

# Cartel Regulation

in 46 jurisdictions worldwide

# 2014

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# New Zealand

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## Legislation and jurisdiction

### 1 Relevant legislation

What is the relevant legislation?

New Zealand law prohibiting cartel conduct is contained in the Commerce Act 1986 (the Act). The general aim of the Commerce Act is to promote competition in markets within New Zealand. It prohibits conduct that restricts competition (restrictive trade practices) and the purchase of a business's shares or assets if that purchase will, or is likely to, lead to a substantial lessening of competition in a market. The Act also gives the New Zealand Commerce Commission (NZCC) particular powers in relation to services provided by electricity line businesses, gas pipeline businesses and airports.

The Act does not currently refer to 'cartels' specifically. Instead, it prohibits contracts, arrangements or understandings (together, arrangements) that have the purpose, effect or likely effect of fixing, controlling or maintaining prices or substantially lessening competition in a market. The Commerce (Cartels and Other Matters) Amendment Bill (the Cartels Bill), which is expected to be enacted in 2013 or 2014, will include a specific prohibition on 'cartel provisions', which are defined to include arrangements between competitors that fix, control or maintain prices, restrict output or allocate markets.

### 2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Under the current civil regime, the NZCC has powers to investigate and bring proceedings in the High Court against parties that it believes have engaged in cartel conduct. The NZCC is a body corporate established under the Act. It is an independent government entity and is not bound by government directives.

Only the High Court has jurisdiction to determine whether cartel conduct has occurred, and to award penalties for a breach of the Act. Currently, all proceedings under the Act are civil, except for offences arising from misleading the NZCC in its investigation or obstruction, which are of a summary criminal nature and dealt with by the district courts. As described in question 16, the NZCC may seek orders from the court for pecuniary penalties, injunctions, orders preventing individuals from participating in the management of any body corporate for up to five years, and may require the amendment of any relevant contractual provisions. As described further in question 20, third parties may also bring private actions seeking compensation for any losses arising from cartel conduct.

If the Cartels Bill is enacted as currently proposed, it will introduce a criminal offence with a maximum jail term of seven years for individuals convicted of cartel conduct. It is expected that the

procedure for criminal enforcement will be that, once the NZCC has completed its investigation, it will be required to make a recommendation to a specialist prosecution panel overseen by the solicitor-general, who will then decide whether criminal proceedings should be brought. This process is not set out in the Cartels Bill; rather, it is expected that it will be established administratively once the Cartels Bill has been enacted.

For the year ending 30 June 2014, the NZCC budgets an operating income of approximately NZ\$41 million. In addition, if required from time to time, the NZCC has access to a litigation fund managed by the Treasury that is not part of its operating budget and can be used for major proceedings. Cartel cases typically fall within this definition due to their importance and complexity. During the 12 months prior to 30 June 2012, the NZCC completed nine coordinated behaviour investigations (the majority of which would be cartel investigations).

### 3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The Cartels Bill was introduced to Parliament in October 2011, and passed its first reading in Parliament in July 2012. The Cartels Bill is a government-backed bill that proposes introducing seven-year jail terms for individuals involved in cartel conduct, expanding the current price-fixing prohibition to specifically include arrangements between competitors that fix prices, restrict output or allocate markets, introducing new exemptions and a new clearance regime to encourage pro-competitive collaborations, and expanding the existing jurisdiction of the Act to match the jurisdiction with the conspiracy rules under the Crimes Act 1961 (which would mean a person will be deemed to have engaged in conduct in New Zealand if any act or omission forming part of the conduct occurs in New Zealand). If enacted, the Cartels Bill will fundamentally alter the scope and enforcement of New Zealand competition law.

In May 2013, the Commerce Select Committee reported back to Parliament after considering submissions from the NZCC and other interested parties. The Committee proposed a number of minor changes to the Cartels Bill, which now awaits its second reading. It is expected that the Cartels Bill will be enacted into law during 2013 or 2014. For further details, see the Update and trends section.

In August 2010, the Trans-Tasman Proceedings Act 2010 was passed. This Act aligns Australia and New Zealand's regulatory regimes by allowing penalties for breaching New Zealand's competition laws to be directly enforceable in Australia and vice versa (Australia passed corresponding legislation in March 2010). Supporting regulations and procedural rules to give effect to this legislation were enacted in August 2013, and the Act itself comes into force on 11 October 2013. Further details are provided in question 10.

In October 2012, the Commerce (International Cooperation and Fees) Act 2012 (the Cooperation Act) was passed into law. The Cooperation Act is designed to facilitate increased information sharing between overseas regulators to assist in the investigation process. This development is discussed further in question 10.

In April 2012, the Search and Surveillance Act 2012 (the Search and Surveillance Act) received royal assent, and the majority of the provisions of the Search and Surveillance Act came into effect in October 2012. As part of a comprehensive reform to the search and surveillance powers of New Zealand's police and enforcement officers, the search powers of the NZCC have been clarified by the Search and Surveillance Act. Further, if the Cartels Bill is enacted in its present form, the Search and Surveillance Act will provide the NZCC with additional powers, including the power to intercept private communications where authorised by a judicial officer.

Finally, on the books, but of uncertain progression, is an amendment to the High Court Rules with the addition of a comprehensive class action regime, with both opt-out and opt-in classes, but a presumption of the former. This may also include a provision for litigation funding. Further details are provided in question 21.

#### 4 Substantive law

What is the substantive law on cartels in the jurisdiction?

As noted above, the Act does not currently refer to 'cartels' specifically. Instead, it prohibits arrangements that are associated with cartel behaviour. These prohibitions collectively cover vertical and horizontal arrangements. The following types of arrangement are per se illegal under the Act:

- price-fixing arrangements between competitors, a prohibition that has been interpreted broadly by the courts so that any arrangements between competitors that affect any element of price competition risk falling within the prohibition, including market-sharing arrangements and bid rigging; and
- resale price maintenance by imposing or offering to enter into an agreement that sets a minimum resale price.

In addition, any contract, arrangement or understanding, horizontal or vertical in effect, will be illegal if it has the purpose, effect or likely effect of substantially lessening competition. Finally, collective boycotts, which involve arrangements between two or more competitors that restrict the supply of goods or services to, or acquisition of goods or services from, a third party that is a competitor of one of the parties to the arrangement are also illegal, but only if the arrangements have the effect of substantially lessening competition in a market.

Under the Cartels Bill, 'cartel conduct' is specifically defined as price fixing, restricting output and market allocation, all of which will be per se illegal. The prohibition on collective boycotts will be repealed by the Cartels Bill, as it will be captured within the definition of restricting output. The Cartels Bill was amended during the legislative process to remove an explicit prohibition on bid rigging, on the basis that such conduct was already captured by the other prohibitions.

#### 5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions?

The Act contains an exception in respect of international liner cargo carriage, which provides that none of the prohibitions on cartel conduct will apply to the entering into of a contract or arrangement, or arriving at an understanding insofar as it contains a provision exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand, or from a place outside

New Zealand to a place in New Zealand, or to any act done to give effect to such a contract, arrangement or understanding. The Civil Aviation Act 1990 also provides an industry-specific authorisation regime for price or capacity arrangements that relate to international carriage by air.

