Navigating a brave new world with the new prohibition on "cartel provisions"

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Matthews Law
COMPETITION · REGULATION · POLICY · STRATEGY

Introduction

"*The* […] *companies obtained legal advice which was to the effect that there was no obstacle to the* […] *agreement in terms of legal liability.* ***The advice did not, however, refer to s 30 of the Commerce Act***."[1]

1. Competition law is not always intuitive and may in some cases prohibit behaviour that businesses consider to be commercially rational. But it serves an undisputedly important purpose: to promote competition in markets for the long-term benefit of consumers within New Zealand.

2. The cartel laws in New Zealand have gone through a recent upheaval with the replacement of the old "price fixing prohibition" with a new prohibition against entering into a contract, arrangement or understanding (**CAU**) that contains or gives effect to a "cartel provision" (**cartel prohibition**). A cartel provision is a provision of a CAU that has the purpose or (likely) effect of "price fixing", "output restricting" or "market allocating".

3. The Commerce Commission (**Commission**) states in its Competitor Collaboration Guidelines[2] (**Guidelines**) that it does "not see the new cartel prohibition as representing a significant shift in the types of conduct that should be regarded as a breach" of the Commerce Act 1986 (**Act**).[3] However, our view is that in practice most arrangements between actual and potential competitors may risk being captured by the broad definitions of price fixing, output restricting or market allocating. Key risk areas include distribution arrangements, joint ventures, restraint of trades, industry associations and procurement.

4. Against that, there is also a new "substance over form" exceptions framework which may provide relief to the broad cartel prohibition, provided that sufficient steps are taken at the outset of any collaboration or agreement with an actual or potential competitor. As the exceptions are reverse onus, it is up to the parties to positively show that their arrangements fall within one or more of the exceptions. (A one-page summary of the cartel prohibition and exceptions can be found in **Appendix A**.)

5. This paper provides an overview of:

    a. the cartel prohibition;

    b. key risk areas and pitfalls for businesses to watch out for;

    c. the new exceptions framework;

    d. practical steps businesses can take to reduce risk of falling foul of the cartel prohibition;

    e. the new clearance regime for collaborative activities;

    f. the recently proposed cartel criminalisation; and

    g. cartel leniency.

[1] [2016] NZHC 1494 (Courtney J). Emphasis added.
[2] Found here: http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/
[3] Guidelines, page 2.

Background

6. The cartel prohibition came into force on 15 August 2017 as part of the Commerce (Cartels and Other Matters) Amendment Act (**Amendment Act**). The Amendment Act was enacted as part of a growing international recognition of the extent and harm of cartel activity and was intended to clarify what constitutes cartel conduct in New Zealand.

7. Some recent examples of court-ordered penalties in relation to cartel conduct (albeit under the old price fixing prohibition) include:

PARTIES	CONDUCT	PENALTIES
Real estate (2016) PPL Agreement: Bayleys, Barfoot & Thompson, Harcourts, L J Hooker, Ray White, Property Page Hamilton Agreement: Success, Lodge, Lugton's, Monarch and Online Manawatu Agreement: Unique, Property Brokers, L J Hooker Palmerston North	Three alleged price fixing agreements in relation to a proposal by Trade Me to (1) increase its fees for listing properties for sale on its website, and (2) that agents pass the price increase on to vendors.	Total: $18.97M between the parties. Largest individual penalties were imposed on Barfoot & Thompson and Harcourts at $2.575M each.
Livestock / NAIT (2015) PGG Wrightson, Elders Rural Holdings & Rural Livestock	Entering into agreements to set tagging and related fees at livestock sale yards.	Total: $3.28M PGG: $2.7M Rural: $425K Elders: $200K in costs Individuals: $105K in total
Enviro Waste (2015)	Attempting to reach an understanding to compete less competitively for existing customers and to not enter the separate waste tallow market.	Total: $435K (plus $5K for an individual)
Carter Holt (2014)	A 7-month arrangement to increase prices for certain timber products in Auckland.	Carter Holt: $1.85M (plus $5K for an individual)
Visy (2013)	Collusion on 3 tenders between 2001 - 2004 for packaging materials.	Visy: $3.6M (plus $25K and $60K, respectively, for two individuals)
Air NZ (2013)	Fixing fuel and security surcharges. (Note: 11 airlines were prosecuted in the NZ "Air Cargo" litigation, with over NZ$42.5 million in total fines imposed)	Air NZ: $7.5M

Transitional provisions

8. Most of the changes contained in the Amendment Act are already in force, but there is a 9-month transition period (ending 15 May 2018) during which pre-existing arrangements cannot be caught by the new cartel provisions (but may still be caught by the former price fixing prohibition). The cartel prohibition does apply to every **new** contract, arrangement or understanding entered from 15 November 2017.

The cartel prohibition

General

9. The cartel prohibition[4] prohibits CAUs that contain or give effect to a cartel provision. A cartel provision is a provision of a CAU that has the purpose or (likely) effect of price fixing, output restricting or market allocating:

PRICE FIXING	OUTPUT RESTRICTING	MARKET ALLOCATING
Fixing / controlling / maintaining: • price, discount, allowance, rebate or credit • for/in relation to goods or services • supplied or acquired by 2 or more parties in competition.	*Preventing / restricting / limiting*: • the (likely) production of goods; • the (likely) capacity to supply services; • the (likely) supply of goods/services; or • the (likely) acquisition of goods/services • supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other.	*Allocating between any 2 or more parties:* • 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.
Or where the provision "provides for" any of the above.		

10. The cartel prohibition is a *per se* prohibition. This means that it is illegal to enter into a CAU containing a cartel provision (or to give effect to a cartel provision) whether or not there is any actual impact on competition (even if it is a positive impact).

11. The term "contract, arrangement or understanding" is deliberately broad – no formal legal agreement is required. It will capture a "nudge and a wink".

Are the parties "in competition"?

12. The cartel prohibition only applies where the provision is part of an agreement between actual or potential competitors.

13. Section 30B of the Act provides that this includes parties who are likely to be in competition with each other and parties who, **but for** a cartel provision, would (likely) be in competition with each other.

14. Section 30B also contains a "look through" test which catches interconnected bodies corporate.

"Price fixing"

15. Price fixing occurs when parties enter into or give effect to a CAU fixing, controlling or maintaining the price (including discount, allowance, rebate or credit) of goods or services that two or more of the parties to the CAU supply or acquire in competition with each other.

[4] Found in section 30 of the Act.

16. Price fixing includes agreements to fix price at a predetermined level, to eliminate or reduce discounts, to increase prices, to set a minimum price, to agree a price to bid for a contract, to maintain prices above a certain level, or to apply a formula to calculate prices.

