BELL GULLY

Bell Gully submission on MED Cartel Criminalisation – Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill

1. Thank you for the opportunity to make submissions on the Ministry's "Cartel Criminalisation – Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill" (the **Draft Bill**).

2. Bell Gully is a leading competition law practice, advising major New Zealand and overseas companies on all aspects of competition law. Our competition law team has acted for companies and individuals involved in most of the Commerce Commission's (the **Commission**) major cartel investigations. We welcome the opportunity to make submissions on the Draft Bill and related issues. We would be very happy to discuss our views further with the Ministry. Please feel free to contact any one of us:

Phil Taylor	Simon Ladd	Torrin Crowther	Jenny Stevens	David Blacktop
Partner	Partner	Partner	Partner	Senior Associate
09 916 8940	09 916 8934	09 916 8621	04 915 6849	04 915 6531

3. In this submission we comment on:

   (a) whether the case for criminalisation of cartel conduct has yet been made out;

   (b) the overall approach adopted in the Draft Bill to criminalisation and some specific aspects of the drafting of those provisions; and

   (c) other matters incorporated into the Draft Bill not directly related to criminalisation.

Should criminalisation be introduced?

4. In our view, the case for criminalisation is still to be made out. Our understanding is that the arguments in favour of criminalisation focus on:

   (a) increased deterrence and detection of cartels, because there are economic benefits that would flow from that;

   (b) harmonisation of business laws with Australia under the Single Economic Market Outcomes Framework, because that should reduce the compliance burden for businesses operating in both countries; and

   (c) improved international co-operation with regulatory agencies in other countries, because that should enhance the effectiveness of the Commission (with economic benefits flowing from that).

5. Deterrence, harmonisation, and international co-operation are not ends in themselves. Their value follows from their economic consequences.

6. When considering the arguments in favour of criminalisation, the focus must be on the incremental benefits because New Zealand already has a civil regime prohibiting cartel conduct.

7. We consider that the incremental benefits from criminalisation are likely to be very small and outweighed by increased costs. In particular, we note the following points.

Benefits

8. It is clear from experiences in other countries that there would be an extremely small number of prosecutions.

(a) In Australia, there have been no prosecutions since July 2009. In the United Kingdom, there have been only two prosecutions since criminalisation under the Enterprise Act 2002. In the United States, where criminal sanctions have existed since the introduction of federal antitrust laws in 1890, the number of prosecutions is nevertheless very small (60 filed in FY2010) given the US population (approximately 300 million) and size of economy (GDP of US$14 trillion).[1]

(b) Currently, under the existing New Zealand civil regime, only a small number of proceedings for cartel conduct are brought by the Commission (the Commission's 2009-2010 Annual Report records a handful of ongoing coordinated behaviour proceedings but no new proceedings filed in that year).

(c) The considerably higher standard of proof for a criminal offence, making it harder to prove the offence, will limit the number of cases brought.

(d) If existing experience of timeframes for investigations (usually around 3 years) and proceedings (upwards of 3 years to reach trial) are a guide, it will be difficult for the Commission to comply with section 25(b) of the New Zealand Bill of Rights Act 1990, the right to trial without undue delay. Those timeframes will be difficult to reduce given the complexity of competition matters and the nature of cartel conduct. This factor is also likely to limit the number of prosecutions that could be brought.

(e) The increased investigation and prosecution costs resulting from the higher standard of proof will limit the number of cases brought.

9. In our view, considering international experience in larger economies, there is likely to be on average less than one prosecution a year in New Zealand.

10. In the absence of actual prosecutions, any increase in deterrence will only be minimal – that is, if the threat of criminal prosecution is seen to be illusory or an empty threat there is no real additional deterrence. Dr Andreas Stephan of the ESCR Centre for Competition Policy & Norwich Law School, University of East Anglia, notes "The lack of prosecutions means that the UK cartel offence can only have a very limited deterrent effect".[2]

11. Moreover, in the case of international cartels that operate in New Zealand, criminalisation in New Zealand is unlikely to add any significant incentive to the existing incentives faced by those cartels as a result of the sanctions they face in other jurisdictions (i.e., where the size of their business, and therefore the likely fines/penalties faced, are larger).

