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Cartel regulation in New **Zealand**: undermining the per se rule?

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***282** I. Introduction

In 2010, the New **Zealand** Government began a process to reform and strengthen the regulation of cartels, with a focus on criminalising hard core cartels. The Organisation for Economic Co-operation and Development (OECD) has condemned hard cartels as the "most egregious violations of competition law" and recommended criminal sanctions.¹ The New **Zealand** Court of Appeal has said that "[c]artel conduct has a damaging impact upon society: it results in high prices, misallocation of resources, and corrodes the incentive for firms to innovate."²

The New **Zealand** cartel reform process began with a 2010 Discussion Document on cartel criminalisation.³ This was followed by an Exposure Draft Bill in 2011⁴ and the Commerce (Cartels and Other Matters) Amendment Bill (the Cartel Bill) was introduced into the New **Zealand** Parliament in October 2011.⁵ The Cartel Bill was designed to improve detection and deterrence of cartel conduct.⁶ The criminalisation of cartels was intended to increase international co-operation as a number of New **Zealand**'s trading partners had made legal provision for criminal sanctions for cartel conduct, and this was recommended by the OECD as best practice.⁷ It was also intended to advance the single economic market with Australia, as Australia had criminalised cartels relatively recently in 2009.⁸ The New **Zealand** proposal was however significantly different from the Australian regime.⁹ The Commerce Commission¹⁰ view was that the introduction of the criminal regime would also provide important investigative and enforcement benefits to New **Zealand**, including enabling extradition of offenders to New **Zealand**, the ability to share information and co-operate with equivalent overseas agencies and access to surveillance and interception powers.¹¹

The Cartel Bill as initially introduced replaced the existing per se rule on price-fixing with a broader cartel provision, and introduced criminal sanctions for cartel conduct, among other things. The Cartel Bill progressed slowly through the parliamentary process; it was reported back from the Select Committee in 2013 and the second reading was in 2014. Then on 8 December 2015 the Minister of Commerce and Consumer Affairs announced that criminalisation of cartel conduct would not proceed and criminal sanctions for cartel behaviour would be removed from the Bill.¹² The Minister said that the Government was concerned that there was a significant risk that criminalisation would "have a chilling

effect on pro-competitive behaviour between companies".¹³ This was a major change in policy, since criminalisation was the major driver for the cartel reform. It seems likely that criminalisation will return to a future legislative agenda, but it will not proceed at this time. *283¹⁴

This article does not seek to revisit questions around the desirability or otherwise of criminalisation.¹⁵ Rather, it is an assessment of what remains of the cartel reforms in the proposed New Zealand legislation, and the structure of the proposed new civil regime for cartel regulation once criminal liability is removed. The decision not to proceed with criminalisation, but to proceed with the Cartel Bill, now focuses attention on the nature and effect of the changes in the absence of criminalisation. The article argues that the proposal to introduce criminal sanctions has substantially shaped the cartel reform, and that the proposed regime evidences a concern to avoid "false positives" under the per se rule in order to avoid imposing criminal sanctions for conduct that is undeserving. This is a laudable goal, but there is now a potential risk that this concern may have weakened the civil regime, and especially the per se rule for cartel conduct, so that it will be for the Commerce Commission and the courts to interpret the new law to ensure that cartel conduct is detected, actioned appropriately, and consequently deterred.

II. Cartel prohibition: the existing law

The Cartel Bill will repeal the existing price fixing provision in s.30, which operates as a per se prohibition on price fixing. The existing provision in s.30 deems a price-fixing contract, arrangement or understanding between competitors to have the purpose, effect or likely effect of substantially lessening competition in a market for the purposes of s.27. Section 27 prohibits contracts, arrangement or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. This per se prohibition on price-fixing covers a wide range of collusive conduct, so long as it has the purpose, effect or likely effect of

"fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services".¹⁶

"Price" is broadly defined,¹⁷ and this is further broadened by the inclusion of "discount, allowance, rebate or credit" in the provision. Any agreement that has the effect or likely effect of price-fixing is covered, so that market allocation agreements, output agreements and collusive tendering are all potentially covered.¹⁸ The existing per se rule is therefore quite broad.

