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From: Matt Sumpter
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By email

TARGETED REVIEW OF THE COMMERCE ACT 1986 – MBIE CONSULTATION PAPER

ISSUE 11, QUESTION 30

Dear MBIE colleagues,

1 Thank you for your thoughtful discussion document.

2 My firm has submitted on issues 1 through 10. And we have contributed to a joint submission on issues 1 to 5 advanced by a group of competition law specialists. I would, though, like to put a couple of personal observations in the mix:

2.1 I think we should repeal ss7, 44(1)(c) and 44(1)(f) of the Commerce Act 1986 to expose employee and contractor restraints of trade to the same liability rules which govern other efforts to supress competition.

2.2 And I would like to see greater natural justice in the merger clearance process.

Restraints of trade

3 Restraints of trade are rife in New Zealand. They supress wages, productivity and efficiency.

4 In the **attached** article – *The Case for Competition in Labour Markets*[1] – I look at why restraints are bad and what we might do about it.

5 In sharing these thoughts I appreciate the Commerce Act amendments I advocate may be a step beyond your targeted review. But perhaps you might consider within the "any other issues" rubric?

Natural justice

6 The Commission's merger clearance process touches billions of dollars' worth of commerce. Many deals are cleared efficiently with Commission staff and counsel for the applicant and target working collaboratively to produce the information Commissioners need to be satisfied there won't be an SLC.

[1] [2023] New Zealand Law Review 213

7 But some matters get niggly for a range of reasons.

8 On the trickier cases I worry there is too little natural justice. The Commission is a quasi-judicial body. Yet merging parties never see the "key facts and documents" Commission staff give Commissioners during investigations where they "brief and advise the Division".[2] To ensure Commission decisions are principled, consistent and fair:

8.1 I feel Commission staff should, on request, share with at least counsel for the applicant the factual findings which form the basis for their recommendations to Commissioners. In a High Court proceeding, you always have what the other side say the facts are. Why should it be any different in high stakes M&A?

8.2 And I think an applicant should be given the option of a hearing before the Division responsible for the application at the SOI and/or SOUI phase. Imagine a High Court judge saying that the Court was prepared to receive written submissions on the substantive matter, but no oral hearing where those involved could test the evidence, expert analysis and legal issues.

9 I would be happy to elaborate on these observations if useful to you at any time. Again, I make these points in my personal capacity. There is nothing confidential in what I have to say. I wish you well for the process.

Kind regards,

Privacy of natural persons

Matt Sumpter
Partner

[2] Commerce Commission, *Mergers and Acquisition Guidelines*, May 2022, at [6.25].

The Case for Competition in Labour Markets

Matt Sumpter*

This article advocates banning employee restraints of trade by exposing labour markets to competition law. The author contends it would be good competition and labour policy to repeal the Commerce Act's employment law exceptions: ss 7, 44(1)(c) and 44(1)(f). Doing so should render employee and contractor restraints of trade illegal cartel provisions because they restrict output and stifle innovation to the detriment of consumers. The author argues that existing common law on restraints of trade is not fit for purpose. He observes that current law does not protect employers' proprietary interests nearly as well as intellectual property remedies; and that current law otherwise unfairly harms workers and their dependents.

I Competition in Labour Markets

A firm cannot agree with a rival business that it will restrict output, or that its customers are off-limits to the other. To do so would be cartel conduct. Body corporates would be liable for millions in fines. The individuals involved could face up to seven years in prison. But at the moment a firm can agree with an employee that he or she will not compete with it and will not target particular customers for a period after he or she leaves. How is that right? It's not; and the law must change.

We should repeal ss 7, 44(1)(c) and 44(1)(f) of the Commerce Act 1986 and expose employee and contractor restraints of trade to the same liability rules which govern other efforts to supress competition. For good measure, we should also extend the proposed ban on restraints in the Employment Relations (Restraint of Trade) Amendment Bill to all employees and

*Partner, Chapman Tripp. All views are my own.

contractors regardless of income. And then pass the Bill. These reforms would enhance productivity and efficiency while delivering a fairer outcome for workers. There is no valid reason to continue exempting the employment relationship from competition law and policy in this country.

