

COMPETITION, FAIRNESS AND THE COURTS

Commentary

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Dysfunctions in the central nervous system of Australian competition law

1. Institutions degenerate if left to their own devices. Constant external appraisal and re-invigoration is essential for their own health and, more importantly, for the health of those whom they serve. Justice Rares' paper appraises two of the main institutional organs of Australian competition law: the brain stem (the Competition and Consumer Act 2010 (Cth) (CCA)) and the spinal cord (the litigation process). The diagnosis is sobering: both are suffering from serious dysfunctions that may require corrective surgery or deep therapy.
2. The paper is both important and timely. It highlights where the legislation has suffered seizures after overdoses of prescriptive drafting and why the litigation process increasingly cannot bear the weight of dispensing justice. These are fundamental and intractable problems. The paper tackles them head on and offers a wealth of insights. These insights are most timely – they are immediately relevant to the 'root and branch' review of Commonwealth competition policy that is now gathering pace.¹
3. My comments focus on and are limited to the problem of legislative undue complexity and hyper-prescription.

Undue complexity and hyper-prescription - critical assumptions

4. Appraisals of legislation depend on underlying critical assumptions.² A prime critical assumption that animates the paper is that competition legislation should avoid undue complexity and hyper-prescription, mainly for these reasons:³

¹ See *Competition Policy Review Issues Paper*, 14 April 2014.

² See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 568.

³ "Competition, Fairness and the Courts" at [18].

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First, attempts at codification involving many permutations on a theme are inevitably complex and likely to miss something, *secondly*, complexity can, and often is a handmaiden of incomprehensibility, *thirdly*, the unravelling of complexity requires time and effort, *fourthly*, the more detailed and complex legislation is, the harder it is for the ordinary person, including the scions of the business community, to grasp the point and comply, *fifthly*, complexity makes litigation more complex, lengthy and expensive for the parties and, *sixthly*, those factors create the need for the Courts to deal with more and more in judgments or summings up to juries leading to delay, the greater likelihood of appellate challenges and, of course, error.

5. The critical assumption about undue complexity and hyper-prescription is closely related to other critical assumptions including: the need to avoid legislative overreach; the need to avoid underreach; and the need to avoid uncertainty.⁴ As the paper explains, overreach, underreach or uncertainty can and often does arise from highly prescriptive legislation. However, these unwanted consequences may also arise from simple legislative wording. This indicates the need to include overreach, underreach and uncertainty among the criteria to be used when evaluating legislation.
6. Reconsideration of the over-prescriptive drafting method that has often been used in Commonwealth legislation requires that the drafting machine be programmed accordingly. Some promising new source code was adopted in 2010 by the Office of the Parliamentary Counsel in the *Developing Clearer Laws Quick Reference Guide*:⁵

Policymakers, instructing agencies and drafters should apply the following general principles when developing Commonwealth legislation.

1. Consider all implementation options – don't legislate if you don't have to.
2. When developing policy, reducing complexity should be a core consideration.
3. Laws should be no more complex than is necessary to give effect to policy.
4. Legislation should enable those affected to understand how the law applies to them.
5. The clarity of a proposed law should be continually assessed – from policy development through to consideration by Parliament (for Acts) or consideration by the rule-maker (for legislative instruments).

⁴ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 569.
⁵ Available at: <http://opc.gov.au/clearer/index.htm>

These aspirations are reflected to varying degrees by recent amendments to the Act. The Australian Consumer Law largely seeks to reflect them. By contrast, the price signalling amendments in 2011 reverted to previous prescriptive type.⁶

7. There is a startling disconnection between the *Developing Clearer Laws Quick Reference Guide*, on the one hand, and the Australian Government's *Best Practice Regulation Handbook* (July 2013),⁷ on the other. The *Developing Clearer Laws Quick Reference Guide* urges that the clarity of a proposed law be continually assessed yet the *Best Practice Regulation Handbook* makes no mention of the need for clarity or the *Developing Clearer Laws Quick Reference Guide*.

The cartel labyrinth

8. Few amendments to the CCA have attracted as much bewilderment or concern as the CCA amendments in 2009 relating to cartels. The paper rightly criticises Division 1 of Part IV as being 'a twenty page long labyrinth' of 'byzantine complexity' that prevents or hinders workable interpretation and application by citizens, businesses, lawyers, regulators and judges.
9. One qualification is that, at the level of corporate compliance programs, the minutiae and prolixity of Division 1 of Part IV generally do not matter much because compliance programs set out basic rules, Dos and Don'ts, and Q&A at a relatively simple level and often seek in general terms to cover the competition laws in all countries where the corporation operates.⁸ For example:

Dos (re risk of price fixing)

Do act independently of competitors at all times.