These exceptions have recently been criticised by the Productivity Commission, and the Commerce Select Committee inserted provisions into the Cartels Bill repealing the sea carriage exemption (over a two-year transitional period), as well as recommending that the carve out from the Commerce Act for international air carriage arrangements be reconsidered as part of a wider review of the Civil Aviation Act 1990 that is currently taking place. In other regulated industries, exemptions to the restrictive trade practices part of the Act, which includes the price-fixing prohibition, are provided for in empowering legislation for the energy sector, agricultural producer boards, tertiary education, fisheries service delivery and certain health-care services.

The NZCC is also responsible for other industry-specific regulations that deal with pricing and aspects of market structure in the dairy, electricity and telecommunications industries, but none of these regulations specifically authorise cartel conduct.

#### 6 Application of the law

Does the law apply to individuals or corporations or both?

The Act applies to all persons, including individuals, corporations and any other association of persons, whether incorporated or not.

The Act requires that a court must impose fines on individuals responsible for cartel conduct, unless good reason exists not to do so.

#### 7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The conduct of a foreign person outside New Zealand will fall within the jurisdiction of the Act where the foreign corporation or individual:

- is resident or carries on business in New Zealand and the conduct affects a market in New Zealand; or
- has a subsidiary or agent in New Zealand that gives effect in New Zealand to the arrangement entered into by the foreign person.

The Supreme Court in *Poynter v Commerce Commission* (2010) 12 TCLR 599 confirmed that a person (including individuals and corporations) will only come under the jurisdiction of the Act if he or she is resident or carries on business in New Zealand, and their conduct affects a market in New Zealand through, for example, the implementation of an illegal arrangement that affects a market in New Zealand, including through communications (such as e-mails, invoices or phone calls) into New Zealand.

Although not strictly seeking to extend the extraterritorial application of the Act, the case also suggests that the conduct of foreign corporations may be regarded as having taken place within New Zealand if it can be established that the corporation's employees, servants or agents (typically employees) engaged in conduct in New Zealand, including communications into New Zealand.

Consistent with this view of the territorial reach of the Act, in *Kuehne + Nagel International v Commerce Commission* [2012] NZCA 221 (*Kuehne + Nagel*), the Court of Appeal confirmed the NZCC's ability to take action directly against foreign corporations, without joining their operating subsidiaries in New Zealand. In that case, the overseas-based company (*Kuehne + Nagel*) had no business operations in New Zealand, but instead carried out its local activities through a subsidiary. The decision indicates that the territorial

reach of the Act may be extended to any 'direction' from an overseas person to enforce an arrangement in New Zealand that results in cartel conduct.

More recently, the Court of Appeal in *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 (*Visy*) has arguably expanded the territorial reach of the Commerce Act by taking a more expansive view of both what constitutes carrying on business in New Zealand and what constitutes affecting a market in New Zealand. The Court also confirmed that communications into New Zealand are conducted in New Zealand for the purposes of the Act.

The Court of Appeal found that in establishing whether a company carries on business in New Zealand, it could consider a number of relevant factors, including whether staff regularly came to New Zealand and whether the overseas entity communicated regularly into New Zealand. In relation to the test for affecting a market in New Zealand, the Court of Appeal said the question involves simply asking whether the New Zealand conduct relates to a market in New Zealand (but with the caveat that the standard does not capture conduct that only has an indirect 'ripple-down' effect on a market in New Zealand, so the Court presumably intended to exclude indirect sales, but this is not the subject of detailed discussion).

Another recent decision, *Commerce Commission v Air New Zealand Ltd & Ors* (2011) 9 NZBLC 103,318 (the air cargo decision), confirms that the market for goods and services, subject to the price-fixing arrangement, must be a market in New Zealand to be caught by the Act. However, the High Court took an expansive view of what constitutes a market in New Zealand. The High Court's decision signals that even if all bids, offers and contracts are concluded overseas, the market can still be located in New Zealand. In particular, where defendants engage in conduct for the supply of services in New Zealand, it is sufficient to establish jurisdiction if part of the market is situated in New Zealand; and part of the market may be determined with reference to where the customers are located, as it is ultimately the customers who decide 'what they want, and how and when they need it'.

On this expanded view, a court could arguably find that an arrangement that was formed overseas can affect a market in New Zealand if there are ultimately customers in New Zealand that buy the product affected by the arrangement. The NZCC's success in *Kuehne + Nagel, Visy* and the air cargo decision, coupled with the NZCC's apparent determination to assert New Zealand law over alleged cartel participants previously thought to be beyond its reach, reinforces the value of making a leniency application in circumstances where international collusive arrangements may have impacted on sales to New Zealand customers.

## Investigation

### 8 Steps in an investigation

What are the typical steps in an investigation?

The NZCC has extensive powers to investigate suspected breaches of the Act within New Zealand, and can use these powers at any time if it has reason to believe that a person has information relating to a breach or potential breach by any person. These powers are discussed in detail in question 9.

The majority of cartel cases begin with a leniency application, which the NZCC will consider before deciding whether to open an investigation file. It then proceeds to gather information from a range of industry participants, typically starting with industry participants other than the subject of the complaint. It also considers information that can be provided by government departments. The NZCC can receive information provided voluntarily or issue section 98 notices, which require recipients to provide documents or attend interviews in respect of particular matters (see question 9). The NZCC may also seek a search warrant from the court where it is facing difficulty obtaining the information sought.

Overseas regulators are an increasingly important source of information for the NZCC.

There is no statutory time frame within which an investigation must take place, but proceedings by the NZCC for recovery of pecuniary penalties for cartel conduct must be instituted within three years of the matter giving rise to the contravention having been discovered or when it reasonably ought to have been discovered and, in any event, no later than 10 years after the matter occurred. In practice, the three-year reasonable discoverability period is usually taken by the NZCC to run from the point in time when the leniency application was received, although that is a position adopted for convenience and the NZCC may move away from it in future cases.

Under the Cartels Bill, as it currently stands, there is no statutory limitation on when criminal proceedings could be brought, although the court retains its usual discretion to stay old proceedings. Only the High Court has jurisdiction to determine that cartel conduct has occurred and to award penalties for a breach of the Act. Currently, all proceedings under the Act are civil, except for offences arising from misleading the NZCC in its investigation or obstruction, which are of a summary criminal nature and dealt with by the district courts. There are no time periods within which the hearing must be completed or that the court must give its judgment. Generally, on application by the parties, the court will first give a judgment determining liability issues. If a contravention is established, it tends to hold a separate hearing to determine the appropriate penalty or other relief.

The time frame for completion of a cartel proceeding, from the time an investigation is commenced to the time judgment is delivered on penalties, can vary widely according to the type of conduct alleged, the number of parties involved and the NZCC's existing workload in respect of other proceedings and investigations. The time frame has ranged from three to six months for investigations involving a single instance of alleged per se conduct, such as resale price maintenance concerning two parties, to several years for major cartel cases involving multiple parties and multiple alleged contraventions of the Act.

### 9 Investigative powers of the authorities

What investigative powers do the authorities have?

