PROMOTING COMPETITION IN NEW ZEALAND

A TARGETED REVIEW OF THE COMMERCE ACT 1986

Submission

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7 February 2025

1. This submission

We welcome the opportunity to make this submission in response to the Targeted Review of the Commerce Act (December 2024).[1]

This submission is concerned with Issue 7 in the Targeted Review − anti-competitive concerted practices – particularly Q 20.

The submission is based largely on our analysis of Australian law on anti-competitive agreements between competitors, to be published later this month as B Fisse and R Nicholls, 'Anti-Competitive Agreements between Competitors and Cartel Enforcement' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition law and Economics in Australia* (Routledge, 2025) Vol I, ch 8.

That recent analysis is relevant to Q 20 in the Targeted Review. Relevant points are set out in Part 2 below.

In summary:

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1 At: https://www.google.com/search?q=targeted+review+New+Zealand&rlz=1C1CHBD_en-GBAU1007AU1007&oq=targeted+review+New+Zealand&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIGCAEQRRg8MgYIAhBFGDzSAQk4ODk5ajBqMTWoAgiwAgE&sourceid=chrome&ie=UTF-8#:~:text=Show%20more-,A%20targeted%20review%20of%20the%20Commerce%20Act%201986,-Ministry%20of%20Business

- We endorse the explicit prohibition of practices by competitors that coordinate their market conduct in ways that harm competition, even without formal agreements.
- However, we also acknowledge the difficulty in framing a workable prohibition due to the nebulous nature of concerted practices and the lack of successful models in other jurisdictions.
- We consider that the Australian legislation on concerted practices is seriously flawed. The flaws include lack of a clear definition, limited enforcement action, and broad scope covering vertical practices.
- Consequently, we advise against replicating the Australian model in New Zealand. Instead, we recommend an approach based on fundamental reconstruction, rather than duplication of a flawed regime.
- This fundamental reconstruction should focus on prohibiting unilateral conduct intended to coordinate market conduct. There are no concrete models on which to base this, but New Zealand can benefit from the errors made in other jurisdictions.
- There is a growing threat of algorithmic coordination of market conduct by competitors and the need for new substantive prohibitions and evidentiary tools to prevent anti-competitive practices. This threat is exacerbated by recent developments in agentic artificial intelligence.

If any questions arise about the matters discussed in this submission, we look forward to responding to them.

2. Our responses to Q 20 in the Targeted Review

(a) Introduction

This Part 2(a) provides basic answers to Q 20. That is followed by comments on concerted practices (Part 2(b)), price signalling (Part 2(c)) and algorithmic coordination of market conduct by competitors (Part 2(d)).

Q 20 asks:

> Should 'concerted practices' (eg, when firms coordinate with each other with the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?

Our basic answer to the first part of Q 20:

> **Serious forms of anti-competitive market coordination by competitors may occur where there is no underlying contract, arrangement or understanding between the competitors. A prohibition should apply if it is possible to define such a prohibition in a satisfactory way**.

To amplify:

> Some forms of market coordination by competitors are seriously anti-competitive but do not stem from any contract, arrangement or understanding between the competitors. That is often the position where facilitating practices are used by market participants.[2] The same is true of algorithmic coordination of market conduct by competitors.[3] There is a policy justification in such situations for prohibiting the conduct but only if it is possible to frame a prohibition in workable terms. Framing a prohibition in workable terms is difficult. For example, the concept of a 'concerted practice' is nebulous and may not be suitable.[4] In any case, a 'concerted practice' may extend beyond 'hub-

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2 See further B Fisse, 'Facilitating Practices, Vertical Restraints and Most Favoured Customers' (2016) 44 ABLR 325.

3 B Fisse and R Nicholls, 'Anti-Competitive Agreements between Competitors and Cartel Enforcement' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition law and Economics in Australia* (Routledge, 2025) Vol I, ch 8.

4 Rob Nicholls and Deniz Kayis 'Concerted practices contested: Evidentiary thresholds' (2017) 25 *Competition and Consumer Law Journal* 125.

and-spoke' conduct[5] (the focus in Australia) and certainly extends beyond data sharing in a hub-and-spoke arrangement.

Our basic answer to the second part of Q 20 (What would be the best way to do this?):

> **Unknowable unless and until plausible workable statutory models are available for consideration**.