Do steer well clear of any discussion with a competitor about anything to do with prices.

Do get advice in advance from the Legal Team if you are ever in doubt about the legality of a discussion or proposed arrangement with a competitor.

⁶ These amendments have been widely criticised; see eg C Beaton-Wells & B Fisse, "Australia's Proposed Information Disclosure Legislation: International Worst Practice", Competition Policy International, Antitrust Chronicle, 30 August 2011.

⁷ Available at: <http://rogerscarlisle.com/services/red-tape-reduction-regulatory-burden/reducing-regulatory-burden-resources/> (OBPR website has dud link)

⁸ See eg ABB, Antitrust guidance note, Competitive intelligence gathering versus commercially sensitive information exchanges (2014) at: [http://www02.abb.com/global/abbzh/abbzh252.nsf/0/df9558e3445cf87ac12577e900589252/\\$file/Antitrust+Guidance+Note+Competitive+Intelligence+vs+Commercially+Sensitive+Information.pdf](http://www02.abb.com/global/abbzh/abbzh252.nsf/0/df9558e3445cf87ac12577e900589252/$file/Antitrust+Guidance+Note+Competitive+Intelligence+vs+Commercially+Sensitive+Information.pdf)

Do get clearance in advance from the Legal Team for any proposed joint venture or other alliance with a competitor.

10. Undue complexity does not end with Division 1 of Part IV. Other thickets include:
- the ancillary liability provisions in s 76 and s 79⁹ - s 79 is a complicated adaptation of the general principles of the Criminal Code (Cth) on complicity, attempt, incitement and conspiracy; s 76 diverges from s 79 in various significant respects without any attempt to consolidate and simplify s 76 and s 79;
 - the relationship between the jurisdiction provisions in s 5 of the CCA and the general principles on geographical jurisdiction under Part 2.7 of the Criminal Code (Cth);
 - the relationship between the Protected Cartel Information regime under Part XII of the CCA, on the one hand, and the disclosure requirements under s 23CE and other provisions of Part III Subdivision C of the Federal Court of Australia Act 1976, on the other;
 - the formula for the calculation of maximum corporate penalties under s 76 and the corresponding formula under 79;¹⁰
 - Part 1B of the Crimes Act 1914 (Cth), which prescribes sentencing principles in a prolix yet incomplete and outmoded way and, in turn, s 76 of the Competition and Consumer Act – s 76 imports penalty-assessment factors that do not always coincide with the approach taken when determining sentence in accordance with Part 1B.¹¹
11. A serious attempt has been made in New Zealand recently to avoid the complexity of the Australian anti-cartel legislation. In May 2013 the NZ Commerce Committee recommended that the Commerce (Cartels and Other Matters) Amendment Bill 2011 be passed with various amendments.¹² This follows a gestation period of over three

⁹ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) sections 6.3–6.4.

¹⁰ One difficulty is illustrated by *ACCC v Flight Centre Limited (No 3)* [2014] FCA 292 (maximum of \$10 million applied where ACCC had not pleaded circumstance of aggravation). See further C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 11.3.4.

¹¹ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) ch 11.

¹² The Commerce Committee Report is available at: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH_SCR5848_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm Disclosure: the author acted as one of several advisers to the Ministry of

years and two rounds of extensive public consultation.¹³ The Bill as revised by the Commerce Committee is likely to be enacted this year. The main provisions are set out in Attachment A.¹⁴

12. The main advantages of the NZ anti-cartel Bill are:

- The definition of cartel offences and civil cartel prohibitions and the exemptions that apply to them is largely straightforward and concise. For instance, the definition of a cartel provision is about half the length of the treatment of the same subject in the CCA. The definition of the collaborative activity exemption takes about half a page compared with the 6 pages devoted to the main exemptions relating to joint ventures under the CCA.
- The concept of an exclusionary provision in s 29 of the Commerce Act is to be repealed and the relevant ground is to be covered by the definition of a cartel provision in s 30. By contrast, under the CCA the concept of an exclusionary provision is retained, the definition of a cartel provision is hobbled by excluding restrictions on the acquisition of goods or services, and there is a considerable and messy overlap between the definition of a cartel provision and that of an exclusionary provision (eg restrictions on the supply of goods or services can easily be cartel provisions and exclusionary provisions).
- The potential overreach of per se prohibitions against cartel conduct is greatly reduced under the NZ anti-cartel Bill by means of the collaborative activity exemption under the proposed s 31. This exemption recognises that a wide range of collaborations between competitors are pro-competitive or not anti-competitive and hence that per se prohibition is unjustified. The collaborative activity exemption also avoids the contortions, uncertainty and commercial unreality of the CCA provisions relating to joint ventures.¹⁵
- The potential overreach of per se prohibitions against cartel conduct is further reduced under the proposed s 32 in the NZ anti-cartel Bill by means of the

Business, Innovation & Employment on cartel law reform. The views expressed here are his personal views and do not necessarily represent those of the Ministry.

