

***CONFERENCE: NZ Productive Markets Forum
19 November 2014***

GETTING UP TO SPEED WITH CARTEL CRIMINALISATION

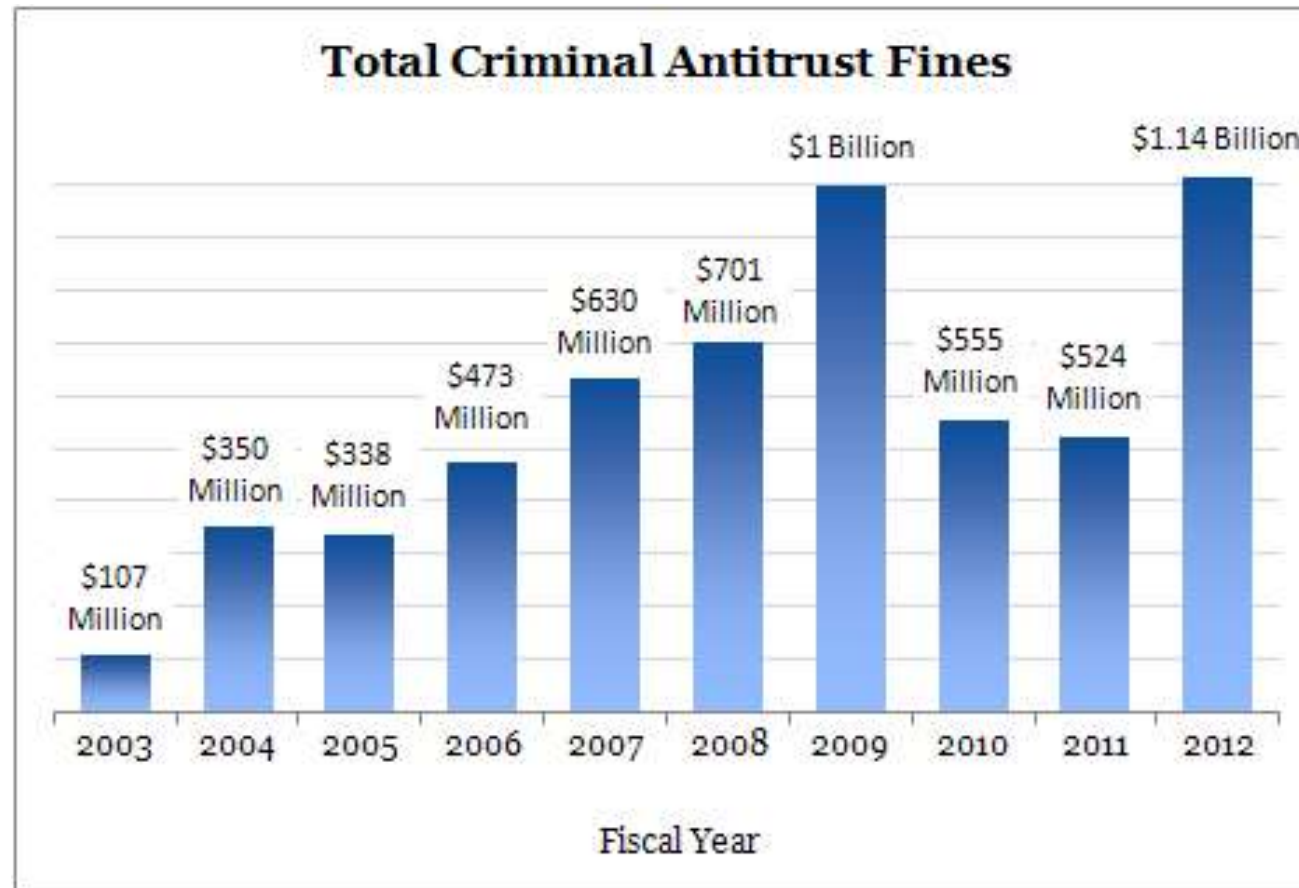
Andrew Matthews & Gus Stewart

Cartels, the “*Supreme Evil of Antitrust*”

*“Cartels are **cancers on the open market economy** ... By destroying competition they cause serious harm to our economies and consumers. In the long run cartels also undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiencies.”*

