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"GETTING UP TO SPEED WITH CARTEL CRIMINALISATION"
CONFERENZ: NZ PRODUCTIVE MARKETS FORUM, 19 NOVEMBER 2014
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OVERVIEW

1. This paper briefly describes key aspects of the Commerce (Cartels and Other Matters) Amendment Bill. It should be read with the accompanying PowerPoint slides, which expand on some of the points made in this paper and discuss practical issues ("must knows").

2. The Bill[2] represents the most significant reforms to the Commerce Act 1986 (**Act**) in over 25 years.

3. As the Bill's name suggests, its primary purpose is to introduce criminal sanctions for "hard core" cartel conduct, bringing New Zealand's cartel laws in line with a number of our key trading partners. However the Bill proposes other important law changes (eg around extraterritorial merger control) and expanded "attribution" provisions (which also have ramifications for multinationals).

4. The key proposed changes to "cartel" law to be aware of are:

   a. A new **cartel prohibition**, defining "hard-core" illegal conduct consistent with the OECD 1998 Recommendation, although by design it deliberately over-reaches.[3]

   b. A **criminal offence** relating to the cartel prohibition:

      i. *Individuals* face up to 7 years in prison and/or a fine of up to $500,000. *Persons who are not individuals* face a fine of up to the greater of $10 million, or 3 times the commercial gain (or if that gain cannot be easily established, 10% of *group* turnover from trading within New Zealand – including interconnected bodies corporate – in each accounting period in which the contravention occurred).

      ii. There will be *parallel* criminal sanctions and civil prohibitions.

      iii. The *mens rea* element (for the criminal offence) of *intent* – eg an intent to engage in the prohibited act, for example "price fixing", as defined in the Bill.

   c. Each of a person's **interconnected bodies corporate** will be deemed a party to a contract, arrangement or understanding containing a cartel provision.

   d. A new **"collaborative activity" exemption** (replacing the current "formalistic" joint venture exemption), as well as a limited exemption for **vertical supply contracts** and an expanded **joint buying and promotion** exemption.

   e. A new **clearance regime for cartel provisions,** but there will still be no clearance process for "non-cartel" restrictive practices.

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[2] In this paper, references to "the Bill" relate to the current version of the bill, as reported from the Commerce Committee and further amended by Supplementary Order Paper 407. This paper does not address Supplementary Order Paper 408 which recommends amendments to section 36 of the Act.
[3] OECD, Recommendation of the Council concerning Effective Action against Hard Core Cartels, 25 March 1998 (**OECD Recommendation**) . Accessed at http://www.oecd.org/daf/competition/2350130.pdf.

5. The Bill introduces a much broader prohibition on cartel conduct than currently exists under the Act, with much tougher sanctions, but may not necessarily exempt all legitimate pro-competitive (or at least competitively neutral) conduct. With jail time a possibility, it will be more important than ever for businesses and individuals to ensure that all future (and existing) arrangements do not fall foul of the Act.

6. The Commerce Commission (**Commission**) helpfully published its revised draft competitor collaboration guidelines (**Draft Guidelines**) in August 2014 (following earlier draft guidelines) in preparation for the proposed laws. The Draft Guidelines outline the Commission's intended approach to assessing collaborations between competitors under the new laws proposed by the Bill.

What was the rationale for the Bill?

7. Cartels have been described as "*the supreme evil of antitrust*"[4] and "*the most egregious violations of competition law"* because they "[raise] *prices and* [restrict] *supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.*"[5] It is therefore no surprise that hard core cartels have been condemned in a number of countries worldwide. Recent years have seen the following international trends in relation to cartels:[6]

   a. increased investigative powers for competition agencies;

   b. increased penalties;

   c. international co-operation;[7]

   d. criminalisation of cartel conduct (eg *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 now, New Zealand*);

   e. adoption or revision of leniency (amnesty) policies; and

   f. private enforcement.

8. The simplest answer to the question of why we are criminalising cartel conduct lies in the Policy Statement from the original bill, which noted: "*The question of whether to introduce criminal sanctions arose out of the Single Economic Market (SEM) Outcomes Framework. In 2009, Australia criminalised hard-core cartel conduct, so it was timely for the Government to consider criminalising hard-core cartel behaviour in New Zealand*."

9. The authors, while broadly supporting the desire to follow international best practice (comity) and the SEM, consider it would have been wise to have also harmonised our "monopolisation" law with Australia (ie section 36 of the Act should be brought in line with section 46(6A) of the Competition and Consumer Act 2010).[8]

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[4] Mario Monti, then EU Competition Commissioner, 3rd Nordic Competition Policy Conference (2000).
[5] OECD Recommendation.
[6] See OECD, Third Report on the implementation of the 1998 Council Recommendation (2005), accessed at http://www.oecd.org/competition/cartels/35863307.pdf.
[7] For further information, see Matthews & Borrowdale, International Information Exchange between Regulators & Third-Party Claimants, 3 August 2013.
[8] See Matthews & Meech, Submission on the Commerce (Cartels and Other Matters) Amendment Bill, 6 September 2012 (**Matthews & Meech**). We note that similar views have also been expressed by the Commission in its submission on the Bill to the Commerce Committee, and the Productivity Commission in its May 2014 report "Boosting productivity in the services sector" (accessed at http://www.productivity.govt.nz/sites/default/files/services-inquiry-final-report.pdf).

The structure of this paper

10. As noted, this paper has been prepared to supplement the presentation and slides by Andrew Matthews at the CONFERENZ: Productive Markets Forum conference on 19 November 2014. It is not intended to be a comprehensive analysis of all the proposed amendments to the Act. This paper is current as at 6 November 2014.

11. This paper is structured under the following headings:

    a. **Up to seven years' jail time for hard-core cartelists:** An overview of the proposed cartel prohibition and criminal offence, restructuring of the Act, and parallel and civil regimes.

    b. **Out with the old, in with the new: Exemptions for cartel conduct:** An overview of the proposed new exemptions, including the "collaborative activity" exemption (replacing the current "joint venture" exemption), the exemption for "vertical supply contracts", and the expanded exemption for "joint buying and promotion".

    c. **Clearance regime for cartel provisions:** An overview of the proposed clearance regime for collaborative activities.

    d. **The "other matters"**: An overview of the main "other matters" that are included in the Bill, including amendments relating to the jurisdictional reach of the Act, expanded "attribution" provisions, extraterritorial merger control, and increased penalties for non-cooperation or misleading the Commission.

    e. **Practical considerations**: Some key "take outs" for businesses and individuals.

12. Relevant sections of the Bill have been reproduced for ease of reference.

UP TO SEVEN YEARS' JAIL TIME FOR HARD-CORE CARTELISTS

13. Arguably the most significant proposed amendment to the Act is the introduction of criminal sanctions for "hard core" cartel conduct.

