

Criminalisation of Cartel Conduct – Some Pre-Trial Management Issues*

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Introduction

1 Criminalisation of cartel conduct in Australia is long overdue. So too is the
decision to confer indictable jurisdiction upon the Federal Court, at least in some
criminal matters.

2 These developments bring with them a number of difficulties.

3 Ever since Federation we have had a dual system of criminal law in this
country. Originally, federal criminal law occupied only a minuscule part of that
system, operating, it must be said, mainly at the periphery. Over the past 30 years or
so, all this has changed.

4 Although federal criminal law now represents a significant part of the overall
body of criminal law throughout Australia, it continues to be administered through
state courts. This is part of what has been termed the ‘autochthonous expedient’.
State courts are invested, pursuant to s 77(3) of the Constitution, and s 39(2) of the
Judiciary Act 1903 (Cth), with jurisdiction to try offences against federal as well as
state law.

5 The new legislation which criminalises cartel conduct, and vests indictable
jurisdiction in the Federal Court is presently before the Parliament. It has generated

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considerable controversy. The aim of this paper is to consider, briefly, some of the issues that have provoked discussion. I have confined myself, for present purposes, to pre-trial matters. In other words, my focus is upon the stage between formal charges having been laid, and the commencement of the trial itself. Even in that respect, I will refrain from dealing with some aspects of the pre-trial process that are to be given separate treatment at this workshop.¹

Current Legislative Developments

6 There are two principal bills currently before the Parliament.

7 The first is the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) (the 'TPA Amendment Bill'). This Bill was introduced into the House of Representatives on 3 December 2008. It was passed by the House on 11 February 2009, and was introduced into the Senate on the following day. It was sent for consideration to the Senate Standing Committee on Economics, and that Committee published its report on the Bill on 26 February 2009. The Bill has not yet passed through the Senate.

8 The TPA Amendment Bill amends s 163(2) of the *Trade Practices Act 1974* (Cth). It confers jurisdiction on the Federal Court to hear criminal proceedings brought under the proposed new criminal cartel provisions (ss 44ZZRF and 44ZZRG).² That new jurisdiction will operate concurrently with that of State and Territory Supreme Courts.³

9 The Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (Cth) ('the Criminal Jurisdiction Bill') was introduced into the House of

¹ For example, I refrain from commenting upon the vexed issue of plea bargaining, or charge negotiation, as it is more aptly termed. I also say nothing about the question of double jeopardy or how to deal with concurrent civil and criminal proceedings.

² Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) cl 117.

³ *Ibid* s 123.

Representatives on 3 December 2008. It was passed by the House on 10 February 2009, and on the following day was introduced into the Senate. The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs (hereafter 'the Senate Committee'), and that Committee reported on the Bill on 11 March 2009.

10 In broad terms, the two Bills make provision for the Federal Court to be able to hear trials on indictment for the new cartel offences. Those who are committed for trial for these new offences, or in the case of a plea of guilty, are committed for sentencing, may be dealt with in either the Federal Court, or the Supreme Court of a State or Territory. Committals for the new offences will be conducted in State and Territory Magistrates' or Local Courts, applying State or Territory law, in the same way as they currently do in relation to other Commonwealth indictable matters.⁴

Choice of Court

11 The Federal Court will not become involved in any cartel prosecution unless and until a case is brought to that Court. Usually, this will be the result of a decision by a committing magistrate that the matter should be committed to that Court. Before any such decision can be made, the committing court must invite the Director of Public Prosecutions ('the DPP') to suggest the court to which the person should be committed, whether for trial or sentence.⁵ This is so even if the DPP is not himself a party to the committal proceedings.

12 When making the committal order, the State or Territory magistrate must consider specifying the court suggested by the DPP as that to which the person should be committed for trial or sentence.⁶

13 The proposed amendments, in their current form, do not require the

⁴ This does not apply to Western Australia, which has abolished committal proceedings.

⁵ Proposed s 68A(3) of the *Judiciary Act*.

