



29 July 2011

Cartel Criminalisation
Ministry of Economic Development
PO Box 1473
Wellington 6140

By email: cartels@med.govt.nz

Commerce (Cartels and Other Matters) Bill - Exposure Draft Amendment Bill consultation

- 1 The New Zealand Law Society (Law Society) welcomes the opportunity to make a submission on the Exposure Draft of the Commerce (Cartels and Other Matters) Amendment Bill (the Exposure Draft Bill).
- 2 As a preliminary comment, the Law Society commends the Ministry of Economic Development (MED) for taking the step of releasing an exposure draft of the Bill. This allows for constructive engagement on the intention and drafting of the Bill in a way that is not practicable during the formal legislative process. While the process of preparing and consulting on an exposure draft necessarily draws on the scarce resources of the relevant Ministry and Parliamentary Counsel Office, the improved engagement will lead to higher quality outcomes. In the Law Society's view, this is a valuable exercise and we would encourage greater use of the option of exposure drafts of potential legislation.
- 3 In this submission we comment on the Exposure Draft Bill, by:
 - 3.1 discussing the practical effects of the following key features of the Exposure Draft Bill:
 - (a) the civil prohibition;
 - (b) the clearance regime; and
 - (c) the criminal offence;
 - 3.2 raising a question as to the interaction with the authorisation process; and
 - 3.3 commenting on other changes to the Commerce Act proposed in the Exposure Draft Bill.

EXECUTIVE SUMMARY

- 4 There are two key design choices in the proposed cartel prohibition framework. The first is to define widely the civil prohibition on cartel provisions, in a way that will impugn a range of bona fide arrangements. The proposal in the Exposure Draft Bill would then rely on the proposed exemptions to delineate legitimate and illegitimate arrangements. The second design choice is to set a parallel criminal offence, thus importing the same issues of scope into the criminal context.
- 5 The principal question that MED has asked for feedback on is whether this approach would materially “chill” bona fide commercial arrangements. In this submission, the Law Society registers its concern that the approach could have a material chilling effect. This is because:
 - 5.1 commercial actors are likely to react to the suggestion that bona fide proposals are cartels, even where an exemption may be available;
 - 5.2 the principal exemption for collaborative activity carries with it a significant risk of the Commission or the court second-guessing the judgement of the parties as to the necessity of the particular aspects of the commercial arrangement or issue. For this reason, potential parties will be conservative in their reliance on the exemption;
 - 5.3 the parallel criminal offence will accentuate both effects. Those bona fide arrangements caught by the expansive scope of the offence are unlikely to be pursued, particularly in light of the onus on the defendant to prove the defence based on the exemptions.
- 6 The Law Society also raises some concerns in relation to the design of the proposed criminal offence. Specifically:
 - 6.1 it is questionable whether a criminal offence should be cast in terms that will capture bona fide behaviour. It is no small matter to subject blameless commercial actors to the criminal law and criminal procedures, even where defences are made available. This seems an inappropriate way for the criminal law to develop;
 - 6.2 the proposal to put the burden of proof on the defendant to prove the defence is inappropriate. This is particularly so in light of the scope issue discussed above, where it is known the criminal offence will capture bona fide arrangements. In such a situation, the analysis will rest on whether a defence is available, and that onus has been placed on the defendant. This is in practice a reverse onus provision, which is contrary to the right to be presumed innocent, and should not be used.

- 7 Reflecting on these concerns, the Society submits the following broad alternatives could be considered by MED:
- 7.1 staying with the status quo;
 - 7.2 introducing only the civil prohibition and exemption framework, with an intention that a criminal offence be considered in several years time when sufficient experience and certainty have been gained in relation to the civil prohibition;
 - 7.3 introduce the civil prohibition and exemptions as proposed, but define the criminal offence in more narrow terms to minimise the risk of capturing bona fide arrangements. This could be focused on price fixing, for example.

CIVIL PROHIBITION

Proposal

- 8 The proposed new section 30 prohibits cartel provisions as follows:
- “(1) No person may –
- (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.”
- 9 The proposed new section 30A defines ‘cartel provision’ very broadly as follows:
- “(1) ...cartel provision means a provision contained in a contract, arrangement, or understanding that has 1 or more of the following purposes:
- (a) price fixing:
 - (b) restricting output:
 - (c) market allocating:
 - (d) bid rigging.”
- 10 These purposes are then separately defined in 30A(2)-(6).
- 11 With the exception of the price fixing definition, the definitions in 30A are key changes introduced by the Bill.

Comment on proposed prohibition

- 12 Four observations can be made regarding the proposed scope of the prohibition of cartel provisions.

