The increasing criminalization of economic law – a competition law perspective

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Acknowledgements


Abstract

Purpose – The purpose of this paper is to examine the trend towards the criminalization of hard core cartel conduct and to consider the appropriateness and effectiveness of extending the criminal law to this conduct. In addition, it will consider some of the legal implications, including the exposure of directors of companies to potential racketeering charges.

Design/methodology/approach – The paper first examines cartel theory and the justification for prohibition. The paper then identifies the emerging trend toward criminalization of hard core cartel conduct, followed by an assessment of potential justifications for criminalization. Implications of criminalization, including the potential impact of organized crime legislation on offenders and regulators, will then be considered.

Findings – There is a clear trend towards the criminalization of hard core cartels. The paper argues that this trend is appropriate, both because of the moral culpability it attracts and because of its potential to enhance general deterrence. The paper also argues that cartel conduct, in jurisdictions in which it is criminalized, will constitute “organized crime” as defined in the Palermo Convention and, as such, expose participants to potential money laundering and asset forfeiture consequences.

Originality/value – This paper is of value to governments and regulators considering adoption or implementation of a criminal cartel regime and to practitioners in advising clients about potential consequences of cartel conduct within a criminal regime.

Keyword(s):

Cartel conduct; Organized crime; Criminalization.

Introduction

Although there is no universally accepted definition of “economic crime”, there can be little doubt that illegal cartel conduct fits squarely within any reasonable definition, whether it focuses on the motive of the individuals or corporate entities involved or purely their financial returns. Some have gone as far as to describe it as “the economic crime par
excellence” (Ball and Friedman, 1964/1965; Kadish, 1963). Cartels involve conduct between competitors designed to limit the amount of competition in the markets in which they operate. This unlawful market manipulation for financial gain has been labeled the “supreme evil of antitrust”[1] and a “veritable cancer in an open, modern market economy” (Monti, 2002).

Competition (or antitrust law in the USA) is almost exclusively targeted toward economic outcomes. While competition policy may facilitate goals beyond the pure economic, it is principally the economic consequences of anti-competitive conduct that provided the genesis for the development of competition laws and remain the central consideration in competition policy and enforcement today. Competition policy is predicated on the notion that a competitive business environment is better – economically and socially – than one which is uncompetitive. Cartel conduct, as the most egregious form of anti-competitive behaviour, is an anathema to free market competition.

Despite the recognition of harm, cartel conduct has, until recently, largely avoided the tag of “economic crime” by virtue of the fact that, with the notable exception of the USA, it has remained relatively immune from criminal classification or, at least, effective criminal enforcement.

There is, however, an emerging trend toward criminalization and an increasing recognition of the importance of protecting against economic harm occasioned by cartels, particularly those operating on the international stage.

This paper discusses possible explanations for the predominantly “civil” approach taken to cartel conduct until recently and assesses whether the current trend toward criminalization is appropriate, particularly in times of economic distress. The paper concludes by considering some of the implications and challenges associated with categorizing cartel conduct as “economic crime.”

**Cartel theory**

There are a variety of possible explanations for the traditional failure of most countries to classify cartel conduct as criminal, notwithstanding recognition of economic harm occasioned by cartels and the clear parallels between cartel conduct and other forms of recognized economic crime, including corporate fraud.

One explanation may be the lack of broad public recognition that cartel conduct is wrongful or that it causes significant harm (Parker, 2006; Stucke, 2006). This perception differs between jurisdictions, but is highlighted by a recent survey suggesting that only one in ten Britons think imprisonment is appropriate for individuals engaged in cartel conduct (Stephan, 2009)[2]. It was also recently exemplified in Australia by divided public opinion over the moral culpability to be attributed to high flying businessmen and philanthropist[3], Richard Pratt, following admissions of long-term cartel conduct, described by the sentencing judge as the “most serious cartel case to come before the Court in the 30 plus years in which price fixing has been prohibited by statute”[4]. Even Australia’s Prime Minister at the time, John Howard and the Victorian premier made statements in support of the businessman, which have been appropriately described as “somewhat troubling” (Hoel, 2008) and which make it more difficult for the public to appreciate the serious nature of the harm caused and the moral blameworthiness that it should attract (Hoel, 2008).
Even where “economic harm” is acknowledged, the “indirect” nature of the harm caused to individual members of the public does not elicit the same emotional response and moral condemnation as more traditional crimes, such as theft, which are more likely to target individuals.

This public disconnect between cartels and harm is magnified by the often substantial delay between the occurrence of the cartel conduct and its discovery. A judicial determination years after the cartel event, that consumers may have been overcharged (cumulatively) $50 as a result of artificial market distortions attributable to cartel conduct, does not raise the immediate sense of injustice that would be felt should $50 be snatched from their wallets.

The apparent disconnect between conduct and harm also raises the philosophical – and perhaps metaphysical – question about whether or not (economic) harm can be said to be caused if the victims are not aware that they have experienced harm (Grayling, 2010). A negative answer would not necessarily provide a case against criminalization, but the question should nevertheless be answered in the affirmative. The fact that an individual or corporate entity has less money than it would have, but for a specified act, does not mean that the financial harm has not been suffered; it simply obscures the source. The “victims” have less funds at their disposal which will normally have a negative – even if only marginal – impact on their quality of life (Grayling, 2010) whether they are aware of how much better off they might have been or not.