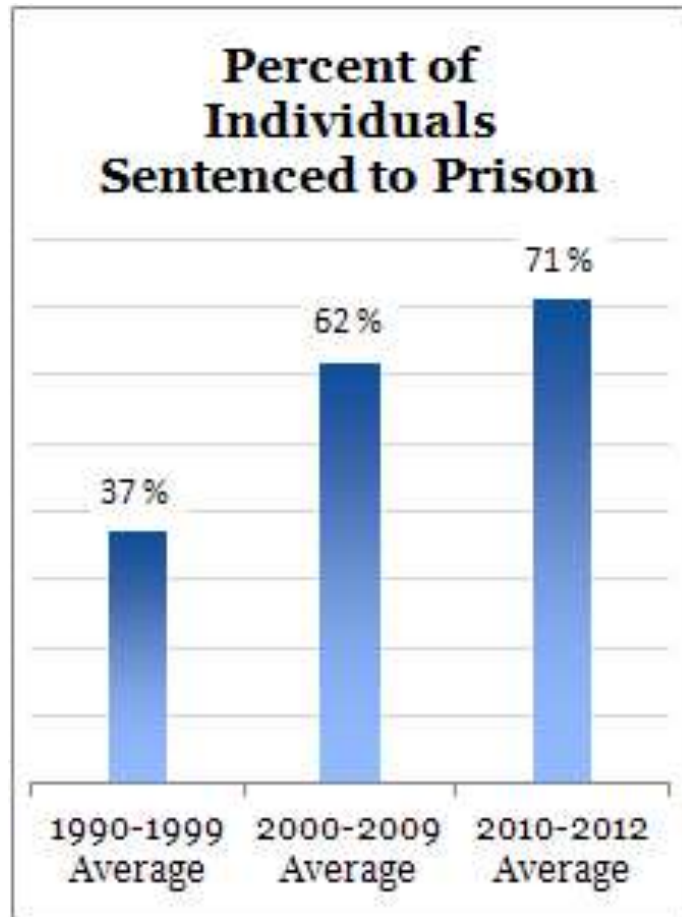
Mario Monti, then EU Competition Commissioner, 3rd Nordic Competition Policy Conference (2000)

“Division Obtains Record Criminal Fines in 2012 and More Than \$3 Billion Since 2009”



Source: US DOJ, Division Update Spring 2013, Antitrust Division 2013 Criminal Enforcement Update, accessed at: <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

“Individuals Going to Prison More Often and for Longer Sentences”



Source: US DOJ, Division Update Spring 2013, Antitrust Division 2013 Criminal Enforcement Update, accessed at: <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.



Department of Justice

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**BRIDGESTONE CORP. AGREES TO PLEAD GUILTY TO PRICE FIXING ON
AUTOMOBILE PARTS INSTALLED IN U.S. CARS**

Company Agrees to Pay \$425 Million Criminal Fine

WASHINGTON — Bridgestone Corp., a Tokyo, Japan-based company, has agreed to plead guilty and to pay a \$425 million criminal fine for its role in a conspiracy to fix prices of automotive anti-vibration rubber parts installed in cars sold in the United States and elsewhere...



Department of Justice

FRIDAY, DECEMBER 6, 2013

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**FORMER SEA STAR LINE PRESIDENT SENTENCED TO SERVE FIVE YEARS IN
PRISON FOR ROLE IN PRICE-FIXING CONSPIRACY INVOLVING COASTAL
FREIGHT SERVICES BETWEEN THE CONTINENTAL UNITED STATES AND
PUERTO RICO**

WASHINGTON — The former president of Sea Star Line LLC, a Jacksonville, Fla.-based water freight carrier, was sentenced to serve five years in prison and to pay a \$25,000 criminal fine for his participation in a conspiracy to fix rates and surcharges for freight transported by water between the continental United States and Puerto Rico, the Department of Justice announced today.

Frank Peake was sentenced today...

What is a cartel?

- **OECD definition** (from the 1998 Recommendation)

“... 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...”

- **This excludes:**

“... agreements, concerted practices, or arrangements that i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or iii) are authorised in accordance with those laws.”