The NZCC has a number of investigative powers at its disposal. The primary tool the NZCC uses to gather information is a notice under section 98 of the Act. These notices enable the NZCC to require any person to produce specified documents or information to the NZCC or to attend a meeting with the NZCC to give evidence, including under oath. Section 98 notices do not need to be authorised by a judicial officer. A wide variety of evidence can be gathered in this way, including physical and documentary evidence and computer records.

Failure to comply with a section 98 notice is a summary criminal offence. Any party found guilty is liable for a fine of up to NZ\$10,000 for individuals and NZ\$30,000 for bodies corporate (per breach). For example, in *Commerce Commission v Aerolineas Argentinas SA* (District Court at Auckland CRI-2008-004-011467, 21 January 2009), as part of its investigation into allegations of cartel conduct in the air cargo services industry, the NZCC issued a section 98 notice to Aerolineas Argentinas requesting information to be provided by mid-November 2007. The required documents were not provided until April 2008, and the NZCC brought criminal proceedings for non-compliance with a section 98 notice. Aerolineas Argentinas was criminally prosecuted and fined NZ\$11,000. In the context of that case, the NZCC also indicated that lawyers could, in certain circumstances, themselves be liable under section 98 if they aid and abet such a breach. The NZCC has also signalled that in appropriate cases it will pursue individuals for the indictable criminal offence of obstruction of the course of justice, although no such case has yet been brought.

The Cartels Bill proposes amendments that will increase the penalties for failing to cooperate with the NZCC. It provides for an increase in pecuniary penalties to NZ\$100,000 for individuals and NZ\$300,000 for a corporation, per offence.

The NZCC's power to request information using a section 98 notice is restricted to information that is relevant to the subject matter of an investigation that the NZCC has undertaken to enforce the Act. The NZCC cannot issue broad section 98 notices to conduct a general audit of an industry, and any notice must be founded on a reasonable belief that there may be undiscovered facts that could give rise to a contravention of the Act (*Astrazeneca Ltd v Commerce Commission* [2010] 1 NZLR 297).

The NZCC may receive in evidence any statement, document, information or matter that may in its opinion assist it to deal effectively with the matter before it, whether or not the same would be otherwise admissible in a court. The exception to this rule is for communications that are legally privileged, which do not need to be disclosed. The ability of the NZCC to use evidence obtained in its investigation in subsequent penalty proceedings is subject to the usual rules of evidence.

A person who is required to produce documents or attend an interview cannot claim a right to silence, even on the ground that to do so might tend to incriminate that person. However, the NZCC cannot use any self-incriminating statement so made in a proceeding in which it seeks pecuniary penalties against that person, unless as a prior inconsistent statement. Self-incriminating statements may be used against that person's employer or co-conspirators.

The NZCC can also use confidentiality to effectively gag individuals under investigation. The Court of Appeal, in *Commerce Commission v Air New Zealand* [2011] 2 NZLR 194, has confirmed the NZCC's view that it can use its powers under section 100 of the Act to prohibit interviewees from disclosing both information provided to, and questions asked by, the NZCC to any other person and that confidentiality orders do not necessarily expire upon proceedings being issued. This can affect the ability of companies to defend proceedings; companies should ensure they have from their employees a full description of relevant events and their involvement in them before those employees are interviewed by the NZCC.

The NZCC can also apply to the district courts for a warrant to search premises and seize documents. To obtain a search warrant, the NZCC must show that the warrant is necessary for the purpose of ascertaining whether a person has engaged in or is engaging in conduct that may constitute a contravention of the Act. To meet this test it is necessary to show that the NZCC has either already tried to obtain the information it is seeking by other means (eg, via a section 98 notice) or other clear grounds upon which the NZCC reasonably believes that a section 98 notice would not produce the relevant information (eg, because the risk of document destruction is high). The NZCC must also state specifically the subject matter of the search and the location to which the warrant will apply.

In respect of information stored electronically, it is common practice for the search warrant to contain a protocol that permits the removal by a forensic specialist of documents stored electronically, and for issues concerning privilege to be dealt with through an independent barrister to be appointed as provided in the terms of the warrant. The Search and Surveillance Act provides for a specific process that must be undertaken by the NZCC's officers when privilege is claimed, although not all sections relating to privilege in the Search and Surveillance Act are currently in force.

## International cooperation

### 10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The NZCC frequently liaises with the Australian Competition and Consumer Commission (ACCC), the US Department of Justice and

Federal Trade Commission, the Canadian Competition Bureau and the European Commission, and is increasingly developing links to other competition agencies via its active participation in the International Competition Network.

The NZCC's powers to engage in inter-agency cooperation have recently been strengthened by the enactment of the Commerce (International Cooperation, and Fees) Amendment Act 2012 (the Cooperation Act) in October 2012. The Cooperation Act amends the Commerce Act and provides a specific legislative framework for the sharing of information between overseas regulators and the NZCC, including allowing the NZCC to share compulsorily acquired information (including information acquired before the Cooperation Act came into force) and to perform searches for the purposes of assisting an overseas regulator. However, before the NZCC may provide such information or investigative assistance to an overseas regulator, it must have entered into a cooperation agreement with that overseas regulator. The requirement for the NZCC to have entered into a cooperation agreement before engaging in such assistance is to ensure that the NZCC can require reciprocal assistance from the overseas regulator. The NZCC must obtain approval from the minister of commerce before entering into any cooperation agreements, and the existence of any cooperation agreements must be publicly notified, including a requirement for the NZCC to publish a copy of any such agreements on its website.

There are some specific safeguards built into the new information sharing regime, including:

- restricting the information provided to compulsorily acquired information;
- self-incriminating information gathered in answer to questions posed by the NZCC may only be provided to an overseas agency if that agency gives an undertaking that it will not be used in evidence in criminal proceedings or proceedings for a pecuniary penalty against that person;
- where the NZCC provides information to an overseas regulator, the NZCC must notify the person from whom the information was acquired, or the persons to whom the information relates, that the information has been provided to that overseas regulator (unless such notice is not practicable or would prejudice the NZCC's processes);
- the NZCC is not taken to have waived privilege in materials merely by providing those materials to an overseas regulator;
- the NZCC may not provide materials that are privileged on the basis that they relate to settlement negotiation or mediation unless every party that has a privilege in relation to those materials consents to the provision of the information; and
- the NZCC's annual report must report on the use and operation of cooperation agreements during the previous 12 months.

In February 2013, the first such cooperation agreement was entered into between the NZCC and the ACCC. This cooperation agreement is in addition to a number of existing agreements between the two regulators or governments, including:

- the appointment of the NZCC chair as an associate commissioner of the ACCC, and the appointment of the chair of the ACCC's Mergers Review Committee as an associate commissioner of the NZCC;
- a 2007 cooperation agreement with the ACCC that created a formal framework (protocol) through which the two commissioners could share information, evidence and documentation in respect of their investigations, prosecutions and enforcement decisions;
- the development of investigative assistance software with the ACCC and the Singaporean Competition Commission to create an intelligence hub of information accessible by authorised persons within each agency; and

- as noted in question 11, the Australian and New Zealand governments have also signed a treaty on Trans-Tasman Court Proceedings and Regulatory Enforcement, which has resulted in the Trans-Tasman Proceedings Act 2010. This Act will assist the harmonisation of Australasian competition law, and will increase the reach and effectiveness of Australian and New Zealand competition regulators.