¹³ See: <http://www.med.govt.nz/business/competition-policy/cartel-criminalisation>.

¹⁴ Attachment A does not include the provisions relating to the proposed new clearance process.

¹⁵ See B Fisse, "New Zealand Government Proposes New Anti-Cartel Law with Collaborative Activity Exemption that Highlights Flaws in Australian Joint Venture Exceptions" at: http://www.brentfisse.com/images/Fisse_Proposed_NZ_collaborative_activity_exemption_01072013.pdf; C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) section 8.3.

exemption of a cartel provision in a supply agreement between competitors where the cartel provision relates to the supply or likely supply of the goods or services to a customer or likely customer. This exemption recognises that such supply agreements between competitors typically are pro-competitive or not anti-competitive. By contrast, there is no such carve-out in Division 1, Part IV.¹⁶ Unsurprisingly, this neglect of a known problem¹⁷ has led to considerable commercial uncertainty and costly disputes, as illustrated by *ACCC v Australian and New Zealand Banking Group Ltd* [2013] FCA 1206 and *ACCC v Flight Centre Ltd (No 2)* [2013] FCA 1313.¹⁸

13. The proposed NZ amendments, it may be argued by a purist, do not go far enough. For instance, they adhere to the filigree concept of a ‘contract, arrangement or understanding’, the atomistic precept of a ‘provision’ in a CAU, and the term ‘purpose of a provision’ which, if interpreted as a test of subjective intentionality,¹⁹ lacks economic grip.
14. The paper invites the remodelling of Australian anti-cartel legislation in the shape of s 1 of the Sherman Act. Attractive as that suggestion may be in the abstract, it would require radical surgery and create its own risks. Account should also be taken of less attractive features of the law on s 1. For example:
 - Deciding which types of conduct warrant per se liability and which do not has been the subject of much dispute, litigation and debate.²⁰ Intriguing as this issue may be, it is wasteful and best avoided by adopting clear statutory rules of demarcation.

¹⁶ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) section 8.6.

¹⁷ See eg B Fisse, "Unjustified per se criminal and civil liability under the Trade Practices Act 1974 (Cth) for supply agreements between competitors" [2009] UNSW Law Forum 239; B Fisse, Submission to Senate Economics Committee, Inquiry into the Trade Practices Amendment (Cartel and Other Measures) Bill 2008, 20 January 2009, section 1.4.

¹⁸ It is unlikely that the proposed s 32 exemption would extend to a situation such as that in *ACCC v Flight Centre Ltd (No 2)* [2013] FCA 1313 where the cartel provision in an agreement by Competitor A with Competitor B for the supply of goods or services by Competitor B to Competitor A does not relate to the price or other terms on which Competitor A will supply those goods or services but the price or other terms on which Competitor B will supply such goods or services to third parties. Query whether or not exemption from per se liability is justified in that type of situation.

¹⁹ As it was in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ), 581 [46] (McHugh J, but with reservations), 587 [65] (Gummow J), 638 [216] (Callinan J). Cf. Kirby J: at 605 [127], 606 [130].

²⁰ See eg M Lemley & C Leslie, "Categorical Analysis in Antitrust Jurisprudence" (2008) 93 Iowa LR 1207.

- The rule of reason is fundamental to the application of s 1 but, despite a century or more of case law, remains open to various interpretations.²¹ This is a thicket if not a maze.
 - The extent to which joint ventures and other collaborative ventures are exempt from per se liability has been the subject of helpful guidelines by the US Federal Trade Commission and Department of Justice.²² However, recent decisions of the US Supreme Court have complicated the law unnecessarily.²³
15. A preferable approach when drafting our anti-cartel laws may be to heed the spirit of s 1 without undertaking radical surgery. For instance, that is the approach taken under the NZ anti-cartel Bill in relation to the proposed collaborative activity exemption. A key requirement of the proposed exemption is that the cartel provision be ‘reasonably necessary for the purpose of the collaborative activity’ (or, in the context of a cartel offence, believed by the accused to be reasonably necessary for that purpose). This requirement is comparable to the rule of reason test that applies to collaborative ventures under s 1 of the Sherman Act but the statutory test adopted seeks to avoid the complexity of the US case law.²⁴ Helpful practical guidance on the operation of this requirement is set out in the NZ Commerce Commission’s Draft Competitor Collaboration Guidelines (October 2013).²⁵ Reference should also be made to the instructive paper on the collaborative activity exemption by John Land,²⁶ this compares the collaborative activity exemption with the US case law on the application of the rule of reason to collaborative ventures.