It is clear that the often immediate, direct and identifiable harm caused by more traditional “crimes” explains the general willingness of the public to classify that conduct as socially or morally reprehensible and to support criminal sanction for perpetrators, while failing to attach the same moral opprobrium to cartel conduct, even where it generates greater profits for its participants and produces considerably more collective societal harm (Sutherland, 2001). It is also unsurprising that the lack of public perception of the seriousness of cartel harm frequently translates into a lack of political will to implement change toward criminalization.

Experience in some jurisdictions does, however, suggest that public perception can be changed through dissemination of information about cartel harm and through promotion of high profile cases illustrating that harm (Ball and Friedman, 1964/1965). The international vitamins cartel appears to have had a significant impact in that respect (Connor, 2006). Experience in the financial sector also suggests that public perception can be shaped by significant events which bring to light economic regulatory failure. Few now doubt the appropriateness of criminal sanctions for those executives, like Bernie Madoff, involved in defrauding the public.

It is, therefore, important that in order to improve public awareness of the purpose of cartel law and to garner support for criminalization, if and where appropriate, that the economic and social harm attributable to cartel conduct is identified. Over time this may produce a “normative change within society” (Hoel, 2008) about the morality of that conduct and the appropriateness of criminalization.

Cartel conduct re-allocates money from victims (normally consumers, either directly or indirectly) to cartelists by depriving consumers of the benefit of price competition that they would otherwise enjoy in a free market. Although the direct profit transfer from consumers to producers is regarded by some as economically neutral, because the wealth remains within the economy, the better view is that consumers should be entitled to competition generated
consumer surplus. This is because the “competitive scenario” is normal in a free market economy and the distributional consequences arising from the distortion of natural market conditions, or market failure, caused by cartel conduct constitutes an unfair “taking of consumer property”[5]. Free and natural market conditions determine that consumers should be entitled to the benefits generated through free competition (Lande, 1982).

Even if it was not accepted that the distributional effects of cartels were sufficiently harmful to warrant moral condemnation, cartel-generated financial harm is not restricted to a direct transfer of wealth from consumers to producers, but also exists in the form of deadweight loss resulting from the impact effective cartels have on the natural competitive process, which affects supply and demand and can cause “buyers and sellers to misallocate their spending” (Scott, 2008).

The potential for cartel conduct to cause considerable economic harm in this way is now widely recognized. There remain, however, difficulties with estimating that harm with precision[6]. These difficulties arise because, even where cartel conduct is detected, harm assessment requires counterfactual predictions about pricing and consumer conduct that are necessarily imperfect. A number of studies have, however, made attempts to produce estimates of cartel harm and, although they vary (sometimes considerably), “the consensus is that most cartels will improve their profits by at least 10 per cent through collusion” (Scott, 2008). Many studies put the figure much higher (Connor, 2004).

In addition to direct distributional harm, cartels harm society by limiting or removing other benefits associated with free competition. These include improved innovation, efficiency, “diversity and quality of the products, promotional effort, and pre-sale and post-sale services” (Gilbert and Sunshine, 1995).

In dollar terms, conservative estimates put the harm of cartels in excess of many billions of US dollars annually (OECD, 2002a, b). For example, it has been estimated that the global vitamin cartel alone caused harm of US$7.5 billion in overcharge (cost transfer to producers) and an additional dead weight loss of more than $2 billion (Connor, 2006, 2007). That cartel, which operated during the 1990s, was described by then US assistant Attorney General, Joel Klein, as:

[…] the most pervasive and harmful criminal antitrust conspiracy ever uncovered. The […] conduct of these companies hurt the pocketbook of virtually every American consumer […] This cartel […] lasted almost a decade […] The enormous effort that went into maintaining the conspiracy reflects the magnitude of the illegal revenues it generated […] (Klein, 1999).

More recently another long-term international cartel, this time relating to international air cargo, has been the subject of attention in numerous jurisdictions, with total global fines so far exceeding $1 billion dollars[7].

It is clear that even in the absence of precise harm estimates, the harm to the economy caused by cartel conduct is potentially very significant and justifies condemnation of cartels through competition laws.

**Cartel enforcement during periods of economic distress**
Before considering the trend toward criminalization and the desirability or otherwise of continuing this trend, it is important to assess the appropriate place for competition policy during periods of economic crisis.

In this respect, some commentators have warned that competition policy may be weakened by the crisis because it:

[…] is still fragile and vulnerable to crude, populist, deeply flawed claims that it is an unnecessary luxury in times of recession or even that the crisis itself is due to “too much competition” (Vaitilingam, 2009).

Contrary to the populist view, history suggests that suspension or relaxation of competition policy can prolong the effects of an economic downturn rather than assist recovery. One study has estimated that:

President Roosevelt's suspension of competition policy in the 1930s […] was responsible for raising unemployment by 24 per cent and extending the Great Depression for seven years (Cole and Ohanian, 2004; Vaitilingam, 2009).

The failure of North American competition policies of the 1930s have, not surprisingly, been invoked by today's regulators to warn against a similar approach to the current economic downturn. The Assistant Attorney General of the Antitrust Division of the US Department of Justice, Christine Varney, has recently repeated the observation that previous efforts to protect cartelists during economic downturn have contributed to and exacerbated the problem rather than solving it (Varney, 2009). There is, she argues, “no adequate substitute for a competitive market, particularly during times of economic distress” (Varney, 2009).