The NZCC also has cooperation arrangements with the Canadian Competition Bureau, the Taiwan Fair Trade Commission and the Office of Fair Trading in the United Kingdom. While these arrangements provide for cooperation between authorities on enforcement activities, information exchange and personnel exchanges, they pre-date the Cooperation Act and are, therefore, subject to the operation of all relevant New Zealand laws, including confidentiality and privacy, and do not allow for the sharing of confidential information in the absence of a waiver from the provider, and the NZCC cannot exercise its search powers for the purposes of assisting these regulators until a further cooperation agreement is entered into.

It is expected that the new Cooperation Act regime will increase the degree of cooperation between the NZCC and international regulators, which historically had been reasonably limited. In particular, the risk that the NZCC might begin an investigation after receiving information from a regulator in another jurisdiction (such as notification of an international cartel affecting New Zealand) had been low. However, even before the enactment of the Cooperation Act there have been indications of greater cooperation with overseas regulators; for example, the NZCC's investigations into the air cargo and freight forwarding cartels involved a much more intensive and integral degree of cooperation than ever before.

### 11 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and penalising of cartel activity in the jurisdiction?

The NZCC can use documents, information or other assistance provided by a foreign regulator or leniency applicant in proceedings in the High Court in respect of conduct that falls within the jurisdiction of the Act, provided such evidence is otherwise admissible in accordance with the New Zealand rules of evidence. As noted in question 10, the information that is gathered by the NZCC can only be passed to an overseas regulator with the consent of the party who provided the information and subject to New Zealand laws relating to confidentiality and privacy unless the NZCC has acquired the information compulsorily and has entered into a cooperation agreement with the overseas regulator under the Cooperation Act (currently, the NZCC only has such an agreement with the ACCC). In addition, the Act specifically permits the NZCC to receive information and documents on behalf of the ACCC in certain circumstances. Further, the NZCC may be asked to assist the New Zealand police should any overseas regulator request assistance (such as the execution of a search warrant) under the Mutual Assistance in Criminal Matters Act 1992.

Generally, foreign penalties, such as a penalty for breach of a foreign trade practices statute, will not be enforced by the courts in New Zealand. However, in July 2008, the Australian attorney-general and the New Zealand associate justice minister signed a treaty on trans-Tasman court proceedings and regulatory enforcement. The objective of the treaty was to streamline the process for resolving civil proceedings with a trans-Tasman element to reduce costs, improve efficiency, and minimise existing impediments to enforcing certain judgments and regulatory sanctions. The Trans-Tasman Proceedings Act 2010, passed in August 2010, implements this treaty and came into effect on 11 October 2013. This Act further aligns the regulatory regimes of Australia and New Zealand by allowing penalties for breaching New Zealand's competition laws

to be directly enforceable in Australia and vice versa (as Australia passed corresponding legislation in March 2010). Australian regulations giving effect to the Act came into force on 25 July 2013.

The NZCC, via the ACCC, will be able to compel persons in Australia to provide information, documents or interviews (and vice versa). As a result of these developments, directors and managers of companies in both Australia and New Zealand with an actual or potential Australasian reach must be aware of, and wary of, the effect of their conduct on both the New Zealand and Australian markets and be familiar with the laws, their rights and their obligations in both jurisdictions.

## Cartel proceedings

### 12 Adjudication

How is a cartel proceeding adjudicated?

Cartel proceedings where pecuniary penalties, damages or injunctions are sought are adjudicated before the High Court, which is the general court of inherent jurisdiction. A High Court judge may, at his or her discretion, have a lay member of the High Court sitting with him or her for the purpose of proceedings alleging arrangements that substantially lessen competition (which is typically pleaded alongside allegations of price-fixing conduct). Lay members are appointed to the court by reason of their knowledge and experience in industry, commerce, economics, law or accountancy. The current panel of lay members is mostly comprised of New Zealand and Australian economists experienced in competition law matters. The Cartels Bill will amend the Commerce Act to make clear that lay members may be appointed in civil proceedings alleging cartel conduct, but not in criminal cartel proceedings. A defendant may elect trial by jury on any charge with a maximum penalty of imprisonment of two years or more. In any complex trial likely to run for more than four weeks, the prosecution may apply for a judge alone trial. In criminal securities cases, such applications are usually successful. Criminal cartel proceedings are therefore likely to be judge alone trials on the basis that most cartel proceedings will be long and complex.

Minor criminal matters, such as proceedings for penalties for misleading the NZCC, non-compliance with a section 98 notice or failure to provide reasonable assistance in the execution of a search warrant by the NZCC, are dealt with in the district courts. No trial by jury is available.

In theory, the NZCC can also seek a cease-and-desist order from its internal cease-and-desist commissioner, who exercises a quasi-judicial function. Such orders are generally available on notice, in instances where the NZCC considers there is a prima facie case that anti-competitive conduct is occurring or about to occur and it is necessary to act to prevent particular persons or consumers from suffering serious loss or damage. However, the procedure is rarely used and is most unlikely to be used in the context of a cartel case.

### 13 Appeal process

What is the appeal process?

Any substantive penalty decision of the High Court in respect of proceedings for cartel conduct can be appealed on questions of fact or law to the New Zealand Court of Appeal, New Zealand's principal intermediate appellate court, with leave from either Court. An application for leave must be made within 20 working days of the decision. The Court of Appeal sits in panels of five judges or three judges, depending on the nature and wider significance of the particular case. Further appeals to New Zealand's highest court, the Supreme Court, are available, subject to leave being granted. The Supreme Court comprises the chief justice and not fewer than four nor more than five other judges.

Applications for judicial review are available in relation to the exercise of delegated authority by the NZCC, but where a right of appeal exists, this must generally be exhausted first. Applications for review are heard exclusively by the High Court, with subsequent appeals available where leave is granted.

#### 14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof lies with the NZCC, or with any third party seeking damages or an injunction, to establish that the alleged contravention of the Act occurred on the balance of probabilities. In this respect, there are three broad categories of prohibited conduct set out in the Act:

- per se prohibitions – the NZCC only needs to establish that a party engaged in the proscribed actions. Price fixing and resale price maintenance are per se prohibitions under the Act;
- reverse onus prohibitions – the NZCC must establish that a party engaged in the proscribed actions. That party can then avoid liability by establishing a defence that the relevant actions did not have the purpose, effect or likely effect of substantially lessening competition. The prohibition of collective boycotts is a reverse onus prohibition under the Act. The Cartels Bill proposes repealing this collective boycott prohibition, and to leave such boycotts subject to the more general rule of reason prohibitions; and
- rule of reason prohibitions – the NZCC must show on the balance of probabilities that the proscribed actions occurred and that this had the purpose, effect or likely effect of substantially lessening competition. The general prohibition on anti-competitive arrangements, which potentially captures arrangements such as exclusionary arrangements, is a rule of reason prohibition under the Act.

