

FROM COAL VEND TO BASIC SLAG: WINNING THE HEARTS AND MINDS?

IAN TONKING SC*

I INTRODUCTION

The current debate, prompted by the Australian Competition and Consumer Commission ('ACCC'), about the extent to which an 'understanding' between competitors about pricing needs to be shown to reflect some 'commitment' in relation to their future action before it is prohibited has ramifications for the pending legislation to criminalise cartel conduct. The purpose here is to expose some of the issues that need to be addressed where these two measures overlap.

One of the functions of the ACCC is to examine critically and report on the laws protecting consumers.¹ The ACCC has been active in this role of late, promoting the criminalisation of cartel conduct, and suggesting that the *Trade Practices Act 1974* (Cth) ('TPA') may need to be amended to redress what the ACCC describes as a subtle but significant shift in the nature of the commitment that must be found to establish the existence of an understanding.² The first has led to legislation presently before Parliament, the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) ('Bill') which is likely to be enacted soon; the second has led to the issuing of a consultation paper by the Treasury, canvassing views and seeking submissions.³

II THE CURRENT POSITION

The TPA imposes civil pecuniary penalties on breaches of Part IV, which deals with anti-competitive conduct. At the centre of this is section 45 which prohibits a 'contract, arrangement or understanding' that has the purpose or effect of substantially lessening competition. Contracts, arrangements or understandings that fix prices are deemed to substantially lessen competition because such conduct is regarded as almost always harmful. Australia originally had criminal sanctions for such conduct, based on the United States *Sherman*

* 7th Floor Selborne Chambers, Sydney.

1 *Trade Practices Act 1974* (Cth) s 28(1).

2 Australian Competition and Consumer Commission, *Petrol Prices and Australian Consumers – Report of the ACCC Inquiry into the Price of Unleaded Petrol* (2007) 228.

3 Australian Treasury, *Discussion Paper – Meaning of 'Understanding' in the Trade Practices Act 1974* (2009).

*Antitrust Act*⁴ of 1890, but the legislation was largely unworkable. Enforcement authorities in many jurisdictions have in recent years argued that criminal sanctions, in particular gaol terms, are necessary to deter cartel conduct. The criminalisation of ‘serious’ cartel conduct was recommended by the Dawson Committee⁵ in 2003 and promised by the previous government, but never introduced. The Labor Government introduced the Bill in 2008. It contains two criminal offences: making or giving effect to a contract, and arrangement or understanding that contains a ‘cartel provision’. ‘Cartel provision’ is defined in the Bill but in terms which are not identical to the elements of existing section 45 of the *TPA*. The Bill will depend on certain provisions of the *Criminal Code Act 1995* (Cth) (*‘Criminal Code’*)⁶ in relation to the fault elements of the offences underpinning its operation, as discussed in more detail below. The Bill introduces corresponding civil penalty provisions for making or giving effect to a contract, arrangement or understanding containing a cartel provision. The ACCC has suggested that the *TPA* be amended to provide that the Court may find that an ‘understanding’ exists based on inference from circumstantial evidence, even if the alleged parties are not ‘committed to giving effect to the understanding’, and listing a number of factors which may be taken into account in drawing such an inference. If the Bill is enacted the new criminal offences will be prosecuted by the Commonwealth Director of Public Prosecutions, rather than the ACCC, as indictable offences.

If the ACCC’s submission is accepted by the Government, and the *TPA* is amended in this respect, there is every reason to expect that the amendment will apply to the word ‘understanding’ where used in the new criminal offences in sections 44ZZRF and 44ZZRG, as well as to the mirror-image civil provisions in sections 44ZZRJ and 44ZZRK. These four provisions prohibit making (or, in the case of understandings, arriving at) and giving effect to contracts, arrangements or understandings that contain a ‘cartel provision’ as defined in section 44ZZRD. In addition the amendment would clearly apply to section 45, the existing civil provision prohibiting anti-competitive contracts, arrangements or understandings.

III WHAT SHIFT?

The present writer has argued elsewhere⁷ that the ‘shift’ detected by the ACCC in the courts’ application of the *TPA* so far as it relates to ‘understandings’ may be overstated, and it is not proposed to repeat the analysis here. Without debating the history again, the point of departure which seems to trouble the ACCC is the nature of the ‘commitment’ required for an

4 *Sherman Antitrust Act*, 15 USC §§ 1–7 (1890).