These are views mirrored by other competition agencies, if not all governments. For example, Neelie Kroes, former European Commissioner for competition policy, made clear early in the current downturn that she saw no “trade-off between competition policy and financial stability” and that competition policy was a tool to be used “to manage orderly the return to normal market functioning” (Kroes, 2009):

[I]n tough times, market distortions caused by […] anti-competitive practices hurt us even more than in good times […] We would do no favours to the economy by going soft on enforcement. If anything, anti-competitive activities – such as cartels – hurt consumers and the economy more in the bad times (Kroes, 2009).

Similarly, Peter Freeman, Chairman of the UK Competition Commission, expressed the strong view that we “must not […] retreat on the principles of competition” in times of economic distress (Freeman, 2008).

Even Alan Greenspan, former US Chairman of the Federal Reserve, and long-time opponent of antitrust policy (Greenspan, 1986), has recently conceded that he had been mistaken in putting too much faith in the markets to self-correct distortions and has pushed for more regulation (particularly of the financial sector) following the recent financial collapse (Andrews, 2008).

It is clear that economic distress makes markets more vulnerable to anti-competitive behaviour (Varney, 2009). The benefits produced by competition (backed by strong competition policy) are also more acute in times of economic downturn, which often produce an increasing number of opportunistic mergers and “crisis cartels”. Governments must, therefore, resist the temptation to suspend or relax competition policy in the mistaken hope
that it will somehow relieve the current distress for some sectors of the economy (Vaitilingam, 2009).

Counter intuitively, perhaps, economic distress might even provide an opportunity for the more vigilant enforcement of cartel conduct to avoid (or reduce) the long-term consequences of recession by ensuring that markets remain competitive (Vaitilingam, 2009; Varney, 2009).

**The “criminalisation” of cartel conduct**

Criminalisation of cartel conduct is not new phenomenon. The first country to criminalise cartel conduct in modern times[8] was Canada in 1889 and the USA followed a year later with the introduction of the Sherman Act.

However, despite increasing recognition of its harmful effects on the economy, anti-competitive conduct has, in most jurisdictions, remained immune from serious criminal sanction. The USA has stood out as the only jurisdiction that has a history of actively prosecuting cartels criminally and, in particular, remains the only country in which jail terms for executives remain commonplace.

In the last 20 years, however, criminal penalties for cartel conduct have been introduced or enhanced in a growing number of countries. There are several possible explanations for this. Significantly, in the 1990s, the USA, in addition to making international cartel prosecution one of its highest priorities[9], began vocal advocacy of the need for, and benefits of, individual liability for cartel conduct, particularly in the form of criminal penalties. This advocacy was made easier by the expansion of the internet for public use in the 1990s which permitted fast and widely accessible communication of information globally for the first time. The high profile nature of some of the international cartels the US agencies successfully prosecuted also caught the attention of regulators and the public worldwide, perhaps most notably the “vitamin cartel and the nearly billion dollars in fines imposed against [its] members” (Hammond and O’Brien, 2010). In addition to fines, 12 individuals were sentenced to serve time in prison in the USA for their participation in that cartel. While some other jurisdictions also imposed record fines, “no cartel member served a single day in jail outside the United States” (Hammond and O’Brien, 2010), a fact that cannot have gone unnoticed by regulators and other interested observers (Clarke and Evenett, 2002).

In addition to the US push for the spread of criminalization in cartel enforcement, in 1998 the OECD issued its Recommendation of the Council Concerning Effective Action Against Hard Core Cartels[10] which identified certain forms of cartels as “hard core” in an apparent (and at least partially successful) attempt to stigmatize this type of conduct and thereby alter public perceptions about its moral content and the importance of its prohibition and sanction[11]. The OECD has since also recommended criminal sanctions for cartel conduct in appropriate cases (OECD, 2003). This organizational recognition of the seriousness of cartel conduct on national economies has also provided an international mandate to which regulators can refer when lobbying for tougher sanctions or promoting cartel enforcement to the broader public. It is clear that, at least in some cases, the desire to be seen as consistent with – or tougher than – international best practice in this area has motivated governments into action.

Related to this is an increasing acceptance that criminal penalties are needed to provide effective general deterrence of cartel activity. The appropriateness and effectiveness of
criminal sanctions for deterrence will be examined in the next section, but there is little doubt about its influence in catalyzing the move toward criminalization.

Countries criminalizing cartel conduct now include Australia, Brazil[12], Canada, Estonia[13], France (Calvet and Seng, 2010; Calvani and Calvani, 2009), Germany[14], Greece[15], Ireland, Israel[16], Japan[17], Macedonia[18], Mexico[19], Norway (Ludvigsen and Syrdal, 2010), Romania (Harapcea, 2010), Russia[20], the Slovak Republic (Černejová and Steinecker, 2010), South Africa[21], South Korea[22], the UK (Department of Trade and Industry (UK), 2001) and the USA[23].

Most of these laws have been enacted in the last 20 years. Australia, Macedonia and South Africa all introduced jail terms in 2009 with maximum jail terms of ten years for those involved in the contravention. This year both Canada and Japan increased their maximum penalty to 14 and five years, respectively.