CASE STUDY – *Caltex* carwash case

Commerce Commission v Caltex NZ Ltd[5] involved an agreement between oil companies to jointly stop a promotion which gave customers a complementary carwash with every fuel purchase over $20. The Court held that the agreement to end the promotion amount to price fixing as the discount was an "inseparable part" of the price of petrol.

"Output restricting"

17. The definition of output restriction captures any attempt to prevent, restrict or limit (likely) levels production, capacity, supply or acquisition between actual or potential competitors.

CASE STUDY – Salmon producers[6]

In 2003 the Federal Court of Australia held that there was an agreement or understand between competing salmon producers to fix, control, or maintain the price of salmon. Five salmon producers agreed to reduce salmon numbers in response to oversupply in the market. Under the new cartel laws, this conduct would likely to have been found to be output restriction.

"Market allocating"

18. Market allocating occurs where two or more actual or potential competitors allocate between them the customers, suppliers or geographic areas each will supply or acquire goods or services from / to.

19. Market allocating captures sales to distributors or re-suppliers as well as to end customers.

CASE STUDY – *Eli Lilly*

Commerce Commission v Eli Lilly & Co (NZ) Ltd[7] involved an agreement between two wholesalers of animal remedies to divide the market for a certain brand between them. One would only proactively sell the Elanco brand of products to purchasers that spend more than $10,000 on those products per annum, while the other would only proactively sell to smaller purchasers.

Key risk areas

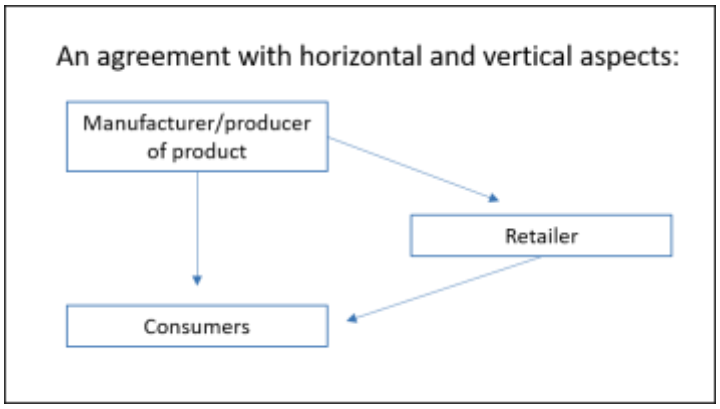
20. The cartel prohibition is very broad – most arrangements between actual and potential competitors risk being caught by the broad definitions of price fixing, output restriction and market allocation. Every "provision" must be considered for its purpose and (likely) effect. Key risk areas include distribution arrangements, restraints of trade, joint ventures, industry associations and procurement.

Distribution arrangements

21. Distribution has always been a problematic area, most obviously in franchise (and similar) arrangements, as highlighted in the early 90s in the *Toyota dealers* litigation.[8] The stakes are now much higher, especially in the "online" world. Suppliers are increasingly supplying end-

[5] *Commerce Commission v Caltex NZ Ltd* [1998] 2 NZLR 78.
[6] *ACCC v The Tasmanian Salmonid Growers Association* Ltd (2003) ATPR 41-954.
[7] *Commerce Commission v Eli Lilly & Co (NZ) Ltd* (HC) Auckland CL 19/98, 30 April 1999.
[8] Ultimately resolved in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608.

customers directly online while many traditional bricks and mortar retailers also have an online presence. This development has increased the risks of arrangements inadvertently breaching the cartel prohibition where suppliers and their customers could be viewed as competing or potentially in competition with each other.



22. For example, issues can arise in arrangements where suppliers retain the right to supply customers directly, particularly where a supplier considers that a distributor is under-performing. Any horizontal understandings between the parties in respect of how each party will compete (especially on price) raise serious competition concerns.

23. Where suppliers or head franchisors seek to appoint exclusive distributors or franchisees, it is important that territories are well defined. Poorly defined territories which allow competition "at the fringes" can create ongoing competition concerns that are difficult to resolve without further competition law risks. (The same applies to contracts where the terms describe the broader relationship and allocate rights and responsibilities, including around use of IP rights.)

24. Where arrangements have allowed intra-brand competition, issues may arise if further arrangements are entered into to remove that competition. It is therefore important to carefully consider proposed distribution arrangements to minimise the risk of inadvertently creating competition issues in the future.

EXAMPLE - Allowing a distributor to supply outside its territory

A supplier had an arrangement with a distributor to distribute the supplier's products to a particular customer segment (territory). Over the years the distributor supplied customers outside of its territory and, on a number of occasions, competed with the supplier. The supplier never sought to rein in its distributor and restrict it to the territory, which gave the appearance that it acquiesced to the distributor's conduct. In other words, the contract did not reflect how the parties competed in practice.

This raised the risk that the parties could be viewed as competitors despite the territory restriction. In these circumstances the parties had to be alive to the risk that any communications around pricing could be viewed in a horizontal (competitor – competitor) context rather than a vertical (supplier – distributor) context.

EXAMPLE - Poorly defined territories

A supplier had earlier appointed a number of dealers to distribute its product. The supplier also supplied its products directly to end-customers. The dealers' territories were not clearly defined and the supplier received a number of complaints from dealers that other dealers were "under cutting" them on prices. A meeting was held between the supplier and its dealers and rules were developed to settle disputes and avoid future competition between dealers. The rules risked being viewed as an arrangement between competitors.

Restraints between competitors

25. We often review restraints between competitors that may, on their face, appear innocuous but in reality could be seen as restraining how those parties compete, thus raising serious competition law concerns. They risk being viewed as forms of price fixing, output restricting or market allocation (or otherwise anti-competitive under the Act's general prohibition against arrangements containing a provision that has the purpose, or has or is likely to have the effect of, substantially lessening competition in a market).

26. Importantly the Act, within a broader exception for collaborative activities, contains an exception for restraints of trade if:

    a. the person and 1 or more other parties to the CAU were involved in a collaborative activity that has ended; and

    b. the cartel provision was *reasonably necessary* for the purpose of the collaborative activity; and

    c. the collaborative activity did not end because the lessening of competition between any 2 or more parties became its dominant purpose.[9]

27. Restraints of trade that are excessively long and clearly unnecessary to protect the goodwill of the purchaser can raise issues, especially where they appear to be mechanisms to permanently exclude a competitor from a market.

CASE STUDY - Commission challenges "pay for delay" IP restraint[10]

In 2015, the Commission issued a formal warning to Consolidated Alloys (NZ) Limited (**CAL**) for the inclusion of an "anti-competitive clause" in a "*negotiated settlement*" with its competitor Edging Systems (NZ) Limited (**ESL**). The parties entered into the settlement agreement to resolve a commercial dispute involving an alleged breach of CAL's registered patent for soft-edge flashing products used on residential metal roofs.