²¹ See eg G Werden, “The Ancillary Restraints Doctrine after *Dagher*” (2007) 8 *Sedona Conference Journal* 17; R Blair & D Sokol, “The Rule of Reason and the Goals of Antitrust: An Economic Approach” (2012) 78 *Antitrust LJ* 271.

²² FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>

²³ *Texaco Inc v Dagher*, 547 US 1, 6 (2006); *American Needle Inc. v. National Football League*, 560 US 183 (2010). See A Devlin & M Jacobs, “Joint Venture Analysis after *American Needle*” (2011) 7 *Journal of Competition Law & Economics* 543; J Keyte “Sorting Out The Analytical Mess: A Step-Wise Approach To Joint Venture Analysis After *Dagher* And *American Needle*” in N Charbit (ed, *William Kovacic: An Anti-Trust Tribute* (2012) 267.

²⁴ Contrast A Harpham, D Robertson & P Williams, “The Competition Law Analysis of Collaborative Structures” (2006) 34 *ABLR* 399.

²⁵ Available at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/>

²⁶ “Joint Ventures and the Collaborative Activity Exemption”, 24th Annual Workshop of the Competition Law and Policy Institute of New Zealand, 2 August 2013.

Principles-based drafting

16. The paper advocates the greater use of principles-based drafting in order to avoid the perils of undue complexity and hyper-prescription, as summarised in para 4. This call to arms is most welcome.
17. There are of course limits to the extent to which principles-based drafting can usefully be taken²⁷ and a principles-based drafting program needs to be targetted accordingly.
18. The first and most obvious limit is that purported principles may be too difficult to apply in practice or otherwise unfit for purpose. Candidates for exclusion include:
 - ‘dishonesty’, as included in the definition of cartel offences under the 2008 Exposure Draft, but later abandoned for various reasons including unworkability and category mistake;²⁸
 - ‘the purpose of a provision’ as used in s 44ZZRD(2)(3), s 4D and s 45(2) – looking at the objective purpose of a provision would be consistent with economic principle²⁹ but the phrase as currently interpreted in Australia does not relate to that principle but is given over to the subjective intention of the parties who happen to be ‘responsible for introducing the provision’³⁰ – ‘the objective’ would be a more principled term;
 - ‘corporate culture’, as included as one type of corporate fault in the general principles of corporate responsibility in the Criminal Code (Cth) – those general principles do not apply to the CCA³¹ partly because of the impracticality of trying to prove the existence of a criminogenic corporate culture;
 - ‘anti-overlap exception’, as used to describe some exceptions to per se liability for cartel conduct (eg under s 44ZZRS) – this is not a principle but an inapposite label (the main purpose of such exceptions is not to avoid overlap but to exempt conduct that, in the general run of cases, is insufficiently anti-competitive to justify per se liability);

²⁷ See further J Black, “Forms and Paradoxes of Principles-Based Regulation” LSE Law, Society and Economy Working Papers 13/2008, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267722

²⁸ See B Fisse, “The Cartel Offence: Dishonesty?” (2007) 35 ABLR 235.

²⁹ See D Robertson, “The Primacy of Purpose in Competition Law – Pt 2” (2002) 9 CCLJ 101.

³⁰ *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, 347–52 [859]–[887] per Dowsett and Lander JJ.

³¹ Competition and Consumer Act 2010 (Cth) s 6AA(2).