In addition, New Zealand (Power, 2010) and The Netherlands (de Pree and Evans, 2010) are currently considering the introduction of criminal penalties for cartel conduct and are expected to announce criminal cartel legislation this year. Belgium is also considering imposing criminal sanctions for hard core anti-competitive conduct (Gilliams et al., 2010).

Even where criminal penalties are not available, civil penalties appear to be on the rise. A recent ICN survey on cartel activity noted that of the 45 Member States who participated, 43 had increased cartel penalties over the last ten years[24].

Even in the USA, recent years have seen a noticeable rise in the volume of cartel cases pursued criminally and the penalties, including jail time, imposed for contraventions. Although the Sherman Antitrust Act of 1890 was passed to combat monopolistic practice, including by way of cartel agreements[25] and thereby “protect the public from the failure of the market[26],” criminal enforcement was not always as aggressive and politically supported as it is today. In particular, more than 70 years after its passage it was observed that “the history of antitrust enforcement to date should not cause undue alarm to the corporate executive” (Whiting, 1961; Ball and Friedman, 1964/1965). However, despite a patchy beginning (including suspension during the Great Depression (Vaitilingam, 2004)), cartel members are now “being sent to jail with increasing frequency and for longer periods of time” (Hammond and O'Brien, 2010; Calvani and Calvani, 2009).

In 2007 defendants prosecuted by the Antitrust Division were sentenced to a record combined total of 31,391 days (approx. 86 years) imprisonment (Silverman and Synnott, 2010). More recently, in 2009, the DOJ obtained the longest prison sentence for a “single-count Sherman Act offence in history” – 48 months (Silverman and Synnott, 2010). In the 2009 fiscal year it obtained more than US$1 billion in criminal fines, a significant increase on previous years, in keeping with an upward trend (Silverman and Synnott, 2010).

This has been, in part, facilitated by the passage of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (USA) which increased the maximum corporate fine from $10 million to 100 million, the maximum individual fine from $350,000 to 1 million and the maximum prison term from three to ten years[27] and by sentencing guidelines which have increased the willingness of courts to sentence convicted cartelists to imprisonment (Calvani and Calvani, 2009).
Outside the USA, however, regulators have yet to flex their muscle in respect of imposition of jail terms for cartel offenders. Neither Estonia nor Russia has imposed custodial sentences. Ireland has imposed custodial sentences but these have been suspended. Japan has imposed custodial sentences but stayed them in each case. Canada frequently permits offenders to serve in home detention. Israel has imposed only brief prison terms (Calvani and Calvani, 2009).

In the UK, although one lengthy criminal conviction has been secured[28], this involved a plea bargain with US authorities and admissions of guilt[29]. The only case in which the UK Office of Fair Trading has attempted to prove conduct in court fell apart earlier this year as a result of procedural errors by the OFT[30]. Perhaps not surprisingly, concerns (or relief) have been raised that the OFT has lost enthusiasm for criminal penalties, with Director Disqualification Orders appearing to be a more important enforcement priority (Stephan, 2009). The new coalition government in the UK has, however, recently announced that it takes white-collar crime as seriously as other crime and will create a single agency bringing together economic crime work currently performed by, *inter alia*, the Serious Fraud Office and the OFT (HM Government, 2010).

Generally, however, it is clear that the trend toward criminalizing cartels is “gathering momentum around the world” (Hammond and O'Brien, 2010), even if enthusiastic and successful enforcement of the criminal prohibitions has yet to take hold.

**Is it appropriate to criminalize cartel conduct?**

Whether one looks upon the current trend toward criminalizing favorably or with hostility, it is important to consider closely the rationale beyond this move; in particular, is criminalization appropriate? The criminal law is “society's strongest form of official punishment and censure” (Ashworth, 1995) and it is a “fundamental ethical principle that we may not inflict pain or disgrace upon another without adequate justification” (Barry, 1962/1964). Criminalization of cartel conduct, particularly where extending beyond fines to the threat of imprisonment, therefore requires justification.

There are broadly three reasons why it may be argued that cartels ought to be subjected to criminal penalties:

1. The conduct is morally reprehensible at therefore appropriately criminal.
2. Other less harmful conduct is already criminal.
3. Criminalization is necessary to effectively deter cartel conduct.

**Cartel conduct is appropriately criminal**

Criminalization is appropriate for deliberate activity which inflicts economic harm on consumers[31]. Cartel conduct is widely considered to be an “anathema to the public interest” (Samuel, 2009) capable of causing significant economic harm. It is not “victimless and certainly not morally neutral” (Hoel, 2008; Ball and Friedman, 1964/1965) and, as a result, it has been argued that, by its nature, cartel conduct ought to be criminalized.

The argument does, however, presuppose that there is some accepted rationale underpinning the criminal law. While it is easy to accept the principle that for an act to be deserving of blame and the deliberate infliction of punishment it must breach some type of norm or
standard (ALRC, 2002) beyond that general principle there does not appear to be any underlying rationale for criminal law, given the broad spectrum of conduct currently criminalized (Bagaric, 2001). The criminal laws are not confined, for example, to conduct which involves violence (such as murder and rape) or to conduct which inflicts direct harm – or any harm at all – but extend to a variety of regulatory offences, apparently offering a convenient means by which to control, deter or punish anti-social behaviour. Many existing criminal offences are no worse than civil wrongs and the basis for characterization of conduct as one or the other “has been neither logical nor consistent” (Freiberg and McCallum, 1979).