Scope of cartel provision captures bona fide commercial arrangements

- 13 The first is that the proposed scope of cartel provision is very broad, and would capture a number of bona fide commercial arrangements.
- 14 The new definitions of output restrictions and market allocation, in particular, are sufficiently broad to pick up all arrangements between competitors (or potential competitors) that include any agreed restriction or condition on the commercial freedom of the parties.
- 15 Some examples illustrate this point:
- 15.1 An agreement between competitors to upgrade the technology they use to provide services, in a situation where inter-operability of the technology used by providers is useful to consumers but not essential. The providers will have in mind an improved platform for competition, but the arrangement is likely to meet the definition of output restriction and price fixing, and hence include a cartel provision;
- 15.2 A supply arrangement between a provider and its major customer, whereby a significant bulk discount is offered to the customer. In such contracts it is not unusual to include a condition that the customer will not use the generous discount to resell the product in competition with the supplier. The parties will have in mind an ordinary vertical supply arrangement with the usual commercial protections to support a generous discount. But the prohibition on resale acknowledges the potential for competition, and the output restriction amounts to a cartel provision.
- 15.3 An ordinary franchise arrangement that allocates to each franchisee a specific region, and includes a non-compete on termination. This would be a cartel arrangement by virtue of its market allocation and output restriction provisions.

The over-inclusive prohibition is a design choice

- 16 The second observation is that this over-reach is deliberate. MED acknowledges that the proposed prohibition has a scope that would pick up a range of bona fide, wealth enhancing commercial arrangements.¹
- 17 It is for this reason that the Exposure Draft Bill includes generally worded exemptions and a clearance regime, both discussed below. The design choice in the Exposure Draft Bill is to set an over-inclusive for the definition of cartel prohibition, and then provide exemptions to draw the boundary between legitimate and illegitimate arrangements.
- 18 The consequence of this design is that a number of bona fide arrangements are tarred with the brush of being a cartel arrangement, at least initially, and then business people and their advisors must be satisfied that an exemption clearly applies.
- 19 This illustrates that the success of this design choice is dependent on two factors:
- 19.1 a sufficiently clear exemption such that the boundary between legitimate and illegitimate commercial arrangements is certain and easily discoverable; and
- 19.2 a commercial and legal framework that does not deter commercial decision-makers from going through the process of being advised a proposal is prima facie a cartel but there are solid grounds for proceeding.
- 20 The first factor, proposed exemptions, is discussed below. The Law Society encourages MED not to under-estimate the second factor. While lawyers can see a two step process of cartel provision/exemption as legal machinery, to a commercial decision-maker the idea of entering into a cartel arrangement on the basis of legal advice regarding an exemption is likely to be off-putting. It seems inevitable that bona fide wealth-enhancing arrangements will be avoided as a result. Certainly, the level of legal costs and involvement of lawyers in commercial decision-making will increase.

Market allocation and output restriction prohibitions will be broad

- 21 The third observation is that it is difficult to imagine eliminating all over-reach once the decision is made to define separately market allocation and output restriction.
- 22 To eliminate loop holes, separate market allocation and output restrictions have to be defined in general terms. For this reason, the Law Society has no changes to suggest to the definitions.

¹ Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [27].

- 23 However, the observation remains that the design decision to include separate market allocation and output restriction provisions means that, in combination with the price fixing definition, the scope of a cartel provision will capture nearly all arrangements between parties that are competitors or could be seen as potential competitors. In New Zealand's concentrated markets this is likely to impugn a wide range of bona fide arrangements.

The Exposure Draft Bill continues the complexity of a provision's purpose

- 24 The fourth observation is that this proposal continues the focus in the Commerce Act on the purpose of a provision.
- 25 This is a complex area of the Commerce Act. As noted by MED in the explanatory material, the concept of the purpose of a provision has proved difficult and conducive to litigation. The most recent guidance from the courts is a majority decision indicating that there is both an objective and subjective aspect to the assessment of the purpose of a provision.
- 26 Obviously a change in this area has potential implications beyond the cartel provisions. However, the legal complexity inherent in identifying the purpose of a provision (as opposed to the purpose of a party) will have additional ramifications in the context of a criminal offence, and this would support the consideration of a different approach.
- 27 An example of a different approach would be to shift the focus from the legal fiction of the purpose of a provision to the knowledge of the parties. A provision could be a cartel provision if two or more parties knew the provision would be likely to result in price fixing.

Exemptions from civil prohibition

- 28 The Exposure Draft Bill provides for 3 exemptions from the civil prohibition on cartel provisions:
- 28.1 exemption for collaborative activity;
 - 28.2 exemption relating to bid rigging; and
 - 28.3 exemption for joint buying and promotion agreements.

