BROADENING THE EXTRATERRITORIAL REACH OF AUSTRALIA'S CARTEL PROHIBITION: ADOPTING THE 'EFFECTS' DOCTRINE WITHOUT THE NEGATIVE EFFECTS

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I INTRODUCTION

In an increasingly global economy, foreign anti-competitive practices pose just as much of a threat to the economic wellbeing of Australians as domestic anti-competitive practices.[1] Multinationals which transcend national boundaries are now major players in many different markets. Furthermore, continuing globalisation means that the number of commercial activities with transnational implications will rise.

The *Trade Practices Act 1974* (Cth) ('TPA') contains a provision that expressly gives the Act extraterritorial operation. Section 5(1) provides that the competition law prohibitions contained in Part IV extend to conduct engaged in outside Australia by bodies corporate incorporated, or carrying on a business, in Australia. With the exception of the prohibitions against cartel conduct,[2] the extraterritorial operation of the prohibitions against the major forms of anti-competitive conduct is even broader. Since the Act's inception, the prohibitions against price[3] and non-price[4] vertical restraints have extended to the engaging in conduct outside Australia by persons and bodies corporate (whether incorporated, or carrying on a business, in Australia or not) in relation to the supply of goods or services to persons within Australia.[5] In 1990 the prohibition against the misuse of market power[6] was extended to regulate conduct engaged in outside Australia by bodies corporate incorporated, or carrying on business, in New Zealand.[7] In 1992 international mergers became subject to increased regulation. Although acquisitions by bodies corporate not incorporated, or carrying on a business, in Australia that take place outside Australia are not caught by the merger prohibition,[8] where such a merger impacts on Australian markets, s 50A comes into play. Section 50A provides that where a body corporate acquires a controlling interest

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1 OECD, *Reports: Positive Comity*, (1999) <http://www.oecd.org/dataoecd /40/3/2752161.pdf> at 21 March 2010.

2 *Trade Practices Act 1974* (Cth) pt IV, div 1 and s 45.

3 *Trade Practices Act 1974* (Cth) s 48.

4 *Trade Practices Act 1974* (Cth) s 47.

5 *Trade Practices Act 1974* (Cth) s 5(2).

6 *Trade Practices Act 1974* (Cth) s 46.

7 *Trade Practices Act 1974* (Cth) s 5(1A).

8 *Trade Practices Act 1974* (Cth) s 50; *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299.

in another body corporate outside Australia and, by reason of the acquisition obtains a second controlling interest in a body corporate that carries on business in Australia, the Australian Competition Tribunal may make a declaration banning the parties from continuing to carry on the business in Australia.[9]

It is odd that the extraterritorial reach of the cartel prohibition has not been extended beyond that provided for by s 5(1). After all, hard core cartels[10] are the most harmful form of anti-competitive conduct.[11] Furthermore, unlike other forms of anti-competitive conduct (such as a merger that causes high market concentration levels but allows for the achievement of economies of scale), cartels rarely offer any 'legitimate economic or social benefits that would justify the losses that they generate.'[12] The Explanatory Memorandum that accompanied the Trade Practices Bill 1974 (Cth) sheds no light on this issue. It simply states that '[t]he extent to which the legislation will operate extraterritorially is indicated in clause 5.'[13] It does not explain the decision to extend the territorial reach of the prohibitions against vertical restraints and not that of the prohibitions against cartel conduct. Although they contain statements acknowledging that cartel conduct will almost always be against the public interest,[14] the Parliamentary Debates of the Bill also make only general reference to the extraterritorial operation of the Act.[15]

Conservatively the global economic harm caused by cartels is estimated to exceed many billions of US dollars per year.[16] This figure includes the many millions of dollars of harm to the Australian economy.[17] Available data indicates that the

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9 The Tribunal will make a declaration if the acquisition is likely to substantially lessen competition in a market in Australia and does not generate sufficient offsetting public benefits.

10 '"Hard core" cartels are anti-competitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets': OECD, *Hard Core Cartels* (2000) 6 <http://www.oecd.org/dataoecd/39/63/2752129.pdf> at 21 March 2010.

11 OECD, *Fighting Hard Core Cartels: Report on the Nature and Impact of Hard Core Cartels and Nature of Sanctions Against Cartels Under National Competition Laws* (2002) 75 <http://www.oecd.org/dataoecd/41/44/1841891.pdf> at 21 March 2010. In *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398, 408 (2004), the United States Supreme Court described 'hard core' cartels as the 'supreme evil of antitrust'.

12 OECD, *Fighting Hard Core Cartels*, above n 11, 75.

13 Explanatory Memorandum, Trade Practices Bill 1974 (Cth) 19 [87].

14 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 13 August 1974, 821 (Ivor Greenwood); Commonwealth, *Parliamentary Debates*, House of Representatives, 7 November 1973, 2910 (Billy Snedden).

15 On 14 March 1974 'Notes on Amendments to be Moved on Behalf of Government' were tabled in the Parliamentary Debates (Senate). These notes highlighted amendments to the Trade Practices Bill 1973 (Cth). These amendments included the insertion of cl 5. The only reference to cl 5 contained in the Parliamentary Debates in the Senate and the House of Representatives is contained in these notes. Item 14 of the Notes states (referring to the introduction of cl 5 into the Bill): 'This is to ensure that, as well as applying to conduct within Australia, the Act will apply to conduct outside Australia by persons having a specified nexus with Australia'. See Commonwealth, *Parliamentary Debates*, Senate, 14 March 1974, 346 (Lionel Murphy).

16 OECD, *Fighting Hard Core Cartels*, above n 11, 71.

17 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12310 (Chris Bowen, Minister for Competition and Consumer Policy) (in the Second Reading Speech for the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill

sanctions imposed on cartelists in recent cases do not achieve the optimal level of deterrence.[18] The OECD has noted that the effective prevention of international cartel activity will require countries to impose severe penalties on cartel participants.[19] Australia has recently increased the penalties imposed on cartel participants in two ways. First, the level of pecuniary penalty that can be imposed on cartel participants was increased in 2006.[20] Secondly, criminal cartel prohibitions were introduced in July 2009.[21] These measures, in particular the criminalisation of cartels, have received a lot of attention from academics and practitioners alike. However, ensuring that the extraterritorial reach of Australia's cartel prohibitions is wide enough to permit Australia to prosecute international cartel activity may be as important, if not more important, in ensuring that deterrence levels are raised to an appropriate level globally and the interests of Australian consumers and businesses are protected.

This article will consider whether the extraterritorial reach of the cartel prohibitions is sufficiently wide to enable cartel conduct occurring outside Australian borders that harms the Australian economy or Australian consumers to be challenged. Part II considers the current extraterritorial scope of the cartel prohibition and concludes that it is not wide enough. Under the current law, mere presence in Australia of goods, the price of which has been affected by cartel activities outside Australia's borders, will not suffice to establish jurisdiction. Mere effects, no matter how substantial, will not of themselves attract jurisdiction.[22] The approach adopted in the European Union and United States to determine the extraterritorial reach of competition laws is then considered with a view to determining whether Australia should adopt the approaches employed in those jurisdictions. A conclusion is reached that, to ensure international cartel conduct is regulated appropriately, Australia should consider adopting the United States 'effects' doctrine. Part III considers whether Australia could successfully adopt the 'effects' doctrine. It begins by identifying reasons why countries benefit from applying their competition laws extraterritorially. The importance of the cooperation of other nations to the effective investigation of cartels and enforcement of judgments is then explained. The United States *Uranium* litigation[23] is discussed as the international

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2008). Cartel conduct not only causes prices to be artificially raised but it also causes other, more subtle forms of loss, such as the loss inflicted on consumers who would have purchased cartelised products or services but for the artificially increased price.

18 OECD, *Fighting Hard Core Cartels*, above n 11, 74.

19 OECD, *Recommendations and Best Practices – Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (1998) A1 <http://www.oecd.org/dataoecd/39/4/2350130.pdf> at 21 March 2010.

20 Prior to the passing of the *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth), the maximum penalty that could be imposed on a body corporate found to be in breach of the cartel prohibition was $10,000,000. Now, the maximum penalty that can be imposed is the greater of (a) $10,000,000, (b) three times the value of the benefit obtained by the breach and (c) (where the court cannot determine the value of the benefit) 10 per cent of the annual turnover of the body corporate. This increase in penalties applies to all prohibitions contained in Pt IV of the TPA.

21 The Trade Practices Amendment (Cartels Conduct and Other Measures) Bill 2008 passed on 16 June 2009. The Act received Royal Assent on 26 June 2009. The cartel provisions entered into force on 24 July 2009.

22 Brendan Sweeney, 'Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?' (2007) 8 *Melbourne Journal of International Law* 35, 64.

23 *Re Uranium Antitrust Litigation,* 617 F 2d 1248 (7th Cir, 1980) ('*Uranium* litigation').

reactions to this litigation provide a useful case study of the negative responses that may be triggered by an overly broad application of Australia's competition laws. An argument is developed that by limiting the adoption of the 'effects' doctrine to hard core cartels and strengthening the requirement that private litigants obtain ministerial consent before commencing actions for damages and other remedial orders, Australia may be able to avoid negative retaliatory reactions. On the assumption that the prospect of cooperation with other nations will not be harmed by this limited adoption of the 'effects' doctrine, Part IV concludes with a consideration of the type of agreements Australia should consider entering with other key jurisdictions to further promote the effectiveness of its extraterritorial competition law regime.

II REGULATING INTERNATIONAL CARTEL CONDUCT

Where a cartel arrangement has been made overseas, it will only be prohibited under Australian law if the:

(a) territorial connections specified in the cartel prohibition are satisfied;[24] and
(b) cartel prohibition extends to such conduct.

The extent to which these requirements limit Australia's ability to tackle international cartel conduct will now be considered.

A Territorial nexus specified in cartel prohibitions

1 The cartel prohibitions

The TPA contains the following cartel prohibitions:

1. A civil prohibition against entering into or giving effect to a contract, arrangement or understanding that contains a provision that has the purpose, effect or likely effect of substantially lessening competition in a market *in Australia* ('Lessening of Competition Prohibition');[25]
2. A civil prohibition against entering into or giving effect to a contract, arrangement or understanding that contains a provision that has the purpose of preventing, restricting or limiting supply to or acquisition from particular persons or classes of persons by parties who would otherwise be in competition with each other (either within Australia or outside Australia) in relation to the supply or acquisition of the goods or services to which the provision relates ('Exclusionary Provision Prohibition');[26]

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24 In *Wells v John R Lewis (International) Pty Ltd* (1975) 25 FLR 194 a Full Court of the Federal Court noted that the provisions relating to particular trade practices are expressly limited to practices that have effect upon Australian markets. See also Karl M Meessen, 'Antitrust Jurisdiction Under Customary International Law' (1984) 78 *The American Journal of International Law* 783, 792.

25 This prohibition is contained in s 45(2) of the *Trade Practices Act 1974* (Cth).

26 Section 45(2) prohibits the making or giving effect to contracts, arrangements or understandings that contains an exclusionary provision. Exclusionary provision is defined in s 4D(1) as a provision, included in a contract, arrangement or understanding between two or more persons who are competitive with each other, that has the purpose of preventing, restricting or limiting supply to or acquisition from particular persons or classes of persons. Section 4D(2) provides that a person will be deemed to be competitive

3. A civil prohibition against the making of or giving effect to a contract, arrangement or understanding that contains a cartel provision (a cartel provision is a provision, included in agreement between competitors, that relates to price fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories, or bid-rigging)[27] ('Civil Cartel Provision Prohibition');[28]
4. A criminal prohibition against the making of or giving effect to a contract, arrangement or understanding that contains a cartel provision ('Criminal Cartel Provision Prohibition').[29]

2 *Lessening of Competition Prohibition — the market in Australia requirement*

The Lessening of Competition Prohibition is the only prohibition that contains a territorial nexus requirement. It will only be breached if the cartel conduct has the purpose, effect or likely effect of substantially lessening competition in a market in Australia.[30] The notion of a 'market in Australia', which only falls to be considered when the market is larger than Australia, has not been the subject of extensive judicial consideration.[31] The first case to consider the meaning of the phrase 'market in Australia' was *Riverstone Computer Services Pty Ltd v IBM Global Financing Australia* ('*Riverstone*').[32] In this case, the applicant sought discovery to enable it to make a decision as to whether to commence proceedings for breach of the prohibition against the misuse of market power and anti-competitive vertical restraints.[33] The respondent objected to the applicant's request for discovery. It argued that as the pleadings only referred to a global market, the claim had no prospect of success as it did not relate to a 'market in Australia'. Hill J rejected the proposition that, in order to be a 'market in Australia', a market must be wholly in Australia. His Honour held that it was arguable[34] that a global market that includes Australia is a market in Australia '*if sales are made [in Australia]*'.[35]

Three recent cases against participants in the international air freight cartel have further explored the meaning of the phrase 'market in Australia'. *Auskay International*

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with another person for the purposes of s 4D(1) if the first-mentioned person would, or would but for the provision, be in competition with the other person in relation to the supply or acquisition of all or any of the goods or services to which the provision relates. As there is no reference to a market in the s 4D(2) definition of competition (cf s 45(3) definition of competition), the prohibition against exclusionary provisions does not provide a territorial nexus for its operation.

27 *Trade Practices Act 1974* (Cth) s 44ZZRD.

28 *Trade Practices Act 1974* (Cth) ss 44ZZRJ and 44ZZRK respectively.

29 *Trade Practices Act 1974* (Cth) ss 44ZZRF and 44ZZRG respectively.

30 Section 45(2) refers only to a lessening of competition in a market. However, market is defined in s 4E to mean a market in Australia. See also *Trade Practices Act 1974* (Cth) s 45(3).

31 *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89, 112.

32 [2002] FCA 1608, [21].

33 The former prohibition would only be breached if, inter alia, the respondent had substantial power in a market in Australia. The latter prohibition would only be breached if the respondent's conduct had the purpose, effect or likely effect of substantially lessening competition in a market in Australia.

34 Hill J did not need to reach a final conclusion as he was considering whether or not to make an order for discovery.

35 [2002] FCA 1608, [21] (emphasis added).

Manufacturing & Trade Pty Ltd v Qantas Airways Ltd ('*Auskay*')[36] involved a representative proceeding against participating airlines. The applicants sought damages to compensate them for the inflated freight charges they paid as a result of the cartel. They brought their action under the now-repealed price fixing prohibition,[37] and were therefore required to show that the airlines were in competition with each other in a market in Australia.[38] Tracey J held that it could not be assumed that the market was located in Australia simply because the relevant services involved moving goods into and out of Australia. Rather, buyers and sellers of goods and services must negotiate and enter transactions in an area in which suppliers are engaged in close competition with each other and that area must be within Australia.[39] This finding is consistent with Hill J's belief that sales must be made in Australia. As the applicants had not clearly identified a market in which the respondents competed, their statement of claim was struck out, although they were given leave to file and serve an amended statement of claim.[40]

The phrase 'market in Australia' was recently given a broader meaning in *Australian Competition and Consumer Commission v Qantas Airlines*.[41] In this case, the Australian Competition and Consumer Commission ('ACCC') sought court approval of pecuniary penalties it had negotiated with Qantas for breach of the now-repealed price fixing prohibition. The parties identified the worldwide market for air cargo services as the relevant market. Lindgren J noted that the definition of market in s 4E excludes a market that is wholly outside Australia.[42] However, as the international air cargo market encompasses the territorial boundaries of Australia, the conduct was held to have occurred in a market in Australia. Lindgren J made similar findings in actions involving other airlines that also admitted liability.[43] Two government-backed airlines (Emirates and Singapore Airlines) refused to admit liability. The ACCC issued s 155 notices to gather evidence about potential breaches of the now repealed price-fixing

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36 (2008) 251 ALR 166.