5 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) (*‘Dawson Review’*).

6 *Criminal Code Act 1995* (Cth) sch, Pt 2.2.

7 Ian Tonking SC, ‘Belling the CAU: Finding a substitute for “understandings” about Price’ (2008) 16 *Competition and Consumer Law Journal* 46.

understanding, and whether a ‘mere expectation’ as a matter of fact,⁸ as opposed to a moral obligation, such as might found an equitable estoppel, should suffice.⁹ This is more than a legal quibble since if there is one matter about which most economists agree it is that, particularly in a market with few players, market forces alone will often result in prices for competing products gravitating to the same level.¹⁰

Broadly speaking, this has led to two schools of thought, those who advocate drawing an inference of collusion where parallel pricing cannot be demonstrated to be merely the result of market forces, and those who would require an element of commitment to be proven before such conduct is treated as a breach of the law.

IV ELEMENT OF COMMITMENT

The two positions may conveniently be identified by reference on the one hand to Justice Isaacs’ famous dictum in *R v Associated Northern Collieries*¹¹ and to the formulation by Diplock LJ in *Re British Basic Slag Ltd’s Agreements*¹² (at least as that case has generally been understood and applied in Australia)¹³ on the other. The difference may no doubt be stated in a variety of ways. For present purposes it is convenient (and in the context of the Bill, and the criminal liability it creates, desirable) to look at it in terms of where the onus of proof (both evidentiary and persuasive) would or should lie. Broadly speaking, the *Coal Vend* formulation would allow the tribunal of fact (in the case of a criminal offence, the jury) to infer the existence of an understanding, and the identity of the parties, from the circumstances identified by Isaacs J: the ‘concurrence of time, character, direction and result’ pertaining to certain proven, but seemingly independent, acts.

The *Basic Slag* formulation is said to require some evidence that the parties regard themselves as under a duty, whether legal or merely moral, to act in accordance with the understanding. This is what is described as the element of ‘commitment’. However the case was decided in the context of legislation which

8 A factual expectation as described by Lindgren J in *Australian Competition and Consumer Commission v CC (NSW) Pty Limited* (1999) 92 FCR 375, 408–9. This approach recently received some support from obiter comments by two judges in *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 255 ALR 1, [48] (French CJ and Kiefel J).

9 Julian Burnside QC, ‘ACCC: Trade Practices Act 1974 Section 45: “Contract, Arrangement or Understanding”’ in *Australian Competition and Consumer Commission* (2007), above n 2, 370, Appendix R.

10 See, eg, *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383, 391 (Lockhart J).

11 (1911) 14 CLR 387, 400 (*‘Coal Vend’*).

12 [1963] 1 WLR 727, 746–7 (*‘Basic Slag’*).

13 Burnside QC seems to read the judgments of Willmer and Diplock LJJ as involving no more than a factual expectation. His point of departure is what he sees as Justice Lindgren’s additional requirement (in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375) of some assurance by the party receiving the communication that it assumes an obligation. He might have pointed out that this approach probably reached its high point in the reasoning of O’Loughlin J in *Australian Competition and Consumer Commission v Pauls Ltd* (2003) ATPR ¶41-911, [105].

made registrable only those arrangements between competitors under which ‘restrictions are accepted by two or more parties’.¹⁴ The substance of the amendment sought by the ACCC would ‘make it clear that courts are entitled to infer the existence of an understanding from the surrounding circumstances and in the absence of a “commitment” by the parties’.¹⁵ The factual matters the courts might take into account would be listed in the legislation, but would not be limited to those listed. The *Coal Vend* case involved a criminal prosecution under the *Australian Industries Preservation Act 1906* (Cth), but no statutory list of factors was required for the Court to find a conspiracy.

V THE NEW OFFENCES: WHEN IS AN UNDERSTANDING ARRIVED AT?