Exemption for collaborative activity
Proposal

29 The proposed new section 31(1) provides an exemption for collaborative activity:

- “(1) 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, and –
- (a) the person and 1 or more other parties to the contract, arrangement or understanding are involved in a collaborative activity; and
 - (b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.”

Meaning of collaborative activity

30 To satisfy the collaborative activity definition in proposed new section 31(2), a party has to prove that the relevant activity was:

30.1 carried on “in co-operation” between the parties; and

30.2 not carried on for the “dominant purpose of lessening competition”.

Co-operation requirement

31 It is not clear whether the reference to co-operation is intended to add an additional requirement over and above the “contract, arrangement or understanding” requirement in section 31(1). There is a risk that section 31(2)(a) will be read as adding a co-operation gloss, which would be unpredictable. If one party is taking advantage of the commercial weakness of another to negotiate particularly favourable terms, is the co-operation element intended to exclude that collaborative activity? The Law Society submits it should be sufficient that the activity is carried on “between” the parties - rather than “in co-operation between the parties”.

Dominant purpose requirement

32 It is unclear whether the term “dominant purpose of lessening competition” refers to the lessening of competition:

32.1 in a market; or

32.2 between the parties to the activity; or

- 32.3 both.
- 33 The Law Society submits that, at a minimum, section 31(2)(b) should be clear as to which of these three meanings is intended.
- 34 The Law Society also submits a preference for the phrase to refer to the lessening of competition in a market. This is because:
- 34.1 competitive effects on markets are the focus of the Act; and
- 34.2 this would ensure consistency with the analysis undertaken by the Commission in deciding whether or not to grant a clearance under proposed new section 65A(2)(b).

The reasonably necessary requirement

Determining what is ‘reasonably necessary’

- 35 The key legal test in the proposed collaborative activity exemption is that the cartel provision must be “reasonably necessary” for the purpose of the wider collaborative activity.
- 36 The “reasonably necessary” filter is critical to the success of the proposed civil prohibition because, as discussed above, the scope of the cartel provision is cast deliberately wide, such that a number of bona fide arrangements will be prima facie cartel arrangements. Commercial parties will inevitably look to satisfy the collaborative activity exemption.
- 37 The intended role of the “reasonably necessary” filter is to strike a balance between:
- 37.1 counter-acting the risk of overreach with respect to the cartel prohibition;² and
- 37.2 ensuring cartel provisions are used with sound commercial justification.
- 38 The “reasonably necessary” requirement is grounded in the US Department of Justice’s *Antitrust Guidelines for Collaborations Among Competitors* (the US Antitrust Guidelines),³ which provide:

An agreement may be “reasonably necessary” without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies [ie the FTC and USDOJ] conclude that the relevant agreement is not reasonably necessary to their achievement. In making this assessment, the

² Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [15].

³ Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [50].

Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.⁴

- 39 The US Antitrust Guidelines propound a very similar approach to interpreting the “reasonably necessary” requirement as that taken in the 2007 Court of Appeal decision of *Mana v Fleming*.⁵ *Mana* was concerned with a provision in an agreement for sale and purchase, which imposed an obligation on one party to “...do all things which may reasonably be necessary to enable [a] condition to be fulfilled...”⁶
- 40 Pertinent observations of the Court of Appeal in *Mana* were as follows:
- 40.1 “A thing is ‘necessary’ in this context if it is required to bring about the stipulated result...”⁷
- 40.2 “The word ‘reasonably’ introduces a qualitative or relative measure of what is necessary; its effect is to modify the obligation by reference to what is reasonable in the circumstances...”⁸
- 40.3 “He or she is required to do all that can be reasonably done to achieve the... object but no more.”⁹
- 40.4 “The word ‘reasonably’ must import an objective standard, and performance is to be measured by applying that standard to the relevant facts and circumstances.”¹⁰
- 40.5 “The Court is the arbiter of what is reasonably necessary in any case...”¹¹
- 41 Using the US Antitrust Guidelines, and the Court of Appeal observations in *Mana*, a court or the Commission ruling on the ‘reasonably necessary’ requirement would be faced with the following question:

Could reasonable commercial parties, operating in the same commercial context as the parties to the collaborative activity, achieve the purpose of the collaborative activity (or a similar purpose) by less restrictive, but still practical, business means?

⁴ US Department of Justice *Antitrust Guidelines for Collaborations Among Competitors*(FTC and USDOJ, April 2000) at 24.

⁵ [2007] NZCA 324.

⁶ *Mana v Fleming* [2007] NZCA 324 at [30].

⁷ *Mana v Fleming* [2007] NZCA 324 at [31].

⁸ *Mana v Fleming* [2007] NZCA 324 at [32].

⁹ *Mana v Fleming* [2007] NZCA 324 at [32].