37 Price fixing is now prohibited under the Civil Cartel Provision Prohibition and the Criminal Cartel Provision Prohibition (see text accompanying nn 28 and 29 above).

38 It was alleged that the respondent airlines had breached s 45 of the TPA (the Lessening of Competition Prohibition). The applicants relied on the now repealed s 45A(1). Section 45A(1) deemed a provision of a contract, arrangement or understanding that had the purpose, effect or likely effect of fixing price charged or paid for goods or services by parties who are (or would otherwise be) in competition with each other to have the purpose, effect or likely effect of substantially lessening competition. When s 45A was in force, s 45(3) provided that a reference to competition in s 45A means competition in any market. Market is defined in s 4E to mean a market in Australia.

39 (2008) 251 ALR 166, 172–3.

40 Other comments made by Tracey J suggest that it could be shown that the respondents were competitors for the purposes of s 45A if they compete in a global market and enter into transactions with customers in Australia.

41 (2008) 253 ALR 89.

42 Ibid 112.

43 See *Australian Competition and Consumer Commission v British Airways PLC* [2008] FCA 1977, [22]; *Australian Competition and Consumer Commission v Martinair Holland NV* [2009] FCA 340, [16]; *Australian Competition and Consumer Commission v Société Air France* [2009] FCA 341, [16]; *Australian Competition and Consumer Commission v Cargolux Airlines* [2009] FCA 342, [16].

prohibition by the two airlines.[44] In *Emirates v Australian Competition and Consumer Commission*,[45] the airlines challenged the validity of the notices to the extent that they requested information relating to the supply of inbound international air cargo services[46] and the supply of air cargo services between two points wholly outside Australia.[47] The airlines argued that the notices were invalid as the airlines were not competitive in a market in Australia with respect to these services[48] because the competitive activity with respect to those services (namely the marketing, negotiation, contracting and setting of rates) occurred entirely outside of Australia. Emirates also argued that for the conduct to occur in a market in Australia, buyers and sellers must transact in Australia.[49]

Middleton J acknowledged that in order for the airlines to be caught by the now-repealed price fixing prohibition, the services the subject of the alleged cartel arrangement must be services supplied by the airlines in competition with each other in a market in Australia.[50] However, he noted that just because the actual place of contracting is not in Australia does not necessarily mean that no negotiating or marketing occurred in Australia[51] or that there is no possibility of competitive activity in Australia in relation to inbound services.[52] Customers in Australia may acquire

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44 Section 155 of the TPA is the ACCC's most widely used mandatory information-gathering power. It gives the ACCC the power to issue a notice requiring a person to provide information, documents and/or give evidence in connection with suspected breaches of the TPA.

45 (2009) 255 ALR 35.

46 The ACCC believed such information impacted on Australia because goods sent from Australia on round trips (eg warranty claims) would be charged the higher price on the inbound freight.

47 The ACCC believed such information impacted on Australia because airlines may need to use such services when transporting Australian cargo to destinations to which they did not fly. No final conclusion was reached about whether or not such conduct could be said to occur in a market in Australia because Middleton J concluded that the s 155 notices only related to inbound and outbound services. On appeal, a Full Court of the Federal Court of Australia concluded that the notice applied to inbound and outbound services and to services entirely outside Australia, provided that they have the proscribed effect on routes to and/or from Australia: *Singapore Airlines Ltd v Australian Competition and Consumer Commission* (2009) 260 ALR 244, 252–4.

48 The applicants accepted that services on routes from Australia in respect of outbound flights are supplied in a market in Australia.

49 This submission was based on J D Heydon, *Trade Practices Law* (2010) [3.258] and (2009) [3.510]. Paragraph [3.258] reads '[Section 4E] says that the market must be in Australia.' Paragraph [3.510] now reads:

> [i]f a market extends beyond the limits of Australia the court would apply the Act in reference to that part of it which falls within Australia. ... The fact that a product market is global does not prevent there being a market in Australia for that product (*Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89 [34]). But the expression in s 4E 'market in Australia' excludes a market that is wholly outside Australia (*Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89 [35]).

50 [2009] FCA 312, [22].

51 Ibid [58].

52 In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 195–6 Deane J acknowledged that a market may exist if there is the potential for competition

inbound services in Australia over the internet. Furthermore, Australian airline staff would attempt to locate lost inbound shipments.[53] Middleton J also observed that it is possible that the relevant market is an international market for inbound and outbound services. He therefore could not be satisfied that the ACCC's requests for information relating to inbound services did not relate to a possible contravention of the price fixing prohibition.

Middleton J adopted a more liberal approach to interpreting the phrase 'market in Australia' than was adopted in *Riverstone* and *Auskay*. Middleton J stated that he did not believe Hill J's observation in *Riverstone* that a global market may include a market in Australia 'if sales are made [in Australia]' made it a requirement that the contract under which services were supplied in Australia must be entered in Australia.[54] A Full Court of the Federal Court of Australia dismissed an appeal against Middleton J's decision by Singapore Airlines.[55]

The territorial nexus requirement that the cartel affect competition in a market in Australia places some forms of international cartel activity beyond the reach of the Lessening of Competition Prohibition. This is best illustrated by way of example. A group of European manufacturers, none of whom are incorporated in Australia, reach an agreement outside Australia to fix the price at which they sell their products to wholesalers operating overseas. As a result, Australian importers pay an inflated price when they acquire the goods in question from the wholesalers. These higher prices will be passed on to Australian retailers and, in turn, to Australian consumers. Although the phrase 'market in Australia' has recently been given a more liberal interpretation,[56] the agreements are unlikely to be caught by the Lessening of Competition Prohibition because the foreign manufacturers do not compete in a market in Australia.

3 The per se prohibitions: no territorial nexus requirement

The Exclusionary Provision Prohibition, the Civil Cartel Provision Prohibition and the Criminal Cartel Prohibition do not contain a territorial nexus requirement.[57] Although all three prohibitions only apply when two or more parties to the agreement containing the offending provision are competitors, it is not necessary to show that the parties to the agreement compete in Australia. The hypothetical agreement between the European manufacturers referred to in the preceding paragraph comes within the terms of the Civil and Criminal Cartel Provision Prohibitions. As they compete (albeit overseas) and have reached an agreement to fix prices, they fall within the terms of the prohibitions. Whether the Cartel Provision Prohibitions extend to such conduct is determined by s 5(1) of the TPA, which is discussed in section B below.

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notwithstanding that there is no supplier of, nor trade in, those goods at a given time: see also 200 (Dawson J) and 211–12 (Toohey J).

53 [2009] FCA 312, [61].

54 Ibid [71].

55 *Singapore Airlines Ltd v Australian Competition and Consumer Commission* (2009) 260 ALR 244.

56 See text accompanying n 41 above.

57 The competition condition contained in s 44ZZRD(4) does not require that the parties be competing in a market (which, as a result of s 4E means a market in Australia). It is therefore sufficient to show that they were likely to have competed, or would have been likely to compete but for the contract, arrangement or understanding in question in any market (which need not be in Australia).

4 Is there a need to amend the territorial nexus requirements in the cartel prohibitions?

The territorial nexus requirement in the Lessening of Competition Prohibition limits the scope of that prohibition. However, the Lessening of Competition Prohibition is unlikely to be relied upon to tackle hard core international cartel arrangements. Such arrangements are far more likely to be challenged under the per se Civil Cartel Provision Prohibition and/or the Criminal Cartel Provision Prohibition. Neither of these prohibitions contains a territorial nexus requirement.[58] It is therefore not necessary to amend the cartel provisions themselves to ensure that Australian businesses and consumers are adequately protected against hard core cartel conduct.

B Conduct to which the cartel prohibition extends

1 Section 5(1) TPA

In addition to satisfying any territorial requirements contained in the cartel prohibitions themselves, it is also necessary to show that the cartel prohibition extends to conduct engaged in overseas. The TPA is framed on the assumption that when conduct is made a contravention, it is only conduct in Australia that is dealt with unless the operation of the relevant prohibition is extended by s 5(1).[59] Section 5(1)[60] provides that conduct outside Australia that is engaged in by a corporation incorporated, or carrying on business, in Australia can be used as evidence to establish that the cartel prohibition has been breached.[61] Section 5 has been held to displace the presumption made at general law against extraterritoriality.[62] It has also been held

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58 See *Trade Practices Act 1974* (Cth) s 44ZZRD.

59 *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305, 319.

60 The scope of s 5 has recently been widened (effective 24 July 2009). All provisions of the TPA now, to the extent that they relate to any of the provisions that have extraterritorial effect, extend to engaging in conduct outside Australia by bodies incorporated, or carrying on business in Australia. This will overcome the limitations on the extent to which overseas conduct can be led as evidence to establish that a person was knowingly concerned in a contravention (as defined in s 75B, to which s 5(1) did not used to apply) of the competition prohibitions (see *Trade Practices Commission v Australia Meat Holdings* (1988) 83 ALR 299, 355). In *Bray (trial)* (2002) 118 FCR 1, 17 Merkel J suggested that legislative oversight may explain why s 5 did not extend to such conduct.

61 The requirements of s 5(1) must be satisfied in order to challenge conduct occurring outside Australia. However, those requirements are not preconditions to the invocation of the court's jurisdiction: *Bray (trial)* (2002) 118 FCR 1, 54, 57 (upheld in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 328 ('*Bray (FFC)*')). See also John A Trenor, 'Jurisdiction and the Extraterritorial Application of Antitrust Laws after *Hartford Fire*' (1995) 62 *University of Chicago Law Review* 1583.

62 *R v Jameson* [1896] 2 QB 425, 430. See also s 21(1)(b) *Acts Interpretation Act 1901* (Cth). This presumption was first articulated in the trade practices context in Australia in *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1965) 115 CLR 10 ('*Meyer Heine*'). See also *Bray (trial)* (2002) 130 FCR 1, 15; *Bray (FFC)* (2003) 130 FCR 317, 352 (Branson J), 370 (Finkelstein J); Stuart Dutson, 'The Conflict of Laws and Statutes: The International Operation of Legislation Dealing with Matters of Civil Law in the United Kingdom and Australia' (1997) 60 *Modern Law Review* 668, 674–6. For reasons as to why the presumption is made see:

that '[t]he express provision for extraterritorial operation made by s 5(1) provides a clear indication that the legislature intended that [Part IV][63] … was to have extraterritorial application to the extent therein mentioned and no further'.[64] As a result, the Australian courts are precluded from adopting a more generous test, such as the United States 'effects' test[65] to determine the extraterritorial scope of the TPA.[66]

2 Conduct that occurs in Australia

One way to catch international cartel conduct is to point to conduct by cartel members that can be said to have occurred in Australia. Conduct that occurs in Australia will be caught by the TPA even if the firm in question has no other territorial connection to Australia.[67] As Wilcox J noted in *Trade Practices Commission v Australia Meat Holdings Pty Ltd* ('*Meat Holdings*'), '[i]n a case where there is relevant conduct in Australia, it is a misuse of language to speak of the statute being given extra-territorial effect. The statute applies because of that conduct. It attaches to conduct within Australia.'[68]

The courts have taken an expansive view of what constitutes conduct in Australia.[69] This broadens the reach of the TPA in several ways. First, it is not necessary to show that all of the conduct that led to the contravention occurred in Australia. In *Meat Holdings* the acquisition in question took place in the United Kingdom. However, the English vendor who sold its shares to an Australian company was viewed as having engaged in conduct in Australia capable of breaching the merger prohibition because it attended meetings with the Trade Practices Commission in Australia to ascertain the likelihood that the Commission would object to the merger.[70] Secondly, communications sent from outside Australia but received in Australia are taken to be conduct in Australia. This is illustrated by Merkel J's analysis in *Bray (trial)*.[71] In this representative proceeding against the participants in the international vitamins cartel, it was alleged that the overseas parent companies that

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William S Dodge, 'Understanding the Presumption Against Extraterritoriality' (1998) 16 *Berkeley Journal of International Law* 85, 112–25.

63 The cartel prohibitions are in Part IV.

64 *Trade Practices Commission v Australian Iron & Steel Pty Ltd* that (1990) 22 FCR 305, 319 ('*Iron & Steel*'); *Bray (trial)* (2002) 130 FCR 1, 15. This accords with para 87 of the Explanatory Memorandum to the Trade Practices Bill 1974 (Cth) which stated '[t]he extent to which the legislation will operate extra-territorially is indicated in clause 5'.

65 See text accompanying n 96 below.

66 See, eg, *Meyer Heine* (1966) 115 CLR 10, 43 (Windeyer); *Bray (trial)* (2002) 130 FCR 1, 15.

67 Wilcox J made this point in *Meat Holdings* (1988) 83 ALR 299, 356; see also *Bray (trial)* (2002) 118 FCR 1, 17.

68 (1988) 83 ALR 299, 356. Brendan Sweeney has also noted that extraterritoriality refers to 'those occasions where domestic law is sought to be applied and enforced against conduct that occurs outside the territorial boundaries of the state': Sweeney, above n 22, 41.

69 Justin Gleeson, 'Extraterritorial Application of Australian Statutes Proscribing Misleading Conduct' (2005) 75 *Australian Law Journal* 296, 306.

70 (1988) 83 ALR 299, 356.

71 (2002) 118 FCR 1. The applicants alleged various breaches of the cartel prohibitions by the foreign companies that formed the cartel and their Australian subsidiaries who implemented it in Australia. In 2006 the representative proceeding against participants in the vitamin cartel was settled for the sum of $30.5 million (plus costs of $10.5 million): *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* (2006) 236 ALR 322. See also *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (No 2)* (1993) 44 FCR 485, 493.

had formed the cartel sent communications to their Australian subsidiaries directing them to implement the agreement in Australia. Although these communications were initiated outside of Australia, as they were received and acted upon in Australia by officers of the Australian subsidiaries, the foreign parents' implementation of the agreement was held to be conduct that took place in Australia.[72] These two principles combined dramatically increase the range of overseas conduct caught by the TPA. Lastly, conduct engaged in by an agent in Australia at the direction of a company overseas will also be caught. In *Bray (trial)*, Merkel J indicated that he would also have been prepared to view the parent companies as having engaged in conduct in Australia on the basis that the Australian subsidiaries implemented the international cartel agreement on behalf of, or as agents for, their parents.[73]

It is important to note, however, that even under the liberal approach adopted to determine whether conduct can be said to have occurred in Australia, the European manufacturers in the hypothetical example outlined above[74] are unlikely to be viewed as having engaged in conduct in Australia because they have not distributed their products through subsidiaries nor have they sent communications to Australia or engaged in marketing activities in Australia.

3 Conduct that occurs outside Australia

Where the conduct of international cartel members cannot be said to have occurred in Australia, it will only be caught if the conduct was engaged in by bodies corporate incorporated, or carrying on business, in Australia. It will not be difficult to ascertain whether a company is incorporated in Australia. However, determining whether a company 'carries on business within Australia' is more difficult.

In *Hope v Bathurst City Council,*[75] Mason J provided a general definition of the phrase 'carry on business'. His Honour held that the word 'business' is best defined as a commercial enterprise. The words 'carrying on' were held to imply that there must be a series or repetition of acts.[76] However, in accordance with standard rules of statutory interpretation, the context in which the phrase is used can influence its meaning.[77] In the trade practices context, the phrase is included in a section which gives effect to the legislature's view that international comity requires that the company in question have a connection with Australia.[78] The underlying concern for international comity has

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72 *Bray (trial)* (2002) 118 FCR 1, 45–6.