The two new criminal offences created by the Bill are, in section 44ZZRF, *arriving at* an understanding, and section 44ZZRG, *giving effect* to an understanding, being an understanding which contains a cartel provision. In the context of what is required to establish that an understanding has been *arrived at*, we are mainly concerned with section 44ZZRF. In adopting the expression ‘arrive at an understanding’ the Bill draws the same distinction as section 45 of the *TPA* does between an understanding on the one hand and a contract or arrangement on the other. A person ‘makes’ a contract or arrangement, but ‘arrives at’ an understanding. This difference in language may be important when one comes to consider the identity of parties to an understanding. This is because an understanding is clearly less formal than a contract, and probably less precise than an arrangement. If an understanding already exists between A and B, and C proposes to become involved, it seems more likely that what will then exist will be a new understanding.

By contrast, where there is an existing contract or arrangement between A and B, the addition of C as a party seems less likely to involve what would commonly be regarded as a completely new contract or arrangement. An understanding about prices or market sharing is more likely to be varied or reformulated depending on the identity of the parties, in contrast to a contract or even an arrangement, but particularly a formal contract recorded in writing. Further, to the extent that some sort of commitment is essential to the existence of an understanding, a new party to a pre-existing understanding probably could be said to ‘arrive at’ an understanding when making that commitment, whether the understanding is regarded as the same as that which previously existed between other parties, or whether it can be said to have been varied or replaced by a new understanding by dint of the additional party having made a commitment to it. The greater formality involved with contracts or arrangements suggests that the addition of a party would not normally be regarded as the making of a new contract or arrangement, at least so far as the substantive terms

14 *Restrictive Trade Practices Act 1956* (UK).

15 Burnside, above n 9, 373–4.

of the contract or arrangement were concerned. This is important because, except as discussed below in the context of related bodies corporate, there is no separate offence of becoming or being a party to a contract, arrangement or understanding. However, as discussed here, a person who becomes a party to an understanding, whether pre-existing or otherwise, can probably be said to ‘arrive at’ the understanding, in the sense of ‘joining in’ the understanding. The term ‘arrive at’ suggests less formality than to ‘make’ a contract or arrangement.

One consequence of the relative informality of an understanding is that it would be unusual for a person to be accused of ‘giving effect’ to an understanding unless it was also alleged that that person had previously ‘arrived at’ the understanding. Accordingly (subject to what is said below about section 44ZZRC) the existence of an understanding, and the identity of the parties to it, will almost invariably have to be determined before a person can be found to have given effect to the understanding for the purposes of section 44ZZRG. These questions whether an understanding exists and whether a particular defendant is a party to it are likely to involve the same issues as arise in relation to whether a person has ‘arrived at’ that understanding.

VI EXTENDED MEANING OF ‘PARTY’ AND THE FAULT ELEMENT

It becomes important to note that section 44ZZRC of the Bill provides that, for the purposes of the new Division 1 of Part IV, ‘if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding’. As already noted, it is not an offence merely to be or become a party to a contract, arrangement or understanding that contains a cartel provision; the relevant *actus reus* (or ‘physical element’ as it is described in the *Criminal Code*) of the offence is to make or give effect to such a contract or arrangement, or arrive at or give effect to an understanding. As further noted, there may be little difference between arriving at an understanding and becoming a party to it.¹⁶ It remains important to preserve the distinction, otherwise the effect of section 44ZZRC would be to displace the need for the prosecution to establish that a related body corporate of a defendant corporation has itself ‘arrived at’ the understanding. As explained below, this will involve establishing the necessary fault element in the case of the related body corporate. It cannot have been the intention of the legislature, in enacting section 44ZZRC, to supplant this requirement. Given that it has been held (at least in the context of the existing civil penalty provisions) that effect may be given to an arrangement or understanding by inaction (even, it would

16 It may turn on whether an understanding changes its character if a party is added, as discussed in Burnside, above n 9, and *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383.

seem inadvertently) and without acting in concert,¹⁷ the importance of the fault elements is obvious.

The physical element of the offences, which consists of making or arriving at the arrangement or understanding, does not specify a fault element. In default, the fault element of intention will apply to the act of making or arriving at the contract or arrangement,¹⁸ or arriving at an understanding, whereas the existence of a cartel provision involves the fault element of knowledge or belief.¹⁹ In order for the members of a corporate group (including foreign entities) to be treated as being party to an arrangement or understanding, the issue would seem to be whether they had knowledge of the cartel provision it contained and whether they intended to become a party to it.²⁰ The second of these fault elements should apply notwithstanding section 44ZZRC.²¹ If the ACCC's proposal in relation to 'understanding' is adopted it will be important to consider how the distinction between arriving at and becoming a party to an understanding will be preserved.²²