12. In relation to harmonisation, although criminalisation would result in businesses facing the same consequences in New Zealand and Australia (consistent with the SEM Framework), the different thresholds for liability under the Draft Bill and the Competition and Consumer Act 2010 mean there would be no reduction in the compliance burden from criminalisation.

13. In relation to improved international co-operation:

(a) Our experience is that overseas regulators are reluctant to share confidential information obtained in parallel investigations because sharing such information negatively affects future co-operation (including leniency applications) from businesses and individuals in their home jurisdiction. For example, we are aware that the

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1 Although criminal sanctions in the United States clearly operate as a deterrent, because the United States has always had criminal sanctions, it is not able not shed light directly on the comparison under consideration here, i.e., the incremental benefits and costs of a move from a civil regime to a criminal regime. Rhetorically, if the same level of penalties and damages were imposed on businesses and individuals in the United States but without additional criminal sanction, would there be any material difference in deterrence?

2 "The UK cartel Offence: Lame Duck or Black Mamba?", CCP Working Paper 08-19, page 20.

European Commission has refused to permit information obtained by it to be disclosed to other regulators.

(b) Irrespective of co-operation agreements between regulators, New Zealand law prohibits the disclosure of confidential information obtained by a public body except for the purpose and to the extent necessary for the performance of its public duties (*Vodafone New Zealand Limited v Commerce Commission*, unreported, High Court, Wellington, 12 October 2005, Ronald Young J and *The Stepping Stones Nursery Limited v Attorney-General* [2002] 3 NZLR 414).

As a consequence, although criminalisation would enable use of "Mutual Assistance in Criminal Matters Act" type regimes (provided the necessary reciprocity exists) to serve documents overseas and to obtain evidence, substantive information sharing about cartels by regulators is unlikely to be materially enhanced in reality.

Costs

14. In contrast to the incremental benefits of criminalisation, the incremental costs are likely to be considerably more substantial.

(a) As a starting point for considering the scale of the costs involved we note that the Commission's litigation fund (presumably separate from its investigation budget) is upwards of $8.5 million. Similarly, participants in major (therefore of a kind more likely to face criminal sanction) Commission investigations and proceedings already face costs measured in millions of dollars. That does not include costs in terms of management time and opportunity cost.

(b) From the Commission's perspective, it will be necessary to commence all investigations as criminal investigations. That necessarily entails use of greater resources and greater costs to ensure that, if necessary, the criminal standard of proof can be met. The need to ensure that defendants' rights under section 25(b) of the NZBORA are met will also place additional pressure on Commission resourcing and increase costs.

(c) Correspondingly, businesses and individuals will incur greater costs in complying with the Commission's increased investigative requirements.

(d) Businesses and individuals are likely to be more reluctant to co-operate with the Commission where doing so increases their exposure to criminal prosecution, with cost consequences for Commission investigations.

(e) The costs to the Commission of conducting proceedings, which are already substantial under the existing civil regime, are likely to increase still further in order to meet the criminal standard of proof and procedural requirements.

(f) Businesses and individuals can also be expected to go to greater lengths, and therefore to spend more, defending such proceedings.

15. Considering benefits and costs together, we consider it is clear that there is no strong case for a move to criminalisation based on net economic consequences. Indeed, it appears to us that the net economic consequences in the short and medium term are likely negative. In the long term, positive net economic consequences would depend on a shift in public opinion.[3]

[3] Inevitably, there is a "chicken and egg" situation – the success of criminalisation depends on public support but criminalisation if successful would assist to enhance public support.

Public opinion

16. Although not going directly to benefits or costs, we note two recent surveys regarding public support for cartel criminalisation. A March 2007 survey conducted by YouGov Plc in Britain sampled 1,219 residents aged 18 or over. Nearly three quarters of respondents (73 percent) recognised that price-fixing was harmful but only 11 percent of those believed imprisonment was an appropriate punishment.[4] More recently, the "Cartel Project" lead by Professor Beaton-Wells of the University of Melbourne, surveyed 1,334 respondents regarding cartel criminalisation in Australia.[5] The report's conclusions included:

> However, less than a majority support the view that cartel conduct should be a criminal offence and less than a quarter support the view that individuals should be jailed for it. There are few associations between views on whether cartel conduct should be a criminal offence or conduct for which individuals are jailed and demographic attributes such as age, education, work status and political affiliation. However, men are less lenient in their views than women in that they are more likely to consider that cartel conduct should be a crime and that individuals should go to jail for it.