73 Ibid 46. Merkel J stated that rather than view the Australian subsidiaries as making the cartel agreement (which they admitted to doing), it may be more accurate to describe their conduct as implementing the agreement reached by their parent companies on behalf of those parents. Ultimately Merkel J concluded (at 48) that the combination of the communications by the foreign parents and the implementation of the agreement by officers of the Australian subsidiaries meant that the foreign parents had engaged in conduct in Australia.

74 See text accompanying n 56 above.

75 (1980) 144 CLR 1, 8–9. In this case the court had to consider whether an individual was using land to carry on the business or industry of grazing.

76 *Bray (trial)* (2002) 118 FCR 1, 18 citing *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 350. See also David Meltz, 'The Extraterritorial Operation for the Trade Practices Act - A Time for Reappraisal?' (1996) 4 *Trade Practices Law Journal* 185, 188.

77 *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 178.

78 *Bray (trial*) (2002) 118 FCR 1, 18.

been reflected in the interpretation that has been given to s 5(1). In *Bray (trial)*, Merkel J held that it was not necessary to show that the company has a place of business in Australia because this was not a requirement of comity.[79]

A company will not be viewed as carrying on a business in Australia simply because its products find their way to the Australian market. In *Andrews v Bells Sports Australia Pty Ltd* ('*Bells Sports*')[80] it was argued that a company incorporated in the United States, that had not exported its goods to Australia, carried on business in Australia because products which it sold in the United States (to retailers and wholesalers) could be imported into Australia. This argument was rejected on the basis that carrying on business in Australia requires something more than passive awareness that the company's product is finding its way to Australia. The fact that products sold by the defendant have, without being marketed directly or indirectly by the defendant in Australia, found their way to Australia did not establish that the defendant was carrying on business in Australia. Further, even where a foreign company is aware that a cartel agreement that it is party to will affect an Australian market, this will not suffice to establish that it is carrying on business in Australia. In *Bray (trial)* the applicants and the ACCC submitted that the expression 'carrying on business in Australia' should be broadly interpreted so as to enable the TPA to apply to conduct that is intended to have, and has, an adverse effect on competition in Australia. Merkel J rejected this argument on the basis that it was not consistent with the legislature's view of comity.[81]

A foreign company may be said to be carrying on business in Australia through an Australian subsidiary. As this involves the lifting of the corporate veil, it will be necessary to show that the foreign company exercises a high level of control over its Australian subsidiary.[82] In *Bray (trial)*, the foreign entities that masterminded the international cartel had not carried on business activities in Australia. However, the claimant argued that the Australian subsidiaries were carrying on business not on their own behalf but on behalf of their parent entities. Merkel J stated that something more than the indirect legal control and commercial capacity of a parent company to control and direct its subsidiary is required.[83] In order to make out such a claim, it will be necessary to establish that the subsidiary was not maintained as a distinct and separate entity and that the parent had disregarded boundaries. It is more likely that a subsidiary is acting on behalf of the parent where: the parent treats the subsidiary's profits as its own; the parent company appoints the board members of the subsidiary; and where the parent exercises a high degree of control over the subsidiary.[84] It will also be relevant to consider whether the parent is using the Australian subsidiary as part of a world-wide distribution system.[85] Having considered these factors, Merkel J rejected the applicant's argument that the parent entities were carrying on business in Australia through their Australian subsidiaries. The Australian subsidiaries were

79 Ibid 19.
80 [2006] QDC 249.
81 *Bray (trial)* (2002) 118 FCR 1, 18.
82 Meltz, above n 76, 188.
83 *Bray (trial)* (2002) 118 FCR 1, 23.
84 These factors were considered by Atkinson J in *Smith, Stone & Knight Ltd v Lord Mayor Alderman and Citizens of Birmingham* [1939] 4 All ER 116.
85 *Amalgamated Wireless (Australasia) Ltd v McDonnell Douglas Corporation* (1987) 16 FCR 238, 240–1.

maintained as distinct and separate entities that held their assets and entered business transactions in their own names.[86] Furthermore, although there were some overlapping board appointments, for the most part the subsidiaries had different boards to their parents. Although the European or regional parents were extensively involved in the implementation of the cartel agreement in Australia, they were not otherwise intimately involved in the running of the Australian subsidiaries.[87] The strict approach adopted when determining whether a subsidiary should be viewed as carrying on the business of its parent may explain why Merkel J adopted such a liberal approach when determining whether the foreign parents could be said to have engaged in conduct in Australia.[88]

The above discussion demonstrates that the extension of the TPA to conduct engaged in by a company 'carrying on business' in Australia does not significantly extend the extraterritorial reach of the TPA. In fact, it appears that it is easier to establish that conduct occurred in Australia than it is to show that the company engaging in that conduct carries on business in Australia.

3 Section 44ZZRC

As noted earlier, hard core international cartel activity is likely to be challenged under the Civil and Criminal Cartel Provision Prohibitions. Thus it is necessary to consider s 44ZZRC with a view to determining whether it provides an effective means of tackling international cartels. Section 44ZZRC provides that where a body corporate is a party to a contract, arrangement or understanding, its related bodies corporate are taken to be a party to that contract, arrangement or understanding. Thus where an Australian subsidiary's overseas parent enters into a cartel agreement overseas, the Australian subsidiary will be taken to be a party to the agreement.

At first glance, s 44ZZRC appears to increase the extraterritorial scope of the Cartel Provision Prohibitions by making it possible to attack a cartel agreement reached overseas between foreign companies by bringing an action against the foreign company's Australian subsidiary even if the Australian subsidiary is not involved in the formation of the cartel agreement or its implementation.[89] It will not matter that the agreement in question was reached overseas as the prohibition will apply to the Australian subsidiary by virtue of the fact that it was incorporated in Australia.[90] However, for the reasons outlined below, it is submitted that this is in fact not the case.

On what basis might the Australian subsidiary be liable? It will not be liable for giving effect to the cartel agreement.[91] Section 44ZZRC simply states that the subsidiary is taken to be a party to the cartel agreement. The section does not make the subsidiary liable for acts of the foreign parent that constitute giving effect to a cartel agreement. However, it is arguable that by deeming the subsidiary to be a party to the

86 *Bray (trial)* (2002) 118 FCR 1, 22.
87 Ibid.
88 See text accompanying n 73 above.
89 It is important to remember that where the subsidiary is involved in the formation of the cartel, it is caught even if this conduct occurs overseas (see text accompanying n 76 above). Where the parent can be viewed as carrying on a business through the subsidiary it will be possible to prosecute the parent directly (see text accompanying n 82 above).
90 *Trade Practices Act 1974* (Cth) s 5(1).
91 Therefore it will not be liable under s 44ZZRG or s 44ZZRK of the TPA.

agreement, s 44ZZRC implicitly deems the subsidiary to have made the agreement. After all, it seems strange to suggest that the subsidiary is a party to an agreement it did not make. However, it seems equally strange to conclude that the subsidiary has made a cartel arrangement if it did not participate in (and may even have been unaware of) the negotiation of the cartel agreement by its parent and other entities overseas.

As both interpretations of the effect of s 44ZZRC produce a strange result, the courts are likely to look to the Explanatory Memorandum when interpreting the section.[92] The Explanatory Memorandum expressly states that s 44ZZRC:

> does not deem a party to have breached the criminal or parallel civil prohibitions regarding making or giving effect to a contract, arrangement or understanding containing a cartel provision.[93]

This statement is likely to encourage the court to find that s 44ZZRC does not provide a means to attack cartels formed overseas by allowing an Australian subsidiary to be prosecuted even where the foreign parent is not carrying on business through that subsidiary. Furthermore, courts are unlikely to impose criminal liability on the subsidiary because the fault element specified in the criminal offence would not be satisfied. In any event, cartels formed overseas between companies that do not carry on business in Australia and do not have Australian subsidiaries remain outside the reach of Australia's cartel prohibitions.

4 Is there a need to amend s 5?

Section 5 in its current form does not adequately permit Australian firms or the ACCC to challenge international cartel activity. The mere presence in Australia of goods the price of which is determined in accordance with a cartel agreement reached overseas will not be sufficient to establish jurisdiction.[94] As the reasoning in *Bray (trial)* and *Bells Sports* demonstrates, the European manufacturers in the hypothetical example given above are unlikely to be viewed as carrying on business in Australia.[95] Furthermore, the entities that could be viewed as carrying on business in Australia (the wholesalers and importers) are victims of, not parties to, the cartel agreement. It is therefore submitted that consideration be given to amending s 5 to widen the circumstances in which the cartel prohibitions extend to conduct that occurs outside Australia.

C The US 'effects' and EU 'implementation' doctrines

This section considers the way in which the European Union and United States determine the extraterritorial reach of their competition laws with a view to determining whether Australia should adopt the approaches employed in these jurisdictions.

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92 *Acts Interpretation Act 1901* (Cth) s 15AB.

93 Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) 1.49.

94 Sweeney, above n 22, 64; Graham R Taylor, 'The Extraterritoriality of the Australian Antitrust Law' (1979) 13 *Journal of International Law and Economics* 273, 289.

95 See text accompanying n 56 above.

1 United States — 'effects' doctrine

Despite a conservative start,[96] the United States antitrust laws have been given a very wide reach. In *United States v Aluminium Co of America*,[97] Judge Learned Hand held that although the anti-competitive agreements under consideration were not reached in America, the Sherman Act nevertheless applied because the agreements had a direct effect upon the United States and its foreign commerce and were intended to have such an effect.[98] The approach adopted in this case has been described as the 'effects' doctrine. This approach, which permits the application of United States law to activities occurring entirely outside the United States involving no United States actors,[99] was codified in 1982 by the *Foreign Trade Antitrust Improvements Act*.

In recognition of foreign criticism of the 'effects' doctrine,[100] the United States courts experimented with what has been described as the 'juristic rule of reason' in the 1970s and 1980s.[101] Under this approach, the presence of domestic anti-competitive effects would not automatically justify the assertion of United States jurisdiction. Rather, the courts expressly recognised comity and asked whether the interests of the United States were sufficiently strong vis-à-vis the interests of other nations. If they were not, the court would not entertain the claim.[102] However, in *Hartford Fire Insurance v California* (1993), a narrow majority of the Supreme Court reaffirmed the 'effects' doctrine and adopted an approach that all but abolished comity as a meaningful element in the analysis of jurisdictional issues. The majority held that United States antitrust laws apply 'to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'[103] and that the court should only decline the exercise of its jurisdiction for reasons of comity if the conduct in question is mandated (as opposed to merely permitted) by the laws of a foreign jurisdiction.[104] This approach severely limited the ability of the United States courts to

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96 In *American Banana Co v United Fruit Co,* 213 US 347 (1909) the United States Supreme Court held that 'the general and almost universal rule is that the character of an act as lawful or unlawful must be determined by the law of the country where the act is done' (at 356).

97 148 F 2d 416 (2nd Cir, 1945).

98 Dodge has noted that antitrust law is one prominent exception to the Supreme Court's devotion to the presumption against the extraterritorial application of US statutes. Dodge also argues that the courts have not convincingly explained why the presumption does not apply in the antitrust context. Dodge suggests that the presumption is ignored in the antitrust context: Dodge, above n 62, 87, 99.

99 Edward A Rosic Jr, 'The Use of Interest Analysis in the Extraterritorial application of United States Antitrust Law' (1983) 16 *Cornell International Law Journal* 147, 147; Stephen D Ramsey, 'The United States-Australian Antitrust Cooperation Agreement: A Step in the Right Direction' (1983) 24 *Virginia Journal of International Law* 127, 137.

100 See text accompanying n 209 below.

101 This idea was originally conceived by Kingman Brewster, *Antitrust and American Business Abroad* (1958) 446.

102 *Timberlane Lumber Co v Bank of America,* 549 F 2d 597, 613 (9th Cir, 1976).

103 509 US 764, 796 (1993).

104 Justice Scalia handed down the dissenting judgment. His Honour noted that comity is exercised by legislatures when they enact laws and courts should assume it has been exercised when they come to interpret the scope of legislative prohibitions. As the conduct in question was engaged in by British subjects primarily in the United Kingdom and because Great Britain had established a comprehensive regulatory scheme governing the

take account of foreign interests and gave the United States antitrust laws, to use the language employed by Justice Scalia in his dissenting judgment, a 'breathtakingly broad' operation.[105]

Despite the approach adopted in *Hartford Fire*, significant attention was paid to comity in *Hoffman-La Roche Ltd v Empagran*,[106] the most recent Supreme Court decision relating to the extraterritorial application of United States competition laws extraterritorially. The court considered whether the United States courts had jurisdiction to hear a claim based solely on harm suffered in foreign markets that was independent of any harm caused by effects in markets in the United States.[107] Justice Breyer, who delivered the opinion of the court, placed considerable emphasis on comity. His Honour acknowledged that the application of United States competition laws to foreign conduct interferes with the sovereignty of other nations but opined that such interference can be justified with respect to claims that relate to domestic harm. It is reasonable for the United States courts to be concerned about redressing domestic harm and, as a result, the exercise of jurisdiction in these circumstances is consistent with comity.[108] Justice Breyer then turned his attention to claims based on adverse foreign effects that were independent of any adverse domestic effect. Based on a comity analysis, his Honour held that the United States should not exercise jurisdiction in such circumstances.[109] Even though Justice Breyer did not explicitly overrule *Hartford Fire Insurance*, the *Empagran* decision has re-established the role of comity in determining the territorial scope of United States competition laws. However, as Justice Breyer rejected the respondents' alternate argument that a case-by-case comity analysis was preferable to an across the board exclusion of foreign injury cases,[110] *Empagran* should not be seen as signalling a return to the 'juristic rule of reason' discussed above.

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reinsurance market, Scalia J held that the Sherman Act was not intended to apply to the conduct in question: see 509 US 764, 813–19 (1993).

105 Ibid 820.

106 542 US 155 (2004).

107 The Supreme Court made it clear that its conclusion was premised on the assumption that the alleged anti-competitive conduct independently caused foreign injury (at 158 and 164). The Supreme Court left open the possibility that a plaintiff may be able to sue in United States courts where harm suffered in foreign markets is linked to harmful effects in markets in the United States. When the matter was remitted to the District of Columbia Circuit the plaintiff argued that because vitamins were fungible and readily transportable, the respondents simply could not have effectively maintained their international price-fixing agreement without the adverse effects in the United States. Thus, it was argued, the court had jurisdiction to hear the claim. Justice Henderson (who delivered the opinion for the court) acknowledged that the maintenance of supra-competitive prices in the United States might well have been a 'but-for' cause of the appellants injury. However, her Honour held that a stronger causative link needed to be established (proximate causation), a conclusion she believed to accord with principles of comity. The plaintiff failed to satisfy this burden and therefore was not able to bring its claim in the United States courts: see *Empagran SA v F Hoffman-La Roche Ltd,* 417 F 3d 1267 (2005). See also *Re Monosodium Glutamate Antitrust Litigation,* 477 F 3d 535 (2007).

108 542 US 155, 165 (2004).

109 Ibid 166–9.

110 Ibid 168–9.

2 European Union — implementation doctrine

In the last two decades, the European Union has become far more willing to apply its competition laws to conduct occurring outside the borders of the common market.[111] The European Commission has espoused a broad notion of jurisdiction similar to the United States 'effects' doctrine.[112] However the European Court of Justice ('ECJ') has taken a narrower view. In *Wood Pulp*,[113] a case which involved an allegation of price fixing by foreign participants in the wood pulp industry, Advocate General Darmon argued that the European Community was entitled to take jurisdiction in this case on the basis of the 'effects' doctrine. However, the ECJ's decision avoided talking in terms of effects. Rather, the court concluded that the conduct in question was within the jurisdiction of the European Community because the producers had implemented their price fixing agreement in the common market by selling to purchasers in the Community at coordinated prices. It did not matter that the agreement was reached outside the European Union.