⁶ Proposed s 68A(4) of the *Judiciary Act*.

committing court to pay any regard to the views of the defence in relation to which court that matter should be sent. In any event, a proposed amendment to the *Director of Public Prosecutions Act 1983* (Cth) will enable the Director to institute proceedings in a court other than that specified in the committal order.⁷

14 These provisions have been criticised. For example, the Criminal Bar Association of Victoria provided the following comments to the Senate Committee:

It is our view that some safety valve should be provided for in the draft legislation which gives a legislative right for an accused person to have some say about the venue in which she or she is to be tried. This could be achieved by providing for the clear right to make submissions about the appropriate forum at the committal stage, upon committal for trial taking place, and, the right to be heard in an application to change venue, at the point at which the indictment is filed in the superior court. We read the present provisions as allowing for criticism of the part of the prosecution in forum shopping. We believe that some curial control should be exercised over the discretion of the prosecution to indict where ever it pleases.

Further, the [Federal] Court should have power, as exists in the Supreme Court and County Court of Victoria, to make venue changes of its own volition, provided that the parties have the ability to appear and make submissions about the issue. In that way, the Federal Court could choose to transfer proceedings to either of the two other courts. Likewise, those Courts should have the power to transfer proceedings to the Federal Court, if it regards that as an appropriate course to take.⁸

15 The Law Institute of Victoria has expressed similar concerns.

16 However, the Commonwealth Attorney-General disputes the need for any such 'safety valve'. He stated in the Second-Reading speech that:

The prosecutor has traditionally made the decision on venue where more than one court has jurisdiction to deal with a matter. It has not been suggested that the Commonwealth DPP has misused this power in the past.⁹

17 This accords with the position taken in the Explanatory Memorandum to the Criminal Jurisdiction Bill, which is that:

⁷ Proposed s 6(2F) of the *Director of Public Prosecutions Act 1983* (Cth).

⁸ Submission at [19] to [20].

⁹ The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, pp. 12295-6.

At the end of the day, however, the DPP will make the final decision on which court an indictment should be filed in. This reflects the traditional principle that the choice of location for a trial rests with the prosecutor. The DPP will have to ensure that an indictment is filed in a court which has jurisdiction to deal with the matter and that the choice of court complies with section 80 of the Constitution and sections 70 and 70A of the Judiciary Act to the extent they are applicable.¹⁰

18 The Explanatory Memorandum goes on to make the point that there are safeguards against ‘forum shopping’ by the DPP. One such safeguard is the fact that any court in which an indictment is filed will have power, inherent or implied, to stay proceedings if it considers that they involve an abuse of the process.

Bail

19 One area in which there are significant differences between the States and Territories as to the present law is that of bail. In Victoria, the *Bail Act 1977* (Vic) provides comprehensive guidance regarding this matter, though it is not a complete code. The Supreme Court of Victoria retains inherent powers to grant release on bail. Other States have their own particular bail regime.

20 In relation to federal offenders charged in any State or Territory, the current position is that those State or Territory bail provisions apply. That will no longer necessarily be the case, at least following committal.

21 To this point, there has been no federal legislation dealing with bail as such. At common law, bail was available for all crimes. That remains true. A person who has been taken into custody can regain his or her liberty upon entering into an undertaking to appear before a court at some later specified time and place and, in default, agreeing to forfeit a sum of money. They can also be called upon to find others to act as sureties. It is now a statutory offence to fail to answer bail.

22 Historically, it was always regarded as a grave matter to refuse an

¹⁰ Explanatory Memorandum, Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (Cth) 2.

unconvicted person bail. At common law, there was a presumption in favour of granting bail for all crimes except those punishable by death. Bail is not a form of punishment. The prime objective of bail was, and still is, to ensure that the accused attends trial. To that end, a person released on bail may be required to comply with specified conditions.

23 In relation to the proposed cartel offences, what is contemplated is that there will be a duality of bail provisions applicable. Prior to committal, State or Territory bail provisions will apply to anyone charged with these offences. Thus, in Victoria, a person taken into custody for a cartel offence will be able to apply for bail in accordance with s 4(1) of the *Bail Act*. That subsection affirms the general right to bail, subject to certain statutory presumptions against bail in relation to certain types of offence, e.g. treason, murder, or serious drug matters. Bail must also be refused if the court is satisfied that there is an unacceptable risk that the accused, if released on bail, would abscond, commit new offences, endanger the public, interfere with witnesses, or otherwise obstruct court processes.