17. These views, assuming they apply equally in New Zealand, are an obviously relevant consideration because legislative change (i.e., criminalisation) does not occur in a vacuum. Social acceptance of that change, and therefore support for the enforcement regime, depends on public awareness and understanding.

18. In addition to the matters set out above we also reiterate many of the comments we made at paragraphs 9 – 23 of our 9 April 2010 submission, which was made in response to the Ministry's initial cartel criminalisation discussion document (the **earlier Bell Gully submission**).

Drafting of the cartel offence

19. Assuming there is a policy decision to proceed with criminalisation then our view is that the approach adopted in the Draft Bill is, overall, sensible and reasonably addresses and balances the sometimes competing considerations that arise. In particular, the Ministry appears to have taken on board earlier concerns expressed about the potential for deterring pro-competitive activity. We support the combination of the collaborative activity exemption and the proposed clearance regime to address this concern.

20. We have two main substantive suggested additions to the proposed drafting of this part of the Draft Bill and other comments on the detail.

Maximum RPM exemption

21. We consider the Draft Bill should introduce an exemption for the imposition of a maximum resale price by suppliers which are also "in competition" with the customer to which that maximum relates.

22. Maximum RPM provisions are not uncommon in vertical supply arrangements to drive volume, ensure cost savings are passed on to consumers, and promote inter-brand competition. Vertically integrated clients are often surprised and frustrated when advised under the current regime that such provisions are likely to amount to price fixing.

23. The ease with which firms can use the internet as a means to compete across wider geographic areas has further heightened the issue because it means suppliers can quite easily find themselves a nationwide competitor of the downstream customer in question.

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4 Stephan, supra at note 2, pages 17-18.

5 The report is at http://cartel.law.unimelb.edu.au/go/project-news/project-survey.

24. We have concerns that a simple supply arrangement may not sit within the definition of 'collaborative activity', having regard to the requirements that:

    (a) the provision is **reasonably necessary** for the purpose of the collaborative activity; and

    (b) it is an activity etc in trade carried on in **co-operation** by two or more persons.

25. In light of this, we believe that, absent a specific exemption, the current uncertainty will persist, with the result being that New Zealand consumers will be denied the benefits of lower prices, either because:

    (a) suppliers choose not to include maximum resale prices in supply agreements; or

    (b) suppliers choose not to compete for end customers.

26. Maximum RPM provisions are already protected in the Australian legislation from the ambit of their cartel prohibitions by virtue of the anti-overlap provision contained in Section 44ZZRR(1)(c). This is a good starting point for the drafting of a new New Zealand exemption. Picking up on the Australian wording, an exemption could read:

> **Exemption for maximum resale price maintenance**
>
> A person does not contravene **section 30(1)** if the person enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or gives effect to a cartel provision in a contract, arrangement, or understanding, if that cartel provision;
>
> (a) relates to conduct that would contravene section 37 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply; and
>
> (b) **[**if considered necessary**]** is not entered into, or given effect to, for the *dominant purpose of lessening competition.*

27. A new exemption for maximum RPM provisions will provide protection for suppliers to enter into consumer welfare enhancing conduct, and the overall objective of the Draft Bill to deter cartel conduct will be preserved.

Trade associations recommendations

28. We have serious reservations about the exclusion of the existing section 32 exemption for recommendations made by certain associations from the Draft Bill. The concern principally arises due to the presence of section 2(8)(b), which provides that:

> ... any recommendation made by an association shall... be deemed to be an arrangement made between those members or the members of that class and between the association or body of persons and those members or the members of that class.

29. While in Australia the equivalent provision to the section 32 exemption has been repealed, we understand there is no equivalent to s 2(8)(b) in Australia.

30. In New Zealand, trade and professional associations commonly make a range of statements that could be arguably classed as "recommendations" in relation to price, capacity, etc to their members. (Indeed, in the aftermath of the Christchurch Earthquake the Insurance Council has exactly this sort of role in dealing with CERA and industry wide issues.)