Even after the ECJ avoided endorsing the 'effects' doctrine in *Wood Pulp*, the European Commission has continued to assert that EU competition laws apply to conduct that has an effect in the common market.[114] Furthermore, there are signs that the ECJ is coming around to the idea of determining questions of jurisdiction by reference to the 'effects' doctrine.[115] As the 'effects' doctrine is only being considered with a view to determining whether Australia should adopt the 'effects' approach, the precise status of the 'effects' test in European Union law will not be explored further.

3 Economic entity doctrine

In addition to the 'effects' doctrine employed by the United States and the 'implementation' doctrine that applies in the European Union, the ECJ[116] and the United States courts[117] have both accepted the 'economic entity' doctrine. This doctrine gives courts jurisdiction over the conduct of non-domestic parent companies based on the acts of subsidiaries within the Community or the United States.

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111 Chad Damro, 'Building an international identity: the EU and extraterritorial competition policy' (2001) 8 *Journal of European Public Policy* 208, 210; Yasuf Akbar, 'The Extraterritorial Dimension of US and EU Competition Law: A Threat to the Multilateral System?' (1999) 53 *Australian Journal of International Affairs* 113, 119.

112 Joseph P Griffin, 'Extraterritoriality in US and EU Antitrust Enforcement' (1999) 67 *Antitrust Law Journal* 159, 173.

113 *A Ahlström Osakeyhtiö and others v Commission* (Case C-89/85), [1988] ECR 5193.

114 Griffin, above n 112, 180.

115 In the merger context, the ECJ appears to have accepted the effects test: *Gencor Ltd v Commission* (Case T-102/96) [1999] 4 CMLR 971, para 90.

116 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* (C-6/72) [1973] 1 ECR 215; *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission of the European Communities* (C-6-7/73) [1974] ECR 223. See also P M Roth, 'Reasonable Extraterritoriality: Correcting the 'Balance of Interests"' (1992) 41 *International and Comparative Law Quarterly* 245, 262.

117 Warren Pengilley, 'United States Trade and Antitrust Laws: A Study of International Legal Imperialism From Sherman to Helms Burton' (1998) 6 *Competition and Consumer Law Journal* 187, 189–90.

4 'Effects' test gives broadest reach

The above discussion reveals three possible approaches that could be adopted to determine the extraterritorial reach of the TPA, namely the 'implementation' doctrine, the 'effects' doctrine or the 'economic entity' doctrine.

Adopting the implementation test employed by the ECJ in *Wood Pulp* may not broaden the extraterritorial reach of the TPA. Employing the logic of the *Bray (trial)* decision, where a foreign company sells to Australia at the cartel price it is likely to be viewed as having engaged in conduct in Australia to which the cartel prohibitions apply.[118] If the 'economic entity' doctrine were adopted the extraterritorial scope of the TPA would be widened.[119] Cartel conduct by non-Australian parents of Australian companies would be caught even if the parent could not be said to be carrying on business in Australia. However, the European manufacturers in the hypothetical example discussed above[120] would still escape liability if they did not have subsidiaries in Australia. The agreement between the European manufacturers would only be caught if Australia were to adopt the 'effects' doctrine.

Adopting the 'effects' doctrine would give the TPA the broadest extraterritorial scope. As Meessen has noted, the doctrine 'expresses the main concern of any state enacting antitrust laws, which is to … defend it against adverse influences no matter where they originate and by whom they are caused.'[121] Graeme Samuel, ACCC Chairman, has recently stated that '[a]rguments that [the ACCC] cannot investigate cartels formed outside Australia affecting Australians … are against the objects of the Act and the welfare of Australians.'[122]

There is also some support for adopting the effects test in the case law. Comments made by Lockhart J in *Trade Practices Commission v Australian Iron & Steel Pty Ltd* suggest that if it were not for the inclusion of s 5 in the TPA, his Honour would have seriously considered adopting the 'effects' doctrine.[123] In *Bray*, Merkel J opined:

> In an era of e-commerce, electronic funds transfers, internet trading and information technology there may be much to be said for the view that, absent a contrary statutory intention, the time might have come to move to the 'effects' doctrine of jurisdiction developed in the United States. [124]

There is merit in Merkel J's observation and, if the extension of the scope of the extraterritorial reach of the TPA did not have the potential to cause conflict with other nations, the reach of the cartel prohibitions should definitely be extended to catch conduct engaged in outside Australia that has a harmful effect on Australia whether or not the entity engaging in the conduct otherwise has a territorial connection with

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118 (2002) 118 FCR 1, 45–6.

119 Merkel J's reluctance to lift the corporate veil between the Australian subsidiaries and foreign parents in *Bray* (see text accompanying n 84 above) suggests that in order to see the 'economic entity' doctrine employed more liberally by the courts, it would be necessary to amend s 5.

120 See text accompanying n 56 above.

121 Meessen, above n 24, 799.

122 ACCC, 'Federal Court dismisses airlines' challenge to ACCC enforcement powers' (News Release, 3 April 2009).

123 (1990) 22 FCR 305, 319.

124 (2002) 118 FCR 1, 15. See also *Emirates v Australian Competition and Consumer Comission* (2009) 255 ALR 35, 37.

Australia.[125] As the TPA was carefully drafted to avoid any general application of the 'effects' doctrine,[126] this could only be achieved by amending s 5.[127]

Adopting the 'effects' test would ensure that the cartel prohibition applies to any foreign conduct that has an effect on Australian businesses or consumers. Whether Australia should ultimately adopt the 'effects' test to determine the extraterritorial scope of the cartel prohibitions will depend on the effect doing so is likely to have on the levels of cooperation that can be expected from other nations and an assessment of Australia's ability to enforce judgments against overseas defendants. These issues are considered in the next part of this article.

III SHOULD AUSTRALIA ADOPT THE 'EFFECTS' DOCTRINE?

Amending s 5 of the TPA so that the prohibitions against hard core cartel conduct (ie, the Civil and Criminal Cartel Provision Prohibitions) extend to conduct engaged in overseas that has a substantial effect in Australia (rather than only to conduct engaged in by a company incorporated, or carrying on business, in Australia) would clearly see the cartel prohibition apply to the widest range of international conduct. However, the wide reach of the effects test is both a benefit and a source of potential problems. The response of many countries (Australia included) to United States actions based on the 'effects' doctrine suggests that its adoption in Australia has the potential to cause tension with other countries. This tension could impede the effectiveness of extraterritorial actions if it encourages other countries to take retaliatory measures designed to thwart Australian enforcement efforts[128] or reduces the levels of cooperation Australia could expect from other nations when it comes to investigating international cartel activity.

To date there have been few objections to Australian extraterritorial actions,[129] however, this is most likely explained by the low number of such actions rather than explicit international acceptance of the TPA's current extraterritorial regime.[130]

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125 It is proposed that this amendment be limited to the cartel offences because, for reasons to be explored in this paper, doing so will maximise the likelihood that foreign nations will cooperate with Australia when it comes to evidence gathering and enforcement.

126 Pengilley, above n 117, n 8.

127 The Commonwealth Parliament has the legislative power to amend s 5 in this manner. As Merkel J noted in *Bray (trial)*, '[i]t was open to the legislature, as a matter of power and comity, to impose a lesser nexus requirement (for example, intended and actual anti-competitive consequences in Australia) but it chose not to do so' (at (2002) 118 FCR 1, 18).

128 Sweeney, above n 22, 66.

129 In response to the commencement of the action in *Meat Holdings*, the United Kingdom Minister for Trade made an order under s 5(4) of the *Protection of Trading Interests Act 1980* (UK) which ensured that an order for divestiture made pursuant to s 81(1A) of the TPA would not be enforceable in the United Kingdom.

130 Australia is a relative late-comer when it comes to the extraterritorial enforcement of its competition laws. The first two attempts to invoke the extraterritorial application of the TPA involved challenges to merger activity with an international dimension. In 1988, the Trade Practices Commission challenged the acquisition by an Australian company of a company incorporated in the United Kingdom (*Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299). However, the extraterritorial reach of the TPA was not tested as Wilcox J concluded that the company incorporated in the United Kingdom had engaged in relevant conduct (including attending meetings at the offices of the Trade

Nevertheless it is important to consider whether extending the extraterritorial reach of the cartel prohibition would actually reduce Australia's ability to regulate extraterritorial conduct because it would decrease the likelihood that other countries will cooperate with respect to the gathering of evidence and enforcement of Australian judgments overseas.

A Other options

Before advocating the adoption of the 'effects' doctrine by Australia, other methods of dealing with international cartels need be considered and dismissed.

1 Free-ride on the efforts of others

Many countries do not challenge international cartel conduct. This is because once the actions of the cartel are challenged by a large jurisdiction the cartel typically ceases to operate. Thus, one option for Australia is to avoid the expense and uncertainty associated with extraterritorial actions and free-ride on the enforcement activities of other jurisdictions.[131]

It is submitted that Australia should not adopt this approach for several reasons.[132] First, the national competition authorities in the large jurisdictions often ignore the anti-competitive effects of local firms' actions on other countries.[133] Bringing extraterritorial actions helps alleviate the effects of self-interested foreign competition enforcement policies.[134] Secondly, it seems reasonable to suggest that competition authorities in large jurisdictions will not spend their limited resources challenging conduct that has limited impact on their jurisdiction, even if the effects on other jurisdictions are substantial.[135] Thirdly, conduct that causes harm in Australia may not be prohibited in the foreign jurisdiction.[136] For example many jurisdictions, including

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Practices Commission to discuss the merger) in Australia. Two years later, the Trade Practices Commission brought proceedings to restrain a New Zealand company from acquiring another New Zealand company (*Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305). The statement of claim was struck out on the basis that s 5 of the TPA provides 'a clear indication that the legislature intended that s 50 … was to have extraterritorial application to the extent therein mentioned and no further' (at 319). As the acquiring company was not incorporated in Australia and did not carry on business in Australia, the acquisition was beyond the reach of the TPA.

131 See Michal Gal, 'Antitrust in a Globalized Economy - The Unique Enforcement Challenges Faced by a Small Economy (Israel)' in Andrew Guzman (ed), *Cooperation, Comity, and Competition Policy* (2009) 17.

132 Gal notes that free-riding on the enforcement actions of large jurisdictions generates sub-optimal outcomes: ibid 19.

133 Aditya Bhattacharjea, 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' (2006) 9 *Journal of International Economic Law* 293, 295. Gal has noted that this occurs in the merger context in that most jurisdictions' evaluation of a merger is limited to the welfare effects of the merger on domestic consumers and/or producers and disregards the effects on foreign consumers and producers: Michal Gal, *Competition Policy for Small Market Economies* (2003) 243.

134 Michael Trebilcock and Edward Iacobucci, 'National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy' in Richard Epstein and Michael Greve (eds), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (2004) 152, 154.

135 Gal, 'Antitrust in a Globalized Economy', above n 131, 19.

136 Roth, above n 116, 267.

Australia,[137] exempt export cartels from their competition laws.[138] Finally, empirical evidence suggests that cartels are often set up so that they do not apply in jurisdictions likely to challenge the conduct.[139] Firms are more likely to engage in cartel conduct directed toward Australia if such conduct is beyond the extraterritorial reach of Australian competition laws.[140]

2 *Positive comity agreements*

Another possible alternative to extraterritorial enforcement of local cartel prohibitions involves making a positive comity request.[141] This involves requesting another country to open or expand investigations and proceedings in relation to anti-competitive conduct occurring in the requested jurisdiction that is harming the requesting jurisdiction.[142] The OECD encourages the requested country to seriously consider such requests and act on them where appropriate.[143] Positive comity provisions were first included in the 1991 Enforcement Agreement reached between the European Union and the United States[144] and have since been included in numerous other competition law agreements.[145]

There are several advantages associated with resolving international competition concerns by making a positive comity request.[146] First, investigation and prosecution of the conduct will be the responsibility of the country in the best position to carry out those functions.[147] Secondly, the cooperative nature of positive comity requests reduces the likelihood that a conflict will arise between the requesting and the requested nation.[148] However, it should be noted that making a positive comity

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137 Section 51(2)(g) provides that Part IV of the TPA does not apply to contracts, arrangements or understandings that relate solely to the export of goods or supply of services outside Australia provided the parties to the contract, arrangement or understanding provide particulars of the agreement within 14 days of the agreement being reached. See also *Sherman Act*, 15 USC § 6a (1890).

138 Trebilcock and Iacobucci, above n 134, 152.

139 Gal, 'Antitrust in a Globalized Economy', above n 131, 18; see also Michal Gal, 'Free Movement of Judgments: Increasing Deterrence of International Cartels through Judicial Reliance (Law and Economics Research Paper No 08–44, NYU, October 2008) 5, available at <http://ssrn.com/abstract=1291844> at 21 March 2010.

140 Empirical evidence confirms this: see Gal, 'Antitrust in a Globalized Economy', above n 131, 18.

141 Sweeney, above n 22, 37.

142 OECD, *Reports: Positive Comity*, above n 1, 5.

143 Ibid 5; OECD, *Recommendations and Best Practices: Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade* (1995).

144 Sweeney, above n 22, 37.

145 The United States also has positive comity agreements with Canada, Brazil and Japan: see Sweeney, above n 22, 38. See also OECD, *Reports: Positive Comity*, above n 1, 7.

146 Positive comity has the potential to challenge anti-competitive conduct that the requesting country is unable to challenge because of its limited jurisdiction. However, as positive comity is being considered as an alternative to broadening the extraterritorial scope of the cartel prohibition, this issue will not be considered any further.

147 Sweeney, above n 22, 39; OECD, *Reports: Positive Comity*, above n 1, 22.

148 Griffin, above n 112, 183. See also Claus Dieter Ehlermann, 'The Role of Competition Policy in a Global Economy' in OECD, *New Dimensions of Market Access in a Globalising World Economy* (1995) 119.

request does not preclude the requesting party from taking its own enforcement action.[149] Thirdly, in many instances the requested country will appreciate having anti-competitive conduct that causes harm in its jurisdiction brought to its attention.[150] Positive comity's potential is greatest in such cases.[151] Fourthly, positive comity provides a remedy where, despite the fact that the requesting country has jurisdiction, it is unlikely to challenge the conduct because any remedy or penalty imposed by its courts is unlikely to be effectively enforced.