There are exemptions from s.30 for joint ventures,¹⁹ for recommendations as to price in some circumstances,²⁰ and for some joint buying and promotion arrangements.²¹ These exemptions are relatively narrow. The joint venture exception applies to structural joint ventures only and has been subject to criticism as not covering some forms of pro-competitive activity.²² The effect of these exemptions is that these activities are not covered by the deeming provision but are still subject to the substantial lessening of competition test in s.27. This means that any conduct that is not found to be per se prohibited can still be a contravention if it has the purpose, effect or likely effect of substantially lessening competition. It is of course well-recognised that it is considerably more difficult and more costly to establish liability under a rule of reason test.²³

Under the existing regime, conduct subject to s.30 may be authorised.²⁴ The test for authorisation is the public benefit test, whereby the conduct may be authorised if the Commerce Commission is satisfied that the conduct²⁵ :

"will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom."

Authorisations are however rarely sought, reportedly because the process is lengthy, difficult, and costly, with uncertain outcomes. Firms also have confidentiality concerns. *284 ²⁶

III. The proposed cartel regime

The Commerce (Cartels and Other Matters) Bill ²⁷ replaces s.30 and exemptions ²⁸ with a new provision that prohibits entering into a contract or arrangement or arriving at an understanding that contains a cartel provision. Giving effect to a cartel provision is also prohibited. "Cartel provision" is defined in the Cartel Bill as ²⁹ :

(1)

"A cartel provision is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the 30 supply or acquisition of goods or services in New Zealand:

(a)

price fixing:

(b)

restricting output:

(c)

market allocating."

Each category of prohibited conduct is then separately defined. "Price fixing" ³⁰

"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 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other."

"Restricting output" ³¹

"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."

"Market allocating"³²

"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."

This is a significant change to the existing cartel legislation. It continues the per se prohibition on price-fixing in s.30, but extends it explicitly to restricting output and market allocation. The Cartel Bill provides a much fuller explanation of what constitutes prohibited cartel conduct, reflecting the definition used by the OECD.³³ The new definition extends beyond price fixing to expressly include output restrictions and market allocation agreements, although as defined in the current s.30 many of these would have been caught as price fixing agreements anyway. Nevertheless, the new provision has the potential to be broader than the existing per se prohibitions in ss.30 and s.29.³⁴ It means that cartel provisions as defined are per se unlawful without a substantial lessening of competition test, unless they are covered by an exemption or subject to a clearance or authorisation. *285

The Commerce Commission has produced draft *Competitor Collaboration Guidelines* in preparation for the new legislation.³⁵ These were produced before the government decision to remove criminal provisions from the cartel bill, and they will inevitably change before the bill comes into force. They are nevertheless relevant to consideration of the bill. In an introduction to the *Competitor Collaboration Guidelines*, the Chair of the Commerce Commission expresses the view that it is reasonable to have exemptions to mitigate any overreach, but that equally the exemptions should not be interpreted in a way that undermines the fundamental per se nature of the cartel prohibition.³⁶

The New Zealand cartels bill also provides for very important new exemptions to liability under s.30. The new exemptions replace the existing, narrower, exemptions to s.30. There is an exemption for vertical supply contracts,³⁷ which provides for an exemption to s.30 for contracts between suppliers of goods or services and customers if the cartel provision relates to supply or likely supply of goods or services or to the maximum price at which the customer may resupply the goods or services, and does not have the dominant purpose of lessening competition. This provision exempts vertical supply contracts that might otherwise be caught by the per se prohibition. It includes an exemption for maximum resale prices, which the Select Committee believed were pro-competitive.³⁸

The Cartel Bill also provides for an exemption for joint buying and promotion agreements, replacing the existing exemption with a broader exemption.³⁹ It provides for an exemption from price fixing for agreements on price in relation

to goods or services collectively acquired, or joint advertising of price, or collective negotiation of price followed by individual purchasing.

The most important exception is the new exemption for collaborative activity, included to mitigate any risk that s.30 may capture pro-competitive conduct.⁴⁰ This exception replaces the existing joint venture exception, but is much wider. Under the proposed collaborative activity exemption, parties to a contract, arrangement or understanding that contains a cartel provision are exempt from s.30 if at the time of entering into the contract, arrangement or understanding they are:

(i)

"involved in a collaborative activity and

(i)

(ii) the cartel provision is reasonably necessary for the purpose of the collaborative activity."⁴¹

"Collaborative activity" in this context is defined as follows⁴²:

"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."

