SUBMISSION
FOR THE MINISTRY OF ECONOMIC DEVELOPMENT (NZ)

Commerce (Cartels and Other Matters) Amendment Bill

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1. Purpose and structure of this submission

- This submission responds to the draft Commerce (Cartels and Other Matters) Amendment Bill (CCOM Bill) released by the Ministry of Economic Development for consultation. To the extent relevant, the submission also responds to issues raised by other submissions.

- In our view, the CCOM Bill is a substantial improvement on the amendments made by the *Trade Practices (Cartel Conduct and Other Measures) Act 2009* (Cth) to the then Australian *Trade Practices Act 1974* (Cth), subsequently renamed the *Competition and Consumer Act 2010* (Cth) (CCA). The CCOM avoids the overreach and the undue complexity of the Australian provisions.

- The points made in this submission relate to the following matters:

    - parallel civil and criminal liability (Part 2);

    - the meaning of cartel provision in s 30A (Part 3);

    - the exemption for collaborative activity in s 31 (Part 4);

    - the offence relating to cartel provisions in s 82B (Part 5).

- This submission does not address the question whether, as a matter of policy, New Zealand should criminalise cartel conduct.

2. Parallel civil and criminal liability

- The CCOM Bill contains a parallel scheme for civil and criminal liability in that the physical elements of the civil prohibitions and the offences are the same. Differentiation insofar as the elements of the offences are concerned is provided by the fault element of knowledge. In general, we support this aspect of the CCOM Bill. However, in our view, an additional fault element of intention in relation to entering into a contract or arrangement or arriving at an understanding, or giving effect to a cartel provision, would assist in further differentiating civil and criminal liability (see Part 5 below).

- Further, we note the proposed reliance on guidelines by the Commerce Commission to provide the business sector with certainty regarding the circumstances in which the Commission is likely to decide to prosecute rather than deal with a matter as a civil contravention. The formulation of such guidelines should not be approached on the

basis that they will be binding or exhaustive. Such an approach would remove the flexibility necessary to assess each matter on its merits. It is unrealistic and potentially hazardous to expect the Commission to establish a "bright line" between criminal and civil liability for the purposes of its future exercise of enforcement discretion. We acknowledge this may not provide the certainty sought by some stakeholders. However, to a large degree, uncertainty is ameliorated by the proposed exemptions and clearance regime.

- In formulating the guidelines, we do not see the ACCC guidelines as a commendable model in their present form.[1] The ACCC guidelines leave considerable room for improvement.[2] The Commerce Commission already has a clear set of published enforcement criteria that guide its discretion when making decisions on whether to open an investigation and what enforcement action it will take after investigation.[3] These criteria are organised into three categories of consideration: extent of detriment; seriousness and public interest. They provide a useful starting point for the purposes of determining when to deal with a matter as a potential offence and when to deal with it as a potential civil contravention.

- Notwithstanding the breadth of the Commerce Commission's existing enforcement criteria, it is likely that, as in Australia, the NZ authorities would seek to reserve criminal liability for those cases in which the actual or potential harm, as reflected for example in the size of the market affected and the duration of the cartel, is greatest. This raises the question whether a threshold criterion based on a minimum value of affected commerce or some other proxy for harm should be considered.[4]

- The ACCC Guidelines identify as a factor relevant to the decision whether to refer a matter for prosecution: whether the value of affected commerce (or the affected bid) exceeds AU$1m in a 12 month period. This factor is problematic in that it is potentially either under-inclusive or over-inclusive, depending on the size of the relevant market.[5] The same problem is likely to arise in the New Zealand context.

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1 See Memorandum of Understanding between the Australian Competition and Consumer Commission and the commonwealth Director of Public Prosecutions, July 2009 (see paragraph 4.4, in particular); Australian Competition and Consumer Commission, ACCC Approach to Cartel Investigation Guidelines, 2009 (see paragraphs 13-17, in particular).

2 For criticisms of the ACCC Guidelines and recommendations for improvement, see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011, CUP), section 9.3.2 and section 9.4.