While attractive for the above-mentioned reasons, the positive comity approach has its weaknesses. It has been argued that limitations on the effectiveness of positive comity mean that it may at times be necessary to apply domestic competition laws extraterritorially.[152] These limitations largely relate to the voluntary nature of positive comity.[153] Where the conduct in question affects the requested jurisdiction positively, the positive comity request may not be fulfilled.[154] As Allan Fels (former ACCC Chairman) observed, 'it is a fact of life that the countries tend not to take action against any anticompetitive conduct that merely affects other countries'.[155] For this reason, Atwood has suggested that '[w]e should not expect the principle of positive comity … to impact dramatically on the proposition that laws are written and enforced to protect national interests.'[156] Finally, positive comity requests are also ineffective where the conduct in question is legal in the requested state.[157]

There is no doubt that Australia should attempt to enter positive comity agreements with other major nations. Doing so will provide a further option for dealing with international anti-competitive conduct and is likely to further cultivate cooperation with enforcement agencies in other countries. However, it would not be appropriate to rely solely on such agreements to protect against the harm caused by international anti-competitive conduct.[158] As Sweeney has observed:

> positive comity, although useful, is not a panacea for all international anti-competitive conduct. Indeed, in practice, positive comity has only rarely been used. This means that

149 OECD, *Reports: Positive Comity*, above n 1, 9.
150 Ibid 13.
151 Ibid 14.
152 Sweeney, above n 22, 41.
153 Even those positive comity requests contained in competition agreements between nations impose no binding obligations: Sweeney, above n 22, 38.
154 Gal, *Competition Policy for Small Market Economies*, above n 133, 244.
155 Allan Fels, 'Trade and Competition in the Asia Pacific Region' (Speech delivered at the Economic Society of Australia 24th Conference of Economists, Adelaide, 28 September 1995). Australian courts have made similar observations. In *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89, 113 Lindgren J stated 'Section 2 of the Act states that the object of that Act is to enhance the welfare of Australians through the promotion of competition. Achievement of that objective is not inconsistent with preventing contraventions by Australian entities that injure non-Australians, but it is appropriate to focus primarily upon the effects of a contravention in Australia'.
156 James R Atwood, 'Positive Comity — Is It a Positive Step?' in Barry Hawk (ed), *1992 Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law and Policy* (1993) 79, 87.
157 Sweeney, above n 22, 40; OECD, *Reports: Positive Comity*, above n 1, 12.
158 The OECD has noted that there do not appear to be any risks involved in placing new emphasis on this form of voluntary cooperation: OECD, *Reports: Positive Comity*, above n 1, 16.

> countries will inevitably have to consider the benefits and disadvantages of applying their domestic competition laws extraterritorially.[159]

Furthermore as the OECD has noted, positive comity has limited potential in hard core cartel cases because the (would be) requesting country is likely to want to impose its own remedies and allow its citizens to seek compensation from the international cartel members.[160]

B Benefits of adopting the 'effects' doctrine

The continued internationalisation of business activities and the increasingly global nature of markets mean that it is becoming even more important that countries are able to protect themselves against harm caused by anti-competitive conduct engaged in by non-domestic firms.[161] One way to protect against such harm is to ensure local competition laws have a wide extraterritorial reach.[162] In fact, it has been argued that where national competition laws are not able to reach anti-competitive conduct originating in other jurisdictions, a national policy failure exists.[163]

The United States has defended its use of the 'effects' doctrine on the basis that it is necessary to maintain competition in United States markets and ensure that alien economic values are not forced upon it.[164] The broad test also ensures that those who deliberately attempt to ensure that their anti-competitive activities occur outside United States borders are not rewarded for doing so.[165]

Although the relatively small size of the Australian economy[166] may make the enforcement of extraterritorial judgments more difficult, it also increases the benefits that flow from broad exterritorial jurisdiction. Concentrated market structures are common in small economies. The limited level of demand means that the number of efficiently-operating firms the market can support is low. This leads to oligopolistic

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159 Sweeney, above n 22, 41 (citations omitted).

160 OECD, *Reports: Positive Comity*, above n 1, 24.

161 Akbar, above n 111, 115; A Douglas Melamed, 'Promoting Sound Antitrust Enforcement in the Global Economy' (Speech delivered at the Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy, New York, 19 October 2000, 5) <http://www.justice.gov/atr/public/speeches/6785.htm> at 21 March 2010; OECD, *Recommendations Concerning Co-operation between Member Countries*, above n 143, 2.

162 Margaret Levenstein and Valerie Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) 71 *Antitrust Law Journal* 801, 843. Levenstein and Suslow note that in recent years, several of the larger developing countries have started to enforce their laws extraterritorially.

163 R Falvey and Peter J Lloyd, 'An Economic Analysis of Extraterritoriality' (Working Paper No 675, University of Melbourne Department of Economics, 1999) 7; Rosic Jr, above n 99, 153.

164 US Attorney General Griffin Bell, Address to the Law Council of Australia, 17 July 1978; Falvey and Lloyd, above n 163, 7.

165 *United States v Nippon Paper Industry Co*, 109 F 3d 1, 8 (1997).

166 In Gal, *Competition Policy for Small Market Economies*, above n 133, Professor Gal classifies Australia as a small economy. Even though Australia does not have a low population, the dispersion of its population over a large geographic area regionalises markets and means that Australian markets exhibit characteristics typical in countries with much lower populations (see part 2).

market structures.[167] The interdependence between firms in oligopolistic markets often results in parallel conduct and supra-competitive prices.[168] Competitively priced imports can dramatically improve the efficiency of local industries by imposing a competitive threat and forcing such industries to become more competitive and efficient.[169] This means that the impact of international cartel activity is likely to be greater on countries like Australia because a cartel operating in a foreign market could remove the threat of low-priced imports that would undermine cartelisation of or coordinated activity in the domestic market.[170] This strengthens the case for adopting the 'effects' doctrine.

Broad extraterritorial jurisdiction also permits the recovery of loss caused to Australians by international cartel activity. A civil action brought by Australian victims of the international vitamin cartel was recently settled for A$30.5 million.[171] To date, pecuniary penalties totalling A$41 million have been awarded against the participants in the international air-freight cartel.[172] Further a representative action is being brought against the major airlines by persons who directly or indirectly paid artificially high prices for freight services.[173] Such actions enable Australian firms to recover damages from the cartelists to compensate them for harm caused by the cartel. Although the extraterritorial application of the TPA was not invoked in the international vitamins actions[174] and the participants in the air-freight cartel were

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167 Gal, *Competition Policy for Small Market Economies*, above n 133, 15–17. Regarding the concentrated nature of Australian markets see Richard E Caves, 'Scale, Openness, and Productivity in Manufacturing Industries' in Richard E Caves and Lawrence B Krause (eds), *The Australian Economy: A View from the North* (1984) 313, 321 (referred to in Gal, *Competition Policy for Small Market Economies*, above n 133, 19).

168 This is particularly the case where firms in the market face similar cost and demand factors.

169 This is acknowledged in the TPA, albeit in a different context. Section 50(3)(a) of the TPA directs the court to consider the level of import competition in the market when assessing the competitive effects of a merger.

170 Bhattacharjea, above n 133, 312.

171 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322. Pecuniary penalties totalling A$26 million were imposed on the Australian subsidiaries (Pecuniary penalties of: A$15 million were imposed on Roche Vitamins Australia Pty Ltd , A$7.5 million were imposed on BASF Australia Limited and A$3.5 million were imposed on Aventis Animal Nutrition Pty Limited (formerly Rhone-Poulenc Animal Nutrition Pty Limited): *ACCC v Roche Vitamins Australia Pty Ltd* [2001] FCA 150).

172 The following pecuniary penalties were imposed: A$20 million against Qantas (*Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89); A$5 million against British Airways (*Australian Competition and Consumer Commission v British Airways PLC* [2008] FCA 1977); A$5 million against Martinair Holland NV (*Australian Competition and Consumer Commission v Martinair Holland NV* [2009] FCA 340); A$6 million against Société Air France and KLM (*Australian Competition and Consumer Commission v Société Air France* [2009] FCA 341); and A$5 million against Cargolux Airlines (*Australian Competition and Consumer Commission v Cargolux Airlines International SA* [2009] FCA 342). The ACCC has also instituted proceedings against Singapore Airlines, Emirates, Cathy Pacific, Thai Airways and Garuda Indonesia (see ACCC, 'ACCC Institutes Proceedings against Thai Airways for Alleged Price Fixing of Air Freight' (News Release, 28 October 2009)).

173 See *Auskay* (2008) 251 ALR 166.

174 This is because the court found that the foreign parents had engaged in conduct in Australia, see *Bray (trial)* (2002) 118 FCR 1 (see text accompanying n 72 above). It is important to note that it will not always be possible to find that international cartelists who

caught under the current extraterritorial reach of the TPA,[175] the legal actions brought in connection with both cartels demonstrate the substantial harm that international cartel activity can inflict upon Australian businesses.

The fact that Australia has had some success against international cartel activity does not demonstrate that it is not necessary to amend s 5. It is important to note that the cartel participants admitted liability in all of these cases discussed in the previous paragraph. We cannot be certain that a fully argued hearing would have led to the same result.

It is also reasonable to suggest that some cartel conduct (such as the conduct of the European manufacturers in the hypothetical example discussed above[176]) is not being prosecuted because it is clear that it is not caught by s 5. In 2001, the ACCC commenced proceedings against the largest foreign producers of vitamin C. It was alleged that these producers were part of a global vitamins cartel which, inter alia, provided for the allocation of global shares of the vitamin C market amongst the producers. None of the Australian subsidiaries of the foreign producers was joined as respondents.[177] These proceedings were discontinued. The ACCC did not doubt that a cartel agreement had been reached or that the agreement caused an elevated price to be charged in Australia for vitamin C. Rather, they were discontinued as it was not clear that the agreement was given effect to in Australia (which, given that the respondents were not incorporated, or carrying on business, in Australia was the only basis upon which their conduct could be caught).[178]

C Importance of cordial relations with other nations

In theory, adopting the 'effects' doctrine would give Australia's cartel prohibition the widest extraterritorial reach. However in practice, effective extraterritorial application of Australia's laws is dependent upon the cooperation of foreign nations. The effective gathering of evidence overseas will require the assistance of foreign competition agencies.[179] Historically, many nations have responded with hostility to United States actions based on the 'effects' doctrine and have taken retaliatory action aimed at exacerbating the problems already inherent in bringing an extraterritorial action.[180] As Edmund Hosker, an official of the British Embassy has noted, one 'perverse result' of the *Hartford Fire* judgment[181] which, in theory, gave United States competition laws a wider reach, may be to reduce the incentive of other foreign states to cooperate with the United States and, in turn, the effectiveness of United States extraterritorial antitrust actions.[182]

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have inflicted harm on Australian businesses or consumers have engaged in conduct in Australia.

175 This is because the participants were carrying on business in Australia.

176 See text accompanying n 56 above.

177 ACCC, 'ACCC Files Proceedings Against Global Vitamin C Cartel' (News Release, 7 February 2003).

178 ACCC, 'ACCC Discontinues Proceedings Against Global Vitamin C Cartel' (News Release, 18 July 2006).

179 OECD, *Fighting Hard Core Cartels*, above n 11, 34.

180 Sweeney, above n 22, 49–51; Pengilley, above n 117, 223; Gal, *Competition Policy for Small Market Economies*, above n 133, 241.

181 See text accompanying n 103 above.

182 Edmund Hosker is quoted in Griffin, above n 112, 195.

Before adopting the 'effects' doctrine, Australia must think carefully about the practical consequences of doing so. This section of the paper discusses the reasons why the cooperation of other nations is so important. Whether Australia could adopt the 'effects' doctrine with respect to cartel conduct while at the same time ensuring that other nations will assist Australia to investigate and prosecute extraterritorial cartel conduct will be explored in the sections that follow.

1 Investigation activities

Competition cases are fact intensive and evidence of international cartels is likely to be spread across various countries.[183] It can be very difficult for the ACCC or an Australian private litigant to obtain the evidence that is required to establish breach of the cartel prohibition without the cooperation of foreign competition authorities or courts.[184]

There are several ways in which the ACCC or private litigant may attempt to obtain evidence from outside Australia. An Australian court may issue letters rogatory, official requests to courts in other jurisdictions to compulsorily take evidence.[185] Where assistance is sought from a country that is a signatory to the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*[186] the various procedures in the Convention that provide for the taking of evidence may be invoked. These include: letter of request,[187] gathering of evidence by a diplomatic official[188] or gathering of evidence by an appointed commissioner.[189] However, these methods of obtaining evidence are slow[190] and will be ineffective if countries take the view that the breadth of the extraterritorial application of Australia's cartel prohibition is too wide. Unless a treaty obligation is involved, courts receiving letters rogatory have no obligation to respond. Furthermore, letters rogatory will be ineffective if blocking legislation exists or is enacted in response to particular actions.[191] Even if the Hague Convention applies, letters of request may be refused if the state to whom they are addressed considers that its sovereignty is being impinged upon.[192] With respect to evidence collected by diplomatic officials, foreign states have the power to declare that the official must first obtain its permission before collecting evidence.[193] An appointed commissioner is only able to collect evidence where the state in which the evidence is to be collected has given permission.[194] It has been suggested that some signatories would object to Australia challenging conduct that was engaged in within the signatory's jurisdiction simply because that conduct was engaged in by a firm that has

183 Sweeney, above n 22, 71.
184 Levenstein and Suslow, above n 162, 844.
185 Sweeney, above n 22, 73.
186 Opened for signature 18 March 1970, 847 UNTS 231 (entered into force 7 October 1972).
187 See arts 1–14; Sweeney, above n 22, 75.
188 See arts 15–16; Sweeney, above n 22, 75.
189 See art 18; Sweeney, above n 22, 75.
190 Sweeney, above n 22, 75.
191 Such legislation can inhibit discovery and/or prevent the enforcement of foreign judgments by domestic courts: Rosic Jr, above n 99, 163; Roth, above n 116, 251.
192 See art 12(b).
193 See art 15.
194 See art 17(a).

carried on business in Australia.[195] Such states are even more likely to object where Australia claims jurisdiction on the basis of the 'effects' doctrine.

The ACCC or private litigant may also request assistance from the competition authorities in the country in which the conduct is believed to have occurred. However such a request is likely to be declined where the requested jurisdiction believes its sovereignty is being impinged upon. Even where a formal agreement has been reached between Australia and another country to promote cooperation with respect to the gathering of evidence, assistance is likely to be denied if the requested authority considers that execution of the request would be contrary to the interests of the requested nation.[196] States may come to such a conclusion if they think that investigating the activity will harm the local economy or will interfere with current or future investigation activities.

2 Enforcement

Even if the difficulties associated with obtaining evidence can be overcome, there is little to be gained from extending the extraterritorial scope of the cartel prohibition by adopting the 'effects' doctrine if doing so would reduce the likelihood that foreign countries would assist in enforcing Australian judgments. Unless the foreign respondent has assets in the jurisdiction, it may be difficult to enforce an Australian judgment against that respondent without assistance from foreign courts.[197] Section 5 currently extends the competition prohibitions to conduct engaged in outside Australia by bodies corporate incorporated, or carrying on business, in Australia. Such bodies corporate are likely to have assets in Australia. However, the type of company that would only be caught if Australia adopted the 'effects' doctrine is far less likely to have assets in Australia.

When determining whether to award a particular remedy, Australian courts are likely to consider the prospect of such an award being enforceable. In *Meat Holdings* Wilcox J declined to declare an acquisition which breached the merger prohibition void. One of the reasons his Honour refused to do so was that he believed such an order would not be enforceable in the United Kingdom.[198] In *Australian Competition and Consumer Commission v Chen*, Sackville J noted '[i]n general, a court will be loath to make orders affecting conduct outside Australia in circumstances where direct enforcement of those orders is difficult or impossible.'[199]

Foreign states are likely to refuse to enforce an Australian judgment where doing so would: amount to the enforcement of a penal or public law;[200] contravene blocking legislation; or the judgment was obtained without personal jurisdiction.[201] While countries are free to enter treaties aimed at overcoming problems with enforcement,

195 Meltz, above n 76, 203.

196 Article IV(A)(4) of the *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*, 27 April 1999, 2117 UNTS 203 (entered into force 5 November 1999) expressly provides that this is the case.

197 Sweeney, above n 22, 84.

198 *Meat Holdings* (1988) 83 ALR 299, 359–64.

199 (2003) 132 FCR 309, 322.