24 The Criminal Jurisdiction Bill contains a proposed amendment to the *Judiciary Act* whereby any State or Territory committal court that commits a person for trial or sentence before the Federal Court, will have the power to grant bail to such a person.¹¹ The Note which accompanies that proposed amendment makes it clear that any appeal from a decision by a State or Territory committal court to grant or refuse bail pursuant to that provision will be governed by the laws of the State or Territory, pursuant to s 68(1) of the *Judiciary Act*.

25 The position changes once the indictable jurisdiction of the Federal Court has been enlivened. Part VIB of the Criminal Jurisdiction Bill will then operate. That Part relevantly provides as follows:

¹¹ Proposed s 68A(5) of the *Judiciary Act*.

58DA Applying for bail

- (1) During indictable primary proceedings or criminal appeal proceedings, the accused can apply to the Court for bail for one or more offences.
- (2) However, if the Court refuses to grant bail to the accused for an offence, the accused cannot apply again for bail for the offence unless there has been a significant change in circumstances since the refusal.

58DB Granting bail

- (1) The Court may, by order, grant bail to the accused for one or more of the offences.
- (2) In deciding whether to grant bail, the Court must consider the following:
 - (a) whether the accused will appear in court if bail is granted;
 - (b) the interests of the accused;
 - (c) the protection of any other person
 - (d) the protection and welfare of the community, including whether there is a risk that the accused will commit offences if bail were granted;
 - (e) whether there is a risk that the accused will approach witnesses or attempt to destroy evidence...

26 There are three contentious issues in relation to these proposed bail provisions:

- (i) proposed s 58DA only provides for a limited right to apply for bail;
- (ii) the Bill does not contain a statutory presumption in favour of the grant of bail; and
- (iii) proposed s 58DB prescribes different criteria for the grant of bail than those which apply in State and Territory jurisdictions.

27 Thus, a person's right to bail may be determined by the choice made as to whether that person is committed to the Supreme Court of a State or Territory, or the Federal Court.

28 The Senate Committee considered and discussed these issues in its report at [3.59] to [3.77]. It made the following recommendations:

Recommendation 6...The committee recommends that proposed subsection 58DA(1) of the Bill allow for multiple bail applications and that the requirement for a *significant* change of circumstances be deleted from proposed subsection 58DA(2).

Recommendation 7...The committee recommends that the Bill be amended to include a presumption in favour of bail.¹²

29 These recommendations are both worthy of attention.

Application of State/Territory or Commonwealth Laws of Evidence and Procedure

30 Another issue arising out of the choice to be made as to whether to commit to the Supreme Court of a State or Territory, or the Federal Court, is what laws of evidence and procedure will apply thereafter?

31 This becomes important if there are significant differences between the procedures that apply under State and Territory laws as compared with those under Commonwealth law. For example, under the Criminal Jurisdiction Bill, as will be seen, the Federal Court may order pre-trial disclosure in any matter. That provision closely accords with the law in Victoria, but differs somewhat from the position in New South Wales. In that State such orders can only be made in what are described as 'complex matters'.¹³

32 There are concerns that such disparities:

... may affect the decision to proceed in either jurisdiction and would produce inequities should defendants be dealt with under different regimes.¹⁴

¹² Senate Standing Committee Legal and Constitutional Affairs, Parliament of Australia, *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 [Provisions]* (2008) (the 'Senate Committee Rep'), [3.109] and [3.110].

¹³ Submission of the New South Wales Attorney-General, p 2.

¹⁴ Ibid.

33 The Criminal Jurisdiction Bill proposes to introduce a new s 68B into the
Judiciary Act. That new section will make it clear that s 68, which provides for the
application of State and Territory procedure to the conduct of proceedings for
Commonwealth offences, will operate even if the proceedings are heard by the
Federal Court. However, this will only be the case to the extent that there are no
inconsistent Commonwealth provisions.