To amplify:

> A satisfactory way of prohibiting anti-competitive market coordination by competitors where there is no underlying agreement between the competitors has yet to be devised in any jurisdiction. The EU concept of a 'concerted practice' is ill-defined and, 60 years after conception, continues to raise many questions of interpretation.[6] The Australian prohibitions against concerted practices are another model.[7] Under this model, the conduct prohibited can be horizontal, vertical, or hybrid in a similar fashion to hub-and-spoke conspiracies.[8] Unfortunately, these prohibitions lead to uncertainty and a reluctance of businesses to engage with the regulator about potential conduct for which they may not be an immunity regime.
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> The flaws in the EU and Australian concerted practice models cannot be fixed by minor amendments but require fundamental reconstruction. It is uncertain whether such reconstruction would necessarily work. Proof of concept would require a detailed review, with draft new statutory provisions, explanatory notes and worked examples. No such proof of concept seems to exist.
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> Some satisfactory way might be found of prohibiting unilateral conduct by one competitor that is intended to or has the likely effect of coordinating market

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5 See, eg, George A Hay, 'Horizontal Agreements: Concept and Proof' (2006) 51(4) *Antitrust Bulletin* 877; Brent Fisse, 'Facilitating Practices, Vertical Restraints and Most Favoured Customers: Australian Competition Law Is Ill-Equipped to Meet the Challenge' (2016) 44(5) *Australian Business Law Review* 325; Pinar Akman and D Daniel Sokol, 'Online RPM and MFN under Antitrust Law and Economics' (2017) 50(2) *Review of Industrial Organization* 133.

6 Fisse and Nicholls, 'Anti-Competitive Agreements between Competitors and Cartel Enforcement'.

7 Ibid.

8 Craig G Falls and Celeste C Saravia, 'Analyzing Incentives and Liability in "Hub-and-Spoke" Conspiracies' (2015) 19(1) *Distribution* 9.

conduct by that competitor and another competitor. We have yet to see any such model.[9] It is beyond the scope of this submission to try to advance a commendable model.

(b) Australian legislation on concerted practices is seriously flawed and should not be followed in New Zealand

In our view, the Australian legislation on concerted practices is seriously flawed, as outlined below:

- The concept of 'concerted practice' is undefined.[10] The Harper Review considered that the word 'concerted' has a clear and practical meaning and no further definition was required for the purposes of a legal enactment. That view is difficult to understand.[11] The EU law on the concept of a concerted practice is far from clear.[12] The judicial definition in *Dyestuffs*,[13] an early leading case, continued for years 'to fascinate the cognoscenti and to mislead the unwary.'[14] The ACCC Guidelines on concerted practices (August 2018) give limited guidance and in any event are the view of the regulator, not the courts or the legislature.

- The SLC test in the Australian concerted practices prohibitions makes the prohibitions rather a dead letter. There has been only one enforcement action

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9 See further C Beaton Wells and B Fisse, *Australian Cartel Regulation* (CUP, 2011), 56-57.

10 See Nicholls and Kayis 'Concerted practices contested', Part II; Lindsay Foster and Hanna Kaci, 'Concerted Practices: A Contravention without a Definition' (2018) 26(1) *Competition and Consumer Law Journal* 1; Michael Gvozdenovic, 'Concerted practices and statutory interpretation: An affirmation of the jurisprudence on "contracts, arrangements and understandings"' (2019) 26 *Competition & Consumer Law Journal* 213.

11 See Nicholls and Kayis 'Concerted practices contested', Part II.

12 See eg Damiano Canapa, 'Non-Binding "Recommended Price" as Concerted Practices' (2022) *J of European Competition Law and Practice* 435.

13 *Imperial Chemical Industries Ltd v Commission of the European Communities* (C-48/69) (1972) ECR 619.

14 Julian M Joshua and Sarah Jordan, 'Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law Symposium on European Competition Law' 647, 664. quoting Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (Wolters Kluwer Law and Business, Vol VI, 2nd ed, 2000), [1426] (commenting on the reception of *Interstate Circuit Inc v United States*, 306 US 208 (1939)).

by the ACCC over approximately 7 years.[15] In our view, the suggestion that: 'An explicit prohibition against anticompetitive concerted practices would ensure the market participants compete on their merits' (Targeted Review, p 27) is false expectation.

- The concerted practices prohibition applies to vertical practices as well as horizontal practices.[16] The prohibition applies to various forms of vertical restraint, not merely exclusive dealing. This very broad scope is unnecessary and unjustified. The concerted practices prohibitions were conceived by the Harper Review largely as a way of replacing the unsatisfactory prohibitions on price signalling, which were concerned with *horizontal* market coordination.[17] However, the legislation later enacted ran off the horizontal rails into an uncharted vertical loop.