- ‘not in the ordinary course of business’, as used in s 44ZZW(c) to limit the scope of liability for making a private disclosure to a competitor of pricing or other competitively sensitive information – the term ‘ordinary course of business’ is not a principle but a carve out; such a carve out makes sense in some domains (eg bankruptcy) but not in the context of price signalling where it introduces mystery and confusion.³²

19. It may not be possible or desirable to avoid prescriptive drafting in some contexts. For example, prescriptive drafting may be appropriate in the setting of powers of investigation where principles-based drafting may give investigators too much rein or give their targets too little guidance about their rights. There are also contexts where bright-line rules may be more efficient than principles. For instance, the related corporation exceptions under s 44ZZRN and s 45(8) turn on the highly prescriptive definition of a related corporation in s 4A. As a result, these related corporation exceptions are clear-cut as compared with their counterparts under US and EU competition law. The meaning and scope of the single economic enterprise principle under US and EU competition law is the subject of a large body of case law and ongoing contention.³³ Query if anyone would want to swap s 44ZZRN or s 45(8) for the much less determinate US or EU single economic enterprise principle.
20. Prescriptive drafting can often be enlivened or kept in check by due recognition of underlying principle. This can be illustrated by the unthinking departure from underlying principle apparent in s 44ZZRN and s 45(8). These exceptions do not apply unless *all* the parties to the CAU are related corporations.³⁴ There is no economic justification for excluding the exceptions where eg a guarantor or other third party is a party to the CAU and the reason for including the guarantor or other third party is not to avoid the application of a per se cartel prohibition. The underlying economic principle is that a single economic entity should be free to address a market by co-ordinating the economic decisions of units within the same group. As currently drafted, the related corporation exceptions lose sight of that principle: in order to

³² See further B Fisse and C Beaton-Wells, “Private disclosure of price-related information to a competitor ‘in the ordinary course of business’” (2011) 39 ABLR 367.

³³ See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2003) ¶1462–¶1478.

³⁴ Note also s 44ZZW(2).

function as an economic enterprise, corporate groups often need to involve banks, advisers and other third parties in their decision-making and contracting.

21. As a test of what principles-based drafting means and is capable of achieving, it is worth considering the state of the substantial lessening of competition test under s 45(2). That test is a prime example of principles-based drafting. Has it worked well? Unfortunately, the test remains of highly uncertain application mainly because the Australian courts have yet to explicate the concept of substantiality in any helpful way. The opportunity to do so was not taken by the High Court in *Rural Press Ltd v ACCC* where a majority of the Court unleashed the proposition that ‘substantial’ means ‘meaningful or relevant to the competitive process’.³⁵ The lack of any evaluative standard of substantiality means that the assessment of evidence on this issue depends much on discretion, impression and unstated assumptions. Little guidance emerges from the case law, including the decisions in *McHugh v The Australian Jockey Club* [2012] FCA 1441 and *ACCC v Cement Australia Pty Ltd* [2013] FCA 909. Headway will not be made by writing off the SLC test as a ‘category of indeterminate reference’.³⁶ Progress will require practical elucidation of the principle that an agreement is anti-competitive if it substantially lessens competition or is likely to do so.³⁷ Should courts, counsel, experts and commentators be induced to work much harder at that elucidation? The need as well as the possibility is suggested by Tom Leuner’s pathfinding work.³⁸

Conclusion

22. His Honour has presented a luminous petition that undue complexity and hyper-prescription be eliminated from Australian competition legislation. That petition may well be a defining moment in the development of the Act.

³⁵ (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ.

³⁶ Cf J Stone, *Legal System and Lawyers’ Reasonings* (1964) 263-7.

³⁷ Query whether this is the correct principle given that it does not squarely take efficiencies into account in the way that the US rule of reason does. A principles-based re-assessment of the CCA would challenge the artificial distinction between SLC cases and public benefit cases and would extract and apply the core economic principle/s underlying s 1 of the Sherman Act. See further R Bork, *The Antitrust Paradox* (1993).

³⁸ T Leuner, “Time and the dimensions of substantiality” (2008) 36 ABLR 327.

ATTACHMENT A

Section 4 is amended by adding the following subsection:

- “(4) For the purpose of determining jurisdiction,—
- “(a) if an act or omission that forms part of a contravention of this Act occurs in New Zealand, the contravention is deemed to have occurred in New Zealand; and
 - “(b) if an event that is necessary to the completion of a contravention of this Act occurs in New Zealand, the contravention is deemed to have occurred in New Zealand.”

- 6 **Section 29 repealed** 10
Section 29 is repealed.