200 See Wilcox J's comments in *Meat Holdings* (1988) 83 ALR 299, 360–1.

201 Sweeney, above n 22, 84.

such treaties are unlikely to force a foreign jurisdiction to enforce a judgment it believes impinges on its sovereignty.

Australia's small size may further hamper the effective extraterritorial enforcement of competition laws.[202] This contention is consistent with empirical research showing that countries with small economies are far less likely to challenge international anti-competitive conduct.[203] Small economies (in which foreign firms are less likely to have assets) may face increased difficulties enforcing judgment and thus be unable to create a credible threat of enforcement.[204] Also, the small economy may not be able to afford to bring enforcement actions in overseas courts.[205] For these reasons, it has been argued that small jurisdictions often lack the power to tackle foreign anti-competitive conduct.[206]

However, it may not be appropriate to apply generalisations about small economies to Australia in this context.[207] In her leading work, *Competition Policy for Small Market Economies*, Professor Gal treats Australia as a small economy because of its dispersed population and distance from major trading partners.[208] However, in other relevant ways Australia is more similar to larger jurisdictions. For example, Australia has a relatively well-resourced competition authority that can afford to take on extraterritorial actions. Further, Australia may have sufficient political clout to enter agreements with other nations that could reduce the problems it faces gathering evidence and enforcing its judgments. Lastly, Australia has a substantial population size, which increases the incentives of firms to operate within it. Therefore, the possibility of adopting wide-reaching extraterritorial prohibitions cannot be dismissed simply on the basis that Australia shares characteristics in common with small market economies.

D Possible negative reactions to the adoption of the 'effects' doctrine

Many states remain opposed to extraterritoriality,[209] and the World Trade Organization, has noted the potential for the extraterritorial application of competition laws to destabilise relations in the international political economy.[210] Having discussed the importance of the cooperation of other nations to the effective application of local laws to conduct that occurs outside the jurisdiction, attention will

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202 Gal, *Competition Policy for Small Market Economies*, above n 133, 10; Gal, 'Antitrust in a Globalized Economy', above n 131, 1.

203 Gal, 'Antitrust in a Globalized Economy', above n 131, 1.

204 Ibid 8.

205 As Gal notes, the size of the jurisdiction does not decrease the fixed costs of conducting an antitrust enquiry: Gal, 'Antitrust in a Globalized Economy', above n 131, 13.

206 Gal, 'Free Movement of Judgments', above n 139, 7.

207 In the empirical research referred to earlier, Australia is not included as one of the small jurisdictions. Unfortunately, it is also not included as a large jurisdiction so we cannot be certain that the authors would not have classified Australia as a small jurisdiction.

208 Gal, *Competition Policy for Small Market Economies*, above n 133, 2. As a result, Australia shares with other small economies the problem that many of its markets are not large enough to permit the operation of many efficiently-sized competitors.

209 Sweeney, above n 22, 65.

210 World Trade Organization, *Annual Report 1997 (Volume 1): Trade and Competition Policy Annual Report* (1997) 76.

now be focussed on the negative reactions that broad extraterritorial application of Australia's competition laws may trigger.

1 Is the 'effects' doctrine consistent with international law?

Critics of the 'effects' doctrine often assert that it is inconsistent with international law.[211] In fact, Australia has itself asserted the United States 'effects' doctrine contravenes international law.[212] Furthermore, inconsistency with international law has often been cited as a justification for non-cooperative, retaliatory action against extraterritorial actions.

International law defines the jurisdictional limits of nation states. Those that support and those that oppose the 'effects' test both claim that principles of international law support their position.[213]

Under the territoriality principle, a country has the competence to prescribe laws that apply to their citizens and to conduct that occurs within its borders.[214] The territoriality principle is uncontroversial.[215] However, the extent to which public international law permits the exercise of extraterritorial jurisdiction is not free from doubt.[216] Supporters of the United States 'effects' doctrine argue that it is based on the objective territorial principle,[217] which is said to allow a country to assert jurisdiction over any conduct that has effects in the jurisdiction. This principle was first recognised in cases of direct physical harm.[218] Although it has been argued that economic effects are too amorphous and too remote to serve as a valid basis of jurisdiction,[219] international law must evolve and, given globalisation of trade and the development of technology that further promotes cross-border transactions, this argument is becoming outdated.

Thus it seems that principles of international law do not conclusively support nor reject the 'effects' doctrine. Although the objective territoriality principle upon which the 'effects' doctrine is based has some support in the case law it is not universally accepted.[220] There is a risk, therefore, that adopting the 'effects' doctrine will alienate nations who take the view that Australia is flouting international law. However, it is

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211 See, eg, Pengilley, above n 117, 189; Sweeney, above n 22, 55.

212 Ramsey, above n 99, 133.

213 Roth, above n 116, 254.

214 Falvey and Lloyd, above n 163, 2; Elizabeth Jardine, 'Extraterritorial Enforcement of Australian Antitrust Legislation: *Australian Meat Holdings Pty Limited & Ors v Trade Practices Commission*' (1990) 12 *Sydney Law Review* 652, 659.

215 Currently, extraterritorial application of the TPA is confined to those areas which international law definitely permits a sovereign to affect externally on the basis of the territoriality principle: see Meltz, above n 76, 186.

216 Ibid 186.

217 Roth, above n 116, 286; Ramsey, above n 99, 131.

218 Ramsay, above n 99, 132. In the *Lotus Case (France v Turkey)* [1927] PCIJ (ser A) No 10, the Permanent Court of International Justice upheld Turkey's jurisdiction to prosecute a French naval officer who had negligently caused a collision between a French vessel and a Turkish vessel which resulted in the deaths of a number of Turkish sailors.

219 R Y Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *British Yearbook of International Law* 146, 159.

220 Sweeney, above n 22, 66.

worth noting that some extraterritorial cases have caused international conflict even though claims in those cases fell within the well-accepted territoriality principle.[221]

2 *Response to US 'economic imperialism'*

The United States is by far and away the most active when it comes to applying competition laws extraterritorially.[222] Aggressive assertions of extraterritorial jurisdiction (based on the 'effects' doctrine) by the United States competition authorities in the 1950s through to the 1970s caused considerable backlash from many foreign governments.[223]

The *Uranium* litigation[224] evoked particularly strong reactions. It provides a nice case study of the negative responses the 'effects' doctrine can evoke. In response to the Atomic Energy Commission's decision to foreclose the United States uranium market,[225] non-United States uranium producers, supported by their governments, formed a cartel. The cartel arrangements were originally entered into to stabilise world prices, although as a result of the cartel and other factors, the price of uranium increased significantly. Westinghouse, a United States company, had entered into contracts under which it agreed to supply uranium without protecting itself against future price rises through hedging arrangements. When it defaulted on its uranium supply contracts, it filed treble damages suits against those who participated in the cartel.[226]

Objections to the United States 'effects' doctrine were forcibly expressed by Britain, Australia, Canada and South Africa[227] and a range of radical retaliatory counter measures were implemented.[228] Many of the foreign defendants, including four Australian defendants, refused to acknowledge the litigation.[229] In response, letters rogatory were issued by the United States courts. Letters rogatory were rejected in the English and Canadian courts.[230] The Australian government passed blocking legislation. The *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Cth) ('Evidence Gathering Blocking Legislation') was aimed at defeating the letters

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221 Meessen, above n 24, 799.
222 Falvey and Lloyd, above n 163, 4.
223 Griffin, above n 112, 160; Ramsey, above n 99, 127; Meessen, above n 24, 791.
224 617 F 2d 1248 (7th Cir, 1980).
225 Pengilley, above n 117, 196.
226 Westinghouse argued that although it could not purchase uranium from the cartel members (because of the Atomic Energy Commission's order), the price charged by the US producers from whom they could purchase rose because those producers could also sell on the world market.
227 Sweeney, above n 22, 55.
228 As Atwood and Brewster have noted, 'when a country's allies begin competing with each other in enacting legislation directed at frustrating, and indeed retaliating against, actions of the first country, conflict and resentment is clear': James Atwood and Kingman Brewster, *Antitrust and American Business Abroad* (2nd ed, 1981) 105.
229 The Australian defendants were advised by counsel not to appear in the US courts. This is because under Australian law, even an appearance to protest the court's jurisdiction might be sufficient to enable a later judgment to be enforced against the Australian corporation in Australian courts: Ramsey, above n 99, 147.
230 *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 ('*Re Westinghouse Uranium Contract*'); *Gulf Oil Corporation v Gulf Canada Ltd* [1980] 2 SCR 39.

rogatory.[231] Section 4 of the Act authorised the Attorney-General to prohibit the giving of evidence or the production of documents to a foreign tribunal if satisfied the foreign tribunal is exercising or likely to exercise jurisdiction or powers in a manner not consistent with international law or comity or if it was necessary to do so in order to protect the national interest.[232]

When default judgment was issued against the Australian defendants, the Australian government passed the *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979* (Cth) ('Enforcement Blocking Legislation').[233] This Act allowed the Attorney-General to declare that a foreign judgment would not be enforced if the Attorney-General was convinced of the same matters specified in the Evidence Gathering Blocking Legislation. The Enforcement Blocking Legislation also included clawback provisions which permitted a company which had a United States judgment executed against assets it held in the United States to recover the amount against any assets of the United States judgment creditor located in Australia.[234]

(a) Reasons for strong negative response peculiar to the Uranium *litigation*

The reactions to the *Uranium* litigation were extreme. To some extent, the strength of the reaction can be explained by circumstances peculiar to that litigation. First, the cartel arrangements had the support of the governments of the participants. Secondly, the cartel arrangements were a direct response to a protectionist United States policy. Thirdly, the possible liability of the defendants was US$7 billion.[235] Such an award would have a devastating effect on the defendants and the economies of the countries in which they are based. Fourthly, the cartel in question did not apply to the United States purchasers, who were precluded from purchasing from non-United States sources as a result of the Atomic Energy Commission's decision to foreclose the United

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231 The *Uranium* litigation also prompted Canada and South Africa to enact legislation prohibiting the giving of evidence or the production of documents in connection with the litigation: see Pengilley, above n 117, 196. In the United Kingdom the defeat of United States letters rogatory was by judicial, not legislative activity (see *Re Westinghouse Uranium Contract* [1978] AC 547). Over 20 nations have adopted similar legislation to prevent United States discovery efforts in their territory. These nations include Belgium, Canada, France, Germany, Italy, South Africa, The Netherlands, New Zealand and the United Kingdom): see Ramsey, above n 99, 128.

232 This Act was said to be an 'assertion of the sovereignty of the Australian Parliament as against attempts of encroachment and assertions of extra-territorial powers by other countries': Commonwealth, *Parliamentary Debates*, Senate, 18 November 1976, 2197 (James McClelland).

233 The British Parliament passed similar legislation (see *Protection of Trading Interests Act 1980* (UK)).

234 Australia has since replaced the two aforementioned Acts with the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth). This Act demonstrates Australia's extreme negative reaction to the *Uranium* litigation. It gives the Attorney-General the power to prohibit the production of documents in foreign courts (s 7) and to declare that foreign antitrust judgments are not to be recognised by Australian courts (s 9). The Act also makes provision for the recovery by an Australian defendant of damages awarded against the defendant in foreign antitrust judgments (s 10) as well as reasonable costs incurred in defending such a case (s 11) by action in Australia against the foreign plaintiff.

235 Ramsey, above n 99, 143.

States uranium market.[236] Lastly, the United States government was unwilling to intervene to ensure the interests of foreign nations were fully brought to the attention of the courts.[237] The non-interventionist stand of the United States government was made worse by inflammatory remarks made by the court that heard the proceeding.[238]

These reasons suggest that reactions to an attempt by Australia to assert jurisdiction over international cartels based on the 'effects' doctrine are unlikely to be as extreme, particularly if the 'effects' doctrine is limited to the prohibitions against hard core cartels.

(b) Reasons for strong negative response that specifically relate to the United States

Many countries have procedural objections to the exercise of extraterritorial jurisdiction by the United States. The unregulated right to commence private extraterritorial actions is of concern to many countries. During the *Uranium* litigation, the Australian government was particularly irritated by the right of private action. The Australian Attorney-General noted that '[q]uestions of sovereignty or comity are matters between nations. In no way should the principle of international comity depend upon private litigants'.[239] This is because private litigants are unlikely to exercise self-restraint for reasons of comity.[240]

Many countries also object to the extensive nature of United States discovery procedures.[241] These procedures permit discovery of all information that will reveal admissible evidence and allow for discovery to be sought from persons not party to the proceedings.[242] The House of Lords described the discovery process in the *Uranium* litigation as a fishing expedition and thus an abuse of court process.[243] The fact that in Australia alone approximately half a million documents were subject to United States discovery orders suggests there is truth in the House of Lords statement.[244] As the Federal Court will only grant leave to serve an originating process if the plaintiff has a

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236 Pengilley, above n 117, 196.

237 The governments of Australia, Canada, South Africa and the United Kingdom requested that the United States Department of State submit an amicus brief to support their decision. This request was denied. It is important to remember that at the time of this litigation, the United States courts applied the juristic rule of reason. As a result, it was important that the interests of the foreign nations affected were adequately explained to the courts.

238 The following comment made by the court added fuel to the fire:

> the defaulters have contumaciously refused to come into court and present evidence as to why the District Court should not exercise its jurisdiction. They have chosen instead to present their entire case through surrogates. Wholly owned subsidiaries of several defaulters have challenged the appropriateness of the injunctions, and shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction. (*Uranium* litigation, 617 F 2d 1248, 1255–6 (7th Cir, 1980))

239 Peter Durack, Australian Attorney-General (Press Release, 5 October 1980).

240 Ramsey, above n 99, 146–7.

241 Sweeney, above n 22, 71–2.

242 Ibid. It has been argued that foreign opposition to American discovery would be reduced if the scope of requests made were more limited: Roth, above n 116, 283.

243 *Re Westinghouse Uranium Contract* [1978] AC 547, 623 (Viscount Dilhorne).

244 Pengilley, above n 117, 208.

prima facie case for relief, Australian plaintiffs are prevented from abusing the discovery process in this way.

United States cost awards are viewed by some as inappropriate. While the successful plaintiff may be awarded a costs order, a successful defendant is not entitled to such an order. Many countries also object to the awarding of treble damages.[245]

The causes for complaint discussed in the preceding paragraph could not be directed toward the narrow 'effects' doctrine being considered in this paper. First, the Australian discovery process is much narrower. Also, leave to serve an originating process will only be granted if the plaintiff has a prima facie case for relief.[246] This prevents abuse of the discovery process. Secondly, under Australian law costs are generally awarded to the successful party. Finally, the TPA already imposes restrictions on the right of third parties to seek damages and other remedies.[247]

3 Other potential concerns

As noted above, many of the reasons for the extreme reactions to the *Uranium* litigation related specifically to that litigation or to United States court processes. However, some objections to the extraterritorial application of United States competition laws in that case apply more generally.