VII ONUS

Under the *Criminal Code* the legal or persuasive onus for the elements of the offence, and in respect of any exception or defence, remains with the prosecution.²³ Therefore, in the absence of the proposed amendment, the prosecution in a case under section 44ZZRF would need to establish, beyond reasonable doubt, that:

- the defendant arrived at the understanding;
- it had the requisite intention;
- the understanding contained a cartel provision;
- the defendant knew or believed this;
- the relevant elements of the cartel provision (that is either the 'purpose/effect condition' or the 'purpose condition' respectively set out in section 44ZZRD(2) or (3), as well as the 'competition condition' in section 44ZZRD(4)) were present;
- in the case of a corporate defendant, the relevant physical element was committed by an employee, agent or officer of the body corporate acting

17 *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1, 68 (Franki J); *Bray v F Hoffmann-La Roche Ltd* (2002) 118 FCR 1, 49 (Merkel J).

18 Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) [2.30]; *Criminal Code* sch, s 5.6.

19 Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) s 44ZZRF(2).

20 Cf *Yorke v Lucas* (1984) 158 CLR 661.

21 The provision is not as prescriptive as those considered in *Hookham v The Queen* (1994) 181 CLR 450.

22 There is no fault element in the case of the corresponding civil penalty provision in s 44ZZRJ of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth).

23 *Criminal Code* sch, s 13.3.

within the actual or apparent scope of his or her employment or authority, and that they had the requisite intention, knowledge or belief to establish the fault elements.²⁴

The defendant bears the evidentiary burden of showing that there was an innocent explanation for the apparent conspiracy.²⁵ It could do this by itself leading evidence, or by pointing to evidence led in the prosecution case.²⁶ Whether it would need to lead evidence would therefore depend on the nature of the explanation.

VIII DEFENCES

At present there are no specific defences to an allegation that a contravention has resulted from making or giving effect to a cartel provision.²⁷ Current drafting policy apparently prefers to avoid a proliferation of defences in individual offence-creating legislation.²⁸ However, the defences set out in section 2.3 of the *Criminal Code* would apply to the extent relevant. Most of those defences are more relevant to offences relating to the person or to property rather than to ‘economic crimes’, however section 9.1 which relates to mistaken belief about, or ignorance of, facts, to the extent the belief or ignorance negates the fault element in relation to the physical element of the offence, may well be relied on. In considering whether the defence applies, the tribunal of fact is entitled to consider the reasonableness of the belief or ignorance. There are also the statutory exceptions to the definitions of cartel provision found in subdivision D of Division 1 of Part IV, as well as section 44ZZRH.

When the elements of the offence in section 44ZZRF of arriving at an understanding containing a cartel provision are considered in the context of the proposed amendment, permitting the existence of the understanding to be inferred from relevant circumstances, those elements most directly relevant to the defence will be:

- whether the defendant intended to arrive at the understanding (as that expression is presently understood);
- if the defendant had that intention, whether the defendant was mistaken about, or ignorant as to, relevant facts (in relation to arriving at the understanding);
- whether the defendant knew or believed that the understanding contained a cartel provision.

24 *Criminal Code* sch, s 12.2; *TPA* s 84(1), (2) as amended by Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth).

25 As the defendants did in *Theatre Enterprises v Paramount Film Distribution Corp*, 346 US 537 (1954). The present writer suggests the courts in Australia have been more prepared to find an understanding where the respondents failed to explain their actions: Tonking, above n 7, 63.

26 *Criminal Code* sch, s 13.3.

27 Save that s 85(6) of the *TPA* applies in the case of a person other than a body corporate.

28 Stephen Odgers, *Principles of Federal Criminal Law* (2007) 221 fn 9.

The existence of the requisite intention, knowledge and belief, are questions of fact.²⁹ It will be a matter for the judge, when instructing the jury, to formulate the elements that constitute the offence in light of the evidence which has been adduced. This task will require considerable care. It will have to be undertaken with due regard to the need for the jury to be satisfied beyond reasonable doubt that each of the overlapping elements of the offence has been proved, but at the same time in a manner which is intelligible to persons not trained in statutory interpretation.

IX FAULT ELEMENTS

Intention is defined in section 5.2 of the *Criminal Code* by reference to conduct, circumstances and results.