¹⁰ *Mana v Fleming* [2007] NZCA 324 at [33].

¹¹ *Mana v Fleming* [2007] NZCA 324 at [33].

- 42 This test will result in considerable commercial uncertainty attaching to the exemption for collaborative activity. This is because:
- 42.1 in a commercial context, alternative means and purposes will always be open to commercial actors, in theory. Reasonable commercial actors will disagree as to which means and/or purpose should be pursued for different (but still reasonable) commercial reasons. The process of negotiation is one where parties settle on one of many potential outcomes; and yet
- 42.2 parties seeking to rely on the collaborative activity exemption will face a material risk that the Commission or courts will subsequently second-guess their negotiated outcome and assert the parties could have negotiated a theoretically “better way”. The consequences of this outcome are obviously severe – parties would find themselves accused of cartel behaviour. For this reason, parties will be risk averse, and react conservatively to the uncertainty in the ex post application of the reasonably necessary test.
- 43 The test is particularly uncertain bearing in mind the Commission or court:
- 43.1 must inquire into whether:
- (a) significantly less restrictive means are available to the parties; and (if the US Antitrust Guidelines are followed)
- (b) a similar, alternative purpose underlying the collaborative activity is more appropriate, given the less restrictive means available to achieve that similar alternative purpose.
- 43.2 it is unclear what factors they will consider relevant in assessing the commercial context.

Timing of the ‘reasonably necessary’ assessment

- 44 There is a further, separate issue relating to the time at which the “reasonably necessary” assessment is made.
- 45 The exemption is framed in the present tense, so even if the cartel provision was reasonably necessary at the time of entering into the collaborative activity, parties will fail to meet the exemption if, due to changed circumstances, the provision is no longer reasonably necessary.
- 46 Framing the exemption in the present tense is problematic because it:

- 46.1 creates commercial uncertainty by putting parties at risk of having their arrangement overturned for reasons that didn't exist at the time of entering into the arrangement; and
 - 46.2 conflicts with proposed new section 82B, whereby it is a defence to the criminal offence relating to cartel provisions if the accused believed that the exemption applied at the time of entering into, or giving effect to, the cartel provision.
- 47 For these reasons, it is more appropriate for the reasonably necessary assessment to be made in relation to the time that the cartel provision was entered into only.
- 48 However even limiting the reasonably necessary assessment to this point in time highlights the practical challenges with the test:
- 48.1 judges will need to assess the factual context several years after the cartel provision was entered into; and consequently
 - 48.2 parties will have an evidentiary burden to document the reasons for their commercial decisions (as compared with alternatives) at the time of making those decisions.

Exemption relating to bid-rigging

- 49 Proposed new section 32 provides an exemption for a cartel provision with a bid-rigging purpose.
- 50 The practical effect of the bid-rigging exemption is to permit a bid-rigging arrangement, provided the parties entering into the bid-rigging arrangement fully inform the person running the bid (the Bid Runner) of the bid-rigging arrangement, and the Bid Runner permits the parties to enter into the bid-rigging arrangement.
- 51 This exemption is justified. As noted in the MED's explanatory material to the Draft Exposure Bill, the exemption strikes a balance between:
- (a) protecting the interests of the person who risks suffering loss from the cartel provision (the Bid Runner); and
 - (b) enabling the pro-competitive effects of various bid-rigging arrangements.¹²

¹² Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [58].

Exemption for joint buying and promotion agreements

- 52 The proposed new section 33 provides an exemption for a cartel provision in certain joint buying and promotion agreements.
- 53 The practical effect of this exemption is to enable parties to agree to:
- 53.1 collectively acquire goods or services at a certain price;
 - 53.2 jointly advertise the price of goods which they have collectively acquired;
 - 53.3 collectively negotiate the price for goods or services, followed by individual purchasing of those goods or services at the collectively negotiated price; and
 - 53.4 purchase goods off an intermediary.
- 54 These exemptions seem non-contentious.

Possible exemption for vertical arrangements

- 55 The MED, in its Explanatory material on the Exposure Draft Bill:
- 55.1 indicates a willingness to consider departing from the Australian approach by including a vertical arrangements exemption;¹³ and
 - 55.2 notes that: “Vertical conduct between entities in different parts of the supply chain can be pro-competitive and should not be prohibited.”¹⁴
- 56 The Law Society agrees this is an option worth exploring. As discussed above, the definition of cartel provision is over-wide, in the sense of impugning legitimate arrangements. In summary:
- 56.1 many pro-competitive and commonplace vertical arrangements (such as the discount supply arrangement discussed above) will be caught by the broad definition of ‘cartel provision’ in 30A; and
 - 56.2 proposed new section 30B defines a ‘person’ that enters into a cartel provision broadly as including that person’s interconnected bodies corporate – giving a broad understanding of what constitutes a competitor and catching many vertical arrangements.¹⁵

¹³ Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [62].