14. Persons that are convicted under the cartel offence would face hefty sanctions. These are:

    a. **For individuals**: a maximum of *seven years' imprisonment*, or a *fine of up to $500,000*, or *both.*[9]

    b. **For persons other than individuals**: a *fine* of up to the greater of *$10 million*, or *three times the commercial gain*, (or, if that gain cannot be easily established, *10% of group turnover* – including interconnected bodies corporate – from trading within New Zealand in each accounting period in which the contravention occurred).[10]

15. The highest penalty under the Act to date for cartel conduct is $7.5 million (Air New Zealand, 2013).[11] The highest penalty for an individual is $100,000.[12] Some other penalties for cartel conduct include:

[9] Proposed section 82B(4). Note that the $500,000 (maximum) pecuniary penalty was added by the Commerce Committee.
[10] Proposed section 82B(5). Note that proposed section 82B(5)(b)(ii) reads as: "*…10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.*"
[11] Agreed penalty in *Commerce Commission v Air New Zealand* (High Court, Venning J, 13 June 2013, CIV-2008-404-008352). Excludes costs.
[12] The $100,000 penalty comprised $65,000 for price fixing, and $35,000 for exclusionary conduct. *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (High Court, Auckland, Williams J, 4 October 2006, CIV-2005-404-2080). Excludes costs of $5,000.

DATE(S)	CARTEL	PENALTY
21 August 2013	**Trans-Tasman corrugated fibreboard packaging cartel**[13]	**$3.6M** agreed penalty for Visy Board; $25K agreed penalty for individual
5 April 2011 – 13 June 2013	**Air cargo cartel** (The Commission issued proceedings against 13 international airlines, reaching settlements with 11 of those airlines, but discontinued proceedings against the other 2)	Total combined agreed penalties **$42.575M** (British Airways $1.6M; Cargolux Airlines $6M; Qantas Airways $6.5M; Japan Airlines $2.275M; Korean Airlines $3.5M; Emirates $1.5M; Singapore Airlines Cargo $4.1M; Cathay Pacific $4.3M; Thai Airways $2.7M; Malaysian Airlines $2.6M; Air New Zealand $7.5M)
16 December 2010 – 8 April 2014	**Freight forwarding cartel**	Total combined penalties **$11.95M** (EGL $1.15M; Geologistics $2.5M; BAX $1.4M; Schenker $1.1M; Panalpina $2.7M; Kuehne + Nagel $3.1M)[14]

16. The criminal sanctions sit in parallel to the civil prohibitions,[15] with the distinguishing feature between the civil and criminal regimes is the required *mens rea* element of "intent" for the criminal offence.

17. Without any formal mechanism being provided in the Bill, the decision about whether to bring criminal or criminal proceedings appears to be one for the Commission to commence. It is proposed (administratively, rather than through legislation) that the Commission commence criminal proceedings by laying an information. The case would then be referred to a specialist "cartel prosecution panel" (to be established by the Solicitor-General), whose members would decide whether or not to file an indictment.[16] Presumably if the prosecution panel declined to bring criminal proceedings, the Commission could bring civil proceedings.

Proposed structure

18. To accommodate the proposed criminal offence, the Bill would repeal the current sections 29 to 34 of the Act, and replace them with a new regime that prohibits the entering into, or giving effect to, a "cartel provision" unless an exemption applies.

19. The following table compares the current and proposed structure of sections 29 to 34 of the Act:

SECTION	CURRENT HEADING	PROPOSED NEW HEADING
29	Contracts, arrangements, or understandings containing **exclusionary provisions** prohibited	[Repealed]
30	Certain provisions of contracts, etc, with respect to **prices** deemed to substantially lessen competition	Prohibition on entering into or giving effect to **cartel provision**
30A	[N/A]	**Meaning of cartel provision** and related terms
30B	[N/A]	Additional **interpretation** relating to cartel provisions
30C	[N/A]	**Temporal application** of cartel prohibition
30D	[N/A]	Cartel provisions generally **unenforceable**
31	**Joint venture** pricing exempt from application of section 30	Exemption for **collaborative activity**
32	Certain **recommendations** as to prices for goods and services exempt from application of section 30	Exemption for **vertical supply contracts**
33	**Joint buying and promotion** arrangements exempt from application of section 30	Exemption for **joint buying and promotion** agreements
34	Certain provisions of **covenants with respect to prices** deemed to substantially lessen competition	[Repealed]

[13] *Commerce Commission v Visy Board (NZ) Ltd* (High Court, Auckland, Venning J, 21 August 2013, CIV-2007-404-7237).
[14] Note that Kuehne + Nagel challenged the Commission's jurisdiction but were unsuccessful in both the High Court and Court of Appeal.
[15] Proposed section 30(2).
[16] For further detail on the proposed specialist "cartel prosecution panel" and prosecutorial discretion, see: (1) MED, Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill – Explanatory Material, 16 June 2011 (**Exposure Draft Explanatory Materials**), paras 16-20; (2) Dickey B, Competition Law and Policy Institute of NZ Conference, Skeletal Outline: Prosecution and Defence of Cartel Claims, 4 August 2012, paras 4.1-4.4; and (3) Crown Law, DRAFT Guidelines on Immunity from Prosecution for Cartel Offences, As at May 2011.

The prohibition on entering into or giving effect to a cartel provision

20. Proposed section 30 would replace the current prohibition on price fixing, and prohibit a person from:

    a. **entering into** a contract or arrangement, or arriving at an understanding, that contains a "cartel provision" or

    b. **giving effect to** a "cartel provision",

    unless an exemption applies.

> ***30 Prohibition on entering into or giving effect to cartel provision***
> *(1) No person may, **unless an exemption in section 31, 32, or 33 applies**, -*
> *(a) **enter into** a contract or arrangement, or arrive at an understanding, that contains a cartel provision; or*
> *(b) **give effect to** a cartel provision.*
> *(2) See section 80 for liability to a pecuniary penalty, and section 82B for criminal liability, for contravention of this section.*

21. Cartel provisions are defined in proposed section 30A(1), and are based on the OECD's definition of a "hard core cartel".[17] The Bill would define a "cartel provision" as a provision in a contact, arrangement or understanding that has the purpose effect, or likely effect of "**price fixing**", "**restricting output**" and/or "**market allocating**" in relation to the supply or acquisition of goods or services in New Zealand.

