

**SUBMISSION
FOR THE MINISTRY OF ECONOMIC DEVELOPMENT (NZ)**

Cartel Criminalisation

30 March 2010

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1. Purpose and structure of this submission

- The purpose of this submission is to respond to the invitation by the New Zealand Ministry of Economic Development to make submissions on the Discussion Document on Cartel Criminalisation released in January 2010 ('the Discussion Document'). We welcome the opportunity to do so.
- The decision to criminalise cartel conduct raises a host of complex legal and practical issues. This submission focuses on one of the most challenging issues – the legal definition of cartel conduct in the context of a dual civil / criminal regime.
- This issue was one of the most controversial in the debate surrounding the design of the Australian legislation. A widespread ongoing concern is that the amendments made by the *Trade Practices (Cartel Conduct and Other Measures) Act 2009* (Cth) (CC & OM Act) fail to distinguish adequately between conduct attracting criminal liability and conduct attracting civil liability.
- In our view, the Australian debate focussed too narrowly on the elements of the prohibitions. Cartel conduct takes a wide range of forms with varying degrees of seriousness in terms of economic harmfulness and culpability. To reflect this, the law should provide a comprehensive framework for distinguishing systematically between conduct subject to criminal liability and conduct subject to civil liability.
- The framework should provide for differentiation by way of a range of factors that include: types of liability (criminal liability, civil liability for penalties, civil liability for remedies), the rules governing liability (defining conduct that is subject to liability as well as the conduct that is excepted from liability), the applicable sanctions and their maxima, the nature and roles of the institutions charged with enforcement, the policies guiding enforcement decisions, the mode of trial and rules of evidence and procedure.
- The Discussion Document canvasses each of these factors. However, its main focus is on the development of a legal definition of cartel conduct for the purposes a regime that applies both civil and criminal liability. Hence, that is the focus of this submission. In particular, the submission is intended to assist the New Zealand government in its assessment of what the Discussion Document identifies as 'Option 2: Adopting the Australian Approach'.¹

¹ Discussion Document, Section 4.2. The submission will also be relevant to 'Option 3: The greenfields approach' (Section 4.3).

- Part 2 of the Submission outlines the provisions of the *Trade Practices Act 1974* (Cth) (TPA) that define cartel conduct. Part 3 highlights the key weaknesses of the Australian approach to definition. Part 4 of the Submission recommends a definition of cartel conduct for the purposes of a dual civil / criminal regime that addresses these weaknesses. Part 5 recognises the importance of exceptions to per se prohibitions against cartel conduct and in particular addresses the need to deal responsively with collaborations between competitors and supply arrangements between competitors and the reflect the fact that they are often pro-competitive or harmless to competition. Part 6 concludes by identifying what we see as the key implications for New Zealand of the Australian experience in defining cartel conduct.
- This submission is based on research and development undertaken for a book by the authors, *Cartel Conduct in an International Context: The Australian Regime*, to be published by Cambridge University Press in November 2010. That book canvasses a much wider range of issues, including those relating to: individual and corporate liability; sanctions and sentencing; enforcement policy; immunity and cooperation policies and compliance and liability control.

2. Outline of the TPA provisions that define cartel conduct

- Prior to the amendments made by the CC & OM Act in 2009, s 45(2) of the TPA contained per se prohibitions concerned with contracts, arrangements or understandings containing two types of provision: price fixing provisions and exclusionary provisions, with a default prohibition relating to provisions that have the purpose, effect or likely effect of substantially lessening competition in a market.
- The CC & OM Act introduced a set of cartel offences (ss 44ZZRF-44ZZRG) and new parallel civil per se prohibitions (ss 44ZZRJ-44ZZRK) into Div 1, Part IV of the TPA (placing s 45 in Div 2). The amendments repealed the pre-existing per se prohibition relating to price fixing provisions, while retaining the per se prohibition relating to exclusionary provisions and the prohibition relating to provisions that have the purpose, effect or likely effect of substantially lessening competition in a market. The new per se offences and prohibitions in Div 1, Part IV are directed at various types of provisions, collectively falling within the definition of a ‘cartel provision’.
- Reading the new Div 1 offences and prohibitions together with the prohibitions in s 45(2), cartel conduct is defined under the TPA as conduct relating to one or more of the following provisions:
 - price fixing provisions