3 See http://www.comcom.govt.nz/enforcement-criteria/.

4 The NZ Serious Fraud Office uses NZ$2m of money lost as an indicator of 'serious fraud': See http://www.sfo.govt.nz/what-is-serious-fraud.

5 B Fisse, 'The Cartel Offence: Dishonesty?', *Australian Business Law Review*, vol. 35, 2007, p. 235, pp. 244–7. See also J Clarke, 'Criminal Penalties for Contraventions of Part IV of the *Trade Practices Act*', *Deakin Law Review*, vol. 10, 2005, p. 141.

Three options for addressing this concern have been suggested by the authors elsewhere:

- omit any threshold factors relating to the value of affected commerce altogether (taking the United States approach, for example, where the relevant criteria guiding decisions to pursue a criminal investigation simply refer to the 'volume of commerce affected' and the 'geographic size of the area affected', amongst others[6]);

- adopt a threshold that is likely to be a more effective measure of the seriousness of the case in question (for example, framed as a minimum percentage (say 20%, as under the United States Sentencing Guidelines) of the combined value of all sales by all competitors who competed over the relevant period in the specific line of commerce in the relevant geographic market affected by the cartel);[7] or

- adopt a threshold but make it explicit that this is a starting point only in identifying a case as one that may be found suitable for referral, and perhaps adopting the wording used by the UK Serious Fraud Office (in listing whether the value of the fraud exceeded £1 million as relevant in deciding whether to investigate) that it is intended to serve as 'an objective and recognisable signpost of seriousness rather than a main indicator of suitability.'[8]

- The Commerce Commission will also need to ensure that its guidelines are consistent with the Prosecution Guidelines of the Crown Law Office.[9] The Crown Law Office's Prosecution Guidelines identify two factors as relevant to the decision to prosecute: (1) the evidential test; and (2) the public interest test.[10] The first test requires that there be a reasonable prospect of conviction. The guidelines state that a reasonable prospect of conviction exists 'if, in relation to an identifiable individual, there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the

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6 United States Department of Justice, *Antitrust Division Manual*, at http://www.usdoj.gov/atr/foia/divisionmanual/table_of_contents.htm, last viewed 6 February 2008; C Beaton-Wells, 'Capturing the Criminality of Hard-Core Cartels: The Australian Proposal', *Melbourne University Law Review*, vol. 31, 2007, p. 675, p. 692.

7 B Fisse, 'The Cartel Offence: Dishonesty?', *Australian Business Law Review*, vol. 35, 2007, p. 235, p. 246.

8 C Beaton-Wells, 'Capturing the Criminality of Hard-Core Cartels: The Australian Proposal', *Melbourne University Law Review*, vol. 31, 2007, p. 675 p. 692.

9 See the recommendation of the New Zealand Law Commission that all New Zealand prosecuting agencies ensure consistency between their policies and that of the Crown Law Office: New Zealand Law Commission, *Criminal Prosecution*, Report No 66 (2000), pp. 28–9 [67]–[69], at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_73_150_R66.pdf.

10 Crown Law Office, Prosecution Guidelines, January 2010, [6.1], at http://www.crownlaw.govt.nz/uploads/prosecution_guidelines.pdf.

individual who is prosecuted has committed a criminal offence.'[11] Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution.[12] The guidelines provide a list of considerations relevant to determining where the public interest lies.[13]

- In explaining the process for decision-making about whether to prosecute, the Commerce Commission guidelines should explain the roles of the Commerce Commission and Crown solicitor appointed from the proposed specialist cartel prosecution panel. We note the proposal that the Commerce Commission make the initial decision whether to prosecute. However, we also note the recommendation of the New Zealand Law Commission that, while the investigating agency retain the power to decide whether to charge a person initially, Crown Solicitors should become involved earlier in the process than has traditionally been the case so as to make their role of oversight and review more effective.[14] This is especially important given the Commerce Commission's lack of experience in investigating and preparing for prosecution of indictable offences.