Some nations are likely to be concerned that extraterritorial actions based on the 'effects' doctrine will jeopardise the effectiveness of leniency programs.[248] Firms may be hesitant to admit to cartel conduct if they will only be protected from prosecution in the country in which leniency is sought.[249] The importance of not disrupting leniency policies cannot be overstated. Such policies uncover cartel conduct that would otherwise go undetected and in recent years have allowed the United States and the European Union competition authorities to successfully prosecute several high-scale international cartels. For example, it was an application for leniency that brought the vitamins cartel to the attention of the United States competition authorities.[250]

Countries that face different economic circumstances from the large jurisdictions may also object to foreign competition laws being applied to local conduct. For example, small or developing nations may take the view that it is worth tolerating some degree of anti-competitive conduct in order to build up the size of its industry so that it can operate on a scale comparable to that achieved in the larger jurisdictions.[251]

E Minimising the risk of negative reaction from other nations

Thus far it has been established that there is a gap in the extraterritorial coverage of the TPA. Cartel agreements reached and implemented outside Australia by entities that are not incorporated, or carrying on a business, in Australia cannot be challenged even if they result in Australian businesses and consumers paying artificially high prices. However, it has also been shown that the cooperation of other nations is essential to the effective investigation of international cartels and the effective enforcement of any

245 Ibid.
246 *Federal Court Rules 1979* (Cth) O 8 r 3(2)(c).
247 See text accompanying n 293 below.
248 Levenstein and Suslow, above n 162, 848.
249 Melamed,above n 161, 6.
250 OECD, *Fighting Hard Core Cartels*, above n 11, 7.
251 Pengilley, above n 117, 193.

judgment made against international cartelists. Assertion of extraterritorial jurisdiction by the United States competition authorities and private litigants has attracted strong criticism from many nations and, more importantly, the adoption by those nations of retaliatory actions designed to thwart the effectiveness of United States actions. This section of the paper considers whether it would be possible to adopt the 'effects' doctrine in a way that would not alienate other countries.

1 General softening of attitudes about the appropriateness of extraterritorial application of competition laws

The past decade or so has seen a noticeable reduction in the level of hostility directed at those countries that have applied their competition laws extraterritorially,[252] even where the application of these laws has been based on the 'effects' doctrine. Sweeney suggests three possible reasons for this softening in attitude. First, a growing number of countries now appreciate that anti-competitive conduct, especially cartel conduct, is harmful to their economy.[253] Secondly, there has been an increase in the number of states that have expressed a willingness to apply their competition laws extraterritorially.[254] As the American Bar Association has noted, '[o]verlapping application of multiple antitrust rules to business conduct is becoming the norm'.[255] This has helped overcome concerns about United States economic imperialism. Thirdly, the United States competition authorities have become less aggressive when asserting extraterritorial jurisdiction.[256] Further reasons can be suggested. Countries are becoming increasingly aware of the reality that a strictly territorial attitude to the application of domestic law cannot be sustained.[257] Gal has also observed that as international trade increases, the relevance of jurisdictional borders to competition policy is being increasingly questioned[258] and that, as a result, it is becoming increasingly difficult to justify constraining competition laws to territorial boundaries.[259]

The previous discussion suggests that the possible extension of the extraterritorial reach of Australia's cartel prohibition should not be dismissed solely on the basis of the negative response to the 'effects' doctrine in the past. It is also worth noting that as the economy has become more global, several countries other than the United States have adopted the 'effects' test without experiencing the same backlash directed towards the United States.[260] Many countries have also acknowledged that parallel action might be needed for deterrence in international cartel cases.

2 Limiting extraterritorial reach to hard core cartel conduct

It cannot be stressed enough that a general extension of the extraterritorial reach of the TPA is not under consideration. Rather, it is the possible extension of the reach of the

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252 Sweeney, above n 22, 86.
253 Ibid. See also Gal, *Competition Policy for Small Market Economies*, above n 133, 3.
254 Sweeney, above n 22, 86.
255 American Bar Association, Sections of Antitrust and International Law, *Comments and Recommendations on the Competition Elements of the Doha Declaration* (2003) 10.
256 Sweeney, above n 22, 86.
257 Roth, above n 116, 266.
258 Gal, *Competition Policy for Small Market Economies*, above n 133, 3.
259 Ibid 240.
260 OECD, *Reports: Positive Comity*, above n 1, 4.

prohibitions against hard core cartels. The recent recognition of the prevalence of, and harm caused by, such cartels may make the adoption of the 'effects' test in this context more palatable.

It is only recently that countries have started to realise the extent of international cartel arrangements and the amount of the harm they cause to the global economy.[261] In fact, the OECD[262] has stated that one of the most serious impediments to effective anti-cartel activity is the lack of awareness on the part of government officials, legislators and members of the public of the amount of harm done by cartels.[263] However, the recent prosecutions of high profile international cartels (including the lysine cartel, the citric acid cartel, the vitamins cartel and the air-freight cartel)[264] have helped promote a new appreciation of the serious and substantial harm caused by hard core cartels.[265] Furthermore, statistics have recently been published that highlight the prevalence of, and harm caused by, cartels. Although it is not possible to be precise about such matters, a recent study found that only a small fraction (13 to 17 per cent) of cartels is detected.[266] The OECD has also publicised the fact that recently exposed cartels have resulted in overcharges of US$1 billion.[267] Thus, slowly but surely countries around the world are beginning to comprehend the harm caused by 'hard core' cartels.[268]

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261 OECD, *Hard Core Cartels*, above n 10, 5. The OECD Report notes that in the first part of the 1900s cartels were encouraged in some countries because of the stabilising effects they had on markets. In the 1980s, a prominent school of economics took the view that cartels were so inherently unstable (because of the temptation to cheat on the agreement) that they should not be viewed as a serious problem. In 2000, the OECD noted that cases prosecuted in 1998, 1999 and 2000 provide evidence that the incidence and harmfulness of hard core cartels are significantly higher than was appreciated even two years ago.

262 The OECD's Competition Committee is the world's premier source of policy analysis and advice to governments on competition law issues and has played a crucial role in building consensus among Members on a wide range of competition policy matters, including cartels. Member States take its recommendations and statements of best practice very seriously.

263 OECD, *Hard Core Cartels*, above n 10, 20.

264 The large and sophisticated firms engaged in this cartel spent millions of dollars and thousands of employee hours to implement and hide their cartel to fix prices and allocate markets shares for the sale of certain vitamins. The fines in the US case against this cartel have exceeded US$1 billion and could have been higher except for the fact that Rhone-Poulenc was not fined because of its cooperation with the US authorities. In the US alone the cartel is estimated to have produced US$5 million in overcharges. In Canada fines exceeded C$ 85 million.

265 OECD, *Hard Core Cartels*, above n 10, 21.

266 John M Connor and Robert H Lande, 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines' (2005) 80 *Tulane Law Review* 513 cited in Gal, 'Free Movement of Judgments', above n 139, 5.

267 OECD, *Hard Core Cartels*, above n 10, 12.

268 In OECD, *Recommendations Concerning Effective Action Against Hard Core Cartels*, above n 19, [A2] the OECD defined a 'hard core cartel' as 'an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce'. See also OECD, *Hard Core Cartels*, above n 10, 6.

The OECD has noted that 'Member countries have a common interest in preventing hard core cartels'[269] and that the cartel problem cannot be addressed without increased global cooperation.[270] The OECD has also urged Member countries to ensure that their laws provide for effective sanctions of a level adequate to deter cartel conduct[271] and encouraged Members to review all obstacles to the effective enforcement of their cartel laws.[272] The extension of the extraterritorial reach of the Australian cartel prohibition through the adoption of the 'effects' doctrine is consistent with both of the recommendations made by the OECD. This, coupled with a growing appreciation of the extreme harm caused by international cartels, decreases the likelihood of knee-jerk objections to such an extension.

3 Benefits to other nations

It is not only Australia that stands to benefit from the extraterritorial application of the Australian cartel prohibition. Prosecution of international cartel activity will generate positive externalities.[273] This is because increased extraterritorial application of competition laws will increase deterrence levels. By investigating and prosecuting international cartel conduct, rather than free-riding on the efforts of other larger jurisdictions, Australia would be assisting in the global effort to stamp out such conduct.

Effective deterrence is achieved when the expected likelihood and magnitude of punishment outweigh expected cartel profits. The two most important determinants of deterrence levels are the height of the sanction imposed and the probability that cartel conduct will be detected and effectively punished.[274] Because of the inherently secretive nature of cartel arrangements,[275] only a small percentage of cartels are detected.[276] As noted above, a recent study has estimated that the probability of detection is below 20 per cent.[277] Increasing detection rates above these levels would require a considerable increase in expenditure on investigations.

An easier way to increase deterrence is to increase the level of punishment. The OECD has noted that current sanction levels are insufficiently high to ensure that potential cartel participants could not expect to profit from contemplated cartel

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269 OECD, *Recommendations Concerning Effective Action Against Hard Core Cartels*, above n 19, B1. See also Melamed, above n 161, 6.

270 OECD, *Hard Core Cartels*, above n 10, 5–6.

271 OECD, *Recommendations Concerning Effective Action Against Hard Core Cartels*, above n 19, A1.

272 Ibid B3.

273 Gal, 'Free Movement of Judgments', above n 139, 17; Sweeney, above n 22, 44.

274 Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169.

275 For example, the participants in the vitamins cartel went to incredible lengths to keep the existence of the cartel a secret. Internal audits designed to ensure incriminating documents had been destroyed were conducted on a regular basis. Those documents that could not be destroyed were copied onto computer disks and hidden in the eaves of one employee's grandmother's house: see OECD, *Fighting Hard Core Cartels*, above n 11, 72.

276 OECD, *Hard Core Cartels*, above n 10, 12; Gal, 'Free Movement of Judgments', above n 139, 4.

277 See studies referred to in Gal, 'Free Movement of Judgments', above n 139, 5.

activity.[278] One study found that approximately 60 per cent of global cartel profits were disgorged from those prosecuted.[279] When one combines these findings with the findings that less than one in five cartels are likely to be detected and that not all of those cartels detected can be successfully prosecuted, deterrence levels are clearly far too low.[280]

Increased extraterritorial application of cartel prohibitions worldwide would increase the penalties imposed on cartelists to more appropriate levels. Currently, those international cartels that are detected are only prosecuted in a small number of jurisdictions.[281] For example, the vitamin cartel discussed throughout this paper resulted in higher prices being charged across the globe, yet its participants were only brought to trial in six jurisdictions.[282] Furthermore, sanctions imposed in most jurisdictions are based on domestic harm[283] even though fines based on cartel profits in a single market will be insufficient to deter international cartels that operate in many markets.[284]

The OECD has recently stated that '[t]heoretically, unless a multinational cartel participant is prosecuted and fined in most or all of the countries in which the cartel had effects, the cartel still might have been profitable after paying fines in only some of the countries affected.'[285] This can be best illustrated by way of example. Imagine that a cartel reached in Country A negatively affects two countries, Country A and Country B. If Country B does not have the power to commence an extraterritorial action, the seeking of penalties by Country A may not be sufficient to bring the cartel to an end. If the cartelists appreciate that their conduct will go unpunished in Country B, they may very well decide that it is in their best interests to continue to operate the cartel because the profits they make in Country B will offset any legal liability they face in Country A.[286] For this reason it has been recently argued that 'to create effective deterrence, a sufficiently high number of jurisdictions must pursue duplicative parallel litigations.'[287] As nations begin to view extraterritorial actions commenced in other

278 OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* (2005) 39. See also Gal, 'Free Movement of Judgments', above n 139, 5.

279 Gal, 'Free Movement of Judgments', above n 139, 5.

280 OECD, *Fighting Hard Core Cartels*, above n 11, 74; Gal, 'Free Movement of Judgments', above n 139, 1.

281 Gal, 'Free Movement of Judgments', above n 139, 4.

282 Ibid 6. Those jurisdictions were the United States, the European Union, Canada, Brazil, Australia and Korea.

283 OECD, *Fighting Hard Core Cartels*, above n 11; Gal, 'Free Movement of Judgments', above n 139, 21. Although courts in the European Union and United States are in principle empowered to impose fines based on global turnover, a recent study shows that in practice fines are based only on domestic sales in affected lines of business (see John M Connor, 'Global Antitrust Prosecution of Modern International Cartels' (2004) 4 *Journal of Industry, Competition and Trade* 239, 246–9).

284 Bhattacharjea, above n 133, 307.

285 OECD, *Fighting Hard Core Cartels*, above n 11, 86. See also Gal, 'Free Movement of Judgments', above n 139, 5.

286 This example is based on Justice Stewart's example in *Pfizer Inc v Government of India,* 434 US 308, 315 (8th Cir, 1978).

287 Gal, 'Free Movement of Judgments', above n 139, 32.

jurisdictions in this light, resistance to the extraterritorial actions against hard core cartels should decrease.[288]

There appears to be a growing appreciation that although extraterritorial actions impinge on traditional notions of sovereignty, they may nevertheless improve global economic conditions. As Sweeney has noted, '[t]he convergence of views in the past decade about the proper policy approach to hard core cartels has enabled the US, and to a lesser extent, the EU to apply their competition laws extraterritorially in the successful pursuit of foreign-based cartels'.[289] Recently, there was little international resistance to the imposition by the United States of fines of over US$1 billion on the participants in the international air-freight cartel.[290] Nor was there international opposition to the actions brought by the ACCC against the same cartel members[291] which resulted in the imposition of pecuniary penalties totalling A$41 million.[292]

4 Comity sensitive tests: s 5(3), (4) and the Federal Court Rules

As noted above, many countries are more concerned about the prospect of private plaintiffs commencing extraterritorial actions based on the 'effects' doctrine than they are about extraterritorial actions brought by enforcement agencies. This is because private plaintiffs are unlikely to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by regulatory bodies.[293] Section 5 of the TPA already contains a limited comity sensitive test in this regard.[294] It prevents private individuals[295] from seeking damages (s 5(3)) or other remedial orders (s 5(4)) unless they obtain ministerial consent. It is submitted that retaining and slightly modifying this requirement is the key to minimising any hostile reaction to the adoption by Australia of the 'effects' test. It is also worth noting that the Australian system has another comity sensitive test built into it. A party will not be given leave by the Federal Court to serve an originating process or other documents unless the person

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288 Hopefully, the hostility that has been directed towards extraterritorial actions brought by private litigants will also lessen. Claims for monetary compensation by victims of the cartel will also raise the sanctions imposed on cartelists: OECD, *Fighting Hard Core Cartels*, above n 11, 73.

289 Sweeney, above n 22, 67.

290 The airlines had entered into global collusive agreements relating to the imposition of a fuel surcharge between early 2000 and early 2006. It is alleged that the airlines calculated their respective fuel charges by reference to agreed methodologies. It was also alleged that they would consult with each other to give and receive assurances as to the timing of price changes to ensure that the implementation of uniform prices was coordinated (see *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89, 100). This conduct ceased in February 2006 when raids were undertaken by competition authorities in the European Union and the United States.

291 The participants were caught by s 5 in its current form because they carried on business in Australia.

292 See above n 172.

293 Griffin, above n 112, 194; Roth, above n 116, 272.

294 Meltz, above n 76, 189.

295 It is of significantly less concern that the ACCC is not required to obtain the Minister's consent before commencing an extraterritorial action. It is in the ACCC's best interests to respect the comity of nations as doing so is essential to the continued cooperation between foreign enforcement agencies.

seeking leave has a prima facie case for the relief claimed.[296] This will prevent plaintiffs using the discovery process to engage in a fishing expedition.

The major objection to the assertion of extraterritorial jurisdiction by the United States stemmed from a belief that the United States courts failed to give adequate attention to foreign interests when determining whether to award damages or penalties against foreign firms.[297] This criticism was made even when the United States courts adopted the jurisdictional rule of reason.[298] The decision as to whether to allow a private plaintiff to make an extraterritorial claim requires the balancing of competing domestic and foreign interests. While one option that would extend the reach of the cartel prohibition would be to adopt the juristic rule of reason rather than the 'effects' doctrine, this is inappropriate as it requires the courts to engage in inquiries outside the realm of judicial competence.[299] As the balancing of competing national interests is the 'hallmark of diplomatic exchange',[300] it is appropriate that this decision rests with the executive.