- **NZ: currently potentially ss30, 29 & 27**

Cartel trends

- Increased investigative powers & increased penalties
- International Co-operation
- Criminalisation
 - Australia, Austria, Brazil, Canada, Czech Republic, France, Germany (bid rigging), Greece, Hungary (bid rigging), Ireland, Israel, Japan, Kazakhstan, Korea, Mexico, Nigeria, Norway, Russia, Slovenia, Taiwan, UK, the US ... and ... New Zealand?
- Adoption or revision of leniency (amnesty) policies
- Private enforcement

International Co-operation



“the ability of agencies to work together and exchange information should be substantially improved in order to strengthen their hand [when] faced with cartelists whose ability to exchange information is unhindered”

- ICN Report at 6th Annual Conference, Moscow, May 2007
- Commerce Commission (International Co-operation, and Fees) Act
- Issues with information exchange
 - Respecting the rights of the defendant
 - Access by third parties in context of private actions

The Commerce (Cartels and Other Matters) Amendment Bill

6 November 2014	#16 on the Order Paper
8 August 2014	NZCC “Competitor Collaboration Guidelines – revised draft” (original draft was in October 2013) & related clearance materials
24 June 2014	Debate interrupted on second reading
11 December 2013	Hon Clayton Cosgrove introduces SOP 408 (section 36)
6 December 2013	Hon Craig Foss introduces SOP 407 (drafting changes; criminal fines)
13 May 2013	Select Committee report (interim report on 28 September 2012)
24 July 2012	First reading
13 October 2011	Bill introduced
16 June 2011	MED Exposure Draft: Commerce (Cartel and Other Matters) Amendment Bill
10 January 2010	MED Cartel Criminalisation Discussion Document

Agenda

1. Overview of key changes
2. Prohibitions
3. Exemptions
4. Defences
5. Parting words



Key changes

1. Parallel civil prohibitions and **criminal offences – jail and/or fines**
2. Prohibitions define illegal conduct per 3 OECD definitions of "hard core" cartels
3. New "collaborative activity" exemption
4. *Mens rea* element (criminal offence) of *intent* e.g. intent to engage in "price fixing" etc (as defined)
5. New clearance regime for cartel provisions

Must knows

1. **Broad reach** – catches “heaps” of stuff you wouldn’t expect
2. **Risk areas** include:
 - Distribution arrangements
 - JVs
 - Industry groups
3. **Tough sanctions:**
 - You or colleagues could go to jail – *up to 7 years* – and/or \$500k fine
 - Corporates – greater of \$10M / 3 x gain / 10% turnover
4. Broadly speaking, **it’s up to you to show an exemption applies**
5. It’s a **board issue** – broad “attribution”

 *Never fear... your friendly competition lawyer can help...*

Provisions with the purpose/effect/likely effect of:

Price fixing	Restricting output	Market allocating
<p><i>Fixing / controlling / maintaining</i></p> <ul style="list-style-type: none">• price, discount, allowance, rebate, or credit• for/in relation to goods or services• supplied or acquired by 2 or more parties in competition	<p><i>Preventing / restricting / limiting</i></p> <ul style="list-style-type: none">• the (likely) production of goods• the (likely) capacity to supply services• the (likely) supply of goods/services• the (likely) acquisition of goods/services• supplied or acquired (as applicable) by 2 or more parties in competition	<p><i>Allocating between any 2 or more parties</i></p> <ul style="list-style-type: none">• the persons or classes of persons to/from whom the parties supply/acquire goods/services; or• the geographic areas in which the parties supply/acquire goods/services• in competition with each other

Provisions are caught where they “*provide for*” the above

Proposed new exemptions

Collaborative activities	Vertical supply contracts	Joint buying & promotion
<ul style="list-style-type: none">parties involved in a collaborative activity<ul style="list-style-type: none">enterprise, venture, or other activity in tradecarried on in cooperation by 2 or more personsnot for the dominant purpose of lessening competition between 2 or more of the partiesthe cartel provision is reasonably necessary for the purpose of the collaborative activityat the time of entering into/arriving at, or giving effect to	<ul style="list-style-type: none">a contract (not an arrangement or understanding)between a (likely) supplier of goods (services are excluded) and a (likely) customer of the supplierthe cartel provision:<ul style="list-style-type: none">relates to the (likely) supply of goods to the customer (including to the maximum price of resupply); anddoes not have the dominant purpose of lessening competition between 2 or more of the parties	<ul style="list-style-type: none">relates to price for goods/services to be collectively acquired (directly/indirectly); orprovides for joint advertising of the price for the resupply of goods/services so acquired; orprovides for a collective negotiation of the price for goods/services followed by individuals purchasing at the collectively negotiated price; orprovides for an intermediary to take title to goods and resell or resupply them to another party to the arrangement