The Cartels Bill, discussed in question 3, proposes that for criminal proceedings the prosecution be required to prove beyond reasonable doubt that the defendant intended, at the time of the relevant conduct, to engage in a cartel provision (civil proceedings, as at present, will not have an intention element).

### Sanctions

#### 15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

The Act currently only provides for civil liability in respect of cartel conduct. However, the Cartels Bill, if passed, proposes to introduce a maximum criminal sentence of seven years for individuals involved in cartel conduct. The Cartels Bill is discussed in more detail in question 3.

#### 16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Act currently provides that any party who engages in cartel conduct can be ordered to pay the following penalties:

- for bodies corporate, up to the greater of NZ\$10 million or three times the commercial gain from the conduct, or, if such gain cannot be ascertained, 10 per cent of turnover of the group of which the party is a part; and
- for individuals, up to NZ\$500,000.

The Act does not prescribe any minimum level of penalty. The court must order an individual who has engaged in cartel conduct to pay

a pecuniary penalty, unless the court considers that there is good reason for not making that order.

As well as imposing penalties, the court may also:

- upon application, grant a permanent or interim injunction preventing a party from engaging in particular conduct;
- vary or cancel any provision of a contract that, if given effect, would contravene the Act and require a party to the contract to pay restitution or compensation to any other party to the contract;
- make any other order that it sees fit where any other party to the proceedings has suffered or is likely to suffer loss or damage as a result of the prohibited conduct; or
- order that a person who has been found to have engaged in price fixing must not take part in the management of a body corporate for a period not exceeding five years.

Following the adoption of an improved leniency programme, the NZCC has been aggressively focusing on investigating and prosecuting cartel conduct in the past few years. The detection and punishment of international cartels through the leniency policy has been described by the NZCC as a key priority. As a consequence, it has increasingly concentrated its resources on identifying and prosecuting cartels. With a decrease in the number of leniency applications for international cartels during the past two years, the NZCC's attention is increasingly turned towards detecting and deterring cartel conduct through more continuous engagement and advocacy with domestic New Zealand businesses.

2011 and 2012 were notable for a string of penalty proceedings arising from settlement agreements between alleged price fixers and the NZCC. In the 2010–2011 financial year, pecuniary penalties awarded to the NZCC totalled NZ\$23 million for breaches of the collusive behaviour prohibitions in the Act, all of which resulted from the settlement of price-fixing proceedings. In 2013, this trend continued, with notable penalty proceedings from settlement agreements including a NZ\$3.6 million settlement in the Visy board cartel case, and four further settlements against airlines in the ongoing air cargo cartel case with a total value of over NZ\$17 million, bringing the total settlements in that case to over NZ\$42 million.

The NZ\$7.5 million settlement with Air New Zealand in 2013 was the largest ever penalty imposed for cartel conduct (*Commerce Commission v Air New Zealand Ltd*, High Court Auckland CIV 2008-404-8352, 7 June 2013). For further details, see the Update and trends section.

In comparison, in *Commerce Commission v Qantas Airways Ltd*, High Court Auckland CIV 2008-404-8366, 11 May 2011, the Court endorsed an agreed penalty of NZ\$6.5 million on Qantas for its participation in a fuel surcharge understanding. The agreed starting point for this penalty was NZ\$13 million, which was subsequently reduced by 50 per cent due to Qantas' full and ongoing cooperation with the NZCC's investigation and during the subsequent proceedings.

#### 17 Sentencing guidelines

Do sentencing principles or guidelines exist? Are they binding on the adjudicator?

Section 80 of the Commerce Act requires the court to determine the appropriate penalty subject to the statutory maximum by having regard to all factors, and having particular regard to the nature and extent of any commercial gain.

Apart from this section, there are no formal sentencing guidelines under the Commerce Act, and the NZCC has not issued any guidelines as to how it quantifies the penalties it recommends to the court. The primary source of guidance in respect of penalties for cartel conduct is previous sentencing decisions by the courts, including in criminal proceedings.

Cooperating parties can negotiate 'suggested penalties' with the NZCC if they admit to the contravention. Typically, an agreed statement of facts and submissions on penalties will then be submitted to the court, but the level of penalty to be imposed is still a matter of discretion for the court. In recent cases, the court's penalty-setting approach has been to determine the maximum penalty, establish an appropriate starting point for the offending that achieves the objective of deterrence in light of relevant factors, and adjust the starting point for mitigating factors.

The courts have stated that an assessment of appropriate penalties must take into account all the circumstances of the particular case, including:

- the need for deterrence, which the court has consistently referred to as a significant factor to be considered in the imposition of penalties for anti-competitive behaviour;
- the nature and extent of the defendant's act or omission;
- the gravity of breaches;
- the extent of any loss or damage suffered by any person as a result of the act or omission, if reliable evidence of this has been brought before the court;
- whether the defendant has previously breached the Act; and
- any gain achieved.

Reduced penalties for some cartel participants who do not qualify for immunity are considered appropriate to provide incentives for full cooperation with the NZCC (see question 25). The High Court has previously endorsed a reduction of between 25 per cent and 30 per cent of the total penalty to be imposed for an early guilty plea, and up to a 50 per cent reduction for an early guilty plea and cooperation with the NZCC's investigation and proceedings against other parties. The NZCC has also released guidelines for an informal cooperation policy, under which it may offer to reach an agreed settlement with a defendant to reflect cooperation deserving of a discount and make submissions to the court recommending a reduction in penalty accordingly (see question 24). Although the level of penalties sought by the NZCC in any particular case is a matter of discretion, and the level of penalty that the court will impose is ultimately fact-specific, there is a general expectation that the NZCC and the courts will continue to discount penalties to encourage cooperation in future.

The minister of commerce has requested that, if the Cartels Bill is passed, the NZCC develop prosecution guidelines that outline when it would mount a criminal prosecution. Government officials have recommended that an independent prosecution panel be formed to establish when criminal proceedings will be brought. Accordingly, it is likely that the NZCC will investigate and then make a recommendation to the panel, the composition of which is likely to be supervised by the solicitor-general.

## 18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements?

There is no sanction of debarment from government procurement procedures for cartel infringements in New Zealand.

## 19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As mentioned in question 15, there are currently no criminal sanctions in respect of cartel conduct under the Act at this time. However, it is widely anticipated that the Cartels Bill, introducing seven-year prison sentences for cartel conduct, will pass into law during 2013 or 2014. The Cartels Bill as currently drafted does not provide any statutory basis for the decision as to which sanction the NZCC will

pursue; however, as noted in question 17, the minister of commerce has requested that the NZCC develop prosecution guidelines if the Cartels Bill is enacted.

If the Bill as currently drafted is enacted, civil proceedings will be stayed if criminal proceedings are commenced for the same or similar conduct.

## Private rights of action

### 20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

The Act does allow for private damages claims to be brought by any person who has suffered loss or damage caused by cartel conduct prohibited under the Act, including both direct and indirect purchasers. The court can also order any party who has engaged in such conduct to pay exemplary damages where the party in question breached the Act despite knowledge that its behaviour was illegal. Actions may be commenced at any time within three years of the matter giving rise to the cause of action becoming discoverable or within three years of when the breach ought reasonably to have been discovered, but no later than 10 years after the matter giving rise to the contravention occurred. A private damages action can be brought notwithstanding that a penalty may already have been imposed on the defendant in a proceeding brought by the NZCC.