This definition of collaborative activity therefore requires two main elements. The first is carrying on an enterprise, venture, or other activity in trade, in co-operation. One commentator has suggested that this could apply to

"consortia, partnerships, strategic alliances, syndicated lending arrangements, lender work-out arrangements for insolvent borrowers, litigation settlement agreements, franchisors and franchisees under a franchise agreement and other kinds of collaborative activity between competitors."⁴³

It has also been suggested that it would extend to such activities as

"arrangements for cost sharing and capacity allocation on shared infrastructure, joint buying (buyers clubs), research and development joint ventures, and committees for establishing technology standards."⁴⁴

The *Commerce Commission Competitor Collaboration Guidelines* interpretation is that the parties must be carrying on a commercial activity in co-operation, and that the parties must be "combining their businesses, assets or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly".⁴⁵ The *Competitor Collaboration Guidelines* also state that

"the parties should be able to identify and to explain how they intend to combine their businesses, assets or operations in a commercial activity, or otherwise operate in a commercial activity jointly". *286⁴⁶

A simple agreement between competitors without the carrying on in co-operation element will not therefore be sufficient on the Commerce Commission's interpretation.

The second element of the collaborative activity definition requires that the activity is not carried on for the dominant purpose of lessening competition between any two or more of the parties. The requirement here is that it not be for the dominant purpose of lessening competition. Any effect or likely effect of lessening competition is not a consideration. There is therefore no requirement that a defendant show that the collaborative activity will not have the effect or likely effect of lessening competition. Purpose is the only relevant consideration in applying this aspect of the exemption. On one view this is appropriate as s.27 already includes a substantial lessening competition test to which the conduct would be subject if the collaborative activity exemption applies.⁴⁷ However on another view, the onus in establishing the exemption is on the defendant, whereas under s.27 the onus will be on the plaintiff, an arguably significant difference in the context of a detailed consideration of the application of the test.

In relation to determining purpose, the *Commerce Commission Competitor Collaboration Guidelines* refer to dominant purpose as the "prevailing objective" of the collaborative activity.⁴⁸ The Commerce Commission takes the view that there is no bright line determining when an objective is the dominant objective.⁴⁹ The test for purpose is primarily objective, and the bill provides that the purpose may be inferred from the conduct of any relevant person or from any other relevant circumstance.⁵⁰

Under s.30, the parties must not only establish a collaborative activity, but must also show that the cartel provision is reasonably necessary for the purpose of the collaborative activity.⁵¹ The test is objective⁵² and the provision requires that it be assessed at the time of entering into the contract, arrangement or understanding.⁵³ The Commerce Commission in its *Competitor Collaboration Guidelines* notes that "reasonably necessary" does not require that the cartel provision be essential, and a "but for" test will not apply.⁵⁴ A determination of "reasonably necessary" will require consideration of why the parties have included the cartel provision, consideration of the scope of the provision, and an assessment of other available options.⁵⁵ In developing the new provision, consideration was given to introducing an ancillary restraints defence based on the US jurisprudence. However this option was rejected because of potential uncertainty of scope.⁵⁶ The preferred option of a collaborative activity exemption was intended to be "sufficiently broad to cover both joint ventures and ancillary restraints."⁵⁷ In relation to ancillary restraints it has however been suggested that, although the inquiry is as to whether the provision is "reasonably necessary" rather than "necessary" or "essential", the Commission is likely to draw on US, Canadian and European jurisprudence on the doctrine of ancillary restraints in making these assessments.⁵⁸

The Cartel Bill contains a new provision reversing the onus of proof in the civil regime where the defendant claims an exemption under ss.31, 32 or 33. In that situation, it will be for the defendant to prove on the balance of probabilities that the relevant exemption applies.⁵⁹ This would not have applied to the previously proposed criminal offence. This reversal of onus seems appropriate in a civil context and is consistent with other areas of civil liability where the defendant has the onus of proving that a defence applies. The draft *Commerce Commission Competitor Collaboration Guidelines* require that parties must be able to explain why they are collaborating, and must be able to explain that the dominant purpose of their activity is benign or pro-competitive, and that if they cannot persuasively do so, it is highly likely that the Commission or court will infer that the dominant purpose is to lessen competition between the parties.⁶⁰ The new provision reversing the onus, as interpreted by the Commerce Commission, will go some way to ensuring that the courts or Commission will consider any evidence of a pro-competitive purpose of the collaboration.

Authorisations remain available under the Cartel Bill for s.30 conduct, and the test remains a public benefit test.⁶¹ Clearances will also now be made available for cartel provisions under a new clearance regime. *287 Clearances will be available if the Commerce Commission is satisfied that the parties are or will be involved in a collaborative activity and the cartel provision is reasonably necessary for the purpose of the collaborative activity, and that the

contract, arrangement or understanding will not have or would not be likely to have, the effect of substantially lessening competition in a market.⁶²

IV. Does the Cartel Bill weaken the civil regime?

The Cartel Bill is structured so that it contains a new, broader, definition of cartel conduct, and then broader exceptions. It is arguable that the new definition of cartel conduct is not dramatically broader than the existing price-fixing rule, which already encompasses at least some agreements restricting output and market allocation. The exceptions are however clearly broader.