> ***30A(1)*** […] *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.*

22. The terms "price fixing", "restricting output" and "market allocating" are defined in proposed sections 30A(2) to (4):

> ***30A(2)*** […] ***price fixing*** *means as between the parties to a contract, arrangement or understanding, **fixing, controlling, or maintaining**, or providing for the fixing, controlling, or maintaining of, -*
> *(a) the **price** for goods or services that any 2 or more parties to the contract, arrangement or understanding supply or acquire in competition with each other; or*
> *(b) any **discount, allowance, rebate, or credit** in relation to goods or services, that any two or more parties to the contract, arrangement or understanding supply or acquire in competition with each other.*

> ***30A(3)*** […] ***restricting output*** *means **preventing, restricting, or limiting**, or providing for the prevention, restriction, or limitation of, -*
> *(a) the **production or likely production** by any party to a contract, arrangement or understanding **of goods** that any 2 or more of the parties to the contract, arrangement or understanding **supply or acquire in competition with each other**; or*
> *(b) the **capacity or likely capacity** of any party to a contract, arrangement or understanding **to supply services** that any 2 or more parties to the contract, arrangement or understanding **supply or acquire in competition with each other**; or*
> *(c) the **supply or likely supply of goods or services** that any 2 or more parties to a contract, arrangement or understanding **supply in competition with each other**; or*
> *(d) the **acquisition or likely acquisition of goods or services** that any 2 or more parties to a contract, arrangement or understanding **acquire in competition with each other**.*

[17] The OECD defines "hard core cartel" in the OECD Recommendation (para 2a) 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*".

> ***30A(4)*** *[…]* ***market allocating*** *means* ***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.*

23. Proposed section 30B(c) would confirm that a reference to persons "*in competition with each other*" includes persons that would be in competition with each other *but for a* cartel provision:

> ***30B(c)*** *a* ***reference to persons in competition with each other*** *for the supply or acquisition of goods or services includes a reference to—*
>
> *(a) persons who are, or are likely to be, in competition with each other in relation to the supply or acquisition of those goods or services; and*
>
> *(b) persons who,* ***but for a cartel provision*** *relating to those goods or services, would, or would be likely to, be in competition with each other in relation to the supply or acquisition of those goods or services.*

24. The proposed prohibition is broader than the current "cartel" prohibitions under the Act (ie the prohibition on "price fixing"), and may in fact catch conduct that is not traditionally thought of as "hard core" cartel conduct. For example, a typical "non-compete" provision may have the effect of restricting output, and therefore be prohibited by the proposed section 30.[18] It is worth noting that the existing price fixing prohibition already has "over-reach", catching both pro- and anti-competitive conduct – essentially, any understanding with the purpose or likely effect of influencing any aspect of "price" competition is caught. This includes discounts, agreeing maximum prices, and arguably credit periods. "Price" means valuable consideration in any form.

25. When the Bill was originally introduced, the definition of "cartel provision" included "bid rigging" (consistent with the OECD Recommendation), but the Commerce Committee recommended deleting this for "simplicity and clarity". The Commerce Committee considered that "*defining bid rigging as an additional and overlapping category would create uncertainty, and that prohibiting the other categories of cartel conduct (price fixing, restricting output, and market allocating) would adequately prevent anti-competitive bidding practices*."[19]

26. While the Bill would repeal section 29 of the Act, exclusionary conduct would continue to be prohibited by the proposed cartel prohibition in section 30 to the extent it fell within the definition of "restricting output" or "market allocating". Again, the "reach" has been significantly extended.

27. Cartel provisions would be deemed unenforceable, unless an exemption applied.[20]

28. As noted, the Bill would also provide that:

    a. each of a person's interconnected bodies corporate is taken to be a party to the contract, arrangement or understanding containing a cartel provision;[21] and

    b. a person A is taken to be in competition with person B for the supply or acquisition of goods or services when any of A's interconnected bodies corporate supplies or acquires goods or services in competition with B.[22]

[18] Note that current section 44(1)(d) of the Act provides that nothing in Part 2 of the Act (restrictive trade practices) applies to "*the entering into of a contract for, or the giving or requiring the giving of a covenant in connection with, the sale of a business or shares in the capital of a body corporate carrying on a business in so far as it contains a provision that is solely for the protection of the purchaser in respect of the goodwill of the business*."
[19] Commerce (Cartels and Other Matters) Amendment Bill, As reported from the Commerce Committee (**Select Committee Report**), Commentary, page 4.
[20] Proposed section 30D.
[21] Proposed section 30B(a).
[22] Proposed section 30B(b).

29. The practical implication of proposed sections 30B(a) and (b) is that a vertically integrated company cannot enter into or give effect to a contract, arrangement or understanding that contains a cartel provision with a competitor **at any level in the supply chain**, unless an exemption applies.

Section 82B: Criminal offence (and statutory defence) relating to cartel provision

30. Proposed section 82B would impose criminal sanctions for cartel conduct, providing that a person commits an offence[23] if they *enter into or give effect to* a contract, arrangement or understanding that contains a cartel provision (in contravention of proposed section 30) and *intend* at the relevant time to engage in "price fixing", "restricting output", or "market allocating" (as those terms are defined).

> ***82B Offence relating to cartel prohibition**:*
> *(1) A person **commits an offence** if -*
> *(a) the person, -*
> *(i) in contravention of section 30, **enters into** a contract or arrangement, or arrives at an understanding, that **contains a cartel provision**; and*
> *(ii) **intends, at that time, to engage** in price fixing, restricting output, or market allocating (as those terms are defined in section 30A); or*
> *(b) the person:*
> *(i) in contravention of section 30, **gives effect to** a contract, arrangement or understanding that **contains a cartel provision**; and*
> *(ii) **intends, at the time the contract, arrangement or understanding is given effect to, to engage** in price fixing, restricting output, or market allocating (as those terms are defined in section 30A).*

31. An individual who contravenes the proposed section 30 would be liable on conviction to a maximum of seven years' imprisonment, or a fine of up to $500,000, or both. A person who is not an individual would be liable on conviction to pay a fine of up to the greater of $10 million, or three times the commercial gain, (or, if that gain cannot be easily established, *10% of group turnover* – including interconnected bodies corporate – from trading within New Zealand in each accounting period in which the contravention occurred). The monetary fines for both individuals and "non-individuals" under the criminal regime are the same as those under the civil regime.