31. Take, for example, a trade association that sends a delegation to a key export market in order to promote New Zealand made goods. During that trip, the delegation discovers that

demand in that export market is actually lower than forecast. On its return, the association makes a statement that members should factor that new information into their upcoming production or capacity decisions. It is not at all clear that this would not amount to a recommendation (and hence a deemed agreement among competitors) which has a purpose of restricting output.

32. The existing section 32 exemption renders section 30 inapplicable to such recommendations (but not section 27), provided those recommendations are genuine and made to associations with not less than 50 persons supplying, etc in trade. This is to allow a trade association to undertake the legitimate activity described above without unduly exposing the association and its members to liability.

33. Under the current wording (which we believe should be retained), there are a number of protections which ensure that only competitively benign recommendations are protected:

    (a) the 50 'member' requirement substantially reduces the prospect that there will be an actual market impact on price, etc. That is, across 50 members there is likely to be a sufficient number of members with different cost models, incentives, etc to ensure that there is not widespread adoption of any recommendation;

    (b) it must be a true recommendation – with no compulsion, etc that members adopt the recommendation; and

    (c) in any event, all recommendations remain exposed to section 27.

Other matters

34. As noted above, overall, we are supportive of the design approach that has been adopted in the Draft Bill and, in particular, we support:

    (a) having a "conduct over outcome" approach to the key section 30 prohibition which should provide greater certainty over when the section will apply;

    (b) having a collaborative activity exemption that will be much more understandable and easier to apply than the current joint venture exemption; and

    (c) providing for a clearance regime for section 30 arrangements, which will provide a useful avenue for parties to obtain certainty in difficult cases.

35. We had the following further comments on some of the specific matters set out in Draft Bill and/or in the Explanatory Material accompanying the Draft Bill (the **Explanatory Material**).

    (a) **Parallel civil and criminal regimes:** We support having a parallel regime with the proposed section 30 test being the same for both civil and criminal liability (with the exception of the knowledge required for criminal liability as set out in the proposed section 82B). In our view having one test reduces compliance costs, increases the prospect of businesses and their employees understanding the test, makes enforcement easier and will assist it achieve the "bright line" policy goal set out in paragraph 14 of the Explanatory Material.

    (b) **That the test is one of "purpose" only:** We support the proposal that the relevant section 30 test (under both the civil and criminal regimes) be whether the relevant provision has the specified "purpose" and support the decision not to extend this to the provision having the "effect or likely effect". The question of what the "effect or likely effect" of particular conduct may be can be difficult and frequently requires economic input. Again, in our view, limiting the test to purpose only creates greater certainty as to the scope of the prohibition and will assist in achieving the Ministry's stated policy goals of creating a bright line between legal and illegal conduct.

(c) **Reverse onus:** We have concerns about the proposal to reverse the onus on defendants to prove (on the balance of probabilities) that an exemption applies. This is not the usual approach in criminal law matters where the onus in relation to all matters generally falls to the Crown and it runs a serious risk of challenge as being in breach of the presumption of innocence.

Paragraph 65 of the Explanatory Material suggests this departure may be justified as the relevant business arrangements will be within the peculiar business knowledge of the defendant. However, the Commission will retain its significant section 98 powers in relation to its investigations and the Commission has the full resources of the State available to it in prosecuting offences. In these circumstances we consider any "imbalance" of knowledge is more perceived than real and is no justification for removing a key constitutional protection of the rights of individuals.

(d) **The prosecutorial decision:** Paragraph 20 of the Explanatory Material describes that the Commission is likely to lay informations in relation to any criminal prosecution with cases then being referred to a member of a specialist prosecution panel. We remain of the view that an independent prosecution decision following an investigation by the Commission would be the most preferable mechanism. This is a matter discussed in paragraphs 42 – 48 of the earlier Bell Gully submission and we refer to the matters discussed there as to why there should be a separation between investigator and prosecutor. In our view, prosecution decisions should be made (or at the very least reviewed) by a member of the panel appointed by the Solicitor-General, rather than by the Commission alone. These are complex and costly matters. In context, having the review of an independent person (who presumably would not then prosecute the matter) is a sensible check and no different to the pre-prosecution review carried out by Crown Solicitors following Police investigations.