The exception for collaborative activity is a significant departure from the previous exceptions, and is designed to clearly exempt pro-competitive activity, providing greater certainty.⁶³ The new exception has been acclaimed by at least one major commentator as a model for other jurisdictions, although this was in the context of the then-proposed criminalisation reform.⁶⁴ The exemption as drafted has the benefit of being wider than the previous joint venture exception, and would cover any kind of co-operative activity so long as it was not for the dominant purpose of lessening competition. It is intended to avoid chilling potentially pro-competitive and innovative business activity, especially when criminal sanctions are available, but it is intended that it would not exempt true cartel activity from the per se ban. As such, it is designed to prevent overreach and capture of beneficial conduct under the per se prohibition on cartels.

It is, however, arguable that the concern about overreach has been excessive. In the New Zealand context, most cases are brought by the Commerce Commission after an investigation, few cases are brought by private plaintiffs challenging rivals.⁶⁵ The Commerce Commission uses established published enforcement criteria in deciding whether to commence or continue enforcement action, the criteria being the extent of the detriment, the seriousness of the conduct, and the public interest.⁶⁶ Legislative overreach and false positives might be regarded as a greater risk in the context of criminal offences, and the policy papers produced in the reform process suggest that providing certainty for business by creating a bright line between conduct which is legal and that which was illegal was a major concern in designing a criminal offence.⁶⁷ Criminal offences have now been removed from the legislation. This raises the question as to whether the exemptions provided in the bill as part of a criminalisation reform will prove to have weakened the civil law regime prohibiting cartel conduct.

The new broad exemption for collaborative activity may weaken cartel regulation. In the Select Committee stage, the Commerce Commission supported the proposed exemption for collaborative activity, saying that it was consistent with other jurisdictions with per se criminal price-fixing prohibitions, where there are exemptions for collaboration between competitors that is shown to be pro-competitive and efficiency-enhancing.⁶⁸ However, the Commerce Commission submitted that amendments were needed to the proposed s.31, requiring the Commerce Commission and the courts to consider the pro-competitive purpose of the collaboration and any efficiency likely to be produced.⁶⁹ The Select Committee did not act on the Commerce Commission's recommendations.

The question whether the current civil regime was "watered down" by the exemptions in the cartel bill was raised by one Member of Parliament in the Select Committee hearing.⁷⁰ In its response, the Commerce Commission said that in its view the existing civil prohibition would not be weakened, provided the amendments it suggested were made. The Commerce Commission submitted that⁷¹:

"While the collaborative activity exemption is designed to limit false positives (excluding conduct from the exemption that is in fact pro-competitive), as currently drafted it risks creating false negatives (exempting conduct that is in fact anti-competitive). *288 "

The Commerce Commission's view was that the new s.31 should be amended to require the courts and the Commission to consider the pro-competitive purpose of the collaboration and any efficiencies likely to be produced as a result.⁷² This approach would have been consistent with the *US Antitrust Guidelines for Collaborations Among Competitors* (*US Guidelines*) which explicitly require consideration of procompetitive benefits and efficiencies.⁷³ The US Guidelines provide an analytical framework for evaluating agreements among competitors. In relation to agreements that are per se illegal, the US Guidelines provide that agreements that "always or almost always tend to raise price or reduce output are per se illegal" so that courts will not inquire into "claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects".⁷⁴ Participants in hard-core cartel agreements are prosecuted criminally.⁷⁵ However, the US competition agencies will analyse some prima facie per se agreements under a rule of reason analysis, if "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits".⁷⁶ The US Guidelines further provide that the "integration must be of a type that plausibly would generate procompetitive benefits cognizable under [an] efficiencies analysis". The US Guidelines are clear that mere co-ordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not enough to avoid the per se rule.

The Select Committee did not make the amendment suggested by the Commerce Commission, and there is now no requirement in the cartels bill that the parties show pro-competitive purpose and/or efficiencies resulting. However, the explanatory material accompanying the exposure draft of the cartel bill clearly stated that the exemption for collaborative activity was "intended to make it clear that the Act encourages pro-competitive, innovative and efficiency-enhancing activities."⁷⁷ The explanatory material also made clear that consideration had been given to requiring "efficiency-enhancing integration" as in the US regime, but that option had been rejected.⁷⁸ However, it was noted that flexibility was built into the US Guidelines, which might suggest that, in the New Zealand context, efficiency enhancing integration had only been rejected as a statutory test. It is not now to be a statutory requirement, but efficiencies will be relevant considerations. Integration will, however, not be required to show that the cartel provision is "reasonably necessary".