CAL and ESL were the only manufacturers and distributors of soft-edge flashing products in New Zealand. CAL, a wholly owned subsidiary of Amalgamated Metal (Australia) Limited, registered a patent for a particular type of soft-edge flashing in 1995 which expired in 2015. ESL was founded in 2008 and produced a soft-edge flashing product, EZ-Edge. CAL alleged that ESL's EZ-Edge product breached its patent and issued proceedings. However, a few days before the trial commenced the parties entered into a settlement agreement, under which ESL agreed to:

- pay CAL a lump sum and royalties on annual sales of EZ-Edge for an undisclosed period of time and subject to a minimum annual payment; and
- not sell any other soft-edge flashing products covered by the patent other than EZ-Edge until June 2023 ie eight years past the expiry of the patent (the restraint).

The Commission considered that while the restraint did not breach the price fixing prohibition, it did have the purpose and (likely) effect of substantially lessening competition in the markets for edge products and soft-edge flashing products. Following the Commission's investigation, CAL formally advised that it would not enforce the restrictive clause in the settlement agreement.

Would the Commission's decision have been different under the new cartel laws? It is likely that this conduct would have been captured under the definition of output restriction.

[9] Section 31(3) of the Act.
[10] See: https://comcom.govt.nz/business-competition/enforcement-response-register-commerce/detail/872

EXAMPLE - Longstanding restraint

There was a longstanding arrangement between members of a financial services group that each member, operating as independent businesses, would not compete for the existing customers of another member. They also agreed that if approached by another member's customer they would refer those sales back to the incumbent business.

Joint ventures

28. Joint ventures between competitors are commonplace, particularly in concentrated markets such as New Zealand. While joint ventures are usually pro-competitive, they can also be a breeding ground for potential competition law issues.

29. Problematic issues can include discussions about or sharing of individual (as opposed to joint venture) pricing, costs, capacity issues, and refusals to deal with third party competitors (or otherwise preferring the joint venture parties). What may start as legitimate discussions between the parties relating to the joint venture can stray into "anti-competitive territory" if care is not taken.

30. The Act provides an exception for collaborative activities which should protect legitimate joint ventures if proper steps are taken when the arrangements are entered into. We expand on this below.

Industry associations

31. Groups of merchants and individual artisans in various industries have been forming trade associations for centuries, and these forums continue to play an important role in modern day commerce. However, while trade associations provide many industry benefits they can be a "hot-bed" for inappropriate communications between competitors.

32. Importantly, the Act deems that any arrangement entered into by a trade association is considered to be entered into by **all** the association's members. This is regardless of an individual member's involvement or knowledge of the arrangement, unless a member can:

    a. demonstrate that they expressly notified the association in writing that they wish to disassociate themselves from the arrangement, and then took such steps; or

    b. establish that they had no knowledge, and could not reasonably have been expected to have any knowledge of the arrangement.

33. Additionally, any recommendation made by an association to its members is deemed to be an arrangement made between those members and between the association and those members.

CASE STUDY - "Off the cuff" comments at business functions can lead to investigation

On 25 March 2015 it was reported in the Australian Financial Review that Andrew Forrest, Chairman of Fortescue Metals Group Ltd stated the following at a business dinner in Shanghai on 24 March 2015:

> *"*[Mr Forrest] *was "absolutely happy to cap [his] production right now" at 180 million tonnes* […] *the other major players, Rio Tinto, BHP Billiton and Brazil's Vale should also cap their production and we'll find the iron ore price goes straight back up to US$70, US$80, US$90* […] *I'm happy to put that challenge out there, let's cap our production right here and start acting like grown-ups."*

Following that article, the ACCC launched an investigation. While the ACCC ultimately concluded that it would take no further action[11] Mr Fortescue had to endure the regulator's scrutiny for some time and likely incurred considerable legal costs.

[11] See: https://www.accc.gov.au/media-release/accc-concludes-assessment-of-fortescue-chairman%E2%80%99s-call-for-cap-on-iron-ore-production.

Procurement

34. Tender and procurement is universally acknowledged as high risk for competition (antitrust) concerns. Bid rigging (collusive tendering) occurs when two or more competitors agree not to compete with each other for tenders, allowing one of the parties to "win" the tender. Bid rigging is likely to be considered illegal under the cartel prohibition.

35. Bid rigging can take a number of different forms, including:

    a. "cover bidding" or "cover pricing", where competitors choose a winner and everyone but the winner deliberately bids above an agreed amount to establish the illusion that the winner's quote is competitive;

    b. "bid rotation", where usual tenderers appear to take turns in submitting (and the other parties take measures to ensure the right party "wins"); and

    c. "bid withdrawal", where a winning bid is withdrawn to allow another bidder to win instead.

36. Some industries, for example construction, are more susceptible to collusion than others. Participants in those industries need to be extra vigilant and ensure that all bids are independently considered and submitted. In 2010 an inquiry by the Commission[12] into the construction industry revealed that, while cover pricing was mentioned by every industry participant that partook in the investigation, none of the businesses spoken to were "taking specific actions to protect themselves from the risks of becoming the victim of, or being a party to, such activity."

37. The Commission has produced dedicated websites for the construction and health industries for members of those industries to increase their understanding of competition and consumer laws so they can improve their compliance. See http://construction.comcom.govt.nz/ and http://health.comcom.govt.nz/.

38. The Commission's Guidelines for Procurers: How to Recognise and Deter Bid Rigging are available here: http://www.comcom.govt.nz/business-competition/guidelines-2/how-to-recognise-and-deter-bid-rigging-guidelines-for-procurers/.

CASE STUDY – "Brisbane fire protection cartel"[13]

For about 10 years until 1997 most of the companies in the fire alarm and fire sprinkler installation industry in Brisbane held regular meetings, at which they agreed to allow certain tenders to be won by particular competitors.

Calling themselves the "Sprinkler Coffee Club" and the "Alarms Coffee Club", the groups would meet up over a cup of coffee at hotels, cafes, and various sporting and social clubs. At these meetings they would share tenders and decide who was to submit "cover prices" to make the tender process look legitimate, while ensuring the agreed company won the tender. It has been estimated that this conduct affected contracts worth more than AU$500 million. The Federal Court imposed more than AU$14 million in penalties on the companies and some of their executives.

[12] Found here: http://comcom.govt.nz/business-competition/anti-competitive-practices/construction-sector/construction-sector-research-key-findings/

[13] Source: ACCC, Cartels Case Studies and Legal Cases. See: https://www.accc.gov.au/business/anti-competitive-behaviour/cartels/cartels-case-studies-legal-cases.