Cartels

- 7 **New heading and sections 30 to 33 substituted** 15
The heading above section 30, sections 30 to 34, and the heading below section 34 are repealed and the following heading and sections substituted:

“Cartel provisions

- “30 **Prohibition on entering into or giving effect to cartel provision**
- “(1) No person may, unless an exemption in **section 31, 32, or 33** applies,—
- “(a) enter into a contract or arrangement, or arrive at an understanding, that contains a cartel provision; or
 - “(b) give effect to a cartel provision.
- “(2) *See* section 80 for liability to a pecuniary penalty, and **section 82B** for criminal liability, for contravention of this section. 25

“30A **Meaning of cartel provision and related terms**

- “(1) A **cartel provision** is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the supply or acquisition of goods or services in New Zealand:
- “(a) price fixing;
 - “(b) restricting output;
 - “(c) market allocating;
 - “(d) ~~bid rigging.~~

- “(2) In this Act, **price fixing** means, as between the parties to a contract, arrangement, or understanding, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of,—
- “(a) the price for goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or 5
 - “(b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other. 10
- “(3) In this Act, **restricting output** means preventing, restricting, or limiting, or providing for the prevention, restriction, or limitation of,—
- “(a) the production or likely production by any party to a contract, arrangement, or understanding of goods that any 2 or more of the parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or 15
 - “(b) the capacity or likely capacity of any party to a contract, arrangement, or understanding to supply services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or 20
 - “(c) the supply or likely supply of goods or services that any 2 or more parties to a contract, arrangement, or understanding supply in competition with each other; or 25
 - “(d) the acquisition or likely acquisition of goods or services that any 2 or more parties to a contract, arrangement, or understanding acquire in competition with each other. 30
- “(4) In this Act, **market allocating** means allocating between any 2 or more parties to a contract, arrangement, or understanding, or providing for such an allocation of, either or both of the following: 35
- “(a) the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other:

- “(b) the geographic areas in which the parties supply or acquire goods or services in competition with each other.
- “(5) In this Act, **bid rigging** means restraining † or more parties to a contract, arrangement, or understanding from making a bid, or requiring a bid to be in accordance with a contract, arrangement, or understanding, where—
- “(a) the parties to the contract, arrangement, or understanding are in competition with each other for the supply or acquisition of the goods or services that are the subject of the bid; and
- “(b) the essential features of the contract, arrangement, or understanding are not disclosed to the person running the bid before the bid is lodged.
- “(6) For the purpose of **subsection (5)**, **bid** includes—
- “(a) a tender; and
- “(b) any step preliminary to making a bid, such as giving an expression of interest.

“30B Additional interpretation relating to cartel provisions

In this Act, in relation to a cartel provision,—

- “(a) if a person is a party to a contract, arrangement, or understanding, each of the person’s interconnected bodies corporate is taken to be a party to the contract, arrangement, or understanding; and
- “(b) if a person (**person A**) or any of person A’s interconnected bodies corporate supplies or acquires goods or services in competition with another person (**person B**) or any of person B’s interconnected bodies corporate, person A is taken to supply or acquire those goods or services in competition with person B; and
- “(c) a reference to persons in competition with each other for the supply or acquisition of goods or services includes a reference to—
- “(i) persons who are, or are likely to be, in competition with each other in relation to the supply or acquisition of those goods or services; and
- “(ii) persons who, but for a cartel provision relating to those goods or services, would, or would be likely to, be in competition with each other in re-

lation to the supply or acquisition of those goods or services.

“30C Temporal application of cartel prohibition

- “(1) **Section 30(1)(a)** (which relates to entering into a contract or arrangement, or arriving at an understanding, that contains a cartel provision) applies only to contracts, arrangements, or understandings that are entered into or arrived at after **section 30** comes into force. 5
- “(2) **Section 30(1)(b)** (which relates to giving effect to a cartel provision in a contract, arrangement, or understanding) applies only to conduct occurring after **section 30** comes into force, but applies whether the contract, arrangement, or understanding was entered into or arrived at before or after that section comes into force, and whether or not it has been suspended at any time. 10 15
- “(3) Despite **subsection (2)**, during the first 9 months after the date on which this section comes into force, no proceedings under section 80 may be commenced for a contravention of **section 30(1)(b)** in relation to a contract, arrangement, or understanding that was entered into or arrived at before this section came into force and that, at that time, contained or may have contained a cartel provision. 20
- “(4) However, during that 9-month period, proceedings under section 80 may be commenced in relation to a contract, arrangement, or understanding referred to in **subsection (3)** as if section 30, as it was before it was replaced by the Commerce (Cartels and Other Matters) Amendment Act **2011**, was still in force. 25

“30D Cartel provisions generally unenforceable

- “(1) No provision in a contract is enforceable if it has the purpose, effect, or likely effect of price fixing, restricting output, or market allocating, or bid rigging (as those terms are defined in **section 30A**). 30
- “(2) However, nothing in **subsection (1)** affects the enforceability of a cartel provision in any contract to which **section 31, 32, or 33** applies. 35