¹⁴ Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [38].

- 57 An exemption for vertical supply arrangements would be one, low risk way of counter-acting this over-reach.

CLEARANCE REGIME

Proposal

- 58 Clause 12 of the Exposure Draft Bill introduces a new clearance regime for collaborative activities.

Comment

Different standards for clearances and exemptions

- 59 The standard to which the Commission must be satisfied in order to grant a clearance for a cartel provision under proposed new section 65A, differs from the standard to which a party must prove the exemption for collaborative activity under proposed new section 31:
- 59.1 Section 65A Clearance – the Commission has the discretion to give a clearance for a cartel provision if (in addition to being reasonably necessary for the purpose of a collaborative activity) it is satisfied that the collaborative activity will not, or would not be likely to have “*the effect of substantially lessening competition in a market*”.
- 59.2 Section 31 Exemption – a party can rely on the exemption for cartel provisions if (in addition to the cartel provision being reasonably necessary for the collaborative activity) they can prove that they are involved in a collaborative activity, defined as an activity that “*is not carried on for the dominant purpose of lessening competition.*”
- 60 The practical effect of having these different standards is that a clearance could be granted in situations where there would be a breach.
- 61 An arrangement could fail to qualify as a collaborative activity (because it had the dominant purpose of *lessening* competition) and thus be a breach of the cartel prohibition but not have the effect of *substantially lessening* competition in a market (thus meeting the clearance criteria).
- 62 This has the potential to confuse the perception of the role of clearances. Currently there is a clear understanding that a clearance signifies no breach, rather than cures a breach.

¹⁵ Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [62].

It is problematic to revoke clearances due to a material change of circumstances

- 63 The proposed new section 65D gives the Commission the discretion to revoke a clearance if it is satisfied that there has been a material change of circumstances since the clearance was given.
- 64 This revocation power is problematic, given the proposed role of the clearance is to foster commercial confidence. As discussed above, the proposed design of the civil prohibition is an overly-wide definition of cartel provision, couple with a collaborative activity exemption and clearance option. Parties contemplating bona fide arrangements will be in a position of relying on the exemption or clearance.
- 65 As discussed, the exemption will look risky to commercial parties, given the prospect of the Commission or court second guessing whether their negotiated outcome is reasonably necessary. To the extent that the clearance option is intended to bolster commercial confidence, the possibility of the clearance being withdrawn at a later stage will undermine the commercial credibility of the option. Parties will be naturally reluctant to run the risk of having the rug pulled out from under them, to discover their options are to suddenly cease trading and unwind investment or be accused of cartel behaviour.
- 66 The Law Society proposes that clearances should be assessed at the time the application is made, and if made then they should endure for the life of the arrangement (absent fraud etc). The attempt to reserve an option to revisit the analysis in light of changed circumstances strikes the wrong balance between managing market outcomes and providing certainty for participants proposing bona fide collaborative arrangements.

CRIMINAL OFFENCE

Proposal

- 67 The proposed new section 82B creates a parallel criminal offence for persons who knowingly enter into or give effect to a cartel provision.
- 68 A defendant will not be liable under 82B for entering into a cartel provision if they can prove, on the balance of probabilities, that:
- (a) they didn't knowingly enter into, or give effect to, a cartel provision; or
 - (b) one of the exemptions apply, or (in relation to the collaborative activity exemption) they believed at the time of entering into, or giving effect to the cartel provision, that the exemption applied.

Advisability of deliberate over-reach in a criminal context

- 69 The design choice proposed of establishing the criminal offence in a way that parallels the civil prohibition means that the discussion above regarding the deliberate over-reach of the cartel provision is equally applicable to the criminal offence.
- 70 The Law Society sounds a note of caution in this regard. It is a significant step to establish a criminal offence knowing it will encompass a range of bona fide behaviour.
- 71 This would mean bona fide commercial actors – directors, managers, business owners – will find themselves grappling with the criminal law and the criminal process. Ideally this would happen at the time an arrangement is proposed, but it will not always be the case. The broadly drafted cartel offence will surprise New Zealand businesses, because of its scope. Parties will discover that arrangements they have entered into, with bona fide purpose, are prima facie a breach of criminal law. This will be the cause of significant stress, distraction and cost.
- 72 It is not clear this is an appropriate way for the criminal law to develop. The Law Society encourages MED to continue to explore whether a criminal offence can be drafted such that its scope is much less likely to impugn blameless behaviour. This will necessarily mean that the scope of the criminal offence is narrower than the civil prohibition, which reflects the seriousness of an accusation of criminal behaviour.
- 73 One possibility in this approach may be to limit the criminal offence to price fixing.