- output restriction provisions
 - market allocation provisions
 - bid rigging provisions
 - exclusionary provisions
 - substantial lessening of competition provisions.
- All except the last of these provisions are subject to per se liability. In the case of each of the per se offences and prohibitions, the definition of the relevant provision is found in a section of the TPA separate from the offences and prohibitions themselves. In each case, the definition is lengthy and complex. The definition of ‘exclusionary provision’ is in s 4D. The former definition of a price fixing provision in s 45A was repealed by the CC & OM Act. Under the amendments made by that Act, price fixing, output restriction, market allocation and bid rigging provisions now come within the definition of a ‘cartel provision’ under s 44ZZRD.
 - Under s 44ZZRD(1), a provision in a contract, arrangement or understanding is a cartel provision if the provision:
 - (a) satisfies either the purpose/effect condition (in subs (2) in relation to price fixing), or the purpose condition (in subs (3) in relation to output restriction, market allocation and bid rigging); and
 - (b) satisfies the competition condition (in subs (4)).
 - Certain fault elements are required for the cartel offences under ss 44ZZRF and 44ZZRG but not for the civil per se prohibitions under ss 44ZZRJ and 44ZZRK. The offences require intention (as defined by s 5.2 of the Criminal Code (Cth) in relation to the making of a contract or arrangement or the arriving at an understanding (under s 44ZZRF) and the giving of effect to a cartel provision (under s 44ZZRG). The offences also require knowledge² or belief³ that a cartel provision is contained in the relevant contract, arrangement or understanding.
 - The cartel prohibitions under Div 1 and the prohibitions relating to exclusionary provisions and substantial lessening of competition provisions under s 45(2) are

² As defined in s 5.3 of the Criminal Code (Cth).

³ The fault element of ‘belief’ is not defined under the TPA or the Criminal Code (Cth).

subject to a wide range of exceptions and exemptions under the TPA. These exceptions are important in limiting the scope of liability. The main exceptions or exemptions relate to:

- related corporations, dual listed companies and partnerships
 - joint ventures
 - collective bargaining and collective acquisition and joint advertising
 - anti-overlap (ie carve-outs for exclusive dealing conduct and certain other kinds of conduct covered by specific per se prohibitions)
 - Australian standards
 - intellectual property
 - export arrangements, and
 - liner cargo shipping services.
- Many of the exceptions and exemptions under the TPA are ill-defined and not all of them have a cogent economic rationale. These failings are a major weakness of the approach taken in Australia⁴ It is beyond the scope of this submission to address all the problems created by the miscellany of exceptions and exemptions under the TPA. Two areas of major practical concern - joint ventures and other collaborations between competitors and vertical supply arrangements between competitors – are discussed in Part 5.

3. **Key weaknesses in the Australian approach to the definition of cartel conduct**

- In formulating a legal definition of cartel conduct for the purposes of a dual civil/criminal regime we make several critical assumptions:
 - **Rules that govern liability must reflect economic seriousness**

Rules governing liability for cartel conduct should reflect the seriousness of the conduct from an economic perspective. The definition and scope of prohibitions

⁴ As discussed in C Beaton-Wells and B Fisse, *Cartel Conduct in an International Context: The Australian Regime* (Cambridge University Press, November 2010), ch 8.

(particularly per se prohibitions) and exceptions should be consistent with the economic rationale that underpins the legal regulation of cartel conduct. Accordingly, to the extent possible, prohibitions and exceptions should be neither over- nor under-inclusive.

- **Criminal liability should be fault-based**

Cartel offences should be fault-based, consistent with the general principle that criminal responsibility requires fault. Fault should be required in relation to not only the cartel offences but also the exceptions to those offences, in particular where, contrary to a defendant's belief as to the relevant facts, the physical elements of an exception are not present.

- **Rules that govern liability must be workable**

Liability rules, including prohibitions and exceptions, need to be drafted in plain language and structured so as to define and communicate legal obligations clearly, concisely and consistently. This is particularly important in the context of jury trials for cartel offences. At the same time, legal rules should not be unduly prescriptive so as to foreclose the purposive interpretation that may be needed to accommodate economic rationales.