In response, some might say that unrestrained employment markets will lead to higher wages. They might say that higher wages, as an input into the cost of production, will lead to higher prices, ironically contrary to the very consumer interests the Commerce Act is designed to serve.[1] But that would be sophistry. It would be to skip the developing consensus that competition law serves to increase output in markets.[2] All else being equal, higher output leads to lower prices. Higher output also requires more labour. In doing so it puts more people in work and sends a price signal which attracts foreigners into the country to fill roles and supress excess wage inflation. In the result, consumer, labour and social interests are aligned and served by releasing workers from the burden of restraints of trade. Employer welfare — represented by the clumsy common law phrase "legitimate proprietary interests requiring protection" — will continue to be met by reasonable contractual notice periods with the option of garden leave.

I elaborate below on why we have a problem and what we should do about it.

II What are Restraints of Trade?

Over time, employment lawyers acting for the owners of capital have created a range of boilerplate options for restraining the free movement of labour. The drafting is often laced with regrettably inaccessible legalese.[3] But generally speaking, the clauses fall into one of four camps:

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1 Commerce Act 1986, s 1A.

2 See, for example, Matt Sumpter "The Politics and Practice of New Zealand Competition Law" (2021) 66 Antitrust Bulletin 462; Herbert Hovenkamp *Competition Policy for Labour Markets* (University of Pennsylvania Law School, Research Paper No 19-29, 2 August 2019) at [2]; Herbert Hovenkamp "Is Antitrust's Consumer Welfare Principle Imperilled?" (2019) 45 J Corp L 65 at 66; Christine Wilson *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get* (United States of America Federal Trade Commission, February 2019) at 4–5; and Amit Zac "Competition Law and Economic Inequality: A Comparative Analysis of the US Model of Law" (2022) 25 J Intl Econ L 484 at 485–486.

3 See, for example, *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA) at [19]; *Asiaciti Trust New Zealand Ltd v Harris* [2013] NZEmpC 238, (2013) 11 NZELR 519 at [3]; *Air New Zealand v Kerr* [2013] NZEmpC 153, (2013) 11 NZELR 124 at [8]; *Mad Butcher Holdings Ltd v Standard 730 Ltd* [2019] NZHC 589 at [7] and [9]; *Transpacific*

- No competition: the employee can't start a rival business or go work for one for a set period across a defined area.[4]
- No poaching: in his or her new role, the employee can't invite any of the employer's other workers to join him or her at the rival firm.
- No solicitation: in his or her new role, the employee can't try and win any business from "the employer's customers or clients" for a set period.
- No dealing with customers: in his or her new role, the employee can't do any work for "the employer's customers or clients" for a set period.

Often employers will pack them all into the back-end of an employment contract with little, if any, assessment of whether they apply to the role or are valid at common law.[5] These clauses are invariably settled in circumstances where the employer is in a stronger negotiating position than the affected employee.[6]

In any event, the first two sorts of clauses involve what competition law would call output restrictions; they restrict labour from producing goods and services where doing so will, ceteris paribus, push up price. The second pair of clauses involve market allocation arrangements; they involve a firm agreeing with new workers of a rival business that certain customers or clients are off-limits, which then denies those consumers the price and service benefits that would otherwise flow from competition for their business during the restraint.

Restricting output and allocating markets is per se illegal under the Commerce Act. You can go to prison for it. Parliament decided that these arrangements are forms of price fixing which so obviously harm competition that it is a waste of time and resources hearing justifications for them at trial.[7] But in passing the Commerce Act, Parliament also decided to exclude employee and contractor restraints from potential competition law liability.[8]

That was a line call even back in the day. In the early 1990s the Government looked at scrapping the employment exceptions in a wide-ranging Commerce Act review.[9] The Ministry of Commerce concluded that:

Industries Group (NZ) Ltd v Harris [2013] NZEmpC 97, (2013) 10 NZELR 640 at [4]–[6]; and *O'Brien v Discovery NZ Ltd* [2022] NZERA 15 at [9].

4 When I refer to employees or workers in this article, I am also referring to independent contractors unless I say otherwise.

5 See Employment Relations (Restraint of Trade) Amendment Bill 2022 (172-1) (explanatory note).

6 *Medic Corp Ltd v Barrett* [1992] 3 ERNZ 523 (EmpC) at 533.