Consequently, although “moral culpability” is sometimes touted as justification for criminalizing cartel conduct (Hoel, 2008), this would not appear to be supported by the existing criminal and civil divide. Much immoral conduct is (appropriately) not criminalized and there are clearly forms of criminal conduct which are unlikely to be considered by most members of the public as “immoral”. At best, identification of conduct as immoral may help to garner public support for criminalization of new forms of conduct, but it does not, by itself, provide a justification for criminalization.

**Principles of fairness and consistency demand criminalization**

The principle of proportionality is the view that the punishment should fit the crime. The law presently criminalizes conduct that is similar in nature to cartel conduct, much of which is less harmful to society[32]. This includes:

- theft;
- fraud;
- money laundering;
- tax evasion; and
- market manipulation and insider trading.

A strong argument can be made that cartel conduct causes at least as much harm as these other forms of financial crimes. Whether someone pick-pockets $2 from a victim or tricks the victim into giving him or her two extra dollars or is able to make the victim pay $2 more for his or her product as a result of cartel-generated market distortions, the victim is in all cases $2 worse off.

It is not surprising that regulators have, in seeking to educate the public about the consequences of cartel conduct, drawn frequent comparisons with theft and fraud. When promoting Australia's new criminal laws, the Australian Competition and Consumer Commission's (ACCC) Chairman, Graeme Samuel, has repeatedly described cartels as “theft by well dressed thieves carrying brief cases” and cartel operators as “corporate fraudsters who defraud their customers and consumers” (Samuel, 2009; Corones, 1996):

Hard-core collusion is morally reprehensible. It is a form of theft and little different from other white-collar crimes (including insider trading and obtaining a benefit by deception) that already attract criminal sentences (ACCC, 2002).

It is inherently difficult to justify criminalizing, for example, common theft, which may cost an individual victim a few hundred or even thousand dollars, while leaving cartel conduct, which produces multiple victims suffering combined losses often into the millions – or even billions – of dollars, immune from criminal sanction. Most notably, cartels lead to consumers
paying more for goods and services and, in this way, unfairly deprives consumers of property – in the form of money (Acquaah-Gaisie, 2001).

Although some may suggest that cartel conduct in fact produces no more harm than some other lawful forms of business conduct; including, for example, price exploitation by companies with sufficient market power, the latter are engaging in that conduct within the bounds of the free market economy which encourages firms to seek to achieve a competitive edge with the promise of higher profits should they succeed. This conduct, while sometimes producing distorting market effects and more rarely producing market failure, is nevertheless encouraged and in most cases produces all the benefits associated with competition[33]. Cartel participants, on the other hand, have not achieved dominance through superior skill or innovation, but through artificial market distortion in the form of secretive deals to extract artificially higher profits at the expense of consumers and contrary to the dictates of the market (Lande, 1982). This is appropriately viewed as an “unfair”, rather than market driven, transfer of wealth from consumers to powerful producers (Lande, 1982) and is deserving of moral condemnation.

The analogy with theft is, therefore, a fair one. Cartel conduct is, however, more closely aligned with corporate fraud. In the UK, fraud is defined by the Serious Fraud Office (2010) as “intentional deception to obtain an advantage, avoid an obligation or cause loss to another person or company”. Fraud is not restricted to corporate fraud, but the latter is a sub-set of the former. This includes dishonest deception of the public, usually resulting in financial gain and includes fraudulent trading, share ramping and publishing false information (Serious Fraud Office, 2010). The harm from these forms of conduct will, in some cases, be indirect in the same way as cartel conduct. Like cartel conduct it is also often “white collar” in nature, in that it is frequently “committed by a person of respectability and high social status in the course of his occupation” (Sutherland, 1940).

Fraud is generally considered appropriately criminal by the public. This is perhaps a product of the association of the word “fraud” with dishonesty and exploitation. The current cognitive dissonance displayed by some members of the public when viewing a secret price-fixing cartel designed to ramp up profits at the expense of consumers differently (in terms of harm and moral culpability) from fraud which directed toward the same end needs to be overcome before a normative change occurs resulting in the wider public equating these forms of conduct. Even without that normative change taking place the proportionality principal justifies criminalization on the basis of the comparison:

Cartels […] enrich participants at the expense of consumers. They injure consumers by raising prices above the competitive level and reducing output. Cartels can be very harmful across wide areas of an economy by artificially creating market power and leads to inefficient and wasteful allocation of resources […] They are blatant frauds on consumers (ACCC, 2002).

Criminalization of cartel conduct would, on this basis, also go some way to addressing claims that the current criminal law regime benefits those capable of more complex and sophisticated theft or fraud by treating their conduct as forgivable by way of civil pecuniary penalties while other less sophisticated (and less financially devastating) criminals may find themselves behind bars or at least facing criminal conviction and its associated stigma (Wils, 2001; Australian Consumers Association, 2002; Lynch, 1997). In this respect ACCC Chairman, Graeme Samuel, has observed:
They may carry a briefcase rather than a gun, but if a business executive steals millions from consumers, he or she will be exposed to the same prospect of time behind bars (Samuel, 2009).

Criminalization can, therefore, be justified on the basis of this principle of proportionality alone, but may be further justified by its ability to deter cartel conduct.