The Cartel Bill as it stands now contains an important exemption to the per se rule for cartel conduct offering broad protection in cases of collaborative activity. The per se rule will continue to apply for simple (or "naked") agreements setting a minimum price or restricting output. However, the situation will be more complex where there is even the possibility of the collaborative activity exemption applying. The exemption is not intended to cover sham collaborations, and it is likely that such constructs will be found to either contravene s.30 or s.27 once the case goes to court. However, investigations of cartel conduct will need to consider the possible application of the exceptions, especially the collaborative activity exception, in a broad range of fact situations. Both parties to potential litigation will need to consider not only whether there is an agreement that is a cartel provision covered by the per se rule as defined, but also whether exemptions apply, particularly those for collaborative activity. Consideration will need to be given to whether parties to a cartel provision are involved in an enterprise, venture, or other activity, in trade that is carried on in co-operation by two or more persons, whether it is carried on for the dominant purpose of lessening competition between any two or more of the parties, and whether the cartel provision is reasonably necessary for the purpose of the collaborative activity. The defendant will need to prove the dominant purpose element, but will not need to prove that the cartel provision does not have the effect or likely effect of substantially lessening competition in order to get the benefit of the collaborative activity exemption.

The inquiry into the application of the collaborative activity exemption will require quite detailed consideration that takes it beyond pure per se consideration and introduces elements of a rule of reason analysis, potentially adding to the costs of litigation. Of course, if it is found that s.30 is not contravened, then there is still the potential for a full rule of reason analysis in s.27. This suggests that there is a real possibility that the changes to the civil regime will in fact create a weaker per se rule for cartel conduct, and it will now be for the Commission and the courts to interpret the law so as to avoid false negatives. *289

V. Conclusion

Now that the criminal sanctions have been removed, hard core cartel conduct such as agreements that raise price or restrict output will be subject only to the new civil law cartel regime in ss.30–33. The definition of cartel conduct is somewhat broader than the existing per se price fixing rule, and the exceptions are significantly broader. In the event that a cartel provision is exempted under one of the exceptions, the effect is not necessarily that it escapes scrutiny. It will still be subject to the s.27 rule of reason test.

The question remains as to what extent the per se prohibition in New Zealand law will be undermined by this change. Per se rules mean that conduct can be prohibited without the detailed economic and factual analysis required by a rule of reason analysis. Per se cases are more likely to be initiated, and much more likely to be successful, than cases brought under rule of reason provisions. Per se rules are, of course, notoriously unpopular in neoliberal theory, and per se prohibitions have been progressively narrowed and displaced by rule of reason analysis in the US, even in the core area of price-fixing, resulting in greater success for defendants.⁷⁹ The New Zealand Cartel Bill does not introduce rule of reason analysis to price fixing and output restrictions, but it opens the door to aspects of that analysis. The New Zealand Bill began with the objective of strengthening the regulation of hard core cartels. However, it will abolish what remained of the per se ban on group boycotts in s.29.⁸⁰ It will introduce a wider per se ban on hard core cartel conduct, but with broad exceptions that, when argued, will require detailed analysis more generally seen in rule of reason cases. It remains to be seen whether this new regime will aid enforcement of anti-cartel rules, but there is certainly room for doubters to suspect that the project which began as an effort to strengthen the prohibitions on cartel conduct may actually have weakened them.

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Footnotes

- 1 See *Organisation for Economic Co-operation and Development, Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998) [C/M(98)7/PROV] [IA(2)]*, <http://www.oecd.org/daf/competition/2350130.pdf> [Accessed 5 May 2016]. See also OECD Cartels and Anti-competitive Agreements, <http://www.oecd.org/competition/cartels/> [Accessed 5 May 2016].
- 2 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [32]. The Commerce Commission quoted from this decision in its submission to the Select Committee. See Commerce Commission New Zealand, The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee (4 September 2012), para.4.2.
- 3 *Ministry of Economic Development, "Cartel Criminalisation: Discussion Document" (January 2010)*, <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/Cartel-Criminalisation-Discussion-Document.pdf> [Accessed 5 May 2016]. See also David King, "Criminalisation of Cartel Behaviour" (*Ministry of Economic Development Occasional Paper 10/01*) (January 2010), <http://www.mbie.govt.nz/publications-research/publications/economic-development/2010-occasional-papers/Criminalisation%20of%20Cartel%20Behaviour.pdf> [Accessed 5 May 2016].
- 4 Commerce (Cartels and Other Matters) Amendment Bill: Draft for Consultation, <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/Exposure%20draft%20Commerce%20-Cartels%20and%20Other%20Matters-%20Bill.pdf> [Accessed 5 May 2016].
- 5 Commerce (Cartels and Other Matters) Amendment Bill 341-1, introduced 13 October 2011.