CASE STUDY – "The Christchurch Bus Cartel"[14]

The chief executive officer of a Christchurch bus company approached its next biggest competitor in the market and proposed an exchange of tender information with a view to bid rigging in order to ensure the retention of the bus routes historically held by each of the companies. Despite discussions, the companies did not enter into a bid-rigging agreement and thus the conduct amounted only to a breach of the Act. The High Court ordered the company to pay a fine of $380,000 and the chief executive officer a fine of $10,000 for an attempt to fix prices by bid rigging.

"Hub and spoke" cartels

39. "Hub and spoke" cartels have been a hot topic amongst competition regulators and practitioners over recent years. The name, while sounding relatively sophisticated, is based on the humble wheel. A "hub and spoke" cartel generally involves competitors (the "spokes") and one or more of their common suppliers and/or customers (the "hub") reach an understanding whereby the hub either intentionally or naively facilitates the cartelistic behaviour of the spokes.

40. Given the complexity and evidential difficulties in investigating (and proving) such "hub and spoke" arrangements, cases seem to have been relatively few and far between – with most of the successful cases coming out of the UK and EU.

41. Despite the relatively rare instances of successful cases to date, practitioners and their clients should be aware of the potential risks for clients if they are sharing sensitive information with (or receiving such information from) their suppliers or customers.

CASE STUDY - The laundry detergent case (Australia)

The "spoke(s)": In April 2016 Colgate-Palmolive Pty Limited (**Colgate**) was fined AU$18 million by the Australian Federal Court for contraventions of the Trade Practices Act 1974 (now the Competition and Consumer Act 2010) after admitting to entering into understandings which limited the supply, and controlled the price, of laundry detergents in Australia. The fine was made up of $12 million for an understanding with Unilever Australia Limited (**Unilever**) and PZ Cussons Australia Pty Ltd (**Cussons**) (the other "spokes") to cease supplying standard concentrate detergents in early 2009 and only supply ultra concentrates from that time (the "timing of supply agreement"), and $6 million for an information sharing understanding with Unilever (including information about when the parties could increase the price of their laundry detergents). Unilever was the leniency applicant in Australia.

The "hub": 2 months later in June 2016, the Federal Court of Australia ordered grocery retailer Woolworths to pay penalties totalling $9 million for its role in the laundry detergent cartel after Woolworths admitted to being knowingly concerned in the making of, and giving effect to the timing of supply agreement between Colgate, Cussons and Unilever. The penalty was the largest obtained by the ACCC against a party that was an accessory to competition law breaches by being knowingly concerned in anticompetitive conduct.

Cussons chose to defend the ACCC's allegations, and in 2017 the Federal Court dismissed the ACCC's case. The Court found that there was no arrangement or understanding between suppliers. On 20 February 2018 the ACCC announced that it is appealing the Federal Court's decision.

[14] Source: Commissions Guidelines for Procurers – How to recognise and deter bid rigging (September 2010), page 3.

Exceptions

42. The Act provides for three exceptions to the cartel prohibition for "collaborative activities", "vertical supply contracts" and "joint buying & promotion".

43. These are "substance over form" exceptions, intended to provide relief to the broad *per se* cartel prohibition.

44. They are also "reverse onus" exceptions, meaning that it is up to the person relying on the exception(s) to prove, on the balance of probabilities, that the exception applies.

45. Of the three exceptions, the exception for collaborative activities has the widest application. The exception for vertical supply contracts only applies where the cartel provision is in a **contract**. The Guidelines specify that this must be a "legally enforceable" contract.[15] The joint buying & promotion exception only applies to cartel provisions that have the purpose, effect or likely effect of **price fixing**. It will not provide protection for cartel provisions that have the (likely) effect of output restricting or market allocating.

COLLABORATIVE ACTIVITY	VERTICAL SUPPLY CONTRACTS	JOINT BUYING & PROMOTION

The cartel prohibition does not apply if, at the time of entering into / arriving at or giving effect to the cartel provision:
• the person and 1 or more other parties are involved in a collaborative activity, ie:
  ○ ***enterprise, venture or other activity in trade***
  ○ ***carried on in cooperation by 2 or more persons***
  ○ not for the ***dominant purpose of lessening competition*** between 2 or more of the parties; and
• the cartel provision is ***reasonably necessary for the purpose of the collaborative activity.***
	The cartel prohibition does not apply where a contract (but **not** an arrangement or understanding):
	• is between a (likely) supplier of goods or services and a (likely) customer of that supplier; and
	• the cartel provision:
	  ○ ***relates to*** the (likely) supply of goods or services to the customer (including the maximum price of resupply); and
	  ○ does not have the ***dominant purpose of lessening competition*** between 2 or more parties to the contract.
		A provision in a CAU does not have the purpose, effect or likely effect of **price fixing** if the provision:
		• relates to collective acquisitions (direct or indirect); or
		• provides for joint advertising of the collectively acquired goods / services; or
		• provides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; or
		• provides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU.

"Relates to"

46. For the vertical supply contracts exception to apply, the cartel provision must relate to the (likely) supply of goods or services to the customer by the supplier.

47. The Guidelines provide that there is no firm requirement as to the degree of connection required by the term "relate to" and that whether there is sufficient connection will depend on the facts of each case. However, a cartel will not "relate to" the supply of goods/services from supplier to customer simply because it is in a supply contract.[16]

[15] Guidelines, page 21.
[16] Ibid.

48. In deciding whether a cartel provision relates to the supply of goods/services from supplier to customer, the Commission may take into account the history and nature of the supply relationship between the parties of which the relevant cartel provision forms part.

"Dominant purpose of lessening competition"

49. For the collaborative activity exception to apply, the collaborative activity in question must not be for the dominant purpose of lessening competition between two or more of the parties. Likewise, for the vertical supply contracts exception to apply, the cartel provision in question must not have the dominant purpose of lessening competition.

50. The Commission's Guidelines provide that the "dominant purpose" is the main or principal reason for the collaborative activity or cartel provision. The Guidelines further provide that the "not for dominant purpose" test is primarily an objective test, although evidence of subjective purpose may be relevant.[17]

51. In relation to the vertical supply contracts exception, the Guidelines provide:

    a. A key factor for the Commission will be whether the cartel provision in question is designed to increase output or lower prices to consumers. In determining this factor, things such as the parties' conduct, the broader context of the supply relationship and the role of the cartel provision in the supply contract.

    b. It may also be relevant whether such provisions are common in similar supply contracts.

    c. If the cartel provision is not designed to increase output or lower prices but the parties are unable to point to any other legitimate purpose for the cartel provisions, the Commission is likely to assume that the dominant purpose of the provision is to lessen competition.[18]

52. In relation to the collaborative activities exception, the Guidelines provide:

    a. The test is whether the parties have a dominant purpose of reducing competition between **each other** rather than in the market generally.[19]

    b. Parties must be able to show the purpose of the collaborative activity and why it is "benign or pro-competitive".[20] If parties are unable to do this, the Commission is likely infer that the dominant purpose is to lessen competition between the parties.