**The need for effective deterrence**

The key justification advanced for criminalizing cartels is that they are necessary in order to effectively deter executives from engaging in cartel conduct (ACCC, 2002; Dawson et al., 2003; Corones, 1996). In this respect the OECD has also suggested that the “principal purpose of sanctions in cartel cases is deterrence” and that “sanctions against individuals can provide important, additional deterrence” (OECD, 2002b).

The two recognized forms of deterrence in criminal jurisprudence are specific deterrence and general deterrence[34]. General deterrence seeks to dissuade potential offenders by making clear there will be severe consequences if caught offending. It is general deterrence that provides the chief argument for criminalizing cartel conduct; in other words, it is argued that criminal penalties will provide a more effective deterrent than civil penalties for first time offenders. While evidence suggests that in most cases the seriousness of the penalty does little to increase deterrence (Clarke and Bagaric, 2003; Zimring and Hawkins, 1973; Walker, 1969; Hood, 1996; Von Hirsch and Bottoms, 1999), white-collar crime appears to be an exception to this rule. This is because it is in the context of white-collar offences that the offender has the time, inclination and resources to do a cost-benefit analysis[35]:

Breaches of competition law rather seem to involve deliberate business decisions, directed at straightforward managerial objectives. The DoJ Lysine Tapes testify to this effect: serious conspiracies are conscious business decisions, aimed at gross enrichment at the expense of the customer and welfare at large. Therefore, decisions to act in breach of the antitrust rules will often be based on a cost-benefit analysis, […] (Cseres et al., 2006).

For a financial penalty alone to provide an effective deterrent the expected gain from the contravention must exceed the gain from the violation (Wils, 2001; Chemtob, 2000). On this basis the current penalty regime in most jurisdictions would appear to fall well short (OECD, 2002b).

In relation to corporations it is unlikely that any financial penalty alone could provide an effective deterrent because, to do so, it would need to be so high as to be impossible in practice (Wils, 2001; Calvani and Calvani, 2009). Roughly, given the difficulty of detection (Calvani and Calvani, 2009) and the expected gains from cartel conduct over the average duration of an undetected cartel, it has been estimated that the figure required to provide effective deterrence on a cost-benefit analysis would be unreasonably high, in many cases exceeding the corporation's ability to pay (Wils, 2001; Ministry of Commerce (NZ), 1998; Dawson et al., 2003). The result of this would be to reduce deterrence value, remove a competitor from the market and penalize the wrong people; namely shareholders, creditors and, ultimately, consumers[36].

As realistic financial penalties for corporations alone are not sufficient to provide effective deterrence against cartelization, alternatives need to be considered. The obvious alternative is to penalize individuals sufficiently that they consider the cost of becoming involved in unlawful cartels so high as to make it not worth the risk. Again, the current civil pecuniary penalties are clearly insufficient and higher civil penalties, while possibly providing some
additional deterrence, could not, within a reasonable range, provide an effective deterrent for several reasons. First, as is the case for corporations, the individual may be “judgement-proof” – unable to “pay the minimum financial penalty required for effective deterrence” (Wils, 2001; Freiberg, 1983). Second, even if an individual is able to pay the fine imposed, there is an additional problem of indemnification – it is relatively easy for the corporation to indemnify, at least indirectly, an executive or employee that has been financially penalized for anti-competitive conduct[37]. In addition, most executives who have admitted or have been held to have engaged in cartel conduct have also managed to retain their existing employment or find other equivalent, or more rewarding, employment elsewhere. Finally, the potential gains of cartelizing, given the low detection rate, might still appear too enticing for certain individuals. In this respect, even the Business Council of Australia has accepted that at present under the current system “there is a danger that (conspirators) may think the profits from price-fixing are going to outweigh any fines” (Speedy, 2005).

A conventional risk-benefit analysis breaks down when the possibility of imprisonment or other criminal sanctions are introduced (Wils, 2001). It is difficult to impose a dollar amount on the loss of freedom or the stigma associated with serving time in prison or receiving a criminal conviction[38]. In the case of senior businessmen, the threat of imprisonment is likely to prove particularly potent (Liman, 1977; Wils, 2001; Katyal, 1997).

It is, therefore, likely that the threat of criminal sanction, in the form of a fine and/or prison term are likely to prove a more effective deterrent against cartel conduct than any amount of pecuniary penalty (Scott, 2008)[39]. Even prominent business groups (Speedy, 2005; O’Loughlin, 2005) have conceded that “the prospect of going to jail is going to make individuals think a lot harder about whether they engage in illegal activity” (Rowland, 2005).

International experience is also illuminating in this respect. In the USA antitrust agencies have:

[…] detected international cartels that fix prices everywhere around the world except in the US […] They have avoided extending the cartel activity to the lucrative US market because they feared detection and going to jail (Hammond, 2008).

In addition, cartel meetings have been found to have frequently take place offshore, demonstrating “a greater awareness of penalties among executives” (Scott, 2008; Samuel, 2009).

The principles of general deterrence therefore also justify the move toward criminalization of cartel conduct.

Consistency with international best practice

In addition to the justifications referred to above, countries introducing criminal penalties often point to international best practice as “justification” for the change (Fels, 2002). The introduction of criminal penalties for cartel conduct in Australia was, for example, promoted as bringing “Australia into line with the toughest approaches in the world” (Samuel, 2009).