“31 Exemption for collaborative activity

- “(1) Nothing in **section 30** applies to a person who enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or who gives effect to a cartel provision in a contract, arrangement, or understanding, if, at the time of entering into the contract, arrangement, or understanding or giving effect to the cartel provision,— 5
- “(a) the person and 1 or more parties to the contract, arrangement, or understanding are involved in a collaborative activity; and 10
 - “(b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.
- “ (2) In this Act, **collaborative activity** means an enterprise, venture, or other activity, in trade, that— 15
- “(a) is carried on in co-operation by 2 or more persons; and
 - “(b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.
- “ (3) The purpose referred to in **subsection (2)(b)** may be inferred from the conduct of any relevant person or from any other relevant circumstance. 20

“32 Exemption for vertical supply contracts

- “ (1) Nothing in **section 30** applies to a person who enters into a contract that contains a cartel provision, or who gives effect to a cartel provision in a contract, if— 25
- “(a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and 25
 - “ (b) the cartel provision—
 - “ (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, or to the maximum price at which the customer or likely customer may resupply the goods or services; and 30
 - “ (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract. 35

“(2) The purpose referred to in **subsection (1)(b)(ii)** may be inferred from the conduct of any relevant person or from any other relevant circumstance.

- “33 Exemption for joint buying and promotion agreements** 5
 A provision in a contract, arrangement, or understanding does not have the purpose, effect, or likely effect of price fixing (as defined in **section 30A(2)**) if the provision—
- “(a) relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by some or all of the parties to the contract, arrangement, or understanding; or 10
 - “(b) provides for joint advertising of the price for the resupply of goods or services acquired in accordance with **paragraph (a)**; or
 - “(c) provides for a collective negotiation of the price for goods or services followed by individual purchasing at the collectively negotiated price; or 15
 - “(d) provides for an intermediary to take title to goods and resell or resupply them to another party to the contract, arrangement, or understanding.” 20

Acquisitions by overseas persons

- 8 New sections 47A to 47D inserted**
 The following sections are inserted after section 47:
- “47A Declaration relating to acquisition by overseas person** 25
- “(1) The Commission may apply to the High Court for a declaration under this section if—
- “(a) an overseas person acquires shares in a New Zealand body corporate; and
 - “(b) the acquisition results in the overseas person acquiring a controlling interest in the New Zealand body corporate. 30
- “(1) The Commission may apply to the High Court for a declaration under this section if an overseas person acquires a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares.
- “(2) The High Court may make a declaration that it is satisfied that the acquisition of shares by the overseas person has, or is likely 35

“(3) Any uncompleted proceedings for an order under this Act that a person pay a pecuniary penalty must be stayed if criminal proceedings are started or have already been started against the person for the same act or omission, or substantially the same act or omission, in respect of which the pecuniary penalty order is sought.” 5

Amendments relating to penalties for cartels

14 Pecuniary penalties

(1) The heading to section 80 is amended by adding “**relating to restrictive trade practices**”. 10

(2) Section 80(2B) is amended by repealing paragraph (b) and substituting the following paragraph:

“(b) in any other case, the greater of the following:

“(i) \$10 million:

“(ii) either,— 15

“(A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or 20

“(B) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.” 25

(3) Section 80 is amended by inserting the following subsection after subsection (2B):

“(2C) In proceedings relating to a contravention of **section 30**, if the defendant claims that an exemption in **section 31, 32, or 33** applies, it is for the defendant to prove, on the balance of probabilities, that the relevant exemption applies.” 30

- 15 Body corporate not to indemnify certain persons in respect of pecuniary penalties**
- (1) Section 80A is amended by omitting the heading and substituting the following heading: “**No indemnity for pecuniary penalties relating to cartels**”.
- (2) Section 80A is amended by repealing subsection (1) and substituting the following subsection:
- “(1) A person, not being an individual, must not indemnify any director, employee, or agent, or former director, employee, or agent, of the person or any of its interconnected bodies corporate in respect of—
- “(a) liability for payment of a pecuniary penalty under section 80 that arises out of a contravention of **section 30**; or
- “(b) costs incurred by the director, employee, or agent, or former director, employee, or agent, in defending or settling any proceeding relating to that liability.”
- (3) Section 80A(3) is amended by repealing the definitions of **agent**, **director**, and **servant**.
- 15 New section 80A substituted**
- Section 80A is repealed and the following section substituted:
- 80A Restriction on indemnities relating to contraventions of section 30**
- (1) A body corporate must not indemnify any director, employee, or agent, or former director, employee, or agent, of the body corporate or of any of its interconnected bodies corporate (**person A**) in respect of—
- “(a) any pecuniary penalty imposed on person A by the court under section 80 in respect of a contravention of **section 30**; or
- “(b) any penalty imposed on person A by the court following the conviction of person A under **section 82B**; or
- “(c) any costs incurred by person A in defending any civil proceedings in which the pecuniary penalty referred to in **paragraph (a)** is imposed or any criminal proceedings in which person A is convicted as described in **paragraph (b)**.”