32. However, it would be a defence under proposed section 82B(2) for a defendant involved in a collaborative activity if they "*honestly believed*", at the time they entered into or gave effect to the cartel provision, that the cartel provision was "*reasonably necessary*" for the purposes of the collaborative activity:

> ***82B(2)** In a prosecution under this section, **it is a defence, for a defendant involved in a collaborative activity**, if -*
> *(a) the **defendant honestly believed** that the cartel provision was **reasonably necessary** for the **purposes of the collaborative activity**; and*
> *(b) that **belief existed at the time** the defendant entered into or arrived at the contract, arrangement, or understanding that contained the cartel provision, or at the time the defendant gave effect to the cartel provision, as the case requires.*

33. The Commission submitted to the Commerce Committee that it did not support the inclusion of an honest belief defence.[24] Its reasons for this view included that:

[23] The cartel offence in proposed section 82B would be added to Part 2 of Schedule 1 of the Criminal Procedure Act 2011 (SOP 407). Note that the Bill as reported by the Commerce Committee made consequential amendments to the District Courts Act 1947 to provide for the new offence, but SOP 407 proposed this be changed to an amendment to the Criminal Procedures Act 2011, which came into force after the Commerce Committee considered the Bill.
[24] Commerce Commission submission on the Commerce (Cartels and Other Matters) Amendment Bill, 4 September 2012.

a. such a defence is unnecessary given that a party who is uncertain about the legality or otherwise of their proposed collaboration can seek clearance; and

b. an "honest belief" defence is out of step with international antitrust law – such a defence is not available in any other jurisdiction that has criminalised cartel conduct.

34. However, MBIE disagreed with that view.[25]

35. Matthews & Meech submitted that the Commerce Committee should clarify the mental element for the criminal offence further, as there was a potential for ambiguity.[26] However, MBIE disagreed with that view without giving any reason for such disagreement.[27]

What does "reasonably necessary" mean?

36. While the Draft Guidelines do not analyse the proposed section 82B(2) defence, they do discuss the "reasonably necessary" requirement in the context of the collaborative activity exemption in proposed section 31. (Note that the proposed exemptions under the Bill, including the collaborative activity exemption, are discussed in more detail later in this paper.) In that context, the Draft Guidelines note that the Commission will likely assess:[28]

a. firstly, the *interest or interests that the parties are trying to protect or promote* by using the cartel provision (ie "what are the parties trying to achieve?");[29]

b. secondly, the *importance or significance* of that interest in *assisting the parties to achieve the collaboration's purpose(s)*; and

c. lastly, *other relevant factors* such as the *scope* of the cartel provision itself (including its duration, its geographic scope, relationship to the parties' businesses, and the products and markets to which the provision applies), and the *other available alternatives* that would enable the parties to pursue their collaboration/protect the relevant interest (ie parties should be able to explain why they have chosen the cartel provision as opposed to other alternatives).

37. As noted by the Commerce Committee, the phrase "reasonably necessary" will likely "*continue to be developed through case law and Commerce Commission guidelines and practice*."[30]

38. The defence was broader in the original version of the Bill – providing a defence if the defendant "*honestly believed at the relevant time that an exemption in section 31, 32, or 33 applied*". However, the Commerce Committee narrowed the defence so that it was only available to defendants who were involved in a collaborative activity and honestly believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity.

Claiming an exemption applies and onus of proof

39. In criminal proceedings, a defendant may also claim that a statutory exemption applies, ie for collaborative activities, vertical supply contracts, or joint buying and promotion agreements. (We discuss these exemptions in more detail later in this paper.) In such cases, the **onus would be initially be on the defence** to establish a factual basis that the exemption applies. Once the

[25] MBIE, Summary of submissions to the Commerce Committee – Commerce (Cartels and Other Matters) Amendment Bill (**MBIE Summary**), row 69.
[26] Matthews & Meech, para 2.
[27] MBIE Summary, row 72.
[28] Draft Guidelines, paras 5.35-5.39.
[2929] The Draft Guidelines give examples of a significant reduction in risk, cost or timeframe for achieving the collaboration's purpose(s). Para 5.35.
[30] Select Committee Report, Commentary, page 6.

defence has done so, the **onus would transfer to the prosecution to prove beyond reasonable doubt that the exemption does not apply**.[31]

40. In civil proceedings, the **onus would be on the person who is relying on the relevant exemption to prove on the balance of probabilities that the exemption applies**.[32]

Defendant in criminal proceedings must notify their reliance on defence or exemption

41. If a defendant wished to rely on the proposed section 82(B)(2) defence or claim that an exemption applies, it would **need to notify the prosecution** of that fact within 20 working days after pleading "not guilty", and at the same time provide sufficient details about the application of the relevant section to "*fully and fairly inform the prosecution of the manner in which the exemption or defence is claimed to apply*."[33]

42. The New Zealand Law Society submitted to the Commerce Committee that proposed section 82(B)(2) should be amended so that the only obligation on the defendant would be to notify the prosecution of the exemption or defence relied upon – in particular that it should be clear that a defendant would be under no obligation to disclose his or her factual case before trial. MBIE disagreed with that view, noting that the prosecutor would need to have an opportunity to carry out inquiries and rebut the defence (stating that this is similar to the approach that is used when a defendant is relying on an alibi).[34]

Civil or criminal proceedings – how does the Commission decide which action to take?

43. There is no formal mechanism in the Bill that dictates when the Commission should bring criminal as opposed to civil proceedings (or other enforcement action). However, the Commission's Enforcement Response Guidelines note that, where such a decision exists, the Commission will take into account factors such as:

    a. the *seriousness* of the conduct and its *consequences*;

    b. whether the conduct was *deliberate* or *blameworthy*;

    c. whether the law being enforced is *long-standing* and *well understood*;

    d. whether and what *time limitations* apply (these can differ between criminal and civil cases);

    e. the *sufficiency of the evidence*, and the *standard of proof required*: civil cases must be proved on the 'balance of probabilities' standard, but criminal cases require proof 'beyond reasonable doubt'; and

    f. the *remedies* that are available.

44. It has been proposed that the Commission commence criminal proceedings by laying an information, after which the case would be referred to a specialist "cartel prosecution panel" (to be established by the Solicitor-General). Members of that prosecution panel would then decide whether or not to file an indictment.

45. The Commission will likely also consider the relative difficulties faced by defendants in raising a defence under the criminal and civil regimes (ie where the burden of proof lies). Accordingly, it

[31] See Draft Guidelines, footnote 38.
[32] Proposed section 80(2C).
[33] Proposed section 82B(3).
[34] MBIE Summary, row 70.

may reserve its efforts in seeking criminal sanctions for the most serious cases of offending, where one of its primary objectives is to make a statement by sending an individual to jail.

No indemnity for civil or criminal penalties and costs

46. The Bill would provide that a body corporate must not indemnify any current or former director, employee, or agent of the body corporate or any of its bodies corporate for any civil or criminal penalty imposed on that individual, or any costs incurred by that individual in (unsuccessfully) defending any civil or criminal proceeding.[35]

Transitional arrangements

47. The Bill provides for a 9 month transitional period in relation to existing arrangements entered into before the enactment of the Bill during which there would be no proceedings against such existing arrangements. For the first 9 months following the commencement date of the Bill, the existing prohibition on price fixing (ie current section 30) would apply to those agreements as if it had not been repealed by the Bill.

48. The Bill also provides for a 2 year transitional period following the date on which the Bill receives Royal assent before the criminal offence comes into force.