Proposed new clearance regime

Clearance test

- To apply: CAU contains (or may contain) a cartel provision
- Parties are (or will be) involved in a “collaborative activity”
 - an enterprise, venture, or other activity, in trade
 - carried on *in cooperation* by 2 or more persons
 - *not carried on for the dominant purpose of lessening competition between 2 or more of the parties*
- Every cartel provision is *reasonably necessary* for the collaborative activity
- Entering into/giving effect will **not have (likely) effect of substantially lessening competition**

Transitional arrangements

- For **existing arrangements**, there would be no proceedings during 9 month transitional period (but s 30 applies as if not repealed)
- Criminal sanctions will apply 2 years from enactment

Prohibition: entering into or giving effect to a “cartel provision”

30A Meaning of cartel provision and related terms

(1) A cartel provision is a provision, contained in a contract, arrangement, or understanding, that has the *purpose, effect, or likely effect* of 1 or more of the following in relation to the supply or acquisition of goods or services in New Zealand:

- (a) price fixing:**
- (b) restricting output:**
- (c) market allocating.**

- All “per se” – illegal, regardless of effect – “over-reach”
- Exemptions:
 - “collaborative activities” (replaces existing JV exemptions)
 - vertical supply (new)
 - collective acquisitions (expanded)
- Interconnected bodies corporate – over reach?



Price fixing

- **fixing, controlling or maintaining** (or providing for the same)
- **price** of goods or services
 - “...valuable consideration in any form...includes any consideration”
 - any **discount, allowance, rebate, or credit**
- **supplied or acquired**
 - by any 2 or more parties to the CAU
 - **in competition** with each other

What we normally say about price fixing

- Covers **any component of price** (market sharing/non-compete?)
- Contracts, arrangements and “*understandings*” is **deliberately broad**
 - no formal legal agreement is required - a “nudge and wink” is enough
 - a court may “infer” an understanding (ie without direct evidence)
- There is **no need to show an actual effect on competition**
 - the acts of entering into a price fixing arrangement, or giving effect to that arrangement, are deemed to breach the Act
- It is also **illegal to attempt** to fix, control or maintain prices

 What about an “information exchange” on capacity, prices or costs?

Some DOs & DON'Ts of Price Fixing

- ✓ Limit communications with competitors
- ✓ Make pricing decisions independently
- ✓ Leave meetings if cartel conduct may occur (make fuss, file note, update manager)
- ✓ Be aware of the potential breadth
- ✗ Communicate about prices, discounts, capacity or costs with competitors
- ✗ Discuss “targeting” customers etc

Restricting output

- ... preventing, restricting, or limiting, or providing for the prevention... [etc]... of,—*
- (a) the production or likely production by any party... of goods that any 2 or more of the parties... supply or acquire in competition... ; or*
 - (b) the capacity or likely capacity of any party... to supply services that any 2 or more parties... supply or acquire in competition... ; or*
 - (c) the supply or likely supply of goods or services that any 2 or more parties... supply in competition... ; or*
 - (d) the acquisition or likely acquisition of goods or services that any 2 or more parties... acquire in competition with each other.*



BUT most JVs aim to achieve better quality & reduced output or capacity

Market allocating

...allocating between any 2 or more parties to a contract, arrangement, or understanding, or providing for such an allocation of, either or both of the following:

- (a) the **persons or classes of persons** to or from whom the parties supply or acquire goods or services in competition with each other:*
- (b) the **geographic areas** in which the parties supply or acquire goods or services in competition with each other.*

- Covers bid rigging (hence no separate prohibition)
- Replaces the prohibition on “collective boycotts”

 Does this catch selective distribution & franchises? Non-competes?

Practical tips: Engaging with competitors

1. Make sure that you and your staff are familiar with the requirements of the Commerce Act. Keep records of who has attended training
2. Think carefully about who you are, or may be, in competition with, especially if sub-contracting is involved
3. Do not agree prices, discounts or any matters relating to price with your competitors (unless it is a specific sub-contract you are discussing)
4. Do not exchange pricing information with your competitors
5. If you are approached by another business to discuss pricing, allocating customers, bids for contracts or restricting outputs you should raise an objection straight away. Leave the discussion immediately
6. Review internal documents, policies and procedures for compliance with the Commerce Act
7. If you become aware of anti-competitive conduct, contact the Commerce Commission

Exemption for “collaborative activities”