- 6 See *Ministry of Economic Development*, "Cartel Criminalisation: Discussion Document" (January 2010), pp.22–29.
- 7 See *Ministry of Economic Development*, "Cartel Criminalisation: Discussion Document" (January 2010), p.31.
- 8 See *Ministry of Economic Development*, "Cartel Criminalisation: Discussion Document" (January 2010), p.30.
- 9 The Australian legislation is the Competition and Consumer Act 2010 (Cth). See *Caron Beaton-Wells and Brent Fisse*, *Australian Cartel Regulation: Law, Policy and Practice in International Context* (Cambridge University Press, 2011). See also discussion in Caron Beaton-Wells, "The Harper Review: Qualified Hope for Australian Competition Law" (2015) 48(4) *Australian Economic Review* 417, 423–425.
- 10 The Commerce Commission is New Zealand's competition enforcement and regulatory agency. See <http://www.comcom.govt.nz/> [Accessed 5 May 2016].
- 11 See Commerce Commission New Zealand, The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee (4 September 2012), paras 10–12.
- 12 Paul Goldsmith, "Amendments to Cartels Bill", press release, 8 December 2015. See also Paul Goldsmith, Minister of Commerce and Consumer Affairs, *Removal of the Criminal Offence for Cartels from the Commerce (Cartels and Other Matters) Amendment Bill* (Cabinet Committee Paper), <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/EGI%20paper%20SOP%20removal%20of%20criminal%20sanctions.pdf>, and *Cabinet Economic Growth and Infrastructure Committee*, "Minute of Decision", <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/EGI-15-MIN-0167%20Minute.pdf> [Accessed 5 May 2016].
- 13 Paul Goldsmith, "Amendments to Cartels Bill", press release, 8 December 2015.
- 14 Historically New Zealand's position as a small and remote economy has been seen to justify a higher tolerance for concentrated markets and relatively high levels of market power, a view that may not be sustainable. See for example A. Bollard, "The Role of Antitrust in a Small Open Economy: The Commerce Act in New Zealand" in D.K. Round (ed.), *The Australian Trade Practices Act 1974: Proscriptions and Prescriptions for a More Competitive Economy* (1995), pp.671–694. See also discussion in Michael Gal, "The Effects of Smallness and Remoteness on Competition Law: The Case of New Zealand" (2007) 14(3) *Competition and Consumer Law Journal* 292.
- 15 For analysis of the issues in criminalisation, see Debra Wilson "The (Lack of a) Case for Cartel Criminalisation" [2012] *New Zealand Law Journal* 173, David King, "Criminalisation of Cartel Behaviour" (*Ministry of Economic Development Occasional Paper 10/01*) (January 2010), <http://www.mbie.govt.nz/publications-research/publications/economic-development/2010-occasional-papers/Criminalisation%20of%20Cartel%20Behaviour.pdf> [Accessed 5 May 2016].
- 16 Commerce Act 1986 s.30(1).
- 17 Commerce Act 1986 s.2 "price" includes valuable consideration in any form, whether direct or indirect; and includes any consideration that in effect relates to the acquisition or supply of goods or services or the acquisition or disposition of any interest in land, although ostensibly relating to any other matter or thing".
- 18 See discussion in M. Sumpter, *New Zealand Competition Law and Policy* (Wolters Kluwer, 2010), pp.155–163.
- 19 Commerce Act 1986 s.31.
- 20 Commerce Act 1986 s.32.
- 21 Commerce Act 1986 s.33.
- 22 See *Ministry of Economic Development*, *Draft Regulatory Impact Statement: Criminalisation of Cartels — Agency Disclosure Statement* (2011), para.26, <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/draft-regulatory-impact-statement-cartel-criminalisation.pdf> [Accessed 5 May 2016].
- 23 See discussion in Sumpter, *New Zealand Competition Law and Policy* (2010), pp.96–97, 130–135. See also discussion in Maurice E. Stucke, "Does the Rule of Reason Violate the Rule of Law" (2009) *UC Davis Law Review* 1375.
- 24 Commerce Act 1986 s.58(1).
- 25 Commerce Act 1986 s.61(6).
- 26 *Ministry of Economic Development*, *Draft Regulatory Impact Statement: Criminalisation of Cartels — Agency Disclosure Statement* (2011), paras 16–17.
- 27 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2, and Supplementary Order Papers 407 and 148.