3. The meaning of cartel provision in s 30A

- The definition of 'cartel provision' in subs 30A(1) adopts a purpose test. The wording of the subsection is unclear as to whether it is the 'contract, arrangement or understanding' or the provision contained therein that need have the relevant purpose. The subsection should be reworded to clarify this. One option is to amend subs 30(2)(b) to read: 'give effect to a cartel provision contained in a contract, arrangement or understanding.' This would enable the words 'contained in a contract, arrangement or understanding' to be removed from subs 30A(1). Consequential amendments would need to be made to subss (2)-(5), replacing 'In relation to a contract, arrangement or understanding referred to in subsection (1)' with 'For the purposes of subsection (1)', or words to that effect.

- Unlike the current s 30 of the *Commerce Act* and the definition of a price fixing provision under subs 44ZZRD(2) of the CCA, the CCOM Bill does not allow for the proof of 'effect or likely effect' as an alternative to proof of a purpose of price fixing.

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11 Crown Law Office, Prosecution Guidelines, January 2010, [6.1], at http://www.crownlaw.govt.nz/uploads/prosecution_guidelines.pdf.

12 Crown Law Office, Prosecution Guidelines, January 2010, [6.5], at http://www.crownlaw.govt.nz/uploads/prosecution_guidelines.pdf.

13 Crown Law Office, Prosecution Guidelines, January 2010, [6.8], at http://www.crownlaw.govt.nz/uploads/prosecution_guidelines.pdf.

14 See New Zealand Law Commission, *Criminal Prosecution*, Report No 66 (2000) pp. 35–6 [91] – [96], p. 38 [100] – [101], at http://www.lawcom.govt.nz/sites/default/files/publications/2000/10/Publication_73_150_R66.pdf. .

We acknowledge that under New Zealand case law, the effect or likely effect of the provision will be highly material in determining the relevant purpose.[15] However, as currently proposed, liability for conduct that has or is likely to have the effect of fixing, controlling or maintaining prices will not be possible where there is clear evidence that, subjectively, the defendants did not have that purpose. In our view, this is problematic. Some trade or industry association activity, for example, is likely to be excluded from the new prohibitions as a result. Civil liability, at least, should be available in such circumstances.[16]

- The concept of a purpose of a provision is problematic. In Australia, reconciling this concept with a subjective approach to the purpose element has produced uncertainty in situations where not all of the parties have the same purpose.[17] Such difficulties are unlikely to be as acute where an objective approach applies. Nevertheless, given that New Zealand case law allows for both subjective and objective tests to be applied, it may be difficult to ascertain the purpose of a provision in situations where, objectively the purpose could not be taken to exist (for example, where the provision was or was likely to be ineffective), but there is evidence of a relevant subjective purpose on the part of one of the parties only. An alternative approach that would overcome this type of problem would be to define 'cartel provision' in terms of effect/likely effect and not purpose of a provision (relying on the exemptions, particularly the exemption under s 31, to prevent over-reach) and to require intention (for example, intention to fix prices) where the defendant is charged with a cartel offence as the principal offender (see further Part 5 below). Liability for attempt will cover cases where the parties intend to fix prices (or restrict output, allocate a market, or rig a bid), but their intention is unlikely to be achieved.

- Subs (5) of a 30A defines 'bid rigging' to include 'requiring a bid to be in accordance with the contract, arrangement or understanding.' In our view, this is too broad and should be amended to read 'requiring a bid to be in accordance with the cartel provision.'

- We note that it is proposed to retain the civil prohibition on exclusionary provisions under s 29 of the Act. In our view, this prohibition should be repealed. There is substantial overlap between the conduct caught by s 29 and the proposed civil

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15 See *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA); *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007.

16 See, eg, *Commerce Commission v Otago and Southland Vegetable and Produce Growers' Association (Inc)* (1990) 4 RCLR 14 (HC).