- Involved in a “collaborative activity” at the relevant time:
 - ... *an enterprise, venture, or other activity, in trade, that—*
 - (a) *is carried on in **co-operation** by 2 or more persons; and*
 - (b) *is not ... for the dominant purpose of lessening competition between any 2 or more of the parties.*
- Cartel provision is “*reasonably necessary*” for purpose of the collaborative activity
- Aims for **substance over form** (an improvement)
- “*Reasonably necessary*”
 - Discussed in *Antitrust Guidelines for Collaborations Among Competitors* (FTC & DOJ) and NZCC draft revised “Competitor Collaboration Guidelines”
 - Doesn’t need to be essential, but the parties would need to be materially hindered without it
 - Evidence, efficiencies, counterfactuals

Exemption for vertical supply contracts

Exemption applies if:

- (a) *the **contract** is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and*
 - (b) *the cartel provision—*
 - (i) *relates to the supply or likely supply of the goods or services **to the customer or likely customer, including to the maximum price at which the customer or likely customer may resupply the goods or services; and***
 - (ii) *does not have the dominant purpose of lessening competition between any 2 or more of the parties...*
- **Does **not** apply to arrangements or understandings**
 - **Benefits:**
 - franchisors can allocate territories to franchisees
 - clarifies / resolves the issue for suppliers setting maximum prices where they also compete



BUT resale price maintenance still *per se* illegal – why?

Exemption for joint buying and promotion agreements

Not “price fixing” if the provision of the contract, arrangement or understanding:

- (a) relates to the price for goods or services to be **collectively acquired**, whether directly or indirectly, by some or all of the parties to the contract, arrangement, or understanding; or*
- (b) provides for **joint advertising** of the price for the resupply of goods or services acquired in accordance with paragraph (a); or*
- (c) provides for a collective negotiation of the price for goods or services followed by **individual purchasing** at the collectively negotiated price; or*
- (d) provides for an **intermediary to take title** to goods and resell or resupply them to another party to the contract, arrangement, or understanding.*

- Expands & clarifies the law



Demand side price fixing is OK (why?)

New clearance regime for cartel provisions

- Basically, the NZCC must be **satisfied** that:
 - the collaborative activity exemption applies; and
 - there is no SLC.
- Modelled on the merger clearance system (public etc)
- Gap: Not for “non-cartel” provisions, but NZCC not required to determine whether it’s a cartel provision
- Clearances can be revoked (if cleared on **false/misleading information, or material change of circumstances**)

Running the defences

- Mental element of criminal offence – **intent** to do the physical act:
 - Enter the contract (or enforce)
 - Attributing conduct (and interconnected bodies corporate)
- Defence to **criminal prosecution** if:
 - Involved in a “*collaborative activity*” **and**
 - “*Honestly believed*” at the relevant time that the provision was “*reasonably necessary*” for the purpose of the collaborative activity
 - Must notify prosecution of relevant exemption (and give sufficient details)
 - Prosecution to prove beyond reasonable doubt that exemption does not apply
- **Civil**: Must demonstrate on “balance of probabilities” exemption applies

Other stuff

- Section 98 powers
 - Commerce (International Cooperation, and Fees) Amendment Act 2012
- Increased penalties for non-cooperation/misleading offences (s 103)
 - Up to \$100k for individuals; \$300k for other persons
- Extended jurisdiction of the Act (s 4)
- Repeal of the “shipping exemption” (2 year transitional period)
- Search and Surveillance Act 2012 (offences punishable by 7+ years prison):
 - Interception of private communications; use of tracking devices; and observation and recording of private activities
- Mutual Assistance in Criminal Matters Act 1992
- Extradition Act 1999
- Leniency / Immunity / Co-operation – draft Solicitor-General guidelines

Parting words

- Broader prohibition, scarier sanctions, but clearer exemptions which can (must) be worked through
- Ensure you've a good business case for anything you do with competitors (even JV partners) which could impact:
 - Price/cost; capacity/output; who supplies which parties/regions?
- Document why this is best option (pro-competitive/neutral)
- Get legal advice – “*honestly believed*” & “*reasonably necessary*”; consider structural JVs

Risk

“These are dangerous times for corporate executives. In terms of economic downturn and financial dislocation, the temptation for corporate executives to embrace a short-term fix to raise prices and allocate markets is almost irresistible”

(Donald Klawiter, Chair of the ABA Section of Antitrust 2005-06, September 2008)

Thank you ... any questions?



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