In the context of an alleged understanding, a defendant might want to argue that it was not aware of a relevant circumstance which is alleged to give significance to a communication with a competitor.

Of course intention itself will often be a matter of inference,³⁰ and knowledge or awareness of the existence of the cartel provision in a particular understanding which has been established will not be essential to prove that the defendant was a party to it, but will clearly be relevant considerations.

Belief is not defined in the *Criminal Code*, but a defendant might believe a certain set of circumstances to exist in the market, even though harbouring doubts about their existence. Those circumstances might involve the way in which competitors or others in the market would behave or respond to certain conduct, events or stimuli.

X COURSES OPEN TO DEFENCE

If any of these elements is not established beyond reasonable doubt the prosecution will have failed to prove the offence.

While in some cases it may be sufficient for the defendant to discharge the evidentiary burden by pointing to defects or ambiguities in the prosecution's case, there may be a need for the defendant itself to adduce evidence, either by way of proffering an explanation for its conduct to demonstrate that it was innocent, or to establish the context for such a submission.

A defendant might want to argue that it was mistaken or ignorant about a relevant set of circumstances in a market the existence of which is not alluded to in the prosecution case.

It will be seen that these elements and defences open up a number of avenues for a defendant to cast doubt on that part of the prosecution case which depends on having the tribunal of fact draw an inference from evidence as to the

29 *Bahri Kural v The Queen* (1987) 162 CLR 502, 505 (Mason CJ, Deane and Dawson JJ).

30 *Ibid* 502, 505 (Mason CJ, Deane and Dawson JJ).

defendant's intention to arrive at or join in an understanding, or the defendant's knowledge or belief as to what the understanding was about. An example could be where the defendant contends that there is an innocent explanation for its response to a communication from a competitor. The prosecution might argue that the defendant's response indicated assent to a proposition that the competitors adopt a common course. The defendant might argue that its response was open to an alternative interpretation, such as that he or she would wait and see what happened. There have been cases in the past where the Court has been prepared to infer that an understanding has come about notwithstanding the absence of direct evidence of any element of commitment.³¹ However that has been in respect of a civil contravention, giving rise to a pecuniary penalty, not a criminal offence. If the evidence adduced in the prosecution case does not go far enough to establish any commitment on the defendant's part, the prosecution will (on the ACCC's view of the current state of the law) likely fail to make out its case.

XI PROPOSED AMENDMENT

As already discussed, the proposed amendment will operate on the first physical element of the offence in section 44ZZRF(1)(a) which is concerned with whether an understanding has been arrived at. For the reasons already stated, this will involve consideration of the nature of the understanding and who is a party to it. The amendment will give rise to additional factual questions to those so far considered, specifically ones which are inevitably tied up with the question whether an understanding has been 'arrived at', namely whether what has been arrived at has the characteristics of an 'understanding'.

XII 'RELEVANT MATTERS' WILL OVERLAP WITH FAULT ELEMENTS

The amendment is said to cater for the situation where there is an absence of evidence of 'commitment', that is, that it is not established that the alleged parties generally, or the particular defendant in the case, have 'assumed an obligation' to the other(s) in terms of the understanding.

However the range of matters it is proposed the Court might consider in deciding whether it should draw an inference that an understanding exists (or that the defendant is a party to it) is not limited, and includes matters that will raise a wide variety of potential considerations for the defendant, and ultimately for the jury, should the defendant dispute them.³² For example, one factual matter listed is 'the extent to which one party intentionally aroused in other parties an

31 See, eg, *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1986) 13 FCR 446.

32 The complete list is contained in the Petrol Prices Report and reproduced in the Treasury's consultation document; Australian Treasury, above n 3, 4.

expectation that the first party would act in a particular way in relation to the subject of the allegation'. If the 'first party' is the defendant the Court may be required to revisit the fault element of intention from the perspective of 'commitment'. Other matters on the list potentially go to the defendant's knowledge or belief about conditions in the market.