- In our view, the Australian definition of cartel conduct does not satisfy the criteria specified above.
- The Australian rules governing liability for cartel conduct do not capture the economic seriousness of the conduct that is subject to them. The physical elements of the per se prohibitions, civil and criminal, fail in many respects to reflect their underlying economic rationale and, as a result suffer from under-reach and over-reach. The definition of collusion is potentially under-inclusive in that the concept of an understanding fails to address the phenomenon of facilitating practices that do not involve collusion, as traditionally conceived, but can have a similarly adverse economic effect.⁵ The definitions of 'cartel provision' in Div 1 of Part IV of the TPA and 'exclusionary provision' in s 45(2), by contrast, are over-reaching and capture conduct that may be either benign or indeed pro-competitive or in some other way welfare-enhancing. Many of the exceptions are under-reaching (in particular, the exceptions in Div 1 for joint ventures and the absence of an exception for vertical

⁵ See C Beaton-Wells and B Fisse, Submission on The Meaning of 'Understanding' in the Trade Practices Act 1974, 31 March 2009, at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1511&NavID=037>

supply agreements between competitors), while others are over-reaching (for example, the intellectual property exemptions under s 51(3)).

- Liability for the cartel offences does not necessarily require fault. First, individual and criminal liability for a cartel offence can be imposed on the basis of the conduct and state of mind of an employee or agent acting within the actual or apparent scope of their authority.⁶ Secondly, mistake of fact is no excuse where a defendant genuinely believes that the elements of an exception are all present.
- The definition of cartel conduct under the TPA also fails the test of workability. It suffers from undue complexity, technicality and prolixity. It has multiple layers, intricate cross relationships, and numerous qualifications. These features generate uncertainty and difficulties in formulating intelligible jury directions. Further, the provisions are excessively prescriptive. This exacerbates the uncertainty through the introduction of numerous new and untested concepts and terms. It also makes the provisions inflexible and hinders the purposive interpretation needed to ensure that the provisions conform to economic principle and are capable of catering for unforeseen circumstances.

4. A proposed reformulation of the Australian definition

- In order to address the weaknesses of the Australian approach to definition of cartel conduct, we would propose that the definition of ‘cartel provision’ be changed substantially. We would retain the structure of dual civil and criminal prohibitions on making a contract or arrangement or arriving at a understanding containing a cartel provision and giving effect to a cartel provision contained in a contract, arrangement or understanding in Div 1. However, we would repeal the per se prohibition on exclusionary provisions under s 45(2)(a)/(b)(i), leaving the prohibition on substantial lessening of competition provisions in s 45(2)(a)/(b)(ii) unaffected. We would repeal the definition of ‘cartel provision’ in s 44ZZRD, and we would redefine a ‘cartel provision’ for the purposes of civil and criminal liability along the following lines:⁷

A cartel provision means a provision that is contained in a contract, arrangement or understanding to which the defendant and a competitor of the defendant are both parties and that has the effect or is likely to have the effect, directly or indirectly, or is intended by the defendant to have the effect, directly or indirectly, of:

- (a) fixing, maintaining or controlling the price for a good or service or any other term or condition of trade that affects the price for a good or service;

⁶ TPA s 84.

⁷ This is intended as a basic conceptualisation of the proposed definition and not as a drafting instruction.