- There is no competition condition in the prohibition against concerted practices.[18] The prohibition does not require that two or more of the persons engaged in the concerted practice be in competition, or likely to be in competition, with each other. That is very odd given that the legislation arose from the need to cover coordination of market conduct *by competitors* in situations where, as in *Apco Service Stations Pty Ltd v ACCC*[19] and *ACCC v Australian Egg Corporation Limited*,[20] a contract, arrangement or understanding could not be established.

- One major concern raised about the ACCC immunity and cooperation policy for cartel conduct is the exclusion of concerted practices from the scope of full immunity under the immunity scheme.[21] In many situations

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15 ACCC, 'Turf breeder to address concerted practices concerns', 18 November 2022, at: https://www.accc.gov.au/media-release/turf-breeder-to-address-concerted-practices-concerns. This case resulted in an undertaking under s 87B.

16 Nicholls and Kayis 'Concerted practices contested'.

17 *Competition Policy Review*, *Final Report*, March 2015, 367-372.

18 Contrast the competition condition that applies to a cartel provision: Competition and Consumer Act 2010 (Cth) s 45AD(4).

19 [2005] FCAFC 161.

20 [2017] FCAFC 152 and [2016] FCA 69.

21 See ACCC, *Immunity and cooperation policy for cartel conduct*, December 2024, [8], at: https://www.accc.gov.au/system/files/immunity-cooperation-policy-cartel-conduct.pdf; Deniz Kayis and Rob Nicholls, 'When the carrot resembles a stick: The exclusion of concerted

there may be cartel conduct and/or a concerted practice that may not pass the SLC test. Where that is so, a potential immunity applicant is bound to ask: why provide incriminating information when there is a real risk of admitting to a concerted practice without any immunity?

Given the major laws set out above, we are unable to agree with the suggestion in the Targeted Review at p 29 that adoption of concerted practices prohibitions parallel to the Australian prohibitions 'would further align with Australia's competition law to promote business certainty'. In our view, importing the flaws in the Australian legislation into New Zealand would be highly likely to cause business uncertainty and frustration.

Rectifying the major flaws in the Australian legislation would require a major reconstruction of the provisions. The submission by Beaton-Wells and Fisse about the Harper Report in 2015[22] criticises some aspects of the draft legislative provisions on concerted practices set at the end of the Harper Report and suggests various possible improvements.[23] The improvements suggested would be relevant to a reconstruction of s 45(1)(c) of the Competition and Consumer Act . The reconstruction necessary would take considerable work. Moreover, it is uncertain whether or not workable new statutory provisions would result. For instance, one challenge today is working out how to define a prohibition against algorithmic coordination of market conduct by competitors (see Part 2(d) below). Algorithmic coordination of market conduct was not widely recognised as a threat in 2015.

In our view, it is more important to remove the element of commitment from an 'arrangement or understanding' in the definition of cartel and other prohibitions[24] than to try to salvage the Australian provisions on concerted practices. The Australian provisions did not address the main basic problem, which was and remains the element

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practices from the ACCC's revised immunity policy' (2020) 27 *Competition & Consumer Law Journal* 187.

22 Submission on the Final Report of the Competition Policy Review (Harper Review), 22 May 2015, at: https://brentfisse.com/wp-content/uploads/2020/07/Beaton-Wellsand-Fisse-_Submission_Final-Report_250515_FINAL.pdf).

23 Including replacing the SLC test with a test focussing on the lessening of competition between the parties to the concerted practice, whether or not there is a substantial lessening of competition in the relevant market.

24 Fisse and Nicholls, 'Anti-Competitive Agreements between Competitors and Cartel Enforcement'.

of commitment. Draft statutory provisions to fix that root problem by redefining the concepts of arrangement and understanding so as to eliminate the element of commitment have been advanced elsewhere.[25]

(c) Australia experimented with price signalling legislation but the experiment failed and did not create a model suitable for adoption in New Zealand

Part IV Division 1A of the Competition and Consumer Act 2010 (Cth) prohibited the unilateral disclosure by a competitor of competitively sensitive information. Section 44ZZW prohibited the private disclosure of pricing information. Section 44ZZX prohibited the disclosure of pricing information or specified other kinds of competitively sensitive information for the purpose of substantially lessening competition in a market. These provisions were roundly criticised for overreach, underreach and uncertainty. They were repealed in 2017.