17 See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011, CUP), section 4.3.1.1, pp91-92. This problem does not appear to have arisen in New Zealand cases. Cf the comment of William Young J in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 at [145] that 'the terminology of s 2(5)(a)(i) in referring to the 'purpose' for which a covenant was 'required to be given' most obviously refers to the purposes of the relevant parties.'

prohibition on output restriction under s 30 (see subs 30A(3)(c)-(d)). Further, any conduct that is not within the scope of the new prohibition may be dealt with under the broader prohibition on provisions that substantially lessen competition under s 27. In our view, unnecessary overlap between prohibitions creates uncertainty and undue expense for parties to proceedings under the Act.

- Subs 30B(1) extends the proposed prohibitions and offences to bodies corporate that are interconnected with parties to the relevant contract, arrangement or understanding. This might possibly be read as deeming interconnected bodies corporate to be liable, without having to prove the physical elements and fault elements of the prohibitions or offences in respect of those persons. In our view, such an extension of liability would be unprincipled. It is not clear to us that subs 30B(1) serves any legitimate purpose..

- Subs 30B(2) extends liability where the parties to the contract, arrangement or understanding would or would be likely to be in competition with each other but for the cartel provision. This should be extended further to cover the situation in which parties are likely to be competition (and it is not a question of them being likely competitors but for the provision). See s 44ZZRD(4) of the CCA. Liability should not be excluded in circumstances where the parties are not competing currently but are likely to be in the future (for example, where one party has plans to enter a market but has not yet done so).

4. The exemption for collaborative activity in s 31

- Concern has been expressed by some stakeholders about the requirement in subs 31(1)(b) that the cartel provision be 'reasonably necessary' for the purpose of the collaborative activity. The concern that has been expressed should be seen in perspective. First, the requirement is closely similar to that applied under s 1 of the Sherman Act and hence the case law in the US will provide guidance on its application. Secondly, the test for the purposes of criminal liability is one of belief as to reasonable necessity (s 82B(2)(b)). Thirdly, some limitation on the scope of the collaborative activity exemption is needed to guard against the danger of joint ventures or other collaborations being used as shams in order to evade the application of the per se criminal and civil prohibitions against cartel conduct. Fourthly, the collaborative activity exemption is a major improvement on the very limited joint venture exceptions currently available under s 31 and the limited and oddly defined joint venture exceptions under ss 44ZZRO and 44ZZRP of the *Competition and Consumer Act 2010* (Cth). The main comparative advantage of the collaborative activity exemption is that, unlike the Australian exceptions, it does not require a joint venture. As has long been recognised in the competition laws of the US, the EU and

Canada, there are many collaborations between competitors that are pro-competitive but which do not happen to be structured as joint ventures.

- In our view the test under subs 31(1)(b) should be a belief on reasonable grounds that the cartel provision is reasonable necessary for the purpose of the collaborative activity. This test is more subjective than that under subs 31(1)(b) but the belief must be one based on objectively reasonable grounds. If such an approach is considered to be still too restrictive or still too prone to being second-guessed by courts or the Commerce Commission, the possible alternatives include replacing the words 'reasonably necessary for' in subs 31(1)(b) with 'reasonably related to' or 'reasonably connected with'.

- In our view, the requirement under subs 31(2)(b) that that the collaborative activity not be carried out 'for the dominant purpose of lessening competition' is sound. It reflects the need to guard against the use of sham joint ventures or other sham collaborations to evade the operation of the per se criminal and civil prohibitions against cartel conduct.[18] There is no justification for replacing the limitation under subs 31(2)(b) with a SLC test: the general prohibition under s 27 already provides a SLC-based safeguard. The justification for the subs 31(2)(b) limitation is that competitors should not be able to fix prices or otherwise engage in cartel conduct simply by badging their conduct as a joint venture or collaborative activity. That justification would be more clearly reflected if subs 31(2)(b) were amended to read: 'for the dominant purpose of lessening competition between any two or more parties to the contract, arrangement or understanding.'