- (b) preventing, restricting or limiting the production, supply or acquisition of a good or service;
 - (c) dividing a market by, for example, allocating customers, suppliers or territories as between any or all of the parties to the contract, arrangement or understanding;
 - (d) excluding a competitor, customer, supplier or other participant in a market from the supply or acquisition of a good or service.
- The key benefits of this formulation are summarised below.
 - **First**, it captures the four types of cartel conduct generally seen as warranting per se liability on the basis of economic principle and consistent with the approach taken under US and EU law. However, while the enforcement advantages of per se liability are preserved, it remains necessary to cater for situations in which the restraints in question are ‘ancillary’ to a broader output-enhancing venture or agreement. This is achieved under the general banner of the doctrine of ancillary restraints, reflected in US law in the rule of reason test applicable to any restraint that is not characterisable as a ‘naked’ restraint and in EU law in the exemption under Art 101(3) of the Treaty for the Functioning of the European Union (formerly Art 81(3) of the EU Treaty).⁸ In the Australian context, we propose that the appropriate amelioration of per se liability be achieved through the introduction of an exception for collaborative ventures between competitors that subsumes the current joint venture exceptions (see Part 5 below).
 - **Secondly**, also consistent with the economic rationale for per se liability, the proposed formulation captures provisions that have or are likely to have the effect of fixing prices, restricting output, dividing markets or excluding market participants, irrespective of a defendant’s purpose or intention. Potential concerns about over-reach in this regard would be addressed by an exception for collaborative ventures between competitors (see Part 5 below).
 - **Thirdly**, the suggested formulation has the benefits of brevity and flexibility and avoids the excessive prescriptiveness and prolixity of the current provisions. However, there remains the issue of how to deal with restraints which, while falling within the terms of the prohibitions, nevertheless have an effect that is de minimis. This is not a problem to which further statutory prescription should be seen as the answer. There are thus only two other ways in which to tackle the issue. The first would involve a change in judicial approach to ‘read down’ the prohibitions in

⁸ See also s 45(4) of the *Competition Act 1985* (Can).

appropriate cases (consistent with the approach of the US judiciary).⁹ This was attempted in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd*¹⁰ and the generally negative reaction to that decision suggests that the traditionally conservative and literal approach taken to statutory interpretation by Australian courts is unlikely to change in the short-term. The second option, reflective of the approach in the EU,¹¹ is for the ACCC to issue guidelines that explain the circumstances in which it is likely to regard the effects of conduct as too insubstantial to warrant proceedings. To an extent this view is already reflected in the ACCC's general *Compliance and Enforcement Policy*.¹² However, there is scope for more detailed guidance, preferably with worked examples and with legislative backing to ensure that the guidelines are binding.

- **Fourthly**, the problematic notion of a purpose of a provision is excised. Instead, the focus is on the intention of the defendant, consistently with the concept of intention under s 5.2(3) of the *Criminal Code* (Cth).¹³ The test of intention is subjective. The test for civil liability on the basis of 'effect' or 'likely effect' is objective. However, criminal liability on the basis of 'effect' or 'likely effect' would be subject to the fault element that applies in relation to the alleged effect or likely effect. That fault element should be knowledge or belief rather than recklessness. This fault element would be the element that differentiates the criminal from the civil liability prohibitions. The concept of 'purpose of a provision' in the definition of the general prohibition against anti-competitive agreements in s 45(2) should also be replaced by a requirement of intention on the part of the defendant. That approach would eradicate the stale and unproductive debate about whose purpose is relevant in establishing breach of the prohibition.¹⁴

⁹ See *Board of Trade of the City of Chicago v United States* 246 US 231, 240 (1918). See further W Pengilly, *Price Fixing and Exclusionary Provisions*, Prospect Media, St Leonards, NSW, 2001, pp. 32–3.

¹⁰ (1982) 62 FLR 437, 448 where Lockhart J rejected the proposition that s 45A of the TPA (the former definitional provision relevant to price fixing) might apply to provisions that have some effect on price but do not restrain price competition.

¹¹ See European Commission, 'Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)', 2001/C 368/07, *Official Journal of the European Union*, vol. 44, 22 December 2001, p. C 368/13, at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c_368/c_36820011222en00130015.pdf, last viewed 28 July 2009.

¹² Australian Competition and Consumer Commission, *Compliance and Enforcement Policy*, April 2009, at [http://www.accc.gov.au/content/item.phtml?itemId=867964&nodeId=38f33e126b23258f0b320d83e4009709&fn=Compliance and enforcement policy.pdf](http://www.accc.gov.au/content/item.phtml?itemId=867964&nodeId=38f33e126b23258f0b320d83e4009709&fn=Compliance%20and%20enforcement%20policy.pdf), last viewed 15 June 2009.

¹³ Section 5.2(3) of the *Criminal Code* provides: 'A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.'

¹⁴ See most recently, *Seven Network Limited v News Limited* [2009] FCAFC 166 at [18]–[26], [859]–[887].