34 This effectively means that:

State and Territory procedural law will apply in the Federal Court only if a
matter is not covered by either the Bill or the Rules. In that event the
procedure of the State or Territory where the trial is being held will apply by
operation of sub-section 68(1) of the *Judiciary Act*.¹⁵

35 The Senate Committee Report states that:

Effectively, the Bill establishes a single set of procedures applicable to all trials
before the Court irrespective of the hearing venue. The rules of evidence
applied by the Court in its Rules of Court are those contained in the *Evidence
Act 1995*.¹⁶

The Controversy Regarding Dual Jurisdiction

36 It is perhaps not surprising that there has been opposition on the part of least
one State to the expansion of the jurisdiction of the Federal Court to include
indictable matters.

37 The New South Wales Attorney-General, in a letter sent on 20 January 2009 to
the Senate Committee, commented that it was not clear why the Federal Court
should suddenly have this new jurisdiction conferred upon it, given that state courts
had, for many years, borne the burden of similarly complex federal matters arising
from taxation and terrorism charges. He put forward the following arguments as to

¹⁵ Explanatory Memorandum, Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (Cth) 1.

¹⁶ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 [Provisions] (2008) ('the Senate Committee Report') [2.45].

why federal indictable matters should continue to be dealt with in state courts:

- State and Territory judges were experienced in the criminal law generally, the conduct of criminal trials, and in dealing with Commonwealth offences;
- committal proceedings would still be heard in State or Territory courts;
- problems with 'dual jurisdiction' would arise where conduct was criminal under both state and federal law. The choice of charges would affect both the venue, and the rules governing the conduct of the proceeding;
- if federal and state charges were laid, the Federal Court would not have jurisdiction to deal with the state offences;
- allowing Commonwealth matters to be dealt with in a separate court would have the potential to create inequality between two categories of offenders, Commonwealth and State;
- the proposed legislation would allow the prosecution to choose to have the case brought in either the Federal Court or the relevant State or Territory court. This would be likely to result in inconsistency and possibly forum shopping as well, and
- allowing proceedings to be brought in State or Territory courts, as well as in the Federal Court, would not promote consistency of interpretation. It would simply add an additional jurisdiction to the number already considering Commonwealth offences.

38 With respect, I do not regard these arguments as particularly compelling. It is true that State and Territory judges have considerably more experience, in general, in dealing with criminal matters than do their federal counterparts. Nonetheless, it

must be recognised that, at least in New South Wales and Victoria, the vast majority of criminal trials are dealt with in the District or County Courts, and not in the Supreme Courts. In Victoria, most trials conducted in the Supreme Court involve murder, or attempted murder. Occasionally serious drug offences are tried in that Court, and in recent times some terrorism offences have been brought there. Regrettably, it is somewhat unusual, these days, for white collar matters to be tried in the Supreme Court.

39 In any event, there are a number of Federal Court judges who have significant experience in the conduct of criminal trials. Some have sat for years as judges on State Supreme Courts. Others sit as judges of the Supreme Court of the Australian Capital Territory, and regularly preside over criminal trials. In addition, any growth in the indictable work of the Federal Court can be taken into account when future appointments to that Court are considered.

40 The fact that committal proceedings are, and will continue to be, heard in State or Territory committal courts has no bearing upon whether any particular trial should be conducted in the Federal Court, or in a State or Territory Supreme Court.

41 As regards 'dual jurisdiction', this is endemic to any federal system of government. In civil proceedings, matters under the *Trade Practices Act* are routinely heard in both state and federal courts.

42 Of course, there would be a problem if a person were to be charged with both state and federal offences in relation to cartel conduct. The Federal Court would have no jurisdiction to deal with the state charges. However, the difficulty seems to be more apparent than real. It is highly unlikely that anyone accused of cartel offences would face concurrent state charges arising out of the same conduct. If that did occur the DPP would, no doubt, arrange for that particular case to be sent for trial, or plea, to the State or Territory Supreme Court.

43 As for the concern regarding unequal treatment of state and federal offenders,

the fact is that this is precisely what takes place today. For example, the Commonwealth has its own sentencing regime. Federal offenders are sentenced under that regime, whereas state offenders are sentenced under state law. The outcomes are often starkly different.