Knowledge requirement

- 74 The prosecution would have to prove that the accused knew the cartel provision was a cartel provision at time of entering into, or giving effect to, the cartel provision.
- 75 This means the prosecution must prove, beyond reasonable doubt, that the accused knew the cartel provision had one of the following purposes, as defined in 30A:
- (a) price fixing;
 - (b) restricting output;
 - (c) market allocating; or
 - (d) bid rigging.

Wilful blindness

76 Given the Court of Appeal’s recognition in *R v Martin*¹⁶ that wilful blindness amounts to knowledge, it is likely that an accused under 82B will be deemed to know that a provision was a cartel provision if:

76.1 the accused suspected the provision was a cartel provision, as defined in 30A; and

76.2 the accused deliberately refrained from confirming their suspicion *because* the accused wanted to remain in ignorance.¹⁷

77 A slightly more restrictive approach was taken to wilful blindness in the earlier Court of Appeal decision of *R v Crooks*¹⁸. *Crooks* held that a failure to inquire into relevant facts may only support an inference of knowledge or belief if the accused was confronted by circumstances which were “so compelling” that it can be inferred that the accused failed to inquire “because he knew what the answer was going to be”.¹⁹

78 However, *Martin* indicates a more generous approach to wilful blindness should be preferred, describing the difference between failing to enquire because you “know what the answer is going to be” (propounded in *Crooks*) and failing to enquire because you want to remain in ignorance of the truth (propounded in *Martin*) as “largely semantic”.²⁰

Complexity of knowledge requirement

79 As this discussion indicates, the proposed knowledge requirement will be complex.

80 The requisite knowledge is knowledge of the purpose of a cartel provision, where that purpose:

80.1 is objectively assessed, but having regard to likely market effects;

80.2 is a particular purpose that is itself made up of the specific elements of one of the forms of cartel provision – price fixing, bid rigging, market allocation or output restriction.

81 In a wilful blindness case, the question becomes whether there was a blameworthy decision not to enquire as to whether such a provision with such a purpose existed.

¹⁶ [2007] NZCA 386.

¹⁷ See *R v Martin* [2007] NZCA 386 at [10].

¹⁸ [1981] 2 NZLR at 58.

¹⁹ *R v Crooks* [1981] 2 NZLR at 58.

²⁰ *R v Martin* [2007] NZCA 386 at [11].

82 Of course, the knowledge requirement of a criminal offence will always give rise to complexity. However this aspect of the criminal offence underscores the point made earlier in this submission that the focus on the fiction of a purpose of a provision increases the degree of complexity beyond possibly what it needs to be. The Law Society encourages MED to consider alternative approaches.

Onus of proof for defence

83 If a defendant knowingly enters into a cartel provision, it can escape liability under 82B if it can prove, on the balance of probabilities, that a relevant exemption applies.

Reverse onus clause

84 Section 82B will impose a reverse onus on a defendant to prove its innocence in some cases. This is because the criminal offence, as discussed above, is cast in deliberately wide terms and will capture blameless arrangements. In practice in such a situation, the analysis will collapse to the defence - which the defendant must prove.

85 The Law Society submits that reverse onus clauses should not be used, especially with criminal offences.

86 This is because:

86.1 reverse onus clauses breach an accused's presumption of innocence - guaranteed in section 25(c) of the New Zealand Bill of Rights Act 1990 (NZBORA):

“25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

.....

(c) the right to be presumed innocent until proved guilty according to law:” and

86.2 the Supreme Court has held in *R v Hansen*,²¹ by majority (with the exception of Blanchard J²²), that a breach of section 25(c) NZBORA could *never* be justified in a free and democratic society:

²¹ [2007] 3 NZLR 1.

²² *R v Hansen* [2007] 3 NZLR 1, at [82].

- (a) “I think it nonsense to speak of the right to be presumed innocent as a restricted right. Under section 25(c), the right to be presumed innocent is given to everyone charged with any offence. A reverse onus excludes the right to be presumed innocent in respect of the offence charged. ... In my view section 25(c) describes an unqualified right to be presumed innocent and any restriction on it is inconsistent with section 25(c).” – *per Elias CJ*²³
- (b) “There are some rights and freedoms in respect of which no limitation could be justified in a free and democratic society... The right to a fair trial is another example...should a trial properly be stigmatised as unfair, section 5 could not be invoked to redeem it. It is also fairly arguable that the burden of persuasion carried by the prosecution in criminal cases is so integral to a fair trial that no relaxation or reversal of it can be justified.” – *per Anderson J*²⁴