- **Fifthly**, with respect to each of the four restraints identified in the definition:
 - (a) catches fixing of both price and non-price elements insofar as they affect price, bearing in mind that concerns about the over-reach of the concept of ‘controlling’ a price will be addressed by a proposed exception for vertical supply agreements between competitors (see Section 5.2 below)
 - (b) catches output restriction by sellers or buyers, unlike the current definition in s 44ZZRD(3)(a) which is limited to restrictions by producers or suppliers
 - (c) recognises that markets can be divided in ways other than by allocation of customers, territories or suppliers (for example, through allocation of functional levels or product lines), unlike the current definition in s 44ZZRD(3)(b)
 - (d) deals with collective boycotts separately so as to distinguish them from output restriction but on the same liability footing as the other types of provision, unlike the prohibition against exclusionary provisions, which should be repealed
 - there is no separate provision for bid rigging - conduct of concern in this regard would be covered by one or more of the restraints defined in (a)–(d), and approach that would avoid the uncertainty and/or over-reach of s 44ZZRD(3)(c) that arises in the context of joint or consortia bidding.

5. Collaborations between competitors and vertical supply arrangements between competitors

5.1 Collaborations between competitors

- The joint venture exceptions under ss 44ZZRO and 44ZZRP (which apply in relation to cartel provisions) and the defence under s 76C (which applies in relation to exclusionary provisions) are ill-designed in major respects.
- The joint venture exceptions under ss 44ZZRO and 44ZZRP create significant practical difficulties:
 - The requirement for the joint venture exceptions under s 44ZZRO and s 44ZZRP that the cartel provision be in a contract is impractical. The Supplementary Explanatory Memorandum says that:

If a board or committee is established under the joint venture contract to regulate or manage the joint venture and the activities of that board or committee are contemplated and regulated by the joint venture contract, then the exceptions would appear to apply in relation to those activities. (para 1.12)

That statement is inconclusive and misleading. If a cartel provision is contained in a joint venture operational arrangement or understanding (eg, in a decision of a joint venture management committee), it is difficult to see how it can qualify for exemption under the new joint venture exceptions. The operational activities may be ‘contemplated or regulated by the joint venture contract’. However, a cartel provision created during those operational activities is nonetheless a cartel provision. Unless the particular cartel provision is contained in a contract or intended contract, it would be dangerous to rely on the new joint venture exceptions.

- The contract proxy provisions in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) do not make allowance for a non-contractual cartel provision contained in a pre-contractual joint venture arrangement or understanding even where that cartel provision is later incorporated in the joint venture contract contemplated by the parties.
- The contract proxy provisions require that *each party* to the arrangement or understanding intended the arrangement or understanding to be in a contract and reasonably believed that the arrangement or understanding was in a contract. This requirement is unprincipled and excessively onerous.
- The joint venture exceptions under ss 44ZZRO and 44ZZRP require the joint venture to be ‘for the production and/or supply of goods or services’. Joint ventures for the acquisition of goods or services are not covered as such but may involve the supply of goods or services to a sufficient extent to qualify for the exception. The exceptions for collective bargaining and collective acquisition are limited in scope (see section 3 below) and are no substitute for joint venture exceptions that extend to joint ventures for the acquisition of goods or services.
- The wording ‘for the purposes of a joint venture’ in s 76C and ss 44ZZRO and 44ZZRP is obscure. Does it mean ‘only for the purposes of a joint venture’? ‘Predominantly for the purposes of a joint venture’? ‘Substantially for the purposes of a joint venture’? Are the relevant ‘purposes’ determined

objectively or do they depend on the subjective intention of all or some of the parties to the joint venture? Must the cartel provision be reasonably necessary to achieve the commercial objectives of the joint venture?