### 21 Class actions

Are class actions possible? What is the process for such cases?

There are currently no provisions in the Act or the High Court Rules allowing a party to bring a class action for breach of the Act.

The High Court Rules do generally allow a representative action for damages by one party where two or more persons have the same interest in the subject matter of a proceeding, provided that the consent of the others is obtained. This provision would apply to a damages action under the Act. The representative can then sue on behalf of or for the benefit of all persons so interested. However, it is only very recently that the courts (albeit in non-Commerce Act proceedings) have signalled a more liberal approach to establishing commonality of interest among plaintiffs and enabling litigation funding of such representative actions.

As such, there have been very few private actions for damages that have proceeded to a full trial in New Zealand; therefore, there is no case law clarifying the class of litigants who can sue for damages. Other reasons for the lack of private actions in New Zealand include the following:

- even in representative actions, there is still likely to be a number of issues that each plaintiff will need to prove individually, such as that the particular plaintiff's tender or pricing was the subject of an illegal arrangement, that the illegal arrangement was actually implemented in respect of that particular plaintiff, and the difference between what the particular plaintiff would have paid in a competitive market for their requirements as against what they actually paid;
- plaintiffs cannot obtain treble damages; they are typically restricted to damage they have suffered, which requires proving the difference between the prices the plaintiff actually paid and the prices they would have paid in a fully competitive market. Given the comparatively small levels of commerce in New Zealand (due to the size of the market), it is common for potential litigations to decide this differential does not warrant the litigation risk and cost of private proceedings;
- while it is possible for a private litigant to seek exemplary (punitive) damages, such damages have never been awarded under the Commerce Act. In particular, it is likely the courts would

be reluctant to award exemplary damages against a defendant facing a penalty through NZCC proceedings, or a party that has applied for leniency to the NZCC;

- contingency fees, whereby the fee of the plaintiff's lawyer is calculated as a proportion of the amount recovered, are not permitted in New Zealand; and
- the Commerce Act does not allow the NZCC to pursue damages on behalf of third parties.

The same standards apply to follow-on as to stand-alone actions, with all plaintiffs having to establish a breach of the Act and damages from that breach, on the balance of probabilities. A finding of fact that was at issue in one civil proceeding is expressly provided by the Evidence Act 2006 to be inadmissible in another one, so a contravention proven in one case (such as that brought by the NZCC) cannot be used as prima facie evidence of that fact in another (such as a private damages proceeding). However, the court has made orders that two proceedings can be run in tandem for timetabling orders and document disclosure purposes, and the hearing of both cases will likely be allocated the same date.

While there has been pressure from a number of sources for the government to implement a law change to better facilitate class actions, this does not seem to be one of the government's legislative priorities at present, and no legislative change to provide for class actions is expected within the next 18 months.

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## Cooperating parties

### 22 Leniency/immunity

Is there a leniency/immunity programme?

The NZCC first introduced a leniency policy to assist detection and punishment of cartel behaviour in November 2004. On 1 March 2010, the NZCC released an updated leniency policy. There are three notable changes from the NZCC's first policy:

- the introduction of a marker system that allows a 'first in' applicant to receive the security of a place holder while it compiles sufficient evidence to secure immunity;
- the introduction of the Amnesty Plus scheme that allows a party to a cartel who is not otherwise eligible for immunity to receive a reduction in the penalty for involvement in that cartel by informing the NZCC of the existence of a second cartel, and to receive immunity in respect of that second cartel; and
- changes in eligibility for conditional immunity. A company or individual can apply for conditional immunity after the NZCC has knowledge of the cartel but does not have sufficient evidence to launch court proceedings.

The NZCC applies the leniency policy to any arrangements between competitors that have the purpose, likely effect or deemed effect of substantially lessening competition.

The penalty of NZ\$1.05 million imposed on Schneider Electric SA in *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 was the result of the first case to come before the court subsequent to a leniency application. A number of such investigations have resulted in settlement agreements being reached between the NZCC and the party who allegedly breached the price-fixing prohibition.

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### 23 Elements of the leniency/immunity programme

What are the basic elements of the leniency/immunity programme?

The NZCC's leniency policy is based on three key principles:

- immunity is available to the first person involved in a cartel that the NZCC is not aware of, or is aware of but does not have sufficient evidence to launch court proceedings, who reports that

cartel to the NZCC, then compiles sufficient evidence to secure immunity and cooperates throughout the NZCC's investigation and any subsequent proceedings;

- the person seeking immunity must provide full cooperation to the NZCC in respect of both the initial investigation and subsequent proceedings, including, in the case of a body corporate, making best efforts to secure the complete and truthful cooperation of current and former directors, officers and employees. If the person fails to fully cooperate with the NZCC at any time, the NZCC may initiate proceedings against that person; and
- the NZCC's leniency policy grants immunity from NZCC-initiated proceedings. The immunity does not apply to proceedings brought by third parties.

Immunity sought by a corporation extends to all current and former directors, officers and employees (unless specifically excluded) as long as the disclosures are 'a truly corporate act'. This means that disclosure cannot be an isolated confession of an individual representative of the corporation. However, any immunity sought by a director, officer or employee in their personal capacity will not extend to the corporation.

In addition, applicants for leniency have an obligation to refrain from disclosing or communicating to any third party the fact or content of their leniency application. The rationale behind this policy is to ensure other parties involved in the cartel conduct are not given an opportunity to destroy evidence, and to maintain the possibility of other parties coming forward with further information in the hope of being granted immunity under the leniency policy.

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### 24 First in

What is the importance of being 'first in' to cooperate?

The NZCC will only grant immunity from NZCC-initiated proceedings to the first person involved in a cartel to come forward with information about the cartel and cooperate fully with the NZCC. It is therefore vital to be the first person forward to gain immunity. Any subsequent cartel members to cooperate will not receive immunity, but may be eligible for the NZCC's cooperation policy or the Amnesty Plus scheme (see question 25).

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### 25 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Other cartel members that wish to cooperate with the NZCC but that are not the first to apply for leniency may be eligible for the NZCC's general cooperation policy or Amnesty Plus scheme. The earlier the approach to the NZCC, the more likely the benefits of these policies will be available. If the NZCC agrees to proceed under the cooperation policy or Amnesty Plus scheme, it will exercise its discretion to take a lower level of enforcement action against an individual or business in exchange for information and full, continuing and complete cooperation. A lower level of enforcement action may be an out-of-court settlement, or an agreed settlement of a court proceeding incorporating a reduction in penalty together with submissions to the court in support of the agreed penalty. In exceptional cases, cooperation may even result in no action being taken, in a de facto grant of leniency. Reductions for early cooperation have been as high as 50 per cent of the total penalty that would otherwise be imposed, but will depend on the value of the cooperation given. For example, in the *Air Cargo* case, discounts have ranged from 50 per cent for a party offering substantial assistance (Qantas) down to a discount of 20 per cent for a party that offered little assistance (Air New Zealand). Generally speaking, the value of cooperation, and therefore the size of the discount received, will be lower the later a party chooses to cooperate with the NZCC.