OUT WITH THE OLD, IN WITH THE NEW: EXEMPTIONS FOR CARTEL CONDUCT

49. The Bill would repeal the current exemptions for price fixing contained in clauses 31-33 of the Act, and replace them with a new set of exemptions. The proposed exemptions relate to collaborative activities, vertical supply contracts, and joint buying and promotion agreements.

50. As discussed earlier in this paper:

    a. In **criminal proceedings**, the *initial onus is on the defendant* to establish a factual basis that an exemption applies, after which the *onus transfers to the prosecution* to prove, *beyond reasonable doubt*, that the exemption does not apply.

    b. In **civil proceedings**, if a person seeks to rely on one of the proposed exemptions, the *onus falls on that person* to prove, on the *balance of probabilities* that the relevant exemption applies.

51. The Bill would also repeal the "shipping exemption" in sections 44(2) and (3) of the Act, which applies to provisions exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand (and vice versa). The Bill provides a transition period of two years for the application of the Commerce Act to the Shipping Act 1987.

52. This proposed repeal of the shipping exemption was added at the Commerce Committee stage, following the Productivity Commission's recommendation to this effect.[36] Yet there was little consultation on this issue or the aviation exemption (in the Civil Aviation Act). Some reports suggest that this has been a contributing factor in the Bill's significant delays.

Proposed section 31: Exemption for collaborative activity

53. The Bill would replace the current section 31 exemption for joint venture pricing with a new "collaborative activity" exemption. The key features of the proposed exemption would be that the parties are involved in a "collaborative activity" as defined, and that the cartel provision is

[35] Proposed section 80A.
[36] Productivity Commission, International freight services transport inquiry, April 2012, accessed at http://www.productivity.govt.nz/sites/default/files/FINAL%20International%20Freight%20Transport%20Services%20PDF%20with%20covers_1_0.pdf.

"reasonably necessary" for the purposes of the collaborative activity. As currently drafted, the proposed exemption provides:

> *31* ***Exemption for collaborative activity***
>
> *(1)* ***Nothing in section 30 applies*** *to a person who enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or who gives effect to a cartel provision in a* contract, arrangement, or understanding, *if, at the time of entering into* [or arriving at][37] *the contract, arrangement, or understanding or giving effect to the cartel provision, -*
>
> *(a) the person and 1 or more parties to the contract, arrangement or understanding, are* ***involved in a collaborative activity****; and*
>
> *(b) the* ***cartel provision is reasonably necessary for the purpose of the collaborative activity****.*
>
> *(2) In this Act, collaborative activity means 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 carried on for the dominant purpose of lessening competition*** *between any 2 or more of the parties.*
>
> *(3) The* ***purpose*** *referred to in subsection (2)(b)* ***may be inferred*** *from the conduct of any relevant person or from any other relevant circumstance.*

54. The current joint venture exemption has been criticised as focussing "*on the form by which the parties were 'cooperating' to determine whether* [the] *exemption to the price fixing prohibition applied*."[38] In contrast, for the proposed exemption to apply, the collaborative activity must not be carried on for the dominant purpose of lessening competition. Accordingly, the proposed exemption focusses on "substance" over "form" – which, in our view, is an improvement.

55. The Exposure Draft Explanatory Material noted that the proposed collaborative activity exemption is intended to be "*sufficiently broad to cover both joint ventures and ancillary restraints*".[39]

56. The Draft Guidelines indicate how the Commission intends to apply this exemption once the Bill becomes law. In determining whether or not the parties are *involved in a collaborative activity*, the Commission must assess whether the parties are involved in an enterprise, venture, or other activity, in trade that is "*carried on in cooperation*" and is "*not carried on for the dominant purpose of lessening competition*." While the Bill does not define these phrases, the Draft Guidelines provide helpful guidance on the Commission's likely approach:

    a. **Carried on in cooperation**: It is not sufficient to simply label an activity as a "collaborative" activity. To qualify as a collaborative activity "*the parties need to be combining their businesses, assets or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly. They need to be doing something more than simply agreeing how to run their separate businesses*."[40]

    b. **Not for the dominant purpose of lessening competition**: The test is "*primarily an objective test for the courts or the Commission to assess, although evidence of what the parties were trying to achieve will be relevant. The focus will be on the substance of the activity being undertaken*."[41] Further, there is "*no bright line as to when an aim or objective* [of a cartel provision] *becomes the dominant purpose". It is a matter of judgement for the court (when applying the collaborative activity exemption)…based on the facts of the case*."[42] As noted by the Commerce Committee, this limitation "*reflects the need to guard against the use of sham joint ventures or other sham collaborations to evade operation of the per se criminal and civil prohibitions against cartel conduct*".

[37] Amendment (insertion of "or arriving at") proposed by SOP 407.
[38] Draft Guidelines, para 5.4.
[39] Exposure Draft Explanatory Materials, para 46.
[40] Draft Guidelines, paras 5.7-5.9.
[41] Draft Guidelines, para 5.20.
[42] Draft Guidelines, para 5.22.

57. The Bill would explicitly confirm that the "purpose" element may be inferred from the conduct of any relevant person or from any other relevant circumstance.[43]

58. We discuss the factors the Commission will likely consider in determining whether a cartel provision is "reasonably necessary" for the purpose(s) of the collaborative activity exemption earlier in this paper. Further to that discussion, the US guidelines for collaborations among competitors (which also employ a "reasonably necessary" type test and have been "influential" in the Bill's formulation) note that "*if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then…the agreement is not reasonably necessary*."[44]

Proposed section 32: Exemption for vertical supply contracts

59. Generally speaking, arrangements are often characterised as "**horizontal**" (ie between competitors, or persons operating at the same level of the supply chain) or "**vertical**" (ie between persons operating at different levels of the supply chain). However, some arrangements may contain both a horizontal and a vertical element. Where a vertical arrangement also involves a horizontal element, the cartel prohibition may apply.[45]

60. Proposed section 32 provides an exemption from the cartel prohibition for vertical supply contracts. Vertical supply contracts are commonplace, and can in fact enhance consumer welfare. Vertical relationships can exist where, for example, a manufacturer supplies good or services to a retailer, but also competes with that retailer downstream (either directly, or through one of its subsidiaries).

61. As currently drafted, the exemption provides:

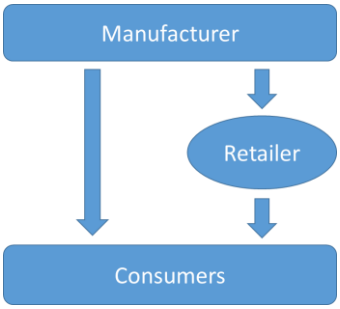
> *32* ***Exemption for vertical supply contracts***
>
> *(1) Nothing in section 30 applies to a person who enters into a contract that contains a cartel provision, or who gives effect to a cartel provision in a contract, if –*
>
> *(a) the contract is entered into* ***between a supplier or likely supplier 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][46] *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 to the contract.*
>
> *(2) The* ***purpose*** *referred to in subsection (1)(b)(ii)* ***may be inferred*** *from the conduct of any relevant person or from any other relevant circumstance.*

62. The exemption includes the same limitation as the collaborative activity exemption, in that the cartel provision must not have the *dominant purpose of lessening competition*.