87 The explanatory material on the Exposure Draft Bill justifies the reverse onus clauses in section 82B on the basis that “the exemption involves complex business arrangements which are within the peculiar business knowledge of the defendant”.²⁵

88 This justification is problematic because:

88.1 complexity in business arrangements is not a principled basis upon which to deny a defendant a presumption of innocence – if anything, business complexity will make it harder for a defendant to prove the exemption applies on the balance of probabilities;

88.2 a defendant’s “peculiar business knowledge”:

- (a) is often subjective, and so is inconsistent with the “reasonably necessary” test for the collaborative activity exemption – which is objective in nature; and
- (b) does not extend to knowledge of all possible business means available to achieve the purpose of a collaborative activity (for the purposes of the collaborative activity exemption).

²³ *R v Hansen* [2007] 3 NZLR 1, at [38].

²⁴ *R v Hansen* [2007] 3 NZLR 1, at [264].

²⁵ Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [65].

Evidentiary burden on defendant more appropriate

- 89 In the Law Society's view, it is more appropriate for an accused to have a mere evidentiary burden under 82B.
- 90 An evidentiary burden is especially justified given the over-broad definition of 'cartel provision', which, as discussed above, the Crown can confidently predict will pick up bona fide commercial arrangements.

AUTHORISATION PROCESS

- 91 The Law Society submits that the relationship between the proposed civil prohibition and criminal offence and the existing option of applying for an authorisation of a price fixing arrangement is unclear.
- 92 Specifically, it is not clear from the Exposure Draft Bill whether it is intended that:
- 92.1 an application could be made for authorisation of a cartel provision on public benefit grounds;
 - 92.2 an authorisation would provide an effective shield to both civil and criminal liability;
 - 92.3 existing authorisations would provide an effective shield (i.e. a transitional issue);
 - 92.4 an accused could raise a public benefits defence to an accusation of breach of the civil or criminal prohibition. If net public benefits can be demonstrated, such that an authorisation would have been given, should criminal liability attach to a failure to apply?
- 93 These questions raise issues of policy and are for MED to consider. The Law Society simply submits that it would assist the clarity of the proposed Bill and the discussion of the proposal if these issues relating to authorisations were brought out in the explanatory material and Exposure Draft Bill.

OTHER CHANGES PROPOSED BY THE BILL**Acquisition provisions are inconsistent with the Act**

- 94 The wording of proposed section 47A (acquisitions by overseas persons) is inconsistent with the wording of section 47 of the Act (certain acquisitions prohibited) in two respects.

- 95 Section 47(1) prohibits a person from acquiring: “assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.”
- 96 In contrast, proposed section 47A gives the High Court the power to declare that an acquisition by an “overseas person” of a “controlling interest in a New Zealand company... has, or will have, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.”
- 97 “Overseas person” is then defined in section 47A(3) as meaning “a person, whether a body corporate or otherwise, that is neither resident nor carrying on business in New Zealand.”
- 98 Section 47A expands the jurisdiction of the Act to capture acquisitions entered into overseas which directly affect a New Zealand market, even if the party making the acquisition does not operate locally.²⁶
- 99 The first difference in proposed section 47A is that it is only triggered in the event of the acquisition of a “controlling interest” in a company. By contrast the more general competition role in section 47 applies to any acquisition of shares.
- 100 Given the context of expanded jurisdiction, the Explanatory Material on the Draft Exposure Bill explains the difference in wording between 47A and 47 on the basis that the higher threshold for intervention, set by the term “controlling interest” is appropriate because:

“the intention of the regime is to encourage persons to apply for clearance so that any competition concerns can be managed to the satisfaction of the Commission. It is not to unreasonably interfere with off-shore, usually multinational, transactions.”²⁷

- 101 The Law Society agrees that it is important to:
- 101.1 fill the current gap in the Act’s jurisdiction by capturing transactions made by “overseas persons”, and
- 101.2 encourage international transactions in New Zealand.

²⁶ This gap in the Act’s current jurisdiction was noted by the Ministry of Economic Development, in its Explanatory Material on the Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [81].

²⁷ Ministry of Economic Development, Explanatory Material on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (June 2011), at [92].

- 102 However, it is incorrect in principle that overseas persons should be able to acquire less than a controlling interest in a New Zealand company, *even if* the effect of the acquisition would have, or be likely to have, the effect of substantially lessening competition in a market.
- 103 The second difference is that proposed section 47A applies only to the acquisition of shares in a company. There is no reference to the acquisition of assets in a New Zealand company – what if an overseas person were to acquire 100% of the business assets of a New Zealand company? Section 47A would prohibit the acquisition of shares, but not the acquisition of assets that would result in the same outcome.
- 104 Finally, while the intention of the regime might be to encourage use of the clearance process, setting a higher threshold for overseas persons will not guarantee this result. If anything, setting a high threshold would, in many cases, result in an overseas person considering it unnecessary to apply for a clearance.

