of a full adversarial hearing, has enabled the agency to close cases and claim victories at a more efficient rate than would otherwise have been possible.[160]

155 Ibid 3.

156 Ibid.

157 Beaton-Wells and Fisse, above n 17, 473–5, 531–2. While the *CCA* identifies several factors that should be taken into account in determining a penalty, it does not provide precise guidelines as to the amount of a penalty or the relative weight of the various factors: *CCA* s 76. In addition, there are a further six factors that were identified by French J in *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076, 52, 152–3 (the 'French factors') and three additional factors outlined by Heerey J in *NW Frozen Foods v ACCC* (1996) ATPR ¶41-515, 42,444–5.

158 In *ACCC v Colgate Palmolive Pty Ltd* (2002) ATPR ¶41-880, [34] Weinberg J said:

> The Court may be seen, perhaps not altogether incorrectly as a 'rubber stamp' in simply approving a decision taken at an executive level by a body charged with investigating and prosecuting contraventions of the Act, but having no role in actually imposing particular sanctions for those contraventions. Negotiated settlements are an important vehicle for resolving complex matters … It must be borne in mind however that there is a public interest in ensuring that corporations that engage in behaviour of the kind that occurred in this case are dealt with appropriately, and that proper recognition is given to the need for specific and general deterrence.

159 The ACCC annual reports indicate that in 2006–07 three cartel proceedings were instituted of which two were concluded by consent orders. In 2007–08 all eight cartel proceedings were concluded by consent orders and in 2008–09 all five cartel proceedings were concluded by consent orders: see Australian Competition & Consumer Commission, *ACCC Annual Reports* (2012) <http://www.accc.gov.au/content/index.phtml/itemId/668577>.

160 Although common practice, the process of arriving at a negotiated settlement has been the subject of considerable criticism: see Caron Beaton-Wells, 'Comment: Recent Corporate Penalty Assessments under the Trade Practices Act and the Rise of General Deterrence' (2006) 14 *Competition and Consumer Law Journal* 65. See also Caron Beaton-Wells, 'Cartel Criminalisation and the Australian Competition and Consumer Commission: Opportunities and Challenges' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 183, 190.

V CONCLUSION

In the wake of recent policy papers, discussions and the introduction of a formal settlement procedure by the influential European Commission (following the long-standing tradition of plea bargaining in the US) there appears to be momentum for the adoption of more formalised settlement or leniency procedures, in one form or another. This paper considers some of the assumptions, risks and benefits associated with the settlement option and then, because the similarities between the two competition law regimes make it possible, compares the settlement/leniency approach adopted in Canada and Australia.

In 2010, the Canadian Bureau demonstrated a commitment to transparency of its own decision-making processes, a key element of procedural fairness, and a willingness to be open with defendants about the investigation. It has introduced considerable certainty about the inducements and acknowledged the need for defendants to have faith that the Bureau, although it may be unable to guarantee a sentencing outcome, will honour its commitment when making its recommendations to the PPSC. Unfortunately, in Australia, the ACCC missed its opportunity to do the same. Despite the long gestation period for the criminalisation amendments and the numerous policy papers that ushered in the new era, the ACCC showed no inclination to either revise its own outdated *Cooperation Policy* or, taking its lead from Canada, draft a new leniency policy applicable to the new dual-track cooperative regime. Regrettably, the truth is that nothing occurred during this period of policy development. Calls to formalise the process in the interests of 'greater transparency predictability and certainty … have largely been rejected …' [161] However, this approach and the absence of any sentencing guidelines may, in the opinion of leading scholars, 'deter defendants from pleading guilty [which] could have implications for the extent to which the criminal regime is able to produce 'results' within a time frame that matches expectations'.[162]

The expected increase in the number of cartels being reported is likely to also increase pressure on regulators to facilitate settlement of as many cartel cases as possible. For this reason the ACCC should consider the work of its Canadian counterpart and draft a policy designed specifically for cartels that contains a transparent, clear and predictable process with sufficient incentives for parties who have missed out on the immunity carrot but wish to cooperate with the regulator and do a deal.

161 Beaton-Wells and Fisse, above n 17, 400–1.

162 Ibid 401.