44 The prospect that criminal trials in the Federal Court will be conducted very differently from those brought in state courts is diminished by the fact that the majority of States and Territories have adopted, or soon will adopt, the provisions of the *Uniform Evidence Act*.

45 I would expect that the vast majority of cartel cases will be tried in the Federal Court, rather than in the State or Territory Supreme Courts. There are good reasons why that should be so. The cartel provisions in the *Trade Practices Act* have been in existence for many years now. They have been the subject of exhaustive consideration by the Federal Court, and being within its exclusive jurisdiction, fall outside the ambit of the work of state courts. They are not easy to grapple with. Anti-competitive conduct of the kind proscribed involves a highly specialised body of law, as well as an appreciation of detailed economic analysis.

46 In my opinion, the Federal Court is better placed to deal with these cases than the State or Territory Supreme Courts. Those courts tend to be under-resourced, and are usually heavily overburdened. Cartel cases are likely to be lengthy, complex and extremely hard-fought. They will require sophisticated case management, and the devotion of considerable resources, almost from the moment of committal for trial. They are likely to receive greater priority within the Federal Court than they could possibly be given within the state system. In part, that is because state courts are required to give priority to those cases in which accused persons are in custody awaiting trial. There appears to be no shortage of murders, and other offences of that ilk waiting to be tried. Regrettably, delays in dealing with criminal matters have become all too common within the state system.

Pre-trial disclosure

47 This is yet another area which has provoked controversy.

48 The Criminal Jurisdiction Bill contains a series of provisions dealing with pre-trial disclosure. Proposed s 23CD establishes a three-step process for court ordered disclosure.

49 Prior to commencement of the trial, the Court may order that the prosecutor give the defence notice of the prosecution case including:

- a copy or details of any information, document or other thing in the possession of the prosecution that is reasonably believed to contain evidence that may be relevant to the defence case;
- any information that suggests the existence of evidence that may be relevant to the defence case; and
- a list identifying any information, document or thing not in the prosecution's possession reasonably believed to contain evidence that may be relevant to the defence case and an indication of where that item, document or thing may be located.¹⁷

50 Proposed s 23CF sets out the response expected of the defence to the prosecution outline of its case. The defence is required to provide:

- a statement setting out, for each fact set out in the notice of the prosecution's case, that the accused agrees that the fact is to be an agreed fact for the purposes of s 191 of the *Evidence Act 1995* at the trial, or that the accused takes issue with the fact; and
- if the accused takes issue with the fact, the basis for taking such issue.

¹⁷ Proposed s 23CE of *Federal Court of Australia Act 1976* (Cth).

51 The aim of this regime is perfectly clear. It is designed to ensure that matters
in dispute are clearly identified prior to trial, and to obviate, the need, if possible, to
call evidence that is not in dispute.

52 The Law Council of Australia, in a submission to the Senate Committee,
argued that these provisions conflict with a fundamental principle that underlies all
criminal proceedings, namely, that the accused has the right to remain silent, and is
not required, prior to the conclusion of the Crown case, to reveal his or her defence.

53 I must say that I regard this criticism as misconceived. The requirement
under s 23CF that the defence indicate whether it takes issue with a particular
allegation of fact, or contention is not only reasonable but accords completely with
the practice that applies in Victoria, and, as I understand it, in complex matters in
New South Wales as well.

54 There was a time when I would have shared the concerns expressed by the
Law Council. Provisions which require pre-trial disclosure on the part of the defence
seem to run counter to a vision of the criminal trial as an accusatorial process,
whereby the defence need say nothing, and can simply put the Crown to its proof.

55 Regrettably, this somewhat idealized vision of the criminal law can no longer
be maintained. We cannot allow trials to meander along for months on end, without
any structure, or proper identification of the issues genuinely in dispute.

56 There are numerous examples of trials that have gone wholly off the rails.
Usually this is because there has been no adequate attempt to clarify the issues at an
early stage. Because everything is potentially in issue, many witnesses whose
evidence is not challenged are called.