(e) **The need for guidelines:** Paragraph 17 of the Explanatory Material describes that there would be guidelines published by the Commission to give greater clarity on the circumstances where the Commission would pursue criminal prosecutions. In our view, it is imperative that such guidelines be produced (including in consultation with the public) so that the public has comfort as to how this law will be enforced. We understand the Ministry's intention is for this to be dealt with by way of a Cabinet direction to the Commission should the Draft Bill be taken forward and we would support that.

It would also be desirable for the Commission to produce guidelines as to how it is likely to interpret and approach some of the key concepts contained in the proposed Draft Bill including, importantly, what it contemplates falling with the "reasonably necessary" test in the collaborative activities exemption. While some may consider that such guidance would be better produced after the Commission has had some experience of dealing with these issues through the clearance process (and, possibly, following some judicial guidance), in our view, early guidance may encourage clearances to be applied for and thus further develop the approach in this area. It would also provide business with greater certainty in proceeding with pro-competitive activities. The Commission could approach the publication of guidelines in a similar way to how it has in its Credit Contracts and Consumer Finance Act jurisdiction. There, for example, it has produced draft guidelines on consumer credit fees with an express intention of further developing the guidelines in light of further guidance on the issues being provided by the Courts. Again, we would support a Cabinet direction that the Commission produce such guidelines.

(f) **40 working day timeframe for clearance:** The proposed section 65A(4) proposes that the Commission would have 40 days to grant clearance (or else it is deemed declined). (We note that draft section 65A(4) refers only to "days" and not "working days". We have assumed the intention is, in fact, to provide for working days.) In our view, it would be preferable if the statutorily enshrined timeframe was 30 working days. 40 working days is 8 weeks, and lengthy clearance processes will discourage business from using the regime. 30 working days should be sufficient in most cases for the Commission and, where it is not, extensions of time can still be granted. Our concern

with a longer period is the risk that it will become the "default" timeframe. We note that the average clearance time for merger and acquisitions clearances completed by the Commission in 2010 (excluding applications where an extension was specifically sought by the applicant) was 30.7 days.

Comments on other matters contained in the Draft Bill

Draft sections 47A – 47D

36. We have serious reservations about the efficacy and effectiveness of the new sections 47A to 47D.

37. As we understand it, the policy objective of these sections is to encourage overseas companies to submit to the jurisdiction of the Commerce Act by applying for clearances of global transactions involving subsidiaries operating in New Zealand markets. In turn this objective appears to be driven by uncertainty about the jurisdictional scope of section 4(3), at least insofar as remedies are concerned, and hence a concern that New Zealand courts would have limited ability to impose remedies should an overseas acquirer breach section 47.

38. While we acknowledge there is uncertainty about the scope of section 4(3) and the availability for remedies for overseas transactions, we are not aware of any situation where this has raised real issues. Numerous global mergers involving New Zealand subsidiaries of overseas persons occur every year – if the theoretical concern was a practical and substantive concern, we would have expected it to have arisen by now.

39. If anything, in a practical sense, any uncertainty is likely to advantage New Zealand. Overseas acquirers are cognisant of their obligations in respect of antitrust compliance around the world, including in New Zealand. The last thing these acquirers want is for issues in New Zealand to hold up a global transaction. It is these practical deal issues (the need to avoid the tail wagging the dog) which drive overseas acquirers to make clearance applications or otherwise provide information about global mergers to the Commission. The risk in taking an aggressive jurisdictional point in a small market like New Zealand is not justified given the potential for disruption and delay – simply put, it's not worth it.

40. It is for all these reasons that we do not see a pressing need for provisions along the lines of sections 47A to 47D.

41. In any event, and putting aside the question of whether these provisions are needed at all, it does not seem that sections 47A to 47D in their present form would really assist in achieving the policy objective; in fact, we think the position is quite likely to be the reverse.

42. Section 47B for example contemplates the High Court ordering a New Zealand subsidiary of an overseas person to cease trading if its overseas "owner" has been declared to have engaged in a transaction that breaches section 47. It is wholly unclear what purpose this remedy serves.

43. Take the following example:

    (a) Suppose overseas company A has a NZ subsidiary B, while overseas company X has a NZ subsidiary Y. B and Y are the only competitors in the relevant NZ market.

    (b) A buys X with the result that A gains a controlling interest over Y, i.e., the only two competitors are now subsidiaries of A.