7 Matt Sumpter *New Zealand Competition Law and Policy* (CCH Wolters Kluwer, Auckland, 2010) at 130–134.

8 Commerce Act, s 44(1)(c) and (f).

9 Ministry of Commerce *Review of the Commerce Act 1986* (1992).

- s 44(1)(c) serves "no practical purpose";[10]
- Parliament included s 44(1)(c) "out of an abundance of caution in order to avoid any conflict with the restraint of trade doctrine";[11] and
- repealing s 44(1)(c) would allow third parties to challenge restraints under the Commerce Act.[12]

But in the end the National Government of the day felt that employment restraints of trade were better left for the common law and the then new Employment Contracts Act 1991.[13] Not the Commerce Act.[14] That decision left us worse off.

III Why do we have Restraints of Trade? How are they even Legal?

The starting point at common law is principled and clear: "The court will never uphold a covenant taken by an employer merely to protect himself [sic] from competition by a former employee."[15]

But from there the position gets murkier with certainty displaced by flexibility to assess matters on a case-by-case basis.

To that end the courts tend to say that restraints are prima facie invalid, but enforceable where they are no wider than reasonably necessary to protect "legitimate proprietary interests".[16] So what are those interests?

The answer begins with *Faccenda Chicken v Fowler* — a classic "master and servant" confidential information case from the early 1980s which is

10 At 32.

11 At 32.

12 At 33.

13 Letter from Bernard Woodhams (Secretary of Commerce) to Roger Kerr announcing the Government's decisions on the Review of the Commerce Act (4 March 1993).

14 Note that in addition to ss 44(1)(c) and 44(1)(f) of the Commerce Act, s 7 provides that: "Nothing in this Act limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of this Act."

15 *FSS Travel and Leisure Systems Ltd v Johnson* [1998] IRLR 382 (CA) at [29]. See too the classic statement to similar effect in *Stenhouse Australia Ltd v Phillips* [1974] 1 All ER 117 (PC) at 122.

16 *Brown v Brown* [1980] 1 NZLR 484 (CA) at 491; *Gallagher Group Ltd v Walley*, above n 3, at [20]; *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731 (CA) at [29]; *Credit Consultants Debit Services NZ Ltd v Wilson (No 3)* [2007] ERNZ 252 (CA) at [45]; *Transpacific Industries Group (NZ) Ltd v Harris*, above n 3, at [37]–[39]; *Asiaciti Trust New Zealand Ltd v Harris*, above n 3, at [33]; *Air New Zealand Ltd v Kerr*, above n 3, at [23]; and *Mad Butcher Holdings Ltd v Standard 730 Ltd*, above n 3, at [18].

still in use today.[17] The litigation involved the sale of fresh (dead) chickens from refrigerated vans to butchers, supermarkets and catering outfits in the English midlands. The market incumbent, Faccenda Chicken Ltd, sued nine of its former employees when they left to start a rival operation on the same route. Faccenda Chicken's allegation was that its former employees were breaching their duties of fidelity and confidence by taking and using its sales information in running their rival enterprise.

At first instance Goulding J described three categories of information which an employee may acquire during the course of employment:[18]

> First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor …
>
> Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master …
>
> Third, however, there are, to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.

For ease of access, we can think of these three *Faccenda Chicken* categories of information as:

- **Category one**: public information.
- **Category two**: confidential information which becomes part of the employee's know-how over the course of his or her employment and career.
- **Category three**: trade secrets.

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17 *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 (Ch); and *Faccenda Chicken Ltd v Fowler* [1986] 3 WLR 288 (CA) [*Faccenda* CA]. To my mind, the fact alone that this area of law was called "master and servant" until fairly recently suggests we should ditch the common law and expose labour markets to the same free-market rules which govern the rest of the economy.

18 At 731.

Goulding J held that an employer could protect confidential information and trade secrets (being categories two and three), but could only do so through a restraint of trade clause in an employment contract; not via the implied duty of fidelity or otherwise.[19] The Faccenda Chicken company had no such contractual arrangements in place with the gang-of-nine chicken vendors, so it lost the case.

The Court of Appeal approved Goulding J's three categories but held, instead, that a restraint of trade is only valid where it exists to protect category three trade secrets.[20]

From *Faccenda Chicken* onwards, courts in Australia[21] and New Zealand[22] have struggled with:

- where you draw the line between category two and three; and
- whether an employee's exposure to category two information can support a restraint of trade and, if so, in what circumstances.