63. Unlike the other proposed exemptions, section 32 could only apply to contracts – not arrangements or understandings. It will therefore be important to formalise any vertical supply arrangements or understandings into contracts if the exemption is to be relied upon. Even then, the proposed exemption is limited in its application – ie it only applies to the extent that the cartel provision relates to the *supply or likely supply of* goods – and the cartel prohibition otherwise applies.

[43] Proposed section 31(3).
[44] Federal Trade Commission and US Department of Justice, Antitrust Guidelines for Collaborations Among Competitors, April 2000, page 9.
[45] Vertical arrangements will also be subject to the general prohibition against anticompetitive conduct that substantially lessens competition under section 27 of the Act.
[46] Amendment (replacing the word "or" with the word "including") proposed by SOP 407.

64. The following diagram illustrates a simple example of a situation where a manufacturer enters into a contract to supply goods to a retailer (who then on-sells those goods to consumers), but also sells goods directly to consumers. In this situation, the manufacturer would be in competition with the retailer for the sale of goods to consumers:



65. In the above example, the exemption for vertical supply contracts would likely apply to a cartel provision in the contract between the manufacturer and the retailer if that provision relates to the supply or likely supply of goods, including if that provision stipulated the maximum price at which the retailer could re-sell those goods. This assumes that the cartel provision does not have the dominant purpose of lessening competition between the manufacturer and retailer.

66. The Draft Guidelines indicate how the Commission intends to apply this exemption once the Bill becomes law. In determining whether or not the cartel provision *relates to* the supply or likely supply of the goods or services, and is *not for the dominant purpose of lessening* competition, the Commission will likely consider the following factors:

    a. **Relates to**: While the term "relates to" does not specify the degree of connection required, the Commission's view in the Draft Guidelines is that this requires a "*relatively close connection between the cartel provision and the act of* [person] *A supplying goods or services to* [person] *B for* [person] *B to resupply*."[47]

    b. **Not for the dominant purpose of lessening competition**: The Draft Guidelines note that "*the prevailing objective of the cartel provision must not be to lessen competition between the parties. If it is – that is, if the cartel provision is simply a device to engage in anti-competitive conduct – then the exemption will not apply*."[48] The test is "*primarily an objective test for the courts or the Commission to assess, although evidence of what the parties were trying to achieve will be relevant*"[49] and there is "*no bright line as to when an aim or objective of a cartel provision becomes the dominant purpose. It is up to the parties to the arrangement to show that the cartel provision does not have the dominant purpose of lessening competition*."[50]

67. Like the proposed exemption for collaborative activities, the "purpose" element may be inferred from the conduct of any relevant person or from any other relevant circumstance.[51]

68. When the Bill was introduced, the proposed exemption only applied to goods. But the Commerce Committee recommended extending this to services as well.

69. The Commerce Committee recommended adding the explicit reference to an exemption for suppliers stipulating maximum resale prices, which was not included in the original version of the Bill (although, arguably it was implicit or at least unclear). The Commerce Committee

[47] Draft Guidelines, para 3.8.
[48] Draft Guidelines, para 3.17.
[49] Draft Guidelines, para 3.18.
[50] Draft Guidelines, para 3.19.
[51] Proposed section 32(2).

consider that "*maximum resale prices are pro-competitive, and that this amendment would ensure New Zealand's approach to this issue is consistent with that of Australia*."

70. Another benefit of the proposed exemption is that it would allow franchisors to allocate territories to franchisees.

71. However, resale price maintenance (sections 37-42 of the Act) would remain a *per se* prohibition.

Proposed section 33: Exemption for joint buying and promotion agreements

72. The proposed exemption for joint buying and promotion agreements in section 33 would apply when competing buyers arrange to purchase goods or services collectively on terms that an individual buyer would be unlikely to be able to negotiate on their own. This replaces the current section 33 of the Act, which also applies to joint buying and promotion.

73. As currently drafted, proposed section 33 provides:

> *33* ***Exemption for joint buying and promotion agreements***
>
> *A provision in a contract, arrangement or understanding does not have the purpose, effect, or likely effect of price fixing (as defined in section 30A(2)) if the provision –*
>
> *(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.*

74. Unlike the other exemptions, proposed section 33 would only apply to price fixing, not the other forms of cartel conduct. Accordingly, even if the exemption applied, it would still be illegal if the provision amounted to "market allocation" or "capacity restriction" and the collaborative activity exemption did not apply, or it otherwise had the purpose, effect, or likely effect of substantially lessening competition.[52]

75. The proposed exemption for joint buying and promotion agreements would expand the current exemption in the Act, including by extending it to include "services". Proposed subsections (c) and (d) would also be new.

CLEARANCE REGIME FOR COLLABORATIVE ACTIVITIES

76. The Bill would insert new sections 65A-D into the Act, allowing the Commission to grant (and revoke) clearances relating to cartel provisions. The effect of a clearance would be that:

    a. a party to the contact, arrangement or understanding to which the clearance relates would not contravene sections 27 or 30 by entering into the contract or arrangement, or arriving at the understanding; and

    b. a person does not contravene section 27 or 30 by giving effect to any cartel provision in the contract, arrangement or understanding to which the clearance relates; and

[52] Draft Guidelines, para 4.6.

c. proposed section 30D(1), which would deem cartel provisions unenforceable, would not apply.

77. Proposed section 65A(2) would provide that the Commission must give a clearance if, following an application for clearance by an applicant, the Commission is satisfied that:

a. the applicant and any other party to the proposed contract, arrangement or understanding are or will be *involved in a collaborative activity* (ie clearance is not available if the parties are not involved in a collaborative activity); and

b. every cartel provision in the contract, arrangement, or understanding is *reasonably necessary for the purpose of the collaborative activity*; and

c. entering into the contract or arrangement, or arriving at the understanding, or giving effect to any provision of the contract, arrangement, or understanding, *will not have, or would not be likely to have, the effect of substantially lessening competition in a market*.

78. The Commission is not required to determine whether a particular provision is in fact a cartel provision, providing there are reasonable grounds for believing it might be.[53]

79. The Commission would be able to revoke a collaborative activity clearance if it is satisfied that the clearance was given on information that was false or misleading in a material particular, or there has been a material change of circumstances.[54]

80. The proposed new clearance regime:

a. Is not available for "non-cartel" restrictive trade practices (although as noted the Commission is not required to determine whether or not there is in fact a cartel provision).