The inclusion in the list of considerations bearing on the fault elements of the offence has a tendency to add a further layer of analysis to the evidence placed before the jury. It will add to the complexity of the judge's instructions to the jury, as well as to the potential for error and appeal. It is certainly not limited to the fault element of intention which operates by virtue of section 5.6 of the *Criminal Code*. The matters proposed to be included in a non-exhaustive list are ones which go not only to the conduct of the defendant and other parties to the alleged understanding, but also 'the characteristics of the market'. If such an amendment is considered necessary, it should be drafted in such a way that the physical and fault elements of the offence are not confused, but are separated out in a logical way which is consistent with the approach in the *Criminal Code*. Even if this precaution is taken, in those cases where there is no direct evidence of 'commitment', the judge will have to explain to the jury:

- the requirements of section 44ZZRD in relation to the conditions whose existence may reveal the existence of a cartel provision, including whether the parties are in competition with each other;
- the requirements of section 44ZZRF in relation to whether the defendant has arrived at an understanding, being the physical and the fault elements; and
- the requirements of the proposed amendment in relation to whether the relationship or conduct of the parties, including the defendant, should be taken to amount to the understanding that is alleged, having regard to any relevant matters, including the parties' intentions and the characteristics of the market.

It might be argued in response that, if the amendment is not required because there has been no shift in the Court's interpretation of 'understanding', the amendment will merely codify the law and add nothing to the steps which will be required in a case where the evidence of the understanding is circumstantial. Clearly there is some merit in that argument. However the practical difficulty which is highlighted here is that the terms in which the amendment is presently proposed do not accommodate themselves to the highly structured statutory environment in which section 44ZZRF (and section 44ZZRG) will operate, including the backdrop of the *Criminal Code*.

It may therefore be preferable if the fault element of the first physical element of the offence (arriving at an understanding) is made explicit (rather than relying on section 5.6 of the *Criminal Code*), and is expressed in terms which make it clear that the matters to be considered go to the question of intention. At the same time it would be desirable to clarify the role of the fault element in section 44ZZRC, dealing with related bodies corporate.

XIII BUSINESS JUSTIFICATION DEFENCE

There has been debate about the notion of a ‘business justification defence’ to a finding of contravention of section 46 of the *TPA*.³³ Although the context is somewhat removed, it needs to be borne in mind that, once the Bill is enacted, for perhaps the first time juries in Australia will be grappling with how to evaluate the conduct of defendants in a business context which is likely to be quite unfamiliar to most of them. It may be one thing to expect a jury to appreciate how a person charged with assault might react under provocation or duress but quite another to expect the members of a jury, uninstructed except as to the formal elements of the offence, to form a view about how participants in a competitive and volatile industry might behave in response to price-cutting by competitors, or how price leadership might operate in a more stable environment.

If the amendment makes explicit the ability of the Court to find that an understanding exists based purely on inference, there is room for debate about whether a statutory defence should be provided in relation to what might be termed a ‘business justification’ or, more broadly, a defence based on the characteristics of the market. As mentioned above, this is a matter which, under the proposed amendment, may be taken into account by the Court in deciding whether there is an understanding. This would seem to provide an opportunity for the defendant to lead or point to evidence tending to suggest that conduct which might appear consistent with the existence of an understanding is capable of innocent explanation.

However it may be desirable, out of an abundance of caution, to include a provision to the effect that the express reference to market characteristics in the context of the proposed amendment is not to be taken as limiting by inference the matters which may be taken into account in deciding whether any of the other elements of the offence has been made out. This would make it clear that, should a defendant desire to do so, it can adduce evidence, possibly of an expert character, as to: how markets operate in the context of issues such as the existence of a cartel provision; the defendant’s knowledge or belief about that matter; how market players behave; and evidence bearing on the defendant’s intention in engaging in the conduct said to constitute arriving at or giving effect to the understanding. A preferable alternative might be, if the fault element in section 44ZZRF is made explicit, as suggested above, to include those matters which go to market characteristics in such a defence, rather than including them in the list to which reference may be made in determining whether the requisite intention to arrive at an understanding exists.

XIV CONCLUSION

The writer has suggested elsewhere that the proposed amendment is not necessary. The proposed amendment, in its present form, is not well adapted to

33 See, eg, Stephen Corones, *Competition Law in Australia* (4th ed, 2007) 390–3.

inclusion in new Division 1 of Part IV of the *TPA* and, if it is to be enacted, careful consideration needs to be given to its interaction with sections 44ZZRC, 44ZZRF and 44ZZRG of the Bill and the relevant provisions of the *Criminal Code*. In particular, consideration should be given to how these matters would be explained to a jury.