    c. In making its decision the Commission may consider factors such as whether the collaboration is designed to lower prices or increase output (or vice versa), whether the collaboration is likely to create significant new productive capacity/new products, or whether there are cost savings associated with the collaborative activity.[21]

    d. Some examples of acceptable reasons for a collaborative activity include:

        i. Where the combining of different capabilities or resources improves the parties' ability to compete ie one party's technical expertise complements another party's

[17] Guidelines, page 22.
[18] Ibid.
[19] Guidelines, page 32.
[20] Guidelines, page 33.
[21] Ibid.

manufacturing process, allowing the latter party to lower production costs or improve quality.

ii. Where the collaboration is to aid the parties to achieve economies of scale or scope beyond what each is capable of individually.

iii. Where the collaboration is to achieve purposes unrelated to improving parties' ability to compete, such as environmental or healthy & safety reasons, or for other social welfare purposes.[22]

"Enterprise, venture or other activity, in trade in cooperation"

53. The Guidelines explain that to qualify as a collaborative activity, the parties must be combining their businesses, assets or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly (and the dominant purpose must not be lessening competition between the parties). The parties must be doing more together than simply agreeing how their two separate businesses shall be run.[23]

EXAMPLE – Cover charge for bars

Four bars introduce a minimum cover charge for Friday and Saturday nights after noticing a pattern of incidents of alcohol related harm in the inner city. The agreement has the effect of price fixing, despite its social benefits. However, the collaborative activities exception would not apply as the bars are not entering into an enterprise, venture or other activity in trade in cooperation with each other. They are simply agreeing on how they will separately supply services.

"Reasonably necessary for the purposes of the collaborative activity"

54. For the collaborative activity exception to apply, the parties must be able to show that the cartel provision is reasonably necessary for the purpose of the collaborative activity. In this case, the "purpose" means all substantial purposes of the collaborative activity.

55. The Guidelines provide that "reasonably necessary" test is an objective test and will be assessed by the courts or the Commission at the time the cartel provision was entered into or given effect to. What is reasonably necessary will depend on the particular context of each individual case.[24]

56. In terms of what the Commission will consider "reasonably necessary", the Guidelines provide:

a. A cartel provision "need not be essential" for the collaborative activity ie parties do not need to show that, 'but for' the cartel provision, the collaborative activity would not occur.[25]

b. But a cartel provision is not reasonably necessary if it is simply desirable, expedient or preferable.[26]

c. Assessment requires consideration of other available options open to the parties that do not, for example, require a cartel provision or where the cartel provision is less restrictive.

[22] Ibid.
[23] Guidelines, page 30.
[24] Guidelines, page 34.
[25] Ibid.
[26] Guidelines, page 35.

57. The Guidelines provide that whether a cartel provision is reasonably necessary for the purposes of a collaborative activity will be assessed in three steps:

    a. Firstly, the Commission will examine the interest/s the parties are trying to protect or promote by using the cartel provision.

    b. Secondly, the Commission will assess how important or significant that interest is in achieving the purpose of the collaborative activity.

    c. Lastly, the Commission will assess whether the cartel provision is reasonably necessary by assessing factors such as the scope of the cartel provision (eg its duration, geographic scope, relationship to the parties' businesses) and the available alternatives.[27]

Exception for joint buying & promotion

58. This exception only applies to cartel provisions which have the (likely) effect of price fixing.

59. The Guidelines provide examples of joint buying, such as a group of small grocers getting together to buy items in bulk at a volume discount, or real estate businesses jointly purchasing advertising in a local newspaper. While these agreements could be regarded as price fixing, the exception will apply if the provision:

    a. relates to the price of goods or services that the competing buyers collectively acquire;

    b. provides for the parties to collectively negotiate the price of goods or services (which they then purchase individually);

    c. provides for an intermediary to take title to the goods and resell/resupply them to one or more of the competing buyers; or

    d. provides for joint advertising of collectively acquired goods.

EXAMPLE – would the vertical supply contracts exception apply?

A headphones manufacturer sells headphones on its online store, as well as supplying headphones to retailers. The manufacturer issues a recommended retail price (**RRP**) list to all its retailer customers. The manufacturer also discusses the RRP with its largest retailer customer and they decided they will not sell the manufacturer's headphones below the RRP in their respective stores.

Is there a cartel provision? The parties have entered into an agreement which has the effect of fixing the price of goods which they sell in competition with each other.

Would the vertical supply contracts exception apply?

- In the Guidelines, the Commission argued for a similar example that there is only a verbal agreement, not a contract, and therefore the exception would not apply. The Guidelines go on to state that the vertical supply exception could only apply to provisions that are in a "formal supply contract". [28] We think this is arguable as the Act does not specify that the contract must be written for the exception to apply.
- In the Guidelines, the Commission also argued that the cartel provision does not "relate to" the supply of goods from the manufacturer to the retailer (rather that it "relates to" the supply of goods from the manufacturer and the retailer to end customers). [29] However, the vertical supply contracts exception includes a specific carve out for setting **maximum** price limits for resupply. As such, to us it seems

[27] Guidelines, page 35.
[28] Guidelines, page 23.
[29] Guidelines, page 23.

arguable that the price of resupply does not relate to the supply of goods between the manufacturer and the retailer.
- However, it does appear that the cartel provision, in the absence of any evidence to the contrary, has the dominant purpose of lessening competition between the manufacturer and the customer.

EXAMPLE – would the collaborative activities exception apply?

X is a gas explorer, producer and wholesaler. X wants help to develop a new petroleum mining field and decides to ask Y and Z, both competing gas producers and wholesalers, to collaborate on developing the field. X, Y and Z agree to each agree to invest capital and that Y will operate the field. The parties also agree they will sell any petroleum mined from the field jointly with profits distributed to the parties in proportion to their relative interests in the field.

Are the parties in competition with each other? Yes.

Are the parties engaged in an enterprise, venture, or other activity, in trade carried on in cooperation? Yes, the parties are jointly developing and running the field.

Is there a cartel provision? Any joint selling provisions in the joint venture arrangements risk being considered a cartel provision.

Does the collaborative activity have the dominant purpose of lessening competition between the parties?
- The parties seem to have entered into a collaborative activity to bring more capacity to the market, which suggests that their dominant purpose was not to lessen competition between them.
- However, if evidence arose which showed that X involved Y and Z to prevent them from (for example) developing a field of their own, the answer may be different. Businesses should try to make sure that internal documents/communications are consistent with the stated/documented purpose of the collaborative activity.

Are the cartel provisions reasonably necessary for the purposes of the collaborative activity?
- If the evidence showed that the field would not be developed by the parties without the cartel provisions in question, then the provisions would be reasonably necessary. The parties would need to explain (and have evidence to back up) why this is the case.
- Whether the cartel provisions are reasonable in the context depends on their scope and the level to which they restrict the parties in comparison to other available options.