Although international practice does not provide a justification for criminalisation – the existence of criminal penalties elsewhere says little about their desirability (ExxonMobil,
2002) and may reflect existing customs, norms and regulatory structures – it can assist in “selling” the appropriateness of criminality to a skeptical public and so should not be ignored.

**Implications of criminalization for executives: organized crime**

Criminalization carries with it additional procedural complexities (Doherty, 2009), increased burden of proof, possible impact on cartel leniency programs and the need to convince the public (from whom jury pools will be drawn) of the moral culpability of cartel conduct. These implementation difficulties have been canvassed elsewhere (Beaton-Wells, 2008a, b, c; Beaton-Wells and Fisse, 2008; Stephan, 2008) and are beyond the scope of this paper.

A less canvassed, but possibly very serious, implication of cartel criminalization is the possibility that cartel conduct may fall within the definition of “organized crime” and be subject to international treaty obligations.

The UN Convention against transnational organized crime (Palermo Convention)[40], which has been ratified by 154 countries, applies, *inter alia*, to “serious crime” which is transnational in nature and involves an organized criminal group. An “organized criminal group” (article 3) is a:

[… ] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes […] in order to obtain, directly or indirectly, a financial or other material benefit (article 2).

Serious crime is, in turn, defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty” (article 2) and a structured group is:

[… ] a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure (article 2).

To be considered “transnational” in nature, it is sufficient if conduct occurs in one state but produces “substantial effects” in another state (article 3).

Cartel conduct would, in most jurisdictions which criminalise it, fit squarely within this definition – at least where the conduct involves transnational commerce – and this may have serious implications for, amongst other things, international cooperation, extradition and mutual assistance requests[41]. It will also have implications for financial institutions and friends and relatives of cartelists, which may need to be alert to the possibility of proceeds of cartel crimes being “laundered” through them (article 7). It may also affect divisions of labour and jurisdiction between domestic agencies. For example, although it is the ACCC, together with the Commonwealth Department of Public Prosecutions that are (collectively) given power to investigate and prosecute cartels in Australia, it is the Australian Crime Commission which has jurisdiction over organised crime.

The implications of classifying cartel conduct within the scope of the Palermo Convention therefore warrant significant further investigation.

**Conclusion**
Cartel conduct is harmful and should be classified as “economic crime.” It is deliberate and dishonest conduct that unfairly manipulates free markets for personal gain. It is appropriate for cartel conduct to be condemned because it is comparable to existing financial crimes, is morally culpable and requires meaningful deterrence that cannot be achieved by financial penalties alone.

There is a clear trend toward criminalization, despite the lack of extensive application of criminal sanctions outside the USA to date. However, in many countries the criminal cartel laws are new and it will require some time before significant and effective enforcement facilitates a normative change in public attitudes to cartel conduct.

Despite some early hurdles in the application of criminal penalties outside the USA which have, at least temporarily, quelled enthusiasm of criminal penalties in some countries and raised some doubts about the ability of other regulators to secure convictions (Stephan, 2009, 2010), there is reason to be optimistic that this will occur and will produce long-term benefits. The process may, however, be a long and difficult, requiring adaptation of agencies and practitioners to new processes and significant changes in judicial and public attitudes to the moral contemptibility of cartel conduct.

Notes

2. The 2007 showed that “only 6 in 10 Britons felt price fixing was dishonest, and only 1 in 10 felt imprisonment was an appropriate sanction” (Stephan, 2009).
3. Richard Pratt was made an Officer of the Order of Australia in 1988, an honour which he surrendered following the successful cartel case against his company (Burgess, 2008).
5. The laws, therefore, do not provide special privileges to consumers, but seek to protect “consumers from monopolistic exploitation” (Lande, 1982, p. 76; Blair and Kaserman, 1985, chapters 1 and 2).
6. See, for example, OECD (2002a, p. 81), “It remains difficult to place a monetary value on the harm [caused by cartels], but it is surely significant, amounting to billions of dollars annually” and, at p. 72; “the amount of commerce affected by just 16 large cartel cases reported in the OECD survey exceeded USD 55 billion world wide. […] it is clear that the magnitude of harm from cartels is many billions of dollars annually” (Acquah-Gaisie, 2001). “Conventional crime may touch only a few people, but corporate crimes can devastate many lives […].”
8. There is also, for example, evidence of ancient Roman criminalisation of monopolies.
10. Adopted by the Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV].
11. See, for example, Beaton-Wells and Haines (2009, p. 228). The authors suggest that the use of this terminology “signalled a shift in places outside of the United States from an attitude of tolerance, even encouragement, to one of intolerance and moral condemnation.”
12. Price fixing (which includes market allocation, bid-rigging and output restrictions) is both a criminal and administrative offence. Imprisonment of between two and five years is possible (Calvani and Calvani, 2009; Grinberg et al., 2010).
13. Price fixing is a criminal offence with prison sentences of up to three years available (Calvani and Calvani, 2009).
14. In Germany only bid rigging is criminal (Calvani and Calvani 2009). Cartels have, however, also been successfully tried as fraud, which carries a maximum term of imprisonment of five years (Bischke and Mäger, 2010).
15. In Greece, following an amendment by Law 3784/2009, more severe fines are available for cartel conduct and imprisonment for up to six months (previously three months) is available (Nissyrios, 2010).
17. The Japanese Antimonopoly Law now (since, 2010) has increased the possible imprisonment term for cartel conduct to five years plus a fine. Cases are initiated by the Japanese Fair Trade Commission, but then referred to Prosecutor-General for action (Calvani and Calvani, 2009). The number of criminal cases has, however, been small (Watanabe, 2010).
18. Since 2009 (Buloski, 2010).
19. Currently only fines are available, but imprisonment is being considered (Shánchez-Dávila, 2010).
22. Cartels are subject to administrative and criminal prosecutions. Korea Fair Trade Commission investigates criminal cases but refers them to the Offices of the Public Prosecutor. A maximum of three years imprisonment is possible.
23. In addition, Austria and Spain criminalise bid rigging (Calvani and Calvani, 2009).
24. Only Mongolia and Poland had not (ICN Cartel Working Group Members, 2010).
25. The harm caused by business combinations was, at least to a degree, understood and a matter of public concern at the time (Apex Hosiery Co v. Leader 310 US 469, 492-3). This is exemplified by a series of cartels appearing in the early 1900s depicting unlawful cartel activity as harmful to consumers generally, which are available at: www.fulltable.com/CCC/trusts01.htm
27. See Hammond (2005). The new act passed into law on 23 June 2004. However, even prior to its enactment, in the case of both individuals and corporations, the fine was capable of being increased to the higher of either twice the pecuniary gain enjoyed by the defendant or twice the gross loss to victims of the conduct (ACCC, 2002). This facilitated very large fines for antitrust breaches, including a fine of $500 million
against F. Hoffmann-La Roche for its role in the international vitamin cartel (this was “the largest single fine imposed in a DOJ case for any crime under any statute” (Hammond, 2001; DOJ, 1999). In relation to individual penalties, fines of up to $7.5 million have been awarded, in addition to jail time (Ackman, 2002).