    (c) The Commission applies to the Court for a declaration that A's acquisition of a controlling interest in Y results in a substantial lessening of competition in NZ. The Court makes such an order.

(d) The proposed section 47B then requires Y (or B) to cease carrying on business in NZ.

44. In that scenario, Y may simply and in effect become consolidated with B, the original NZ subsidiary. Hence, the result is that the proposed section 47B does nothing more than simply accelerate the consolidation that is likely to happen in any event as a result of the acquisition.

45. Another example maybe a situation where overseas company A is an offshore manufacturer but has no presence in New Zealand. NZ independent distributors bring A's products into NZ to compete against a local manufacturer, B, which is partly owned by an overseas person. Suppose A buys 51% of B off overseas interests. On a manufacturing basis, A has 90% market share under its "control". The Commission uses sections 47A and 47B to obtain an order the result of which B must cease operating in NZ. A would, presumably, be very pleased with such an outcome – it would certainly not seek a clearance for its 51% shareholding in B.

46. What these examples illustrate is that it is unclear what behavioural changes the proposals will actually engender:

(a) Under the proposed regime, if an overseas company seeks clearance and the Commission declines clearance, the overseas company may still decide to proceed with the transaction in any event subject to sections 47A to 47D. If the Commission obtains a remedy, as per the example above, nothing really happens.

(b) Conversely, the overseas company could simply not to seek clearance and face the same risk of a finding under sections 47A to 47D. Again, the practical impact of any remedy is negligible.

47. Accordingly, overseas acquirers might very well ask: why seek a clearance? Far from driving clearances, they may well discourage them.

Repeal of section 29

48. The Explanatory Material (paragraphs 44 and 45) notes that some consideration has been given to whether section 29 should be repealed. We consider it should be. Any conduct that falls within section 29 would also fall within section 27 and, as is noted by the Ministry, some conduct will also now also be caught by section 30. In our view, section 29 serves no useful ongoing purpose and should be repealed.

Lay members of the High Court

49. We are concerned at the suggestion that lay members would no longer be available for either civil or criminal proceedings. In our experience, competition matters are often heard by Judges who do not have competition or economic experience and both the Court and the parties benefit from the presence of the lay member. We do not consider that the role of the lay member, as the Explanatory Material suggests, is to determine questions of fact; the role of the lay member is to provide expert assistance to the Court on economic issues. That role remains valid under the Draft Bill (particularly in relation to issues of whether parties are in competition with each other or as to the application of the collaborative activity exemption) and should be retained.

Proposed section 103 amendments

50. Clause 25 of the Draft Bill proposes to dramatically increase the penalties for offences under section 103. There is no discussion in the Explanatory Material as to the reasons why this is now being proposed. It has not been made clear as to what concern or harm the proposed increase in penalty is seeking to address.

51. In our view this is a significant change that is not justified. In our experience, it is frequently the case that a section 98 notice will raise difficult and complex issues as to its validity and

scope. The threat of imprisonment for an individual (or a large fine for a corporate) who "gets it wrong" in responding to such a notice is a disproportionate and unnecessary threat.

52. It is our experience that such notices are already considered with appropriate seriousness and diligently dealt with and replied to by businesses, which are well aware of the existing criminal sanctions. Indeed, in relation to one of the prosecutions under section 103, the company concerned came forward to the Commission despite the fact that doing so exposed it to prosecution. Given this, in our view, the existing threat of criminal penalty should such notices not be complied with is working and there is no issue here that needs addressing.

40 working days for clearance for business acquisitions

53. Clause 13 of the Draft Bill proposes to amend the time for giving clearance for business acquisitions under section 47 from 10 working days to 40. For the reasons set out above in relation to the clearance regime for section 30, we consider a better starting point would be to provide clearance within 30 working days.

Final comment

54. Finally, even if a policy decision were taken not to proceed with criminalisation of cartel conduct, in our view, a number of the changes proposed in the Draft Bill are very positive developments which would improve the Commerce Act and its application. In particular, the core changes proposed to section 30, the collaborative exemption and the clearance regime would all enhance the current civil regime. We would encourage the Ministry to seek a policy outcome that these changes be made even if criminalisation does not proceed.

Bell Gully
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