57 One example will suffice. In the Russell Street bombing trial, in Victoria, an
issue arose as to whether a vehicle of a kind that could be linked to the accused had
been seen at a given location on a given day. The vehicle in question was somewhat

unusual, having been repainted in a particular way. Some forty-two witnesses, all of whom owned cars of a description similar to that of the vehicle in question, were called to give evidence that their own cars were not at that particular location on that particular day. Their evidence was not challenged. However, this added enormously to the length of the trial. Nothing of any rational benefit was achieved.¹⁸

58 It is, of course, a fundamental precept of our criminal justice system that, above all else, a trial should be fair. The accused is presumed innocent. His or her right to a fair trial must be fully protected. It is a terrible injustice when, as happens on occasion, an innocent person is convicted. However, it must also be remembered that an injustice is done when a guilty person is able to walk free, not because the merits of his or her case so dictate, but because the trial itself has become too difficult for a jury to follow, or is rendered otherwise unmanageable.

59 As indicated, the proposed pre-trial disclosure regime is modelled upon one that has operated for some years now in Victoria.¹⁹ Section 7 of the *Crimes (Criminal Trials) Act 1999* (Vic), which sets out the obligations that rest upon an accused, where the prosecution has served a summary of the prosecution opening, and a notice of pre-trial admissions, is virtually identical, in its terms, to the requirements contained in proposed s 23CF.

60 As with that proposed section, the defence response must identify the acts, facts, matters and circumstances with which issue is taken, and the basis on which such issue is taken. The same is true in relation to a defence response to a notice of pre-trial admissions. If no issue is taken with a prosecution contention, no evidence need be led to support that contention. If no issue is taken with a notice of pre-trial admission, the statement of the witness whose evidence is contained therein can be admitted as evidence without further proof.

¹⁸ The example was provided by Vincent JA of the Victorian Court of Appeal who was the trial judge.

¹⁹ *Crimes (Criminal Trials) Act 1999* (Vic).

61 It should be noted that the Victorian provision makes it clear that despite the obligations imposed upon the defence, the accused is not required to state the identify of any defence witness other than an expert witness, or whether the accused will give evidence.

62 It is true that the New South Wales legislation that embodies these principles²⁰ is confined to 'complex' matters, while the Victorian regime, though discretionary, operates across the board. The pre-trial disclosure provisions proposed for the Federal Court, though discretionary, can apply to all cartel offences. The distinction between the New South Wales provisions and the proposed federal provisions seems to be to be of little consequence. It is hard to imagine that any cartel prosecution could be characterised as other than 'complex'.

63 It is also true that the regime set out in the Bill suggests a degree of what might be described as 'front-end loaded' case management. The New South Wales Attorney-General describes such management as 'costly and time consuming'. That may be so. However, it is surely far less costly, and likely to be much more efficient, to dispose of issues that are not really in dispute before a trial commences, rather than have the usual procession of totally unnecessary witnesses called in anticipation of some defence that is never going to be taken.

64 Of course, much will depend upon how a court approaches the requirement that the accused state 'the basis' for taking issue with a fact alleged, or contention made, in a prosecution case statement. In that regard, the practice in Victoria is instructive. In practice, these provisions cause no difficulty whatsoever. The defence is called upon to indicate only what matters are really in issue, and to provide a general indication as to why that is so.

65 This is hardly a major incursion into the right to silence. It allows for the fact that a trial is a fluid process, in which issues originally thought to be unimportant

²⁰ *Criminal Procedure Act 1986 (NSW)*.

may take on greater significance. It puts a stop to the old practice of saying that everything is in issue, and the Crown must prove its case.

66 There are sanctions of various sorts for failure to comply with the requirements of the Act, in Victoria,²¹ just as there will be in relation to the regime contemplated for the Federal Court.²² However, there are broad discretions built in to these provisions to ensure that the right to a fair trial is not jeopardised.

67 Everyone to whom I have spoken regarding the operation of the Victorian provisions agrees that they generally work well when invoked, and have operated to the benefit of the system as a whole. That includes judges, and counsel who defend as well as prosecute. The concerns that these provisions generated before they came into effect have been largely allayed, and shown to have been misconceived.

68 The Explanatory Memorandum, and the extrinsic material associated with the pre-trial disclosure provisions, make it plain that the federal provisions are intended to operate no differently to their Victorian counterparts. They should not be regarded as embodying a regime of formal pleadings, and I am certain they will not be treated in that way.