## 26 Approaching the authorities

Are there deadlines for applying for immunity or leniency, or for perfecting a marker?

Although there are no formal deadlines for seeking leniency, the best time to approach the NZCC when seeking leniency is as soon as possible after an individual or organisation has concluded that it may be in breach of the Act and that it is preferable to apply for leniency. Not only does delay increase the risk that another party involved in the cartel may apply for leniency first; the NZCC may also reject a leniency application in respect of conduct for which it has already commenced an investigation.

A party may go to the NZCC as soon as it becomes aware that it may have breached the Act, as a marker will save the place of the first informant. This provides the party with the ability to save its place in the line, for a limited time, while it gathers sufficient information to make a leniency application. After a marker is granted, the applicant then has 28 calendar days (or more time by agreement with the NZCC, if there are exceptional circumstances) to perfect the marker, by providing a written or oral statement that describes the cartel and any evidence in support of the cartel's existence. If the marker lapses, the NZCC will retain the information received, and offer the next party in line the marker.

Immunity provided under the NZCC's cartel leniency policy becomes unconditional when all proceedings have been resolved.

For other cartel members that wish to cooperate with the NZCC but are not the first to apply for leniency, the earlier an approach is made to the NZCC, the more likely the benefits of these policies will be available. There is, however, no deadline by which a party must choose to cooperate, and a very significant proportion of contested cartel cases are finally concluded by way of agreed settlement, and include discounts for cooperation even where defendants have contested jurisdictional and procedural points and have only commenced cooperation shortly before trial.

## 27 Cooperation

What is the nature and level of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

As noted above, the person seeking immunity must fully cooperate with the NZCC in respect of both the initial investigation and subsequent proceedings, including, in the case of a body corporate, making best efforts to secure the complete and truthful cooperation of current and former directors, officers and employees. If the person fails to fully cooperate with the NZCC at any time, the NZCC may initiate proceedings against that person. Other cartel members that wish to cooperate with the NZCC but that are not the first to apply for leniency are also required to provide all relevant information and full, continuing and complete cooperation with the investigation.

## 28 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?

The NZCC considers confidentiality an important part of a leniency application, for both the first applicant and subsequent cooperating applicants. As such, it is a condition of leniency or cooperation that the person must not disclose to, or communicate with, any third party (except as required by law, in their communications to other competition authorities or otherwise with the prior written consent of the NZCC):

- the person's application;
- any request by the person for clarification regarding his or her application;

- any grant of a marker or conditional immunity from NZCC-initiated proceedings to the person; and
- any information provided by that person to the NZCC for the purposes of, or in connection with, the application, or any information created by the NZCC by reason of, or as a consequence of, the person's application.

A party will not be publicly identified as the recipient of leniency at any stage during an investigation or proceeding, although the identity of the recipient is likely to become apparent once proceedings are issued and particularly if that party is called upon to give evidence during a court proceeding. However, the NZCC will take appropriate steps to protect information provided by leniency applicants in proceedings brought as a result of an application, including applying for the court file to be sealed pending judgment so that it cannot be searched by certain third parties (such as class action plaintiffs overseas). To date, the High Court has agreed to make such orders sought by the NZCC or parties.

In *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271 (the *Schenker* decision), the High Court clarified its approach to requests by third parties for access to documents on the court file, in particular, where parties have voluntarily provided information to the NZCC for the purposes of expediting proceedings. The High Court rejected the third parties' application to access the court file on the basis that the reasons for release of information (being the assessment of third-party claims in overseas jurisdictions) did not outweigh the possible detrimental effect of release on the willingness of parties to cooperate with the NZCC.

The High Court's decision was appealed to the Court of Appeal, which upheld the decision: *Schenker AG v Commerce Commission* [2013] NZCA 114. The Court noted that the fate of such an application is highly contextual, contingent on the documents sought to be disclosed, the purposes of disclosure and the nature of the proceeding. However, on a balance of the facts, the Court of Appeal refused access even on a redacted basis to the documents sought, upholding the lower court's finding that redaction could not cure the harm to confidentiality and privacy interests. In reaching its decision, the Court of Appeal placed significant weight on the potential for disclosure to disincentivise use of the leniency programme, but with the ultimate caveat that each case turns on its facts.

However, while the *Schenker* decision provides guidance on how the Court will consider requests for access to information provided to the NZCC by a leniency applicant or cooperating party, the NZCC has not yet provided general guidance on how it will respond to requests for these same documents under the Official Information Act 1982 (which the NZCC is subject to as a public body).

## 29 Settlements

Does the enforcement authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The NZCC and a defendant may agree on a recommended penalty, although the parties still must approach the court to seek approval of such recommended penalties (see questions 17 and 25). Furthermore, the court is under no obligation to approve penalties as agreed between the parties. However, provided that the court is advised of the process followed in reaching the recommended penalty and that appropriate reference is made to relevant precedents, it is likely that it will approve the recommended amount. The court has not rejected a penalty recommendation made after the 2001 amendments to the Act.

The NZCC has no authority to make a binding resolution as to the penalty – the High Court has stressed that it is important that the courts retain an independent approach to the imposition of penalties, particularly those of the magnitude customarily imposed for

### Update and trends

The past 12 months have been a dynamic period for New Zealand's competition law that saw a number of legislative changes, as well as developments from the NZCC.

In May 2013, the Select Committee reported back on the Commerce (Cartels and Other Matters) Amendment Bill. The Bill is expected to be enacted during 2013 or 2014 (see question 3). The Cartel Bill, as currently drafted, proposes:

- introducing criminal sanctions of up to seven years' imprisonment for cartel behaviour;
- expanding the existing section 30 price-fixing prohibition to specifically prohibit not only price-fixing arrangements, but also market or customer allocation and output restriction arrangements between competitors. The Select Committee recommended deleting the reference to bid rigging in the definition of cartel conduct on the basis that it was adequately covered by the other prohibitions;
- re-drafting and clarifying the exemptions to section 30 of the Commerce Act, including a new collaborative activities exemption;
- introducing a new clearance regime for new arrangements that are considered to be collaborative activities;
- increasing the jurisdictional reach of the Commerce Act to cover conduct that occurs outside of New Zealand if any act or omission forming part of that conduct occurs in New Zealand;
- expanding the regime for the attribution of conduct by one person to another person for the purposes of establishing vicarious liability;
- increasing the penalties for failing to comply with any NZCC compulsory information request from NZ\$30,000 for a company and NZ\$10,000 for an individual to NZ\$300,000 for a company and NZ\$100,000 for an individual; and
- removing the exemption from the Commerce Act for the international carriage of goods by sea.

For existing arrangements, the new prohibitions on market allocation and output restrictions apply nine months from enactment. Criminal sanctions will apply two years from enactment.

The Select Committee and Cabinet have recommended that the NZCC issue prosecution guidelines setting out when it will seek criminal sanctions, and guidelines on how it will interpret the new collaborative activities defence.