New Zealand adopts a "we know it when we see it approach". Employment Court Judge Ford summarised the position diplomatically when he said:[23]

> In New Zealand it would appear from the authorities that in appropriate cases the courts are prepared to extend protection through a restrictive covenant [in other words a restraint of trade] to confidential information encompassed more within the second category of information in *Faccenda Chicken* rather than the third.

This flexibility leads to silly outcomes. In one recent Employment Tribunal decision, for example, the Member upheld a restraint of trade as necessary to protect an employer's "proprietary interests" like the departing journalist's

19 At 731.

20 *Faccenda* CA, above n 17, at 297.

21 See, for example: *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 (CA) at 329; *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172, (2007) 73 IPR 326 at [31]; *Europa International Pty Ltd v Child* [2016] NSWSC 923 at [123]; and *New Aim Pty Ltd v Leung* [2022] FCA 722 at [115]–[116].

22 See, among other cases: *Broadcasting Corp of New Zealand v Nielsen* (1988) 2 NZELC 96,040 (HC); *Allright v Canon New Zealand Ltd* (2008) 6 NZELR 367 (EmpC); *Warmington v AFFCO New Zealand Ltd* [2012] NZEmpC 19, [2012] ERNZ 1; *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR 1; *Transpacific Industries Group (NZ) Ltd v Harris*, above n 3; and *Air New Zealand v Kerr*, above n 3.

23 *Air New Zealand v Kerr*, above n 3, at [44].

knowledge of her colleague's salaries and her personal relationship with a research company which ran her previous employer's political polling.[24]

So where does this leave us?

Well at common law the courts will enforce a restraint of trade where it is "reasonable" to do so. The New Zealand courts decide whether the restraint is reasonable by asking:[25]

- Does the employer have a "legitimate proprietary interest" in material which the firm is entitled to protect? In practical terms, has the employee been exposed to category three, or maybe category two, *Faccenda Chicken* information in their former role which they might take with them?
- Does the duration, geographical reach, and scope of the restraint feel about right?
- Does the restraint restrict competition generally, or is it limited to non-solicitation?
- Does the restraint cast the net wide and far, or is it limited to a named competitor or reasonably restricted group of rivals?

In answering these questions in decided cases the courts have:

- Stopped a political journalist from leaving a TV station to join a talk-back radio show put to air by another company.[26]
- Stopped a barista leaving a café to make coffee instead at a cart 70 metres down the road.[27]
- Stopped a sales rep from leaving a brewery to start work at another one.[28]

These outcomes are outrageous. They supress opportunities and wages in labour markets to the detriment of real people and their dependents. They restrict output in associated product markets to the detriment of the economy at large. And against that reality, the real kicker is that restraints of trade do not even work — they do not achieve the outcome which is said to justify their existence. Let's walk that through.

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24 *O'Brien v Discovery NZ Ltd*, above n 3, at [47] and [49].

25 For a variation which generally tracks this list see, for example, *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42 (EmpC) at 53; and *Fire Security Services Ltd v Smith* ERA Auckland AA228A/03, 16 September 2003 at [7].

26 *O'Brien v Discovery NZ Ltd*, above n 3.

27 *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58, [2007] 2 NZLR 651.

28 *DB Breweries Ltd v Marshall* [1994] 1 ERNZ 98 (EmpC).

We have already canvassed the fact that common law principally justifies restraints of trade where necessary to protect trade secrets.[29] Trade secrets cover matters like chemical formulae, technical process details, and confidential pricing data.[30] But how does a three- or six-month restraint of trade actually protect that sort of material? An employee at, say, a biotech firm who is minded to pinch intellectual property (IP) will do so just as readily on day one as on day 91 or day 183. If the biotech firm believes, on evidence, that the employee has taken and is likely to be disclosing trade secrets to a rival firm, it can seek an interim injunction to protect its position.[31] Forcing the employee out of the workplace for a few months "just in case" will not change the employee's attitude to IP, nor will it stop infringement. Restraints of trade don't obviously protect category three information. And so, again, they do not achieve the outcome said to justify their existence.

On occasions, as we've noted already, the common law also justifies restraints of trade to protect category two information — confidential information which is short of a being a trade secret, but somehow more than know-how which is part of an employee's stock-in-trade.[32] This

29 *Faccenda* CA, above n 17, at 626.