- Vertical supply agreements between competitors may come within the collaborative activity exemption but that seems an inappropriate solution. Having to characterise vertical supply agreements between competitors as collaborative activities when they are simply supply agreements is artificial. More importantly, given the generally pro-competitive nature of vertical supply agreements between competitors, there seems no policy justification for requiring the parties to show that a restrictive provision in a supply agreement is reasonably necessary for the purposes of the collaborative activity.[19] Anticompetitive supply agreements are subject to the general prohibition under s 27. A neater and far more appropriate solution in our view would be to

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[18] As discussed in C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011, CUP), section 8.3.4.

[19] See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011, CUP), section 8.6.5.

provide a specific exemption for vertical supply agreements between competitors or likely competitors.[20]

- We have a reservation about the persuasive burden of proof imposed on defendants under s 82B(2), at least in the context of criminal liability. An evidential but not a persuasive burden of proof is placed on defendants who seek to rely on the joint venture exceptions under ss 44ZZRO and 44ZZRP of the *Competition and Consumer Act 2010* (Cth). However, the collaborative activity exemption under s 31 is more generous than those joint venture exceptions and the joint venture defence under s 76C that applies in relation to civil prohibitions against exclusionary provisions imposes a persuasive burden of proof.

5. The offence relating to cartel provisions in s 82B

- In our view it would be desirable to specify the fault element that is required in relation to the physical element of entering into a contract or arrangement or arriving at an understanding or giving effect to a cartel provision. We recommend that this fault element be intention, in the sense of meaning to engage in the conduct (see s 5.2(1) of the Criminal Code (Cth)). Intention in that sense is required for the cartel offences under ss 44ZZRF and 44ZZRG of the *Competition and Consumer Act 2010* (Cth).

- The fault element of knowledge under s 82B requires knowledge that the purpose of a provision is price fixing, restricting output, market allocating or bid rigging. As we understand the interpretation of 'purpose' in NZ, purpose is determinable by an objective examination of all the relevant circumstances. Where purpose depends on an objective determination, an accused will not have the requisite knowledge unless he or she knows the circumstances that are capable of supporting the objective determination that the provision in issue comes within s 30A. Although this inquiry may be straightforward in some cases (eg blatant price fixing) in other cases it may be complex. A simpler approach, and one easier for juries to apply, would to require that the accused intended that a provision in the contract, arrangement or understanding would result in price fixing, restricting output, market allocating or bid rigging, or that giving effect to a provision in a contract, arrangement or understanding would result in price fixing, restricting output, market allocating or bid rigging. Intention in this context could be defined in terms of 'meaning to bring about that result or being aware that the result will occur in the ordinary course of events' (see s 5.2(3) of the

[20] See the limited specific exception proposed in C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011, CUP), section 8.6.5. An alternative possible approach would be simply to exempt vertical supply agreements from per se liability and to rely on s 27 as a safeguard.

Criminal Code (Cth)). On this approach, the requirement in subs 82B(1)(a) and (b) of knowledge that the provision is a cartel provision (and the need to know the purpose of the provision) would be deleted.

- If knowledge is to be retained as a fault element under s 82B, in our opinion the term 'knowledge' needs to be defined. There is a danger that 'knowing' may be interpreted as including wilful blindness, which is a form of constructive knowledge (see *The Queen v Martin* [2007] NZCA 386 at [10]). In Australia, it would an error of law to treat wilful blindness as sufficient to amount to knowledge or belief under ss 44ZZRF and 44ZZRG.[21] In *Adler v ASIC* (2002) 168 FLR 253, 312 [209] Santow J avoided the concept of wilful blindness by defining knowledge in terms of what constitutes a minimum degree of knowledge. This approach was based on *Richardson and Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd* (1994) 123 ALR 681 at 694 (Burchett J), as endorsed by French J in 'Mental states in civil litigation' [2003] Fed J Schol 16. The definition of wilful blindness in *The Queen v Martin* [2007] NZCA 386 at [10] is very sweeping and, if let in under s 82B, would radically dilute the requirement of knowledge. We therefore suggest that knowledge be defined along the lines of the definition in s 5.3 of the Criminal Code (Cth): 'A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.'

[21] See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011, CUP), section 5.4.4.