EXAMPLE – would the joint buying & promotion exception apply?

A group of small vacuum cleaner repair companies arrange to jointly buy some vacuum components in bulk in order to bring down costs.

*Is there a cartel provision which has the (likely) effect of **price fixing**?* Competing businesses are jointly setting the price at which they buy goods that they acquire in competition with each other. As such, the businesses are agreeing to a cartel provision which has the effect of price fixing.

So what practical steps can be taken to reduce the risk of falling foul of the cartel prohibition?

Steps to take at the outset of entering into arrangements with a competitor

60. While the cartel prohibition is broad, the three exceptions form a framework to better protect legitimate competitive conduct, provided that sufficient steps are taken by the parties at the outset of the collaboration and that parties are mindful of compliance on an ongoing basis. Practitioners need to understand the relevant laws to advise clients on these matters.

61. At the time that any collaboration is entered into, the parties should:

    a. Determine whether they are "in competition" with each other, including whether the parties would be competitors "but for" any cartel provisions in the relevant CAU or in the counterfactual.

    b. Document the business case for the collaborative activity at the time of entering into any arrangement. This should be a written document that outlines the purpose of the collaboration and why the collaboration necessary in comparison with other options available to achieve that purpose. If possible, the business case for the collaboration should emphasise that it is allowing the parties to innovate, and that they would not have been capable of achieving such the purpose of the collaboration alone.

    c. Work through the arrangements provision by provision to identify potential cartel provisions. For each cartel provision, ask: is there a less restrictive way of achieving the provision's purpose? Document each available option to achieve the desired purpose and why the cartel provision at hand is the best, least restrictive available option. For something to be reasonably necessary it must be "clearly justified".[30]

    d. For franchise arrangements or distribution models, get the structure "right" at the outset. Define territories clearly, taking into account online and telephone sales. More broadly, have the parties documented where and how they will compete? What are the arrangements surrounding rights to use IP? Is a supplier proposing to change existing arrangements to remove competition between itself and its distributors?

62. A list of questions that practitioners / parties to arrangements should consider is **attached** as **Appendix B**.

Guidelines for discussions with competitors

63. Adopting and following protocols for talking to competitors is a pragmatic way to reduce risk. Some basic tips for practitioners and the clients when dealing with competitors include:

DO	DON'T
✓ Discuss any proposed agreements or meetings with competitors with legal advisers first. ✓ Have an agenda (that has been reviewed by a legal advisor) circulated before any meetings and stick to it once you're there. ✓ Leave meetings with competitors if a topic you are uncomfortable with / unsure about is brought up.	☒ Discuss or exchange information in relation to: ☒ **Price** – including rates, commissions, discounts, gifts or credit terms. ☒ **Output** – including production, expected volumes, capacity, demand or costs (including cost of transport / freight). ☒ **Suppliers** – including terms of supply.

[30] *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347, at [93].

✓ Make diary or file notes or have it recorded in minutes of meetings that you left because issues that may raise competition law concerns were being discussed. Tell a legal adviser ASAP. ✓ Ensure that decisions about pricing, output, capacity, suppliers, customers & strategy are made **independently** of competitors. ✓ Remember that the Commission has the power to demand copies of all such correspondence, including **emails**. Have a legal advisor review any proposed emails/communications with competitors. ✓ Take care with the language you use in **any** correspondence, including within your own workplace. ✓ Seek legal advice if you are in any doubt.	☒ **Customers** – including relationships with specific customers or specifically targeted customers. ☒ **Strategy** – including future plans regarding pricing, bids or tenders. ☒ Come to any sort of agreement or understanding about **any of the above** – even just a "nudge and wink". ☒ Don't forget that the cartel prohibition applies whether or not there is actual impact on competition, and also prohibits *attempts* to enter into / give effect to a cartel provision.

Pre-merger information exchange protocols

64. Discussions between potential merger parties who are actual or potential competitors are a growing risk area. It is now usual to adopt pre-merger protocols governing information exchange and related matters. Risks include:

    a. behaviour that may be perceived as "gun jumping" ie partially implementing a merger before necessary regulatory approval or before closing; or

    b. discussions and information exchange (such as price information, cost data, information about customers or suppliers) facilitating tacit or explicit collusion.

65. Some examples of steps parties should take before entering discussions include:

    a. Take legal advice.

    b. Have an appropriate confidentiality agreement in place to limit use and disclosure of any information exchanged.

    c. Best practice is, at a minimum, to ensure that the recipients of information are not in roles that involve setting prices or strategy. Better still would be to have an external party, such as an accountant or business advisor, review the information.

    d. Make sure not to discuss future plans (eg tenders, auctions, future pricing) without taking legal advice.

Clearance for collaborative activities

66. The Amendment Act has introduced a new clearance regime by which a party proposing to enter into an agreement containing a cartel provision may apply for clearance for that agreement. Clearance is only available if the agreement is part of a collaborative activity. Section 65A of the Act provides that it is not necessary for the Commission to determine that the provision is in fact a cartel provision, "*providing there are reasonable grounds for believing it might be*".

67. The clearance regime is voluntary, however it is only available where the cartel provision has not yet been entered into or given effect to.

68. The onus is on the parties to convince the Commission that clearance should be given. The Guidelines provide that the Commission will give clearance if the parties can show that:

    a. the applicant and any other party to the agreement are or will be involved in a collaborative activity;

    b. every cartel provision in the agreement is reasonably necessary for the purpose of the collaborative activity; and

    c. entering into the agreement, or giving effect to any provision of the agreement, will not have (or not be likely to have) the effect of substantially lessening competition (**SLC**) in a market.[31]

Substantial lessening of competition

69. The first two requirements above are identical to the criteria for the collaborative activities exception. The third requirement involves satisfying the Commission that the agreement is not likely to SLC.

70. A lessening of competition is the same as an increase in market power for one or more businesses in a market. It can manifest in several different ways, including increased prices or reduced quality. The Guidelines provide that factors the Commission may take into account when assessing whether there has been a lessening of competition include:

    a. the nature of the restrictions contained in the agreement;

    b. the nature of the products involved;

    c. the number and size distribution of independent suppliers, and the degree of market concentration;

    d. the conditions of entry into the market (how easily new firms may enter and secure a viable market share); and

    e. other restraints, such as countervailing buyer power.[32]

71. The lessening in competition must also be substantial or "material".[33] This means that the reduction in competition resulting from the agreement must be real or of substance. To assess whether the lessening of competition is substantial, the Commission will look at how competitive the market would be with the agreement in place and compare that to how competitive it would be without the agreement.