- “(2) An indemnity given in contravention of **subsection (1)** is void.
- “(3) In this section, **indemnify** includes relieve or excuse from liability, whether before or after the liability arises; and **indemnity** has a corresponding meaning.” 5
- 16 Court may order certain persons to be excluded from management of body corporate**
- (1) Section 80C is amended by omitting “that—” and substituting “that the person has, in contravention of **section 30,—**”.
- (2) Section 80C is amended by repealing paragraphs (a) and (b) to (d) and substituting the following paragraphs: 10
- “(a) the person has, in contravention of **section 30,—**
- “(i) entered into a contract or arrangement, or has arrived at an understanding, that contains a cartel provision; or 15
- “(ii) given effect to a contract, arrangement, or understanding that contains a cartel provision:
- “(a) entered into a contract or arrangement, or has arrived at an understanding, that contains a cartel provision; or
- “(b) given effect to a contract, arrangement, or understanding that contains a cartel provision.” 20
- 17 Exemplary damages for contravention of Part 2**
- Section 82A is amended by adding the following subsection:
- “(3) The court may not order a person to pay exemplary damages in relation to conduct for which the person has been convicted of an offence under **section 82B.**” 25
- 18 New section 82B inserted**
- The following section is inserted after section 82A:
- “82B Offence relating to cartel prohibition**
- “(1) A person commits an offence if— 30
- “(a) the person,—
- “(i) in contravention of **section 30**, enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision; and

- “(ii) intends, at that time, to engage in price fixing, restricting output, or market allocating; ~~or bid rigging~~ (as those terms are defined in **section 30A**);
or
- “(b) the person,— 5
- “(i) in contravention of **section 30**, gives effect to a contract, arrangement, or understanding that contains a cartel provision; and
- “(ii) intends, at the time the contract, arrangement, or understanding is given effect to, to engage in price fixing, restricting output, or market allocating; ~~or bid rigging~~ (as those terms are defined in **section 30A**). 10
- “(2) ~~In a prosecution under this section, it is a defence if the defendant honestly believed at the relevant time that an exemption in **section 31, 32, or 33** applied.~~ 15
- “(2) In a prosecution under this section, it is a defence, for a defendant involved in a collaborative activity, if—
- “(a) the defendant honestly believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity; and 20
- “(b) that belief existed at the time the defendant entered into or arrived at the contract, arrangement, or understanding that contained the cartel provision, or at the time the defendant gave effect to the cartel provision, as the case requires. 25
- “(3) A defendant that wishes to claim that an exemption in **section 31, 32, or 33** applies, or to rely on the defence in **subsection (2)**, must—
- “(a) notify the prosecution of that fact within 1 month after the date on which the defendant is committed for trial for the offence; and 30
- “(b) at the same time, provide sufficient details about the application of the relevant section to fully and fairly inform the prosecution of the manner in which the exemption or defence is claimed to apply. 35
- “(4) An individual who commits an offence against this section is liable on conviction on indictment to imprisonment for a term not exceeding 7 years.

- “(5) A person, not being an individual, that commits an offence against this section is liable on conviction on indictment to a fine of the greater of the following:
- “(a) \$10 million;
 - “(b) either,—
 - “(i) if it can be readily ascertained and if the court is satisfied that the offence occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
 - “(ii) if the commercial gain cannot be readily ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.”

Amendment relating to acquisitions by overseas persons

19 Pecuniary penalties

- (1) The heading to section 83 is amended by adding “**relating to business acquisitions**”.
- (2) Section 83 is amended by repealing subsection (1) and substituting the following subsections:
 - “(1) The court may, on the application of the Commission, order a person to pay a pecuniary penalty to the Crown if the court is satisfied that the person—
 - “(a) has contravened section 47 or **47B**; or
 - “(b) has attempted to contravene either of those sections; or
 - “(c) has aided, abetted, counselled, or procured any other person to contravene either of those sections; or
 - “(d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene either of those sections; or
 - “(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of either of those sections; or
 - “(f) has conspired with any other person to contravene either of those sections.