69 There is, however, one aspect of the proposed pre-trial disclosure regime that causes me concern. That relates to the issue of legal professional privilege. As I understand the proposed provisions, legal professional privilege is intended to be abrogated at the pre-trial disclosure stage by the proposed s 23CL(1)(a), but

²¹ For example, the trial judge may comment on inadequate or non-disclosure to the jury noting that there has been a divergence between what was said earlier on, and what took place at the trial. This sanction, which is taken from the New South Wales legislation, has been heavily criticised, and does not appear in the proposed federal provisions.

²² The sanctions that are proposed are discretionary, and in my view, modest. See generally proposed s 23CM. The most likely to be useful, in a practical sense, is that which allows compliance with pre-trial disclosure obligations to be taken into account as a mitigating circumstance in sentencing in the event that the accused is convicted. A number of the others are more likely to be theoretical, than real. No judge will prevent an accused from adducing genuinely exculpatory evidence in a criminal trial merely because that issue was not flagged at the stage of pre-trial disclosure.

somehow revived, pursuant to s 23CL(2)(a) when it comes to the trial itself. That seems to me to be contrary to basic principle,²³ and entirely unnecessary. The Senate Committee expressed strong concerns about this aspect of the Criminal Justice Bill. It is to be hoped that wiser heads prevail before the Bill is ultimately enacted.

Conclusion

70 For commercial litigators the transition to criminal defence work will no doubt pose its own challenges. A criminal trial for cartel offences may seem like a proceeding under s 45 of the *Trade Practices Act* with the only difference being that of trial by jury. However, a criminal trial on indictment is, in reality, a very different creature.

71 The pre-trial stages of such a case are plainly of critical importance. The defence will endeavour to obtain every conceivable document, or piece of information, that might bear upon the charges laid. The committal provides one avenue by which that goal can be attained.

72 While the Australian Competition and Consumer Commission ('ACCC') is expected to act as a 'model litigant' in civil proceedings brought by it against corporate entities or individuals, its duties are even higher when it acts as the primary investigator in relation to a matter that is to be referred to the DPP.

73 The duties of disclosure, and of fairness, that rest upon a prosecutor are more onerous than those imposed upon a litigant giving discovery in a civil action. For example, there is a duty to disclose 'unused material' which arguably goes well-beyond the normal ambit of discovery.

74 In addition, the law relating to legal professional privilege may operate quite differently in a criminal case, than it does in ordinary civil proceedings. There is

²³ As well as being unworkable in practice, and contrary to established legal doctrine. See generally *Mann v Carnell* (1999) 201 CLR 1.

much to be said for the view that the DPP should allow the defence access to any and all documents in its possession, save for legal opinions, and those that may properly be the subject of a claim for public interest immunity.

75 The ACCC, as a relative newcomer to serious criminal proceedings, will have to adapt to these changes. Processes will have to be put in train to ensure that any documents that might conceivably be relevant are provided to the DPP, and thereby, in turn, to the defence. The cultural change that is required may not be easy to achieve.

76 Another aspect of pre-trial preparation that will require careful attention is the preparation of cases for consideration by juries. Invariably, cartel prosecutions will involve complex evidence, sometimes of a highly sophisticated nature. Economic concepts will need to be simplified, and presented in a manner that juries can grasp.

77 The pre-trial disclosure provisions go part of the way towards achieving that object, but more is required. There is much to be said for empowering any court that is to conduct a trial of this nature to require each side's experts to confer before trial, and to produce a statement of agreed facts, and conclusions. That could be provided to the jury, and the only matters left to be resolved would be those upon which agreement could not be reached.

78 Briefing practices will also have to be addressed. Counsel who regularly appear in criminal trials may not be altogether suited to the highly specialised work involved in cartel cases. At the same time, those who regularly appear in Part IV matters in the Federal Court may not be suited to the conduct of jury trials.

79 All of this will be a learning experience. It represents the first step on a path that will lead inevitably to a broader criminal jurisdiction for the Federal Court, just as it has done for many years in the United States. This will be to the benefit, ultimately, of the criminal justice system in this country, as the reach of federal criminal law continues to expand.