30 WR Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (7th ed, Sweet & Maxwell, London, 2010) at [8–29]; Paul Sumpter *Intellectual Property Law: Principles in Practice* (3rd ed, Wolters Kluwer, Auckland, 2017) at ¶705; Rob Batty "Trade Secrets Under New Zealand Law" (2016) 22 Canta LR 235 at 237–241; and *Laser Alignment (NZ) 1984 Ltd v Scholz (t/a Laser and Instrumentation Services)* [1993] 2 ERNZ 250 (HC) at 259–260, where Hammond J suggested that a trade secret (i) is, or may be used in a trade or business; (ii) is not generally known in that trade or business; (iii) has economic value from not being generally known; and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. A very similar definition was subsequently adopted in s 230 of the Crimes Act 1961 — which criminalises taking or obtaining trade secrets with intent to obtain a pecuniary advantage or cause loss.

31 See, for example, *Coco v AN Clarke (Engineers) Ltd* [1969] RPC 41 (Ch); *Pilkington (New Zealand) Ltd v Hall* HC Auckland M1587/89, 6 December 1989; *Cheqer Systems Ltd v McIntyre* HC Auckland CP1423/90, 4 October 1990; and *Foot Science International Ltd v Xu* [2014] NZHC 645. It bears emphasis here that seeking an injunction to prevent apprehended misuse of confidential information should be no more inconvenient and costly to the plaintiff employer than suing to enforce a restraint. Moreover, an IP injunction will be a more effective option for an employer for at least two reasons. First, any IP injunction is likely to last longer than a restraint of trade and can be converted to permanent relief. Secondly, the plaintiff employer can extend the injunction to the new employer by either naming that entity in the proceeding on, for example, an accessory liability allegation, or by providing the new employer with sealed orders making it liable for contempt of court if it (the new employer) took any action inconsistent with the injunction.

32 See, for example, the cases cited above at notes 21 and 22.

sort of information might include, for instance, customer details: names; consumption patterns; decision-maker identities; budgets and the like. It is the sort of information which, while not a trade secret, might give an employee a head-start at his or her new role with a rival firm. And so some might argue a restraint is sometimes fair enough to allow an employer to take steps to shore up customers upon the departure of a key person.

But there are three things wrong with that idea.

First, even on existing case law, the further you move from a genuine trade secret like the recipe for Coke, the weaker the puny case for any restraint of trade becomes as it flirts with absurdity.[33] Secondly, the restraint will invariably run from the end of the employee's notice period, not concurrently with it. If an employer really wants to give itself space to ensure its customers remain loyal, the employer can do so by having the worker sit out his or her notice period on garden leave — which often happens.[34] Thirdly, piling a restraint on top of notice unfairly shifts the economic burden of an employer's suspicion or disorganisation onto the employee and his or her family. If an employer wants to buy itself time to plan for an employee's departure, the employer can and should literally have to buy that time off the employee through garden leave. So while restraints of trade might protect category two information on some occasions to some extent (unlike category three), they should be invalid for competition policy reasons.

Beyond protecting trade secrets and allegedly confidential information, I am mindful that some employers may moan that they have invested in their people and need restraints to ensure rivals cannot free-ride on the investment by poaching well-trained workers.[35] This justification for restraints is the weakest of them all. Employers who provide a desirable working environment tend to keep their staff. That is the market: offer attractive terms and opportunities and market forces will give you good people for a long time. Don't do that, and you will lose share as your performance in labour markets flows through to the product markets you compete in to sell your output. That is workable competition in action.

In the result, I see no justification for restraints of trade to justify the harm they do to markets, consumers and workers.

In saying that, I emphasise that the vast majority of the harm never sees the light of day. Most litigated cases only exist because the firm the employee is joining is paying the legal fees in a fight over whether the restraint is valid or not. The real evil with restraints is how thoughtlessly the owners of capital spray them across labour markets. Restraints stop sales reps,

33 For absurdity see, for example, *O'Brien v Discovery NZ Ltd*, above n 3; *Fuel Espresso Ltd v Hsieh*, above n 27; and *DB Breweries Ltd v Marshall*, above n 28.

