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Submission on criminalisation of hard-core cartel conduct

I am an Australian solicitor with more than 30 years' experience in Australia of advising clients (including the former Trade Practices Commission) on the application of the Australian *Trade Practices Act* 1974 ("**TPA**").

This submission is made in my personal capacity and sets out my views, which are not necessarily shared by any current or former clients or by the law firms or other professional bodies with which I am associated.[1]

I submit that New Zealand should not copy Australia's legislation which criminalised cartel conduct because the Australian provisions are unsatisfactory in a number of respects.

Harmonisation of trans-Tasman laws does not require New Zealand to repeat mistakes made in Australia. New Zealand has the opportunity of achieving a much better targeted and more refined piece of legislation which, hopefully over time, Australia might follow.

New Zealand has commenced a course of inquiry and consultation which should allow it to produce a principled and effective set of provisions.

I respectfully submit that New Zealand should commence by reviewing the scope of its civil contraventions. If it is considered, for example, appropriate to expand those contraventions to cover additional forms of market sharing, output or capacity constraints and bid rigging, those amendments should be drafted with appropriately considered modifications of existing provisions.

New Zealand should then consider any proposed criminal offences. These should be a sub-set of the civil contraventions in terms of the conduct that is to be the subject of the criminal offences. This would not preclude the addition of an element such as "knowledge" if considered appropriate.

Importantly, New Zealand should also include a limitation, so that the criminal offences are limited to conduct that is likely to be "hard-core" cartel conduct and, for example, do not cover all price fixing regardless of how minor it might be. Such a limitation is admittedly difficult to draft and may need to be an arbitrary cut-off, such as a minimum value of the trade or commerce affected by the conduct or proposed conduct, with the value being sufficiently large that it is likely only to apply to "hard-core" cartel conduct. A limitation based on a factor such as the percentage of the market affected, or total

[1] I am currently a Consultant with the law firms, Mallesons Stephen Jaques and Addisons. I am also a member (and a former chairman) of the Trade Practices Committee of the Business Law Section of the Law Council of Australia.

market shares of the parties to the conduct, may be preferable from a theoretical perspective, but would be impractical due to the scope for arguments as to the relevant market definition and the calculation of market shares or percentages.

If New Zealand were to adopt the above approach, it should avoid the worst of the Australian mistakes. Moreover, it should produce a refined and well-integrated set of laws that prohibit all relevant restrictive trade practices on a civil basis and effectively a sub-set of those on a criminal basis.

In particular, New Zealand should avoid the following Australian mistakes.

(a) **Inappropriate overreach** - The Australian provisions go beyond "hard-core" cartel conduct by criminalising all price-fixing as well as a range of other cartel conduct such as market sharing, output restrictions and bid-rigging, some of which was not previously prohibited on a civil basis.

The overreach has at least two aspects. First, there is no statutory limitation based upon the significance or seriousness of the contravention. Second, some of the provisions appear to cover commercial dealings which should be lawful.

Example 1

If Competitor A offers to supply products to Competitor B in the knowledge that Competitor B is facing a "build or buy" decision, would the contract of supply have a purpose *"of directly or indirectly…restricting or limiting the production, or likely production, of goods by any…of the parties…or the capacity, or likely capacity, of any…of the parties to supply services"*? (See s.44ZZRD(3)(a) of the TPA.)

Example 2

If a supplier bids for a contract and also agrees to supply (as a sub-contractor) an input to a second bidder if that bidder is successful in winning the contact, is *"a material component of at least one of those bids…worked out in accordance with"* the sub-contract? (See s.44ZZRD(3)(c)(v) of the TPA.)

It is unsatisfactory for criminal legislation to be drafted in overly broad terms and for the overreach to be dealt with administratively as a matter of prosecutorial discretion exercised by the Australian Competition and Consumer Commission and the Commonwealth Director of Public Prosecutions.

(b) **Unnecessary duplication** - Although duplication between criminal offences and civil contraventions may be appropriate, Australia also has potential duplication between the new cartel contraventions and the pre-existing civil contraventions. For example, Australia repealed the pre-existing prohibitions on price fixing, but retained the pre-existing prohibition on exclusionary provisions even though that prohibition appears to be duplicated by the new civil cartel contraventions.

(c) **Unnecessary special definitions and deeming provisions** - Australia inexplicably has incorporated some special definitions for the purposes of the new cartel provisions (see section 44ZZRB). Terms such as "likely", which continue to appear in the balance of the TPA, are given special definitions. If there is a benefit from those definitions (which is hard to discern), then that benefit should be extended at least across all of Part IV of the TPA. Indeed, terms should be used consistently throughout the TPA.

Australia also deemed that related bodies corporate are to be regarded as a party to any cartel conduct, but only in relation to the new cartel contraventions (see section 44ZZRC). This

appears to add an unnecessary complication in identifying the parties to a cartel agreement and may be an unnecessary complication in the enforcement of the cartel provisions. It may also lead to perverse outcomes.

Example 3

Where two related companies are competitors, a contract between one of them and a third party may be a cartel provision even where the third party is not a competitor because the other related company is to be regarded as a party.

(d) **Joint venture exception** - The Australian joint venture exception is problematic both in policy terms and in practical application. It results in the curious position that in those cases where the joint venture exception is applicable, any price fixing is taken outside of both the criminal and civil cartel provisions and would only be unlawful if it had the purpose or likely effect of substantially lessening competition under the pre-existing general catch-all provision of section 45.

In one sense, the breadth of the joint venture exception leaves a large hole in the application of the new cartel provisions to "hard-core" cartel conduct. On a practical level, however, the joint venture exception has some curious aspects which make it difficult to fit some legitimate joint ventures within the scope of the exception. For example, it is limited to *"contracts"* when the prohibition refers to *"contracts, arrangements or understandings"*, and it is limited to joint ventures for the production or supply of goods or services. It also inconsistent with the joint venture defence still available in respect of exclusionary provisions.

Example 4

A mining joint venture makes decisions through an operating committee. One of its decisions involves an agreement containing a potential cartel provision due to the fact that the joint venturers are otherwise competitors. The exception would only be available if the operating committee's decision is included in a "contract" between the parties.

If an independent operator or manager is also a party to the decision or if the contract is with a third party (e.g., a supplier), is *"the joint venture…carried on by the parties to the contract"*?

(See ss.44ZZRO and 44ZZRP of the TPA.)

The joint venture exception was a late addition to the Australian cartel provisions and was a compromise aimed at maintaining the onus of proof of all elements on the prosecution, and only placing an evidentiary burden on a defendant to raise the exception. The curious limitations were included to try to limit the breadth of the resulting exception. The result, however, is a very broad exception with capricious limitations, which could trip up a bona fide joint venturer, but which a serious and deliberate cartelist could exploit.

(e) **General drafting** - The Australian provisions do not mesh neatly with the balance of Part IV of the TPA. In addition to the duplication and special definitions, the new cartel provisions are set out in a very prescriptive style of drafting which is at odds with the style of the pre-existing prohibitions. It is also a style of drafting which is not suited to trade practices prohibitions where parties may always be seeking to be innovative in the types of arrangements they make.

In conclusion, I support the criminalisation of "hard-core" cartel conduct, but it is important for facilitating both compliance and enforcement that the relevant provisions are well drafted, well targeted and well suited for their purpose and their context.

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