- The requirement that a cartel provision be in a contract (or an intended contract) is an inept legislative attempt to prevent the use of sham joint ventures. ‘JV Ultra-Lights’ (ie, joint ventures created on a contractual basis for the dominant purpose of evading a per se prohibition against cartel conduct and which is also calculated to achieve some efficiencies in order to create a substantial smokescreen) are the most insidious type of sham joint venture in modern commerce. They can be used to evade liability for the cartel offences (ss 44ZZRF and 44ZZRG) and the per se civil prohibitions against cartel conduct (ss 44ZZRJ and 44ZZRK).
- The joint venture defence under s 76C does not require that the exclusionary provision be in a contract but is also unsatisfactory:
 - One defect is that, like ss 44ZZRO and 44ZZRP, s 76C uses the vague wording ‘for the purposes of a joint venture’.
 - Another unsatisfactory feature is the competition test under the s 76C defence. First, joint venture exceptions should be defined on a per se basis that avoids the need to assess competition effects.¹⁵ A ‘per se legality’ approach to the definition of joint venture exceptions can avoid the indeterminacy of a competition test and promotes commercial certainty, expediency and cost-saving. By contrast, a corporation that wishes to rely on s 76C needs to apply the competition test and be able to prove that the test is satisfied. Secondly, the competition test adds nothing to the prohibition under s 45(2) against substantial lessening of competition provisions apart from inverting the persuasive burden of proof.
- In our submission, a fresh start needs to be made by creating an exception or a defence for collaborative ventures that are likely to be pro-competitive or harmless to competition.¹⁶ Three essential elements of such an exception or defence would be:
 - (1) a definition of a collaborative venture that covers not only joint ventures but also any activity in trade or commerce:

¹⁵ See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶2100g.

¹⁶ This approach is a substantial revision of an earlier proposal that a legitimate primary intention be a requisite element of liability.

- (a) carried on in cooperation by two or more persons, whether or not in partnership;
or
- (b) carried on by a body corporate formed by two or more persons to enable them to carry on that activity in cooperation
- (2) a rule excluding from the collaborative venture exception a cartel provision (or exclusionary provision if the prohibitions against exclusionary provisions are retained) the objective dominant purpose of which is to cease or avoid competition between the parties to the collaborative venture, and
- (3) amend ss 44ZZRO and 44ZZRP (and s 76C if s 76C is retained, which it need and should not be) so as to specify the requisite relationship between the cartel provision (or exclusionary provision) and the legally relevant purposes of the collaborative venture:
- (a) under s 44ZZRO, it would be necessary and sufficient that the defendant believed that the provision was reasonably necessary to achieve those purposes
- (b) under s 44ZZRP (and s 76C if s 76C is retained), it would be necessary and sufficient that the defendant believed on reasonable grounds that the provision was reasonably necessary to achieve those purposes.

5.2 Supply agreements between competitors

- Competitors frequently buy and sell each other's products. Such dealings inevitably involve price setting and non-price restrictions and often entail a cartel provision as defined by s 44ZZRD and/or an exclusionary provision as defined under s 4D of the TPA. Such dealings are not only commonplace but typically also promote consumer welfare.¹⁷ Remarkably, many situations involving economically beneficial or innocuous supply agreements between competitors are not covered adequately by the TPA. There is no exception under the TPA for 'vertical' as distinct from 'horizontal' agreements. The joint venture exceptions and the exclusive dealing anti-overlap exceptions are often irrelevant. Authorisation is an escape route in theory but, but given the sheer volume of economically beneficial or harmless supply agreements between competitors, authorisation is not a practical solution.

¹⁷ See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶1437a.

- Many examples can be given of supply relationships between competitors where the TPA breaks down. This is one of them:

Assume that XCO, an Australian manufacturer, agrees to supply Product D to YCO on condition that YCO agrees to supply Product E to XCO. YCO agrees to supply Product E to XCO on condition that XCO agrees to supply Product D to YCO. XCO and YCO compete against each other in the market for Product D, Product E and competing products. The reciprocal supply provisions are pro-competitive because they increase the ability of XCO and YCO to compete against major competitors in the market. Neither XCO nor YCO are prevented from deciding to acquire Product D or Product E from alternative sources at any time.