- 28 Commerce Act 1986 ss.31–34.
- 29 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. Bid-rigging was originally included as a fourth conduct category but was removed by the Select Committee on the basis that the other categories of cartel conduct would adequately prevent anti-competitive bidding practices. See the Commerce (Cartels and Other Matters) Amendment Bill 341-2, Commentary, 4.
- 30 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.30A(2) of the Commerce Act 1986.
- 31 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.30A(3) of the Commerce Act 1986.
- 32 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.30A(4) of the Commerce Act 1986.
- 33 See OECD, Cartels and Anti-competitive Agreements, <http://www.oecd.org/competition/cartels/> [Accessed 5 May 2016]. The OECD defines a hard core cartel as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce". The hard core cartel category "does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws". See *OECD, Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998) [CM(98)7/PROV] [IA(2)]*.
- 34 Section 29 is a per se prohibition on exclusionary provisions. The section will also be repealed (by cl.6 of the the Commerce (Cartels and Other Matters) Amendment Bill 341-2.
- 35 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014)*, <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/> [Accessed 5 May 2016].
- 36 *Mark Berry, "Introduction" in Commerce Commission Competitor Collaboration Guidelines Revised Draft (August 2014), p.4*, <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/> [Accessed 5 May 2016].
- 37 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2, which will create a new s.32.
- 38 See also *Tru Tone Ltd v Festival Records Records Marketing Ltd* [1988] 2 NZLR 352.
- 39 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2, which will create a new s.33.
- 40 See Commerce Commission New Zealand, The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee (4 September 2012), para.17.
- 41 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.31 of the Commerce Act 1986.
- 42 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.31(2) of the Commerce Act 1986.
- 43 Caron Beaton-Wells "The Harper Review: Qualified Hope for Australian Competition law" (2015) 48(4) *Australian Economic Review* 417, 424.
- 44 John Land and Aaron Schiff, "Analysing Collaborative Activities" [2014] *New Zealand Law Journal* 230. See also John Land, "Joint Ventures and the Collaborative Activity Exemption" [2014] *New Zealand Law Journal* 190.
- 45 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), p.36, para.5.12*, referring to *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383, <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/> [Accessed 5 May 2016].
- 46 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), p.36, para.5.14*.
- 47 Caron Beaton-Wells and Brent Fisse discussed this in their submission on the cartels Bill, saying that there is no justification for replacing the limitation with a SLC test: the general prohibition under s.27 already provides a SLC-based safeguard. See *Caron Beaton-Wells and Brent Fisse, Submission For The Ministry Of Economic Development (NZ) Commerce (Cartels and Other Matters) Amendment Bill (1 August 2011), p.8*, <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/Caron%20Beaton-Wells%20and%20Brent%20Fisse%20-245%20KB%20PDF.pdf> [Accessed 5 May 2016].