29. The executives were first arrested in the USA and allowed to return to the UK only on condition they enter guilty pleas (Scott, 2008). See also R v. Whittle, Allison & Brammar [2008] EWCA Crim 2560 and Joshua (2010).

30. However, before it fell apart, the Court of Appeal, on 9 December 2009, in IB v. The Queen [2009] EWCA Crim 2575 made a significant finding; it held that EU Regulation 1/2003 did not prevent UK Courts enforcing the Cartel Offence where the underlying cartel impacts on trade between Member States (thereby invoking EU power) (Joshua, 2010).

31. Many who oppose the introduction of criminal penalties have mounted this argument in the negative: that anti-competitive conduct is not “of the type” that should be prohibited (Shell Australia, 2002).

32. “It is not unusual for anti-competitive violations to involve far greater sums than those that may be taken by thieves or fraudsters, and the violations can have a far greater impact upon the welfare of society […]”: ACCC v. ABB Transmission and Distribution Limited (No. 2) FCA 559, para28 [2002] per Justice Finkelstein, cited in ACCC (2002), Corones (1996).

33. Lande (1982, p. 70): “[..] Congress did not pass the antitrust laws to secure the ‘fair’ overall distribution of wealth in our economy or even to help the poor. Congress merely wanted to prevent one transfer of wealth that it considered inequitable, and to promote the distribution of wealth that competitive markets would bring. In other words, Congress implicitly declared that ‘consumers' surplus’ was the rightful entitlement of consumers; consumers were given the right to purchase competitively priced goods. Firms with market power were condemned because they acquired this property right without compensation to consumers” (footnotes omitted).

34. In relation to the limits of specific deterrence (The Panel on Research on Deterrent and Incapacitative Effects, 1978; Bagaric, 2000).

35. Recently, the New Zealand Ministry of Commerce took the view that “the arguments are relatively strong for assuming a high degree of rationality when firms make decisions about whether to comply with a competition law” (Ministry of Commerce (NZ), 1998; McNeill, 2004).

36. It has been observed that if, between 1955 and 1993, optimal fines had been imposed on firms convicted of price-fixing “58 per cent of the firms would not have been able to survive […] without becoming technically insolvent” (Wils, 2001; Craycraft et al., 1997; ACCC, 2002; Acquaah-Gaisie, 2001; OECD, 2002b; Calvani and Calvani, 2009).

37. Even where prohibitions on corporate indemnification exist, such prohibitions may easily be avoided: “[..] firms can relatively easily indemnify their agents for any threat of fines or any fines effectively imposed, thus taking away the deterrent effect of the penalty on the individuals concerned […] the firm can relatively easily compensate the manager in advance for taking the risk and/or indemnify him ex post when he has to pay the fine” (Wils, 2001, p. 27).

38. Wils (2001) observes that a distinguishing feature of the criminal law is that it “carries, and is designed to carry, a stigma effect” (Small Business Development Corporation, 2002; Lynch, 1997; Dawson et al., 2003; Chemtob, 2000; Australian Industry Group, 2002).
39. In this respect Hammond (US) argues deterrence works and “the threat of criminal penalties is the single greatest deterrent for a cartelist” (Scott, 2008, p. 6 at 7).
41. In this respect, there have been a number of US instances in which action for cartel conduct has been pursued both under the Sherman Act and under the US’ core legislation dealing with organised crime, the Racketeer Influenced and Corrupt Organizations Act 18 USC 1961-1968 (Graham, 2010; DOJ, 2010; Walker, 2007). Antitrust has, however, been used against organised crime where the criminals have infiltrated business. Although this recognises overlap – or at least a relationship – between the two activities, this view still treats them as distinct.

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