Overreach:

- Part IV Division 1A imposed liability for unilateral disclosure of competitively significant information without any requirement that the disclosure facilitate the co-ordination of conduct between competitors so as to remove the need for competitors to collude explicitly. The underlying problem was that Part IV Division 1A was never designed to address facilitating practices but only price signalling and public announcement of competitively relevant information. [26]

- The prohibition of private disclosure of pricing information under s 44ZZW was too sweeping. For example, a competitor would breach the prohibition if it were to disclose privately to another competitor the mere fact that it had a price-related MFC (Most Favoured Customer) restraint in place. Such a disclosure would 'relate to a price' whether or not any details were given of

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25 Brent Fisse, 'Australian Cartel Law: Biopsies', Competition Law Conference, Sydney, 5 May 2018, Part II, at: https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf.

26 See Brent Fisse and Caron Beaton-Wells, 'The Competition and Consumer Amendment (No 1) 2011 (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 ABLR 28.

the terms of the MFC restraint, the identity of the customer beneficiary or the number of customer beneficiaries. Section 44ZZW was defined in terms of 'price signalling', not likely anti-competitive harm.[27]

Underreach:

- Part IV Division IA applied to goods or services prescribed by regulation. Regulation 48 prescribed goods and services of taking deposits and advances of money by authorised deposit-taking institutions. There was no principled justification for such selective application. As a general policy, competition laws should apply across all sectors of the economy, and competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided.[28]

- The exclusion under s 44ZZW(c) of a disclosure 'in the ordinary course of business' was remarkably lax and created a substantial hurdle for enforcement of the prohibition.[29]

- Non-price MFC restraints may be material to competition but s 44ZZW was limited to price-related information. Again, the underlying problem was that Part IV Division 1A was never designed to address facilitating practices squarely.

- The s 44ZZY(6) exception opened the way for the use of continuous disclosure as a vehicle for the use of facilitating practices without getting caught by s 44ZZW or s 44ZZX.[30]

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27 Brent Fisse, 'Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge' (2016) 44 ABLR 325, 339.

28 Fisse and Beaton-Wells, 'The Competition and Consumer Amendment (No 1) 2011 (Exposure Draft)', 32-34.

29 See Brent Fisse and Caron Beaton-Wells, 'Private disclosures of price-related information to a competitor "in the ordinary course of business": A new slippery dip in the political playground of Australian Competition Law' (2011) 39 ABLR 367.

30 See Brent Fisse and Caron Beaton-Wells, 'The continual regulation of continuous disclosure: Information disclosure under the Competition and Consumer Amendment Bill (No1) 2011' (2011) 19 *Competition & Consumer LJ* 127.

Uncertainty:

- The key elements of 'disclosure', 'private disclosure' and 'accident' raised questions of interpretation the answers to which were not always clear.

- The 'ordinary course of business' carve out in s 44ZZW(c) was open to various possible interpretations none of which made sense as a matter of policy.[31]

The Harper Report found that the 'price signalling' provisions of Part IV, Division 1A were not fit for purpose.[32] The Report recommended repeal of those provisions and the extension of s 45 to prohibit a person engaging with one or more other persons in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition in a market.[33] Those recommendations were followed in 2017.[34]

Is there any alternative to the Australian price signalling legislation that would avoid the same terminal problems? Some satisfactory way might be found of prohibiting unilateral conduct by one competitor that is intended to or has the likely effect or coordinating market conduct by that competitor and another competitor. We have yet to see any such model.[35] It is beyond the scope of this submission to try to advance a commendable model.

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31 See Fisse and Beaton-Wells, 'Private disclosures of price-related information to a competitor "in the ordinary course of business"'.

32 *Competition Policy Review*, *Final Report*, March 2015, Recommendation 29.

33 *Competition Policy Review*, *Final Report*, March 2015, Recommendation 29.

34 Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth).

35 Contrast Beaton-Wells and Fisse, Australian Cartel Regulation, 56-57. In the US, antitrust law has not found reason to infer that a meeting provided an opportunity to conspire *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185 (3d Cir. 2017).

(d) Australia has yet to develop cogent ways of preventing anti-competitive algorithmic coordination by competitors

Algorithmic coordination of market conduct by competitors is likely to increase around the world, especially in the context of major platforms with global operations.[36] The harm caused or likely to be caused may be as significant as that from price fixing and other types of so-called 'naked' cartel conduct.[37]

At this stage in the development of algorithmic business processes and what is understood about their effects on competition, algorithmic coordination of market conduct is a potential threat. The extent and severity of the anticompetitive harm that could result, and the likelihood of that harm occurring, are the subject of emerging experience and research.