> ***65A Commission may give clearances relating to cartel provisions***
>
> *(1) A Person who proposes to enter into a contract or arrangement, or arrive at an understanding, that* ***contains, or may contain, a cartel provision*** *may apply to the Commission for a clearance under this section.*
>
> […]
>
> *(3) For the purposes of subsection (2),* ***it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision****, providing there are* ***reasonable grounds for believing it might be****.*
>
> […]

b. Will be a public process (like it currently is for mergers), although the Commission is "open" to granting "fact confidentiality" while it determines whether or not the collaborative activity exemption applies ("stage 1"). However, as the Commission must be satisfied that the entering into or giving effect to the arrangement will not have, or would not be likely to have, the effect of substantially lessening competition in a market, the Commission is highly unlikely to grant fact confidentiality in the second stage of the process.[55]

81. Although clearance offers immunity, we expect that in most instances clients will prefer to avoid a costly, public process. While key commercial provisions will no doubt remain confidential, in our experience clients are usually sensitive about keeping contractual arrangements confidential – as opposed to mergers, which inevitably become public.

[53] Proposed section 65A(3).
[54] Proposed section 65D(1).
[55] For further details, see the Draft Guidelines, chapter 7.

THE "OTHER MATTERS"

82. The Bill would also make various other important amendments to the Act. The main amendments include:

a. **Amendments to the jurisdictional reach of the Act (section 4 of the Act)**: The Bill would insert a new section 4(1AA) into the Act which is intended to clarify the relationship between the jurisdictional provisions in section 4 of the Act and the attribution provisions in section 90, so that it was clear that if conduct of a person in New Zealand is attributed to an overseas party by virtue of section 90, the conduct of the overseas person is to be treated as occurring in New Zealand.[56]

> ***4(1AA)*** *For the purposes of this Act, -*
>
> *(a) a person engages in conduct in New Zealand if any act or omission forming part of the conduct occurs in New Zealand; and*
>
> *(b) a person (**person A**) engages in conduct in New Zealand if another person (**person B**) engages in conduct in New Zealand, and the conduct of person B is deemed (by virtue of section 90) to be conduct of person A.*

The Bill would also repeal current section 4(3) which relates to acquisitions by overseas persons, which would instead be covered by the proposed extraterritorial merger control provisions.[57] The initial amendments to section 4 of the Act were drafted based on section 7 of the Crimes Act 1961 and would have extended the jurisdiction of the Act to acts committed outside New Zealand where an act or omission related to an offence that occurred in New Zealand, however the Commerce Committee considered those initial amendments were too broad.

b. **Attributing conduct (replacement of section 90):** The Bill would repeal and replace section 90 of the Act which deals with attributing conduct by employees ("servants"), agents and others. The main policy change is to remedy a deficiency in the current subsection (4) which fails to provide that conduct by a person acting under the direction, or with the consent or agreement (express or implied), of another person is deemed to be the conduct of the latter person, even if the first person is not an employee or agent of that latter person. The language has also been "modernised" to refer to "employees" rather than "servants". Some of the proposed attribution provisions will only relate to civil proceedings.[58]

> ***90 Conduct by employees, agents, and others***
>
> *(1) In proceedings under this Part in respect of conduct engaged in by a person other than an individual (**person A**), if it is necessary to establish the state of mind of person A it is sufficient to show that a director, employee, or agent of person A, acting within the scope of the director's, employee's, or agent's actual or apparent authority, had that state of mind.*
>
> *(2) Conduct by a person (**person B**) is deemed for the purposes of this Act also to be the conduct of a person other than an individual (**person A**) if, at the time of the conduct,—*
>
> *(a) person B was a director, employee, or agent of person A, acting within the scope of person B's actual or apparent authority; or*
>
> *(b) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of a director, employee, or agent of person A who was acting within the scope of the director's, employee's, or agent's actual or apparent authority.*
>
> *(3) In civil proceedings under this Part in respect of conduct engaged in by an individual (**person C**), if it is necessary to establish the state of mind of person C it is sufficient to show that an employee or agent of person C, acting within the scope of the employee's or agent's actual or apparent authority, had that state of mind.*
>
> *(4) In civil proceedings under this Part, conduct by a person (**person B**) is deemed for the purposes of this Act also to be the conduct of an individual (**person C**) if, at the time of the conduct,—*
>
> *(a) person B was acting at the direction, or with the consent or agreement (express or implied), of person C; or*

[56] Select Committee Report, Commentary, page 2.
[57] As proposed by SOP 407.
[58] The Commerce Committee recommended amendments to proposed sections 90(3) and (4) so that they would only relate to civil proceedings.

(b) person B was an employee or agent of person C and acting within the scope of person B's actual or apparent authority; or

(c) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of an employee or agent of person C who was acting within the scope of the employee's or agent's actual or apparent authority.

(5) A reference in this section to the state of mind of a person includes a reference to—

(a) the knowledge, intention, opinion, belief, or purpose of the person and the person's reasons for that intention, opinion, belief, or purpose; and

(b) the state of mind of a person outside New Zealand.

c. **Acquisitions by overseas persons (proposed new sections 47A-D)**: The Bill would insert new sections 47A-D into the Act which would allow the Commission to seek a declaration from the High Court that an acquisition by an overseas person of a "controlling interest" in a New Zealand body corporate (assets or shares) has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand. As proposed, only the Commission may apply for a declaration. The Commission may not apply for a declaration if more than 12 months has passed since the date of the acquisition, or if it has given a clearance or authorisation under Part 5 of the Act in respect of the acquisition.

If the High Court has made a declaration in relation to a New Zealand body corporate, it would be able to make an order requiring that New Zealand body corporate to:

i. cease carrying on business in New Zealand in the market to which the declaration relates;

ii. dispose of shares or assets; or

iii. take any other action that the court considers, in all the circumstances, is consistent with the purposes of the Act.

The Commerce Committee recommended amending the proposed "controlling interest" test to reduce the relevant threshold from 50% to 20%, in line with that of domestic entities under the Takeovers Code. Further, SOP 407 proposed amendments to the definition of controlling interest, by adding an "effective control" test.[59]

47A Declaration relating to acquisition by overseas person

(1) The Commission may apply to the High Court for a declaration under this section if an overseas person acquires a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares.

(2) The High Court may make a declaration that it is satisfied that—

(a) the overseas person has acquired a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares; and

(b) the acquisition of that controlling interest has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.

(3) A declaration may not be made in respect of an acquisition if—

(a) the application for the declaration is made more than 12 months after the date of the acquisition; or

(b) the Commission has given a clearance, or granted an authorisation under Part 5, in respect of the acquisition.