Each reciprocal supply provision is a cartel provision, as defined by ss 44ZZRD(3)(a)(iii) and (4). XCO and YCO compete with each other in relation to the relevant competing products. A substantial purpose of each provision is to restrict or limit the supply or likely supply of goods or services to a person (YCO or XCO) by a party to the contract (XCO or YCO) (s 44ZZRD(3)(a)(iii)). It is irrelevant that the purpose is conditional: the purpose required to satisfy the purpose condition under s 44ZZRD(3) may be conditional or unconditional. Nor can it be maintained that the 'real' or 'ultimate' purpose of each reciprocal supply provision is not a s 44ZZRD(3) purpose but a purpose to 'act in the best interests of the market' or to 'improve competition': if the substantial purpose of a provision is to restrict the supply or acquisition of goods or services in the way prescribed by s 44ZZRD(3)(a), it is irrelevant whether or not D believes that the restriction is in the best interests of the market or a way of improving competition.

The reciprocal supply provisions are also exclusionary provisions as defined by s 4D of the TPA. The analysis is essentially the same.

The reciprocal supply provisions are not excepted by s 44ZZRS from per se liability for a cartel offence under ss 44ZZRF or 44ZZRG or for breach of the civil penalty prohibitions under ss 44ZZRJ or 44ZZRK: they are not exclusive dealing conditions. Nor is there a way out under the joint venture provisions in ss 44ZZRO(1) and 44ZZRP(1): there is no joint venture between XCO and YCO but merely a reciprocal supply agreement. The exclusionary provisions are in the same boat. They are not exclusive dealing conditions and hence are not excepted by s 45(6) from per se liability under s 45(2)(a)(i) for making a contract containing an exclusionary provision. The joint venture defence under s 76C does not apply; again, there is no joint venture.

- A commendable solution would be to create a specific exception for supply agreements between competitors and to define that exception in a way that excludes per se liability where a supply agreement is not anti-competitive. A cartel provision or an exclusionary provision in an agreement by a competitor to supply another competitor should be excepted where the provision does not have the effect or likely effect of lessening competition between the parties and where any party seeking to rely on the exception has not adopted the provision for the purpose of lessening competition between the parties.¹⁸ The parties to a supply agreement would not be subject to per se liability where this exception applies. However, the agreement would remain subject to the general safeguard of the prohibition under s 45(2) against provisions that have the purpose, effect or likely effect of substantially lessening competition in a market.

6. Key implications for New Zealand

- The Australian anti-cartel legislative regime is unsatisfactory in many significant respects including the substantive flaws outlined above. Rectifying those flaws would require a fresh start. Accordingly, our submission is that the TPA provisions should not be followed in New Zealand. Instead, a ‘greenfields’ approach, as foreshadowed in Option 3 of the Discussion Document,¹⁹ should be taken.
- One step required by a greenfields approach would be to define the concept of a cartel provision in terms that avoid the worst problems manifested by s 44ZZRD of the TPA. See the proposal outlined in Part 4 above.
- Another requisite step would be to create well-defined exceptions for collaborative ventures between competitors and vertical supply agreements between competitors. We have outlined in Part 5 above how that could be achieved.
- Finally, in our view it would be misguided for New Zealand to follow the Australian provisions merely for the sake of achieving consistency. Indeed, it would be perverse for any jurisdiction to replicate the serious flaws apparent in the TPA provisions. The TPA provisions in many respects defy commercial reality and already have occasioned significant difficulties of interpretation for corporations and their legal advisers.²⁰ Nor has it been demonstrated that it is possible for juries to be directed on the elements of cartel provision under s 44ZZRD in readily intelligible terms. The current prospect in Australia is test litigation over the next decade or more coupled

¹⁸ Compare the proposals advanced in W Pengilley, *Price Fixing and Exclusionary Provisions*, Prospect Media, St Leonards, New South Wales, 2001, Attachments 1–2.

¹⁹ Section 4.3.

²⁰ See eg I Wylie, ‘Cartel output restrictions – Construction and common sense collide and particularity of “persons” under the Trade Practices Act 1974’ (2010) 38 ABLR 23.

with the improbability that the problems created by the TPA anti-cartel amendments will ever be addressed satisfactorily by judicial interpretation.²¹

²¹ As suggested by decades of experience trying to grapple with the definition of an exclusionary provision in s 4D, which has proven to be highly resistant to clarification notwithstanding two extensive reviews by the High Court of Australia and numerous examinations by the Federal Court: see I Wylie, 'What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond' (2007) 35 ABLR 33.