72. The test focuses on "likely" effects ie a real and substantial risk, or a real chance, that a SLC will occur.

73. The Commission outlines the process for applying for collaborative activity clearance in Chapter 7 of the Guidelines.

74. If clearance is denied, the Commission must still grant authorisation where it is satisfied that the agreement will be likely to result in a benefit to the public that would outweigh the lessening

[31] Guidelines, page 40.
[32] Guidelines, page 41.
[33] *Woolworths & Ors v Commerce* Commission (2008) 8 NZBLC 102, 128 (HC) at [129].

in competition. For more information on this, see the Commission's Authorisation Guidelines: http://www.comcom.govt.nz/business-competition/guidelines-2/authorisation-guidelines/

Cartel criminalisation

75. On 15 February 2018, Commerce and Consumer Affairs Minister Kris Faafoi tabled the Commerce (Criminalisation of Cartels) Amendment Bill (**Bill**) in the House. If enacted, the Bill would introduce a new criminal offence for cartel conduct.

76. Early versions of the Amendment Act also included a criminal offence for cartel conduct, which has already been introduced in Australia, the United States, the United Kingdom, Canada and Japan. However, cartel criminalisation was removed from the proposed amendments in December 2015 due to concerns about the potential "chilling effect" it could have on pro-competitive behaviour between companies.[34]

The offence and defences

77. Under proposed section 82B, a person would commit an offence if the person:

    a. enters into a CAU that contains a cartel provision (or gives effect to a cartel provision); and

    b. *intends*, at the time the CAU is entered into or the cartel provision is given effect to, to engage in price fixing, restricting output or market allocating.

78. An individual convicted under section 82B would face up to 7 years in prison or a fine of up to $500,000 (or both). Persons who are not individuals would 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* (including interconnected bodies corporate) in each accounting period in which the contravention occurred).

79. Proposed new section 82C outlines the available defences to prosecution under section 82B:

    a. Section 82C(1) provides that it is a defence if the defendant was involved in a the defendant was involved in a collaborative activity with 1 or more other party to the CAU and the defendant believed the cartel provision was *reasonably necessary* for the purposes of the collaborative activity. This defence is a reflection of the exception for collaborative activities in relation to the cartel prohibition, but there is no equivalent defence for the exceptions for vertical supply contracts or joint buying & promotion, except as described in paragraph 78(c) below.

    b. Section 82C(2) provides a defence where the cartel provision is a restraint of trade that again mirrors an exception to the civil prohibition described above in paragraph 26.

    c. Sections 82C(4)-(7) contain defences for suppliers of international liner shipping services where the cartel provision relates to restricting output or market allocating and the circumstances described in subsection (6) apply.

How will the criminal offence be applied?

80. The most important difference between the civil cartel prohibition and the criminal offence is that the offence contains an element of *intent*. The intent element relates to the cartel

[34] Source: https://www.beehive.govt.nz/release/amendments-cartels-bill

provisions as defined in the Act, which seems to mean intended effect. But the definitions are still broad – for example price fixing, which has an extended definition and has also been interpreted broadly in case law.

81. Questions also remain as to whether the prospect of imprisonment, combined with the overly broad definitions of price fixing, output restricting and market allocating, may leave parties more inclined to settle early on in proceedings.

82. The proposed criminal sanctions would sit parallel to the pre-existing civil prohibition. There is no formal mechanism in the Bill that dictates when the Commission will bring criminal, as opposed to civil, proceedings. However, the Commission's Enforcement Response Guidelines[35] 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.

83. While this has not been confirmed in relation to the Bill, it was suggested in relation to the proposed cartel criminalisation under the Amendment Act that criminal proceedings would begin by the Commission laying an information. The case would then be referred to a member of a "specialist cartel prosecution panel" (which would be established by the Solicitor-General), which would then decide whether or not to bring criminal proceedings.[36] Presumably if the panel declined to bring criminal proceedings, it would still be open to the Commission to bring civil proceedings.

Cartel leniency

84. "Immunity" or "leniency" is a common tool worldwide to detect and prosecute illegal price fixing cartels. It is unquestionably effective and has led to a rise in prosecutions internationally. Under these regimes, the party who is "first in" to "blow the whistle" on a cartel will get conditional immunity. For many, these regimes raise policy and moral issues, but they work.

85. The Commission's current cartel leniency policy was introduced in 2010, replacing the 2004 policy. The key changes were to add a marker system, remove the availability of amnesty for "coercers" and introduce Amnesty Plus. The Commission is currently in the process of revising it's cartel leniency policy.

[35] Found here: http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/
[36] Source: MED, Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill – Explanatory Material, 16 June 2011, page 10.

86. The leniency policy has two main parts:[37]

> "***Immunity**: Conditional immunity will be granted where an applicant is the first participant in a cartel to apply to the Commission and to meet the prescribed conditions. Immunity is 'conditional' in that the holder must continue to meet the prescribed conditions to maintain their immunity status.*
>
> ***Cooperation**: The Commission may exercise its discretion by taking a lower level of enforcement action, or, in exceptional cases for individuals, no action at all, in exchange for information and full, continuing and complete cooperation throughout a cartel investigation and any subsequent proceedings*.
>
> *The availability of conditional immunity and concessions for cooperation reflect the exercise of the Commission's discretion as to how it will deal with a cartel member who offers significant assistance in detecting and proving cartel conduct. The Commission has determined that conditional immunity from prosecution is justified where the cooperation and full admission by a party enable the Commission to detect and/or prove the existence of cartel.*

87. If a cartel member has all the required information about the cartel (including who is involved) and meets the necessary requirements, it may contact the Commission and receive conditional immunity immediately. If a cartel member does not have all the required information to hand, but wants to make sure they are "first in", they may contact the Commission and request a "marker". This allows the cartel member to gather the information necessary to perfect the marker and be granted immunity.

88. The conditions for full immunity are:

    a. the applicant is the first to apply for a marker or conditional immunity in respect of a cartel that:

        i. the Commission is not aware of; or

        ii. the Commission is aware of but does not yet have evidence that is likely to warrant issuing proceedings;

    b. the applicant is or was a participant in the cartel;

    c. the applicant admits that it participated in conduct that may constitute a contravention of the cartel prohibition;

    d. the applicant has ceased involvement in the cartel or otherwise acts as directed by the Commission;

    e. the applicant has not coerced others to participate in the cartel;

    f. in the case of applications by companies, the admissions by the company must relate to genuine corporate acts (not those taken by individuals); and

    g. the applicant agrees to full and continuing cooperation with the Commission's investigation and any subsequent proceedings.

89. The first party to lodge a leniency application receives full immunity from Commission-initiated proceedings (assuming full and continuing co-operation). This does not protect the "whistle-

[37] Commission, Cartel Leniency Policy and Process Guidelines, para 1.07.

blowing" party from third party proceedings, but these have been relatively rare. If immunity is granted to a body corporate, it will usually extend with the same conditions to any current or former directors, employees, officers or its subsidiaries. By contrast, an individual's leniency application will generally render their employer ineligible for leniency.