(3A) Nothing in this section limits the Commission's functions or powers under any other provision of this Act.

(4) In this section and in sections 47B to 47D,—

***controlling interest** means, in the context of an overseas person having a controlling interest in a New Zealand body corporate, that the overseas person—*

(a) controls the composition of the board of the body corporate; or

(b) is in a position to exercise, or control the exercise of, more than 20% of the maximum number of votes that can be exercised at a meeting of the body corporate; or

[59] Proposed section 47A(4)(f).

> *(c) holds more than 20% of the issued shares of the body corporate, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or*
>
> *(d) is entitled to receive more than 20% of every dividend paid on shares issued by the body corporate, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or*
>
> *(e) is the holding company (as defined in section 5(2) of the Companies Act 1993) of the body corporate; or*
>
> *(f) acquires assets in circumstances where the acquisition results in the overseas person having effective control of the body corporate*
>
> ***New Zealand body corporate** means a body corporate (whether incorporated overseas or in New Zealand) that carries on business in New Zealand*
>
> ***overseas person** means a person, whether a body corporate or otherwise, that is neither resident nor carrying on business in New Zealand.*

> ***47B Orders following declaration under section 47A***
>
> *(1) If the High Court makes a declaration under section 47A in relation to a New Zealand body corporate, it may make an order under this section requiring the New Zealand body corporate to—*
>
> *(a) cease carrying on business in New Zealand, in the market to which the declaration relates, no later than 6 months after the date of the declaration or any longer period specified by the court; or*
>
> *(b) dispose of shares or other assets specified by the court; or*
>
> *(c) take any other action (including disposing of shares or other assets) that the court considers, in all the circumstances, is consistent with the purpose of this Act.*
>
> *(2) Contravention of an order made under this section is deemed to be a contravention of this section.*

> ***47C Application by Commission for declaration***
>
> *(1) An application for a declaration under section 47A may be made only by the Commission.*
>
> *(2) On making an application under section 47A, the Commission must give notice of the application to the relevant overseas person and New Zealand body corporate.*

> ***47D Revocation and variation of declarations and orders***
>
> *(1) The Commission, or the overseas person or New Zealand body corporate that a declaration made under section 47A relates to, may apply to the High Court at any time to revoke the declaration, revoke or vary the order, or both.*
>
> *(2) The High Court may, if is satisfied that there has been a material change of circumstances, do either or both of the following:*
>
> *(a) revoke the declaration:*
>
> *(b) revoke or vary any order.*

This change is modelled on Australian provisions which we understand have been seldom, if ever, used. As many have observed, this "solution" of requiring a monopolist to cease supply[60] is somewhat counterintuitive and could be counterproductive.

d. **Appeals relating to authorisations (sections 58 and 67)**: The Bill would amend the current rules relating to appeals of authorisations so that any person who has a "*direct and significant interest*" in an authorisation application and "*participated in the Commission's processes*" leading to determinations for *authorisations* under sections 58 and 67 may appeal that authorisation, and not just those who participated in a conference.

e. **Increased penalties for "non-cooperation"/misleading offences (section 103)**: The Bill would increase the penalties under section 103 of the Act, which relate to failing to co-operate with (or misleading) the Commission in its investigations. The maximum fines under section 103(4) would be increased tenfold to $100,000 for an individual, or $300,000 in any other case. Proceedings may be commenced within 3 years after the non-cooperation was discovered (or ought reasonably to have been discovered).

[60] Proposed section 47B(1)(a).

83. While not within the scope of this paper, we note that the Commission would have expanded powers and access to international assistance in criminal proceedings by virtue of the Bill, including under the following legislation:

    a. **Search and Surveillance Act 2012**: Intrusive surveillance and interception powers would be available to the Commission by virtue of the criminal offence for cartel conduct carrying a maximum term of imprisonment of 7 years. Powers would include the ability to intercept private communications, use tracking devices, and observe and record private activities in private premises.

    b. **Mutual Assistance in Criminal Matters Act 1992:** Would assist the Commission with locating witnesses and gathering evidence from other jurisdictions, which would be important where conduct occurred in multiple jurisdictions.

    c. **Extradition Act 1999**: The Commission could apply to extradite defendants to and from New Zealand.

PRACTICAL CONSIDERATIONS

84. The Commission's Fact Sheet on Price Fixing & Cartels (based on the current law) provides some useful tips for engaging with competitors:[61]

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 straight away.

85. However, with a broader prohibition on the horizon, it would be wise to carefully consider *any* communications or arrangements with competitors – not just those relating to "price". (A cartel provision need not be formal, a "wink and nudge" could constitute an "understanding".)

86. The proposed cartel prohibition could capture unexpected conduct. Key risk areas include joint ventures, distribution arrangements and industry groups. Existing contracts, arrangements or understandings need to be reviewed to assess whether they contain a "cartel provision" as defined in the Bill.

87. Businesses should ensure they have a good "business case" for anything they do with competitors (even joint venture partners) which could impact price (cost), capacity (output), or who supplies which parties/regions. Businesses should also clearly document why this has the best pro-competitive or at least competitively neutral outcomes.

88. Businesses (and directors) should seek expert legal advice:

    a. Giving effect to *existing arrangements* could be captured by the proposed cartel prohibition following the 9 month transitional period, and then be open to criminal prosecution two years after the commencement of the Bill.

[61] Commerce Commission, Price Fixing and Cartels Fact Sheet, accessed at: www.comcom.govt.nz/business-competition/fact-sheets-3/price-fixing-and-cartels.

b. An expert competition lawyer can advise on whether existing or proposed arrangements would likely be captured by the proposed cartel prohibition, and whether an exemption is likely to apply – it is better to be safe than sorry!

c. If a defendant wishes to run the statutory defence in a criminal proceeding, the fact that they sought and relied on expert legal advice on the application of the exemptions would likely be a key factor in determining whether or not that defendant "honestly believed" that an exemption applied.

89. Employers may face issues with existing employment agreements and how they are framed (especially considering the expanded "attribution" provisions), as well as the corporate approach to compliance generally. Insurance policies will also need to be reviewed. There could be a tension between "zero tolerance" policies for employee transgressions, and:

a. a desire to cooperate with a regulator (or be "first in" seeking leniency); and

b. a need to frame any defence or arguments for any follow on actions.

90. The introduction of criminal sanctions including jail time and/or substantial fines for hard core cartel conduct, as well as the expanded "attribution" provisions (and expanded prohibition) make the Bill a truly board-level issue. Directors will be well-advised to familiarise themselves with the proposed new laws. They may want to know that full advice has been taken on contracts or arrangements with actual or potential competitors.

91. Further, practitioners who have traditionally only dealt with civil matters will need to familiarise themselves with aspects of criminal law, as their advice to clients will most certainly be impacted by the changes.

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