34 See, for example, *Air New Zealand v Kerr*, above n 3, at [13]–[14].

35 *Fuel Espresso Ltd v Hsieh*, above n 27, at [21].

architects, patent attorneys,[36] hairdressers, sparkies and physios, among so many others, from jumping ship when they think they can get a better deal elsewhere. That is because restraints have a chilling effect. Very few people have the temperament and resources to take or defend legal action over a restraint while fighting to avoid a period-without-pay in their chosen occupation. By contrast, very many people will think there is at least a risk the restraint is valid or that the rival workplace won't wait for them to sit out the restraint period. So why move? Why even look at moving? Where this is the position — which I am sure it will be in New Zealand — restraints of trade supress wages. Why pay people more if, realistically, they cannot leave and go work down the street? The personal cost to individual workers is obvious. The wider economic cost arises from the fact that poorly paid people don't work as hard, so they produce less for the firms they work for. As output and innovation retreats, consumer prices rise under standard principles. Workers lose; consumers lose.

IV We Need to Change the Law

The restraint of trade malarkey must stop. To make it stop, we could repeal ss 7, 44(1)(c) and 44(1)(f) of the Commerce Act.[37] Doing so should:

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36 The Commerce Commission should have appreciated the pernicious effect of restraints of trade on entry and expansion in patent services markets when it investigated AJ Park's acquisition of rival firm Baldwins in 2020: *AJ Park IP Ltd, AJ Park Law Ltd and Baldwins Intellectual Property, Baldwin Holdings Ltd, Baldwins Intellectual Property Ltd and Baldwins Law Ltd* [2020] NZCC 17. But as is so often the case, the Commission decided to clear the merger at a high level leaving Commission staff to backfill the decision with written reasons written with no apparent appetite or incentive to amplify what was really the only tricky issue in the constraints analysis (at [95]–[96]).

37 I acknowledge that repealing s 44(1(f) could make unions and collective bargaining illegal as involving price fixing between employees otherwise actually or potentially in competition with one another in the labour market at issue. I take no view on unionism in this article. But I observe that if, for public policy reasons, we wish to preserve the status quo we could readily do so by amending pt 5 of the Employment Relations Act 2000 to record that collective bargaining, and any other activity approved or regulated by that Act, is exempt from the Commerce Act 1986. There are many Acts with comparable Commerce Act exceptions. See, for example: Airport Authority Act 1966; Civil Aviation Act 1990; Electricity Industry Act 2010; Port Industry Board Act 1977; Meat Board Act 2004; Education (Tertiary Reform) Amendment Act 2002; Fisheries Act 1996; Human Tissue Act 2008; Accident Compensation Act 2001; and the New Zealand Health and Disabilities Act 2000 among other legislation. I note further that repealing the ss 44(1)(c) and (f) exceptions is consistent with the Government's recent repeal of the Commerce Act's s 45 exception in relation to IP rights: Commerce Amendment Act 2022 which was ushered through with full support from the Commerce Commission.

- make restraints of trade "cartel provisions" and thus per se illegal under s 30 and unenforceable under s 30C of the Commerce Act;[38] and
- expose firms who make widespread use of restraints of trade to liability under ss 27 or 36 of the Commerce Act for substantially lessening competition in affected markets — and what "people and culture" manager would want that on their plate?

Any firm genuinely believing its restraints of trade are innocent, efficient provisions could always seek Commerce Commission approval for the proposed regime under pt 5 of the Commerce Act. Firms without such confidence should focus instead on agreeing fair notice periods and being prepared to pay their people to sit it out before they join a rival outfit if they think it is valuable for their shareholders to do so.

38 At the point the employee leaves, the employer and employee should, on a purposive interpretation, be actually or potentially in competition with one another for ss 30A(3) and 30A(4) purposes. That said, I can see room for argument the other way in certain cases. An employer may say: (i) it only competes on the buy-side of labour markets; (ii) the employee does not compete in the employer's product market(s); (iii) the employee only supplies his or her labour to another firm who does; and so (iv) restraints are beyond the Commerce Act's cartel provisions regime. The argument wouldn't be available where the employee was quitting to establish a business, as principal, in competition with his or her former firm. But leaving that aside and reacting to the possible "not in actual or potential competition" argument, I feel allowing such a thread-the-needle approach would run contrary to rules designed to prevent firms from restricting output and allocating markets to the detriment of consumers. To hedge the risk, as I said at the outset, Parliament should extend the Employment Relations (Restraint of Trade) Amendment Bill to cover all restraints in employment and analogous contractor relationships. And then pass the Bill as being good employment and competition policy.