Administrative restraint will be important. Meessen suggests that Switzerland was able to adopt the 'effects' test without causing international conflict because of its lenient enforcement policy.[301] Rosic Jr has also noted that tempering enforcement activities in a principled manner will ultimately lead to the most effective application of competition laws extraterritorially.[302] Doing so will benefit Australia in the long run as it will encourage other nations to cooperate with it with respect to the prosecution of seriously harmful international cartel conduct.[303] If Australia refuses to compromise its own interests where appropriate, it may find that it is unable to further even those policies that compromise would have left intact.[304]

The factors that guided United States courts that employed the juristic rule of reason should be considered by the Minister. In *Timberlane Lumber Co v Bank of America*, Judge Choy stated that consideration should be given to the following factors:

296 *Federal Court Rules 1979* (Cth) O 8 rr 3(2)(c), 4(2).
297 Rosic Jr, above n 99, 164.
298 H Maier, 'Interest Balancing and Extraterritorial Jurisdiction' (1983) 31 *American Journal of Comparative Law* 579, 590–3.
299 Rosic Jr, above n 99, 191; Roth, above n 116, 278. As Judge Wilkey noted in *Laker Airways v Sabena, Belgian World Airlines,* 731 F 2d 909, 955 (DC Cir, 1984): 'this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association.'
300 Meessen, above n 24, 789.
301 Ibid 797.
302 Rosic Jr, above n 99, 176.
303 Ibid 176.
304 Ibid 170.

- the degree of conflict with foreign law or policy,
- the nationality or allegiance of the parties and the locations or principal places of business or corporations,
- the extent to which enforcement by either state can be expected to achieve compliance,
- the relative significance of domestic effect as compared to elsewhere,
- the extent to which there is explicit purpose to harm or affect domestic commerce,
- the foreseeability of such effect, and
- the relative importance to the violations charged of conduct within the jurisdiction as compared with conduct abroad.[305]

In *Mannington Mills Inc v Congoleum Corporation* the court suggested that the following factors should also be considered:

- the availability of a remedy abroad and the pendency of litigation there,
- the possible effect on foreign relations if the court exercises its jurisdiction and grants relief,
- whether, if relief was granted, a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries,
- whether an order for relief would be available in this country if made by a foreign nation under similar circumstances, and
- whether a treaty with the affected nations has addressed the issue.[306]

Even-handed consideration of the factors listed above and other relevant interests of other nations when deciding whether to permit private extraterritorial litigation would make Australia's adoption of the 'effects' test far more palatable. For example, it would allow the Minister to refuse consent on the basis that the contemplated action would undermine the leniency program which led to the discovery of the cartel if he or she believed that protecting the program was important. Guidelines explaining how the Minister will decide whether to permit private actions should be published. This will provide valuable information to potential plaintiffs and may also help allay concerns held by other nations.

While it is not necessary to amend s 5 so that these factors are listed, there is a need for a slight amendment to the provision. Currently ministerial approval is required before an application can be made to the court for other remedial orders (s 5(4)). However, when it comes to an application for damages, ministerial consent is not required at the outset. Rather, it is only necessary to obtain such consent before the court grants relief in the form of damages.[307] Thus a private plaintiff could commence an action, and put a foreign company through the inconvenience of discovery and court proceedings, without first receiving the consent of the Minister. To ensure that this does not occur, s 5(3) should be amended along the lines of s 5(4) so that a person is not entitled to make an application for damages without ministerial consent. This

305 549 F 2d 597, 614 (9th Cir, 1976).
306 595 F 2d 1287, 1297–8 (1979).
307 *Auskay* (2008) 251 ALR 166. See also *Tycoon Holdings Pty Ltd v Trencor Jetco Inc* (1995) ATPR 41–413; *Natureland Parks Pty Ltd v My-Life Corporation Pty Ltd* (1996) 138 ALR 47.

amendment should apply to all extraterritorial claims, not just those relating to international cartel activity. A redrafted version of s 5(3) is included in Appendix 1.

Currently, the Minister is only allowed to refuse consent in very narrow circumstances. Section 5(5) provides that the Minister is required to give his or her consent unless, in the opinion of the Minister (a) the law of the country in which the conduct occurred required or specifically authorised the engaging of the conduct and (b) it is not in the national interest that consent be given. The requirement that the conduct be required or authorised by the country in which it occurred significantly hampers the Minister's discretion. It prevents him or her from refusing consent in a variety of circumstances in which it may be appropriate to prevent the bringing of a private action under ss 82 or 87 even though the conduct in question was not authorised in the country in which it occurred. Section 5(5) should therefore be amended so that (a) and (b) are alternative bases on which the Minister can refuse consent. The Explanatory Memorandum to the Bill that introduced s 5(5) suggests that the provision was always intended to operate in this fashion.[308] Again, this amendment should apply to all extraterritorial claims. A redrafted version of s 5(5) is included in Appendix 1.

The fact that private parties cannot seek damages or other orders without the consent of the Minister allows matters of international comity to be considered before a private action is brought. This mitigates the otherwise expansive operation of the 'effects' doctrine. As a result, negative reactions to the adoption of the 'effects' doctrine to extend the extraterritorial reach of the cartel prohibitions are likely to be significantly reduced.

5 Avoid hypocrisy

As noted earlier, in the past Australia has been critical of the 'effects' doctrine.[309] Australia has also adopted blocking legislation designed to hamper the investigation and prosecution of extraterritorial actions brought by other nations.[310] To avoid hypocrisy Australia should consider repealing the exemption given to export cartels by s 51(2)(g), although the need to do this is minimal while most other major jurisdictions have a similar exemption. While it is not necessary to repeal the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth),[311] the Attorney-General should be careful when exercising his or her power to block enforcement activities relating to hard core cartel activity.

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308 Paragraph 23 of Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) states:
> New sub-s 5(5) requires the Minister to give the consent required under new sub-ss 5(3) or 5(4) unless is his opinion *either* the law of the other country required or specifically authorized the conduct concerned *or* that it is not in the national interest to give his consent (emphasis added).

309 Jardine, above n 214, 668.

310 See text accompanying nn 231 and 233 above.

311 See above n 234.

6 Agreements

Extraterritorial application of domestic laws will need to be supported through bilateral agreements and treaties.[312] Such agreements will increase voluntary cooperation between national competition authorities in the investigation and enforcement of competition laws[313] and may help to minimise the potentially destabilising effects of extraterritorial competition policy.[314] It is submitted that the increased awareness about the harm caused by international cartels may make countries more willing to enter into agreements under which they make a commitment to reciprocal assistance designed to facilitate the effective investigation and prosecution of international cartels.

(a) Investigation

As noted earlier, the assistance of foreign competition authorities will often be necessary when investigating international cartel conduct. The governments of Australia and the United States have entered into an agreement designed to improve the effectiveness of the enforcement of competition laws in both countries through cooperation and mutual legal assistance on a reciprocal basis.[315] This agreement, which Australia entered into despite its historical opposition to the 'effects' doctrine, could be used as the model for further agreements with other countries. Under the Agreement, the parties make a commitment to assist one another on a reciprocal basis in providing or obtaining antitrust evidence.[316] Specific provision is made for the exchange of evidence in the possession of the competition authorities of each country and for the obtaining of evidence at the request of a competition agency of the other party to the agreement.[317]

Such agreements will necessarily contain limits on the evidence that can be provided. A competition authority will be keen to protect information that has been provided to it on a confidential basis.[318] It will not be simple to get states to relax their protection of such information, especially where it has been provided under a leniency program.[319] However, attitudes may soften if the agreement contains a provision under which Australia agrees to extend immunity that has been granted to the applicant in the foreign country. In fact, it may strengthen foreign immunity programs as the prospect of obtaining immunity in Australia may strengthen incentives to seek immunity. Although this would limit Australia's ability to prosecute the immunity applicant where evidence could be obtained from other sources, it is likely to result in

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312 In its Recommendation concerning Effective Action against Hard Core Cartels, the OECD encourages countries to enter into agreements to facilitate cooperation in dealing with hard core cartels: OECD, *Recommendations Concerning Effective Action Against Hard Core Cartels*, above n 19, B2.

313 Trebilcock and Iacobucci, above n 134, 172.

314 Chad Damro, above n 111, 218.

315 *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*, opened for signature 27 April 1999, [1999] ATS 22 (entered into force 5 November 1999).

316 Art IIA.

317 Art IIE.

318 Art II.I provides that nothing in the Agreement compels the disclosure of evidence in violation of any legally applicable right or privilege.

319 Sweeney, above n 22, 82.

the disclosure of information that would facilitate actions against the other participants in the cartel that could not otherwise be brought.

The effectiveness of such agreements in promoting cooperation cannot be underestimated. The European Union and the United States entered into a cooperation agreement in 1991.[320] It provides, inter alia,[321] for the exchange of information that will facilitate the effective application of competition laws in these jurisdictions. The European Commission has reported that bilateral cooperation between the European Commission and the United States Department of Justice improved dramatically as a result of this agreement and that this was particularly true with respect to cartel cases.[322]

(b) Enforcement

The Australian government should attempt to widely enter into treaty agreements that provide for the enforcement of Australian judgments in overseas courts (and the reciprocal enforcement of judgments of overseas courts in Australian courts).[323] The *Foreign Judgments Act 1991* (Cth) makes provision for the enforcement of overseas judgments in Australian courts. Section 6(1) provides that a judgment creditor under a judgment to which the Act applies may apply to the appropriate Australian court at any time within six years after the date of judgment to have the judgment registered in the Australian court. A registered judgment has the same force and effect that it would have had if the judgment had been originally given in the court in which it is registered.[324]

Section 5 gives the Governor-General the power to declare that the Act applies to judgments given in foreign courts. In order to make such a declaration, the Governor-General must be satisfied that substantial reciprocity of treatment will be assured in relation to the enforcement of Australian judgments in those courts.[325] Where a reciprocal enforcement agreement has been negotiated between Australia and another country, the Governor-General is likely to be so satisfied.

The Commonwealth Government has entered into a treaty with the government of the United Kingdom of Great Britain and Northern Ireland ('AU/UK Treaty') that provides for the reciprocal recognition and enforcement of judgments and could be used as a model for further treaties with other countries.[326] The AU/UK Treaty seeks

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320 *Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws*, opened for signature 23 September 1991, [1995] OJ L 95, 47 (entered into force 23 September 1991).

321 The agreement also provides that each party will notify the other when its enforcement activities affect the interests of the other party. Parties also agree to cooperate in enforcement activities and attempt to avoid conflicts over enforcement activities.

322 Commission of the European Communities, *Report from the Commission to the Council and the European Parliament on the Application of the Agreements between the European Communities and the United States of America and Canada Regarding the Application of Their Competition Laws* (2002) 3.

323 Jardine, above n 214, 668.

324 *Foreign Judgments Act 1991* (Cth) s 6(7).

325 The *Foreign Judgments Regulations 1992* (Cth) lists the courts that have been declared and whose judgments can be registered and enforced under the legislation.

326 *Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of*

to ensure that the judgments of a court of a party to the AU/UK Treaty are enforced in the territory of the other party on terms which are no less favourable than in the jurisdiction of the first party.[327]

It should be noted that countries (including Australia) are unlikely to assume irrevocable treaty obligations. For example, art 9(2) of the AU/UK Treaty provides that it may be 'terminated by notice in writing by either Party through the diplomatic channel'. Furthermore, some countries may insist that any obligation is not binding if compliance with that obligation would be contrary to domestic interests. Thus, it will be important that the ACCC only pursues, and private litigants are only given permission to pursue, actions that are unlikely to disrupt cordial relations with the other party to such a treaty.

IV CONCLUSION

International hard core cartel activity is prevalent and harmful. In an increasingly global economy it is essential that the Australian prohibitions against cartel conduct apply as widely as possible. The territorial connections specified in the cartel prohibitions themselves are not problematic. However, the TPA needs to be amended so that it applies more broadly to conduct that occurs overseas. Rather than only catching conduct engaged in by companies incorporated, or carrying on business, in Australia the prohibitions that regulate hard core cartels should extend to all conduct that has an appreciable effect on Australian businesses and consumers. Section 5 of the TPA should be amended along these lines (see proposed sub-s (1AA) in Appendix 1).

Widening the territorial scope of the prohibitions against hard core cartels would allow damages and penalties to be recovered in actions against cartel participants to redress the harm inflicted on the Australian economy. Such actions would also allow Australia to play its role in ensuring international cartels are punished with sufficient severity.

In the past extraterritorial actions brought on the basis of the 'effects' doctrine have attracted heavy criticism and evoked retaliatory action designed to thwart such actions. However, adopting the 'effects' doctrine to determine the extraterritorial scope of the prohibition against hard core cartels is unlikely to evoke such strong reactions today. Many of the negative reactions were prompted by concerns that specifically related to the exercise of extraterritorial jurisdiction by the United States courts. Moreover, there has recently been a softening in attitudes about the extraterritorial application of competition laws which is best explained by the increased appreciation that greater prosecution of international cartels is a necessary part of ensuring deterrence levels reach the required level. By limiting the extension of the extraterritorial scope of the TPA to the prohibition against hard core cartels, and sensibly regulating the rights of parties to bring private actions, Australia may very well be able to adopt the controversial 'effects' doctrine to define the extraterritorial reach of its prohibitions against hard core cartel conduct without undermining its relationships with other nations in a manner that would make international cartel activity difficult to investigate and successfully prosecute in Australia.

Judgments in Civil and Commercial Matters, opened for signature 23 August 1990, [1994] ATS 27 (entered into force 1 September 1994).

327 Art 2.

Appendix 1: amendments to s 5 proposed in this article

(1) Each of the following provisions:

(a) Part IV;

(b) Part IVA;

(c) Part V (other than Division 1AA);

(e) Part VC;

(f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b), (c) or (e));

extends to the engaging in conduct outside Australia by:

(g) bodies corporate incorporated or carrying on business within Australia; or

(h) Australian citizens; or

(i) persons ordinarily resident within Australia.

(1AA) In addition to the extended operation that sections 44ZZRJ, 44ZZRK, 44ZZRF and 44ZZRG have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia where that conduct:

(a) has a substantial effect on competition in a market in Australia; or

(b) has a substantial effect on the price paid for goods or services by Australian businesses or consumers.[328]

(1A) In addition to the extended operation that section 46A has by virtue of subsection (1), that section extends to the engaging in conduct outside Australia by:

(a) New Zealand and New Zealand Crown corporations; or

(b) bodies corporate carrying on business within New Zealand; or

(c) persons ordinarily resident within New Zealand.

(2) In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

(3) ~~Where a claim under~~ **A person is not entitled to make an application to the Court for an order under** section 82 ~~is made in a proceeding, a person is not entitled to rely at a hearing~~ in ~~respect of that~~ **in a** proceeding **in respect of** ~~on~~ conduct to which a provision of this Act extends by virtue of subsection (1)**, (1AA)** or (2) of this section except with the consent in writing of the Minister.

(4) A person other than the Minister, the Commission or the Director of Public Prosecutions is not entitled to make an application to the Court for an order under subsection 87(1) or (1A) in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1), **(1AA)** or (2) of this section except with the consent in writing of the Minister.

328 In *Australian Competition and Consumer Commission v Singapore Airlines Cargo Pte Ltd* (2009) 256 ALR 458, 470, Jacobson J drew a distinction between adverse price effects on consumers in Australia and adverse effects on competition in an Australian market.

(5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister:

(a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; ~~and~~ **or**

(b) it is not in the national interest that the consent be given.