90. If leniency is not available (ie someone else was already "first in"), cooperating parties may request a lower level of enforcement action from the Commission. This could be in the form of reduced penalties if the Commission proceeded to prosecution.

91. Cartelists (or potential cartelists) or their lawyer can make a "hypothetical" or "off the record" inquiry to the Commission to see if leniency is available. This usually only requires disclosing to the Commission the general industry involved and establishing that no Commission investigation has been initiated and no other leniency applications have been lodged. Time is of the essence during this phase as other cartelists may also be contemplating applications. Hypothetical inquiries will not constitute an application for immunity or a marker.

92. Where an investigation was commenced on the Commission's own accord (for example from an anonymous tipoff where none of the cartel members had sought leniency), the Commission may (but will not always) offer leniency to one of the parties in return for that party providing fulsome and incriminating evidence on the other cartel members.

93. Amnesty Plus allows an applicant not eligible for immunity for one cartel to receive a reduced penalty for involvement in that cartel by informing the Commission of a separate cartel.

Summary of the cartel prohibition and exceptions

15 March 2018

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COMPETITION · REGULATION · POLICY · STRATEGY

Prohibition

No person may enter into a contract, arrangement or understanding (**CAU**) that contains a **cartel provision,** or otherwise give effect to a **cartel provision**. A cartel provision is a provision with the purpose or (likely) effect of:

PRICE FIXING	RESTRICTING OUTPUT	MARKET ALLOCATING
Fixing / controlling / maintaining: • price, discount, allowance, rebate or credit • for/in relation to goods or services • supplied or acquired by 2 or more parties in competition.	*Preventing / restricting / limiting*: • the (likely) production of goods; • the (likely) capacity to supply services; • the (likely) supply of goods/services; or • the (likely) acquisition of goods/services • supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other.	*Allocating between any 2 or more parties:* • 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.

Or where the provision "provides for" any of the above

Exceptions

COLLABORATIVE ACTIVITY	VERTICAL SUPPLY CONTRACTS	JOINT BUYING & PROMOTION

The cartel prohibition does not apply if, at the time of entering into / arriving at or giving effect to the cartel provision:
• the person and 1 or more other parties are involved in a collaborative activity, ie:
  ○ enterprise, venture or other activity in trade
  ○ carried on in cooperation by 2 or more persons
  ○ not for the *dominant purpose of lessening competition* between 2 or more of the parties; and
• the cartel provision is *reasonably necessary* for the purpose of the collaborative activity.
	The cartel prohibition does not apply where a contract (but **not** an arrangement or understanding):
	• is between a (likely) supplier of goods or services and a (likely) customer of that supplier; and
	• the cartel provision:
	  ○ relates to the (likely) supply of goods or services to the customer (including the maximum price of resupply); and
	  ○ does not have the *dominant purpose of lessening competition* between 2 or more parties to the contract.
		A provision in a CAU does not have the purpose, effect or likely effect of **price fixing** if the provision:
		• relates to collective acquisitions (direct or indirect); or
		• provides for joint advertising of the collectively acquired goods / services; or
		• provides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; or
		• provides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU.

Questions to ask at the outset of collaboration

1. BEFORE YOU START TALKING

- Have you discussed any proposed arrangements or meetings with a legal adviser / someone who understands competition law issues?
- Have you circulated an agenda/ schedule prior to the meeting?
- Do you have internal competition law protocols eg protocol for discussions with competitors?
- Do you know what you shouldn't discuss with competitors? (price, individual customers)
- Privilege?
- Confidentiality?

2. ARE THE PARTIES "IN COMPETITION"?

- Could the parties be viewed as actual or potential competitors?
- Could the parties be viewed as actual or potential competitors "but for" any cartel provisions?
- Could the parties be viewed as actual or potential competitors in the counterfactual?
- Could the proposed collaboration remove any pre-existing competition between the parties?
- If the parties are in a vertical supply relationship – does the supplier sometimes sell directly to end customers?
- Are any territories between franchisees clearly defined?

3. WHAT IS THE PURPOSE OF THE COLLABORATION?

- What is the dominant purpose of the collaboration?
- Is the collaboration designed to lower prices or increase output?
- How likely is the collaboration to create significant new productive capacity or new products?
- Will the collaboration allow the parties to combine different capabilities or resources to improve their ability to compete?
- Will the collaboration help the parties to attain economies of scale or scope beyond what they could achieve individually?
- Are there any social benefits to the collaboration? (eg environmental, health and safety)
- Are there any internal documents / communications which contradict this purpose?

4. ARE THERE ANY "CARTEL PROVISIONS"?

- Is there a contract, arrangement or understanding (**CAU**)?
- Could any of the provisions of the CAU be viewed as having the purpose or (likely) effect of **price fixing**, **output restricting** or **market allocating**?

5. DOES THE EXCEPTION FOR COLLABORATIVE ACTIVITIES APPLY?

- How are the parties combining their businesses, assets or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly?
- What is the purpose of each cartel provision?
- Are there any alternative available options for achieving the purpose of the cartel provision, and are they less restrictive in their scope or do not involve a cartel provision at all?
- Why have the parties used the cartel provision over other available alternatives?
- Is each cartel provision in the CAU reasonably necessary for the purpose of the collaborative activity?
- Is the cartel provision more than merely desirable, expedient or preferable?
- How is the scope (eg duration, geographic scope) of the cartel provisions proportionate to its intended purpose?
- How important is the purpose of the cartel provision in assisting the parties to achieve the purpose of the collaboration?

6. DOES THE EXCEPTION FOR JOINT BUYING & PROMOTION APPLY?

- Does the cartel provision in question have the purpose or (likely) effect of **price fixing**?
- Does the provision relate to the price of goods or services that the parties collectively acquire?
- Does the provision provide for joint advertising of collectively acquired goods/services?
- Does the provision provide for collective negotiation followed by individual purchasing?
- Does the provision provide for an intermediary to take title to goods and resell them or resupply them to parties to the CAU?
- Could the CAU contain cartel provisions that are not protected by the joint buying exception? (ie with the effect of output restriction or market allocation?)

7. DOES THE EXCEPTION FOR VERTICAL SUPPLY CONTRACTS APPLY?

- Is the cartel provision in a **contract** between a (likely) supplier of goods / services and a (likely) customer? (Preferably a written, formal supply contract)
- How does the cartel provision relate to the (likely) supply of goods / services between the parties?
- What is the dominant purpose of each cartel provision?
- Is the cartel provision common iN similar supply contracts?
- Is the cartel provision consistent with the parties' past conduct?
- Is the cartel with the broader context of the supply relationship?

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