Cogent ways of preventing anti-competitive algorithmic coordination have yet to emerge in Australia. The proposed changes to competition law in Australia to introduce an *ex ante* regime for platforms does not even consider algorithmic coordination.[38]

We set out some observations below in brief.

- It is clear from the extensive literature on this subject that some forms of algorithmic coordination of market conduct by competitors will not involve an underlying contract, arrangement or understanding between competitors. For instance, the use of a common algorithm provider to 'optimise' pricing typically will not involve a contract, arrangement or understanding between those using the common service provider.

- Not all forms of algorithmic coordination of market conduct are likely to involve a concerted practice under EU or Australian competition law. For instance, in the use by competitors of agentic artificial intelligence from a

36 Fisse and Nicholls, 'Anti-Competitive Agreements between Competitors and Cartel Enforcement'.

37 Treasury, Digital platforms – a proposed new digital competition regime, 2 December 2024, at: https://treasury.gov.au/consultation/c2024-547447.

single model provider there would be a significant issue in determining that the conduct had been concerted, even if the outcome was anticompetitive.

- Precautions against the potential threat of algorithmic coordination of market conduct by competitors are advisable.[39] Two precautions are discussed below. The first is to try to ensure that the scope of liability under cartel-related prohibitions is adequate to cover the potential anticompetitive use of algorithms. The second is to recognise and address potential evidentiary obstacles to effective enforcement.

- **The first precaution** is to design new substantive cartel-related prohibitions capable of covering the ground. The most attractive proposal to date is a per se prohibition against proscribed types of algorithm, with each type each defined on the basis of demonstrated propensity to cause anticompetitive harm.[40]

- Alternatively, a prohibition against unfair trading practices would help to plug the gap in the present law in the short term. The Australian government has announced that it intends to enact a general prohibition against unfair trading practices[41] but legislation has yet to be published for comment. Depending on how the prohibition is drafted, it may apply to unfair methods of competition as well as to unfair practices relating to consumer protection.[42] If so, the prohibition of unfair trading practices could apply to

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39 Fisse and Nicholls, 'Anti-Competitive Agreements between Competitors and Cartel Enforcement'.

40 Joseph E Harrington, '"Developing Competition Law for Collusion by Autonomous Artificial Agents' (2018) 14 *Journal of Competition Law & Economics* 331. See also E Calvano et al, 'Algorithmic Pricing What Implications for Competition Policy?' (2019) 55 *Review of Industrial Organization* 155. On difficulties facing this approach see Michal Gal, 'Limiting Algorithmic Coordination' (2023) 38 *Berkeley Technology Law Journal* 173.

41 Media Release, 'Albanese Government to stop the rip offs from unfair trading practices', 16 October 2024, at: https://www.pm.gov.au/media/albanese-government-stop-rip-offs-unfair-trading-practicesl. See further Treasury, Consultation on Regulatory Impact Statement, *Protecting consumers from unfair trade practices*, November 2023; Treasury, *Unfair trading practices – supplementary consultation paper,* November 2024.

42 As is the position under s 5 of the Federal Trade Commission Act (US). See further GJ Werden, 'Unfair Methods of Competition under Section 5 of the FTC Act: What is the Intelligible Principle?' (2024) 85 *Antitrust Law Journal* 819. The efficient competitor test advocated by Werden may be too difficult to apply in practice. .

facilitating practices and algorithmic coordination of market conduct in cases where the conduct is 'unfair'.

- There is no escape from the hard work ahead of determining the kinds of algorithmic coordination that are likely to be anti-competitive and prohibiting or regulating such algorithms. That is a large, demanding and ongoing challenge.

- **The second precaution** flagged above is to overcome the evidentiary obstacles that stand in the way of effective enforcement.[43] Algorithmic market coordination is difficult to discover. Like the ACCC, the Commerce Commission may need to use regulatory technology to help unearth algorithmic collusion. That is much more easily said than done. Coordinating algorithms and their effects on competition also need to be understood.

- Section 155 of the Competition and Consumer Act 2010 (Cth) in its present form does not enable the ACCC to investigate algorithmic coordination in the proactive way that is essential for effective enforcement in this area.[44] The section needs to be amended to rectify those limitations.[45] Section 98 of the Commerce Act seems to raise similar concerns.

43 Fisse and Nicholls, 'Anti-Competitive Agreements between Competitors and Cartel Enforcement'.

44 See Nathan Feiglin, 'Algorithmic Collusion and Scrutiny: Examining the Role of the ACCC's Information Gathering Powers in the Digital Era' (2020) 43(4) UNSW Law Journal 1137.

45 Ibid.