- 48 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), p.38.*
- 49 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), p.38, para.5.22.*
- 50 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.31(3) of the Commerce Act 1986.
- 51 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.31(1)(b) of the Commerce Act 1986.
- 52 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), p.40, para.5.28, referring to Mana v Fleming [2007] NZCA 324.*
- 53 Clause 7 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.31(1) of the Commerce Act 1986.
- 54 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), p.40, para.5.31.*
- 55 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), pp.41–42, paras 5.34–5.39.*
- 56 *Ministry of Economic Development, Cartel Criminalisation: Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill Explanatory Material (June 2011), p.15, para.49, <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/exposure-draft-bill-explanatory-material> [Accessed 5 May 2016]*
- 57 *Ministry of Economic Development, Cartel Criminalisation: Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill Explanatory Material (June 2011), p.15, para.46.*
- 58 See discussion in *L. Hampton and P. Scott, Guide to Competition Law, (2013), p.107.*
- 59 Clause 14(3) of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute new s.80(2C) of the Commerce Act 1986.
- 60 *Commerce Commission New Zealand, Competitor Collaboration Guidelines Revised Draft (August 2014), p.39, para.5.23.*
- 61 Commerce Act 1986 s.61(6). However, the Cartel Bill will make procedural amendments and an amendment so s.61(6) deleting the words "or is deemed to result" from the provision requiring that the public benefit "would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom". This reflects the shift away from using a deeming provision for s.27 purposes. See cl.10A10B of the Commerce (Cartels and Other Matters) Amendment Bill 341-2.
- 62 Clause 12 of the Commerce (Cartels and Other Matters) Amendment Bill 341-2. This provision will constitute the new s.65A of the Commerce Act 1986.
- 63 *Ministry of Economic Development, Draft Regulatory Impact Statement: Criminalisation of Cartels — Agency Disclosure Statement (2011), para.33, <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/draft-regulatory-impact-statement-cartel-criminalisation.pdf> [Accessed 5 May 2016].*
- 64 See Caron Beaton-Wells, "The Harper Review: Qualified Hope for Australian Competition Law" (2015) 48(4) *Australian Economic Review* 417, 423–424. The new exemption is in fact similar to a proposal put forward by *Caron Beaton-Wells and Brent Fisse, in Australian Cartel Regulation: Law, Policy and Practice in International Context (2011), pp.292–296.*
- 65 See *Sumpster, New Zealand Competition Law and Policy (2010), p.134.*
- 66 *Commerce Commission, Enforcement Criteria (updated 5 June 2014), <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-criteria/> [Accessed 5 May 2016].*
- 67 See *Minister of Commerce, Criminalisation of Cartels, Cabinet Paper (15 October 2010), para.38, <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/Cabinet%20paper%202013%20Cartel%20criminalisation%202013%20October%202010.pdf> [Accessed 5 May 2016].*
- 68 See *Commerce Commission New Zealand, The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee (4 September 2012), paras 18–19.*
- 69 See *Commerce Commission New Zealand, The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee (4 September 2012), para.13.*
- 70 The question asked was: "does the Bill have the unintended consequence of weakening the existing civil prohibition?" It was rephrased as: "does it create such wide defences that it is impractical?" And "does the repeal of sections 29–34 create a risk that the current civil offence is watered down?" The question was asked by the Hon David Cunliffe MP in Select Committee hearing on 25 October 2012. See Commerce

- Commission New **Zealand**, The Commerce (Cartels and Other Matters) Amendment Bill Supplementary Submission to Commerce Select Committee (22 November 2012), para.2.
- 71 See Commerce Commission New **Zealand** "The Commerce (Cartels and Other Matters) Amendment Bill Supplementary Submission to Commerce Select Committee (22 November 2012), para.10.
- 72 See *Federal Trade Commission and US Department of Justice, Antitrust Guidelines For Collaborations Among Competitors (April 2000)*, pp.6–8, https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [Accessed 5 May 2016] and Commerce Commission New **Zealand**, The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee (4 September 2012), para.19. See also Russell McVeagh, Submission to the Commerce Committee, Commerce (Cartels and other Matters) Amendment Bill (6 September 2012), paras 5.8–5.12.
- 73 See Commerce Commission New **Zealand**, The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee (4 September 2012), paras 13–29.
- 74 See *Federal Trade Commission and US Department of Justice, Antitrust Guidelines For Collaborations Among Competitors (April 2000)*, para.3.2, p.8 (footnotes deleted).
- 75 See *Federal Trade Commission and US Department of Justice, Antitrust Guidelines For Collaborations Among Competitors (April 2000)*, para.3.2, p.8.
- 76 See *Federal Trade Commission and US Department of Justice, Antitrust Guidelines For Collaborations Among Competitors (April 2000)*, para.3.2, p.8.
- 77 *Ministry of Economic Development, Cartel Criminalisation: Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill Explanatory Material (June 2011)*, p.15, para.49(d), <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/exposure-draft-bill-explanatory-material> [Accessed 5 May 2016].
- 78 *Ministry of Economic Development, Cartel Criminalisation: Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill Explanatory Material (June 2011)*, p.16, para.51.
- 79 For example, *Continental TV Inc v GTE Sylvania Inc* 433 U.S. 36 (1977), *State Oil Co v Khan* 522 U.S. 3 (1997), *Leegin Creative Leather Products Inc v PSKS, Inc* 551 U.S. 877 (2007). See discussion in Maurice E. Stucke, "Does the Rule of Reason Violate the Rule of Law" (2009) UC Davis Law Review 1375.
- 80 See the discussion in Rex Ahdar, "The Abolition of the Group Boycott Prohibition from New **Zealand** Competition Law" (2015) 23(1) *Competition and Consumer Law Journal* 78.

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