Drafting of 82B

Giving prosecution details of exemption application

- 105 The proposed new section 82B(4)(b) requires a defendant wishing to rely on an exemption to:

“provide sufficient details about the application of the exemption to fully and fairly inform the prosecution of the manner in which the exemption is claimed to apply.”

- 106 The Law Society submits that the requirement on the defendant to “fully and fairly inform the prosecution” is:

106.1 too onerous; and

106.2 inconsistent with the proposed reforms in the Criminal Procedure (Reform and Modernisation) Bill 2010 (the Criminal Procedure Bill).

- 107 The select committee report specifically recommended amendments to clause 64 of the Criminal Procedure Bill, to make it clear that the defendant was not required “to disclose its factual case to the prosecution before the start of the trial.”²⁸

²⁸ Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) (select committee report) at 2.

108 Clause 64 of the Criminal Procedure Bill provides:

“(1) The defendant must, in accordance with subsection (2) or (3) –

- (a) Give notice of any individual elements of the offence that the defendant disputes; and
- (b) Give notice of any defence, justification, exception, exemption, proviso, or excuse on which the defendant intends to rely.

(1A) Nothing in subsection (1) requires the defendant to give notice of –

- (a) any evidence to be adduced by the prosecution that is disputed; or
- (b) any evidence that the defendant intends to adduce; or
- (c) any witnesses that the defendant intends to call.”

109 In the interests of consistency and fairness, the Law Society suggests that - in line with clause 64 of the Criminal Procedure Bill - a defendant under 82B be under no obligation to disclose the material facts upon which they will rely in proving an exemption applies.

110 Rather, the defendant should simply be required to notify the prosecution of the relevant exemption upon which they will rely.

The position of offending company directors

111 The proposed new sections 82B(5) and (6) prescribe different penalties for individuals and bodies corporate.

111.1 An individual who commits an offence under 82B is liable to imprisonment for a term not exceeding 7 years - 82B(5).

111.2 A body corporate that commits an offence under 82B is liable to pay a pecuniary penalty for the greater of:

- (a) \$10 million; or
- (b) an unspecified amount, dependent upon whether or not the body corporate’s commercial gain is readily ascertainable.

112 It is clear that the knowledge of a company director would be directly attributed to the company under 82B, thus incurring a pecuniary penalty for the company.

112.1 Section 90(1) establishes that “where...it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of his actual or apparent authority, had that state of mind.”

113 However, it is unclear whether a company director would *also* be classed as an “individual” under 82B(5), thus risking imprisonment (in addition to the company paying a fine).

114 More generally, it is unclear how proposed section 82B(5) would apply to the individual manager that commits his or her company to a price fixing arrangement. It is not the individual that prices consistent with the cartel arrangement, but the company. The Law Society expects the intention is that such an individual would be alleged to be part of the pricing arrangement, in addition to the company conducting the trading – if this is the intention, MED could consider clarifying the point.

Regard to the “nature and extent of commercial gain”?

115 The formula for determining the maximum penalty imposed on a body corporate under 82B(6) is the same as that which currently exists under section 80 (pecuniary penalties).

116 However, unlike in section 80(2A)(b), there is no mandatory consideration in 82B for a court to have regard to “the nature and extent of any commercial gain” made by the offending body corporate.

117 Because commercial gain is a fundamental part of the formula for determining the maximum penalty imposed on a body corporate under 82B(6), the Law Society recommends that an equivalent provision requiring the court to have regard to “the nature and extent of any commercial gain” be inserted into 82B.

Clarification needed regarding immunity of the export sector

118 Section 44(1)(g) excludes arrangements which relate “exclusively to the export of goods from New Zealand or exclusively to the supply of services wholly outside New Zealand” (Exclusive Export Arrangements) from the restrictive trade practices provisions in Part 2.

119 The Law Society believes clarification is needed on whether Exclusive Export Arrangements will be immune from the criminal offence provisions in 82B.

120 The reason clarification is needed is that:

120.1 Exclusive Export Arrangements are likely to meet the definition of cartel provision; and

120.2 the exception for Exclusive Export Arrangements is contained in section 44, which relates solely to Part 2 of the Act - 82B (the offence provision) will be located in Part 6.

121 The Law Society would appreciate the opportunity to discuss these concerns with the Ministry.

Contact can be made in the first instance through, Kim Oelofse, email

kim.oelofse@lawsociety.org.nz or phone (04) 463 2991.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'B. Gilmour', with a long horizontal line extending to the right.

Bruce Gilmour
Vice President