The Commerce (International Cooperation, and Fees) Amendment Act 2012 was enacted in October 2012 (see question 10). The Cooperation Act provides a specific legislative framework for the sharing of information between overseas regulators and the NZCC, including allowing the NZCC to share compulsorily acquired

information and to perform searches for the purposes of assisting an overseas regulator where the NZCC and an overseas regulator have entered into a cooperation agreement. Information acquired before the Cooperation Act came into force is also captured under the new regime. This reform is expected to increase the degree of cooperation between the NZCC and international regulators.

In February 2013, the ACCC and NZCC announced that a cooperation agreement had been signed to give effect to the mutual information exchange regime provided for in the Cooperation Act. The chair of the NZCC stated that working closely with the ACCC was an important part of the NZCC's preparation for the new criminal cartel regime. In light of the various agreements between the ACCC and the NZCC, the two regulators have declared that they have 'probably the most complete set of cooperation arrangements in place globally – outside countries who have established cross border enforcers, such as the EU'.

Comprehensive reform to the search and surveillance powers of New Zealand's police and enforcement officers, in the form of the Search and Surveillance Act, came into force in October 2012. The NZCC has been granted several new powers in performing search warrants, such as the power to access data remotely stored in 'clouds' and the power to require passwords to be handed over. The duties of officers when executing a search warrant have also been set out. If criminal sanctions of up to seven years' imprisonment for cartel conduct are introduced, the NZCC's powers will be significantly expanded to include intrusive surveillance, interception and tracking device powers that are currently largely reserved to the police for the investigation of serious crimes (see question 3).

In June 2013, the High Court approved a settlement between the NZCC and Air New Zealand in which Air New Zealand agreed to pay a NZ\$7.5 million penalty for price-fixing on international air cargo, the largest-ever penalty for cartel conduct in New Zealand (*Commerce Commission v Air New Zealand Ltd*, High Court Auckland CIV 2008-404-8352, 7 June 2013). In endorsing the settlement amount, the Court noted that Air New Zealand's conduct was not as culpable as some of the other airlines pursued by the Commission, and Air New Zealand had not been a participant in a cartel on a global basis. However, the magnitude of the penalty in comparison with other airlines reflected Air New Zealand's high volume of cargo business in New Zealand, and a lower discount for its cooperation with the NZCC (of 20 per cent) given that it contested the proceedings for longer than all the other airlines. Air New Zealand also agreed to pay a contribution towards the costs of the case and the Commission's investigation.

anti-competitive behaviour. While the NZCC is the body charged with investigating and prosecuting contraventions of the Act, it is ultimately the court's role to determine that a contravention has actually occurred and impose a particular sanction for those contraventions.

Generally speaking, agreeing on a recommended penalty will usually involve agreeing on the summary of facts provided to the court for the purposes of considering the penalty. This can provide parties with a greater degree of control over what information about the conduct in question is made public and what is kept confidential.

The NZCC will face more stringent requirements, and therefore have less discretion, in exercising prosecutorial discretion in the plea-bargaining process in future criminal cartel proceedings. In particular, the NZCC will have to ensure that the exercise of such discretion is consistent with the solicitor-general's prosecution guidelines. These guidelines were re-released in July 2013, and now permit the prosecution to engage in plea negotiations. These negotiations are confined to the charges faced by the defendant and the facts agreed upon for the purposes of sentencing. While a prosecutor can indicate what sentence would be sought by the prosecution on a particular combination of agreed charges and facts, a prosecutor cannot agree to seek a specific sentence type or length, or fine amount.

The Criminal Procedure Act 2011 does, however, allow a defendant to seek an indication from a judge as to what sentence would be imposed if a guilty plea were entered. A sentence indication, if accepted by the defendant, is binding on the judge. A sentence indication may be used in combination with, or following, plea negotiations. In particular, a judge can offer a sentence indication on the basis of a reduced set of charges proposed by the prosecutor.

### 30 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

Where immunity is granted to a body corporate as first applicant for leniency or a lower level of enforcement action is undertaken in exchange for cooperation, it will extend to any of its current or former directors, officers or employees, unless they are explicitly carved out of the agreement or refuse to cooperate with the NZCC's investigation. Leniency may be available to an individual who is directly involved in the cartel or to a company officer directly involved in the cartel where that individual acts independently in coming forward to the NZCC. Immunity will not be available to a body corporate where a current or former director, officer or employee applies for leniency independently.

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### 31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

The best practice in making a request for immunity is to immediately make an informal 'no names' enquiry to establish whether an application for leniency has already been received, and, if not, apply for a marker while information is obtained.

Once the formal application is made, the NZCC will take quite a flexible approach to gathering information. In particular, a paperless process is likely to be acceptable, especially where a party has engaged New Zealand-based counsel. The NZCC will likely require a face-to-face meeting with the representative of the applicant who is in the best position to provide the necessary information.

Where a significant number of relevant documents are provided in a language other than English, or where witnesses do not have a good working knowledge of English, the NZCC will require the leniency applicant to provide an appropriate translation.

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### 32 Ongoing policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As previously mentioned, the NZCC released its updated leniency policy on 1 March 2010. The notable changes from the NZCC's first policy, released in 2004, are the introduction of a marker system and the Amnesty Plus scheme, both designed to incentivise the disclosure of cartel conduct to the NZCC, and changes in eligibility for conditional immunity, which mean that a company or individual can apply for conditional immunity after the NZCC has knowledge of the cartel but does not have sufficient evidence to launch court proceedings.

It is anticipated that if the Cartels Bill is passed, the NZCC will need to update its leniency guidelines to provide clarity on how the leniency policy will be used in a criminal regime. Immunity from criminal prosecution may only be granted by the solicitor-general. As part of the consultation on the Cartels Bill, the solicitor-general has released draft guidelines that indicate that a party who obtains leniency from prosecution from the NZCC will be similarly eligible for, and will be granted by the solicitor-general, immunity from criminal prosecution.

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## Defending a case

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### 33 Representation

May counsel represent employees under investigation and the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

The Act is silent in relation to legal representation, and the scope of the right to legal representation in the context of investigations and proceedings under the Act has not been tested in the New Zealand courts.

More generally, there is no restriction on the ability of counsel to represent more than one party to an investigation (such as an employer and its employees), provided that counsel fulfils his or her obligation to avoid a real risk of conflict of interest under the Rules of Professional Conduct published by the minister of justice. In particular, rule 6.1 states that 'A lawyer must not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients'.

In addition, if a more than negligible risk of conflict subsequently arises, the clients concerned should be advised of the conflict and advised to seek independent legal advice. For example, such a conflict may arise when acting for two parties who could each claim immunity under the leniency policy at the expense of the other.

While in the context of an interview before the NZCC compelled via a section 98 notice the NZCC usually seeks to retain the right to ask legal counsel to leave if the lawyer's conduct is considered to be 'obstructing or interfering with the interview', the NZCC has previously conceded (during the proceedings in *Koppers Arch Wood Protection (NZ) Limited v Commerce Commission*, HC Auckland, CIV 2004 404 3858, 16 November 2004, Williams J, paragraphs 14 to 15) that certain rights affirmed in the New Zealand Bill of Rights Act 1990 may apply at this stage of an investigation under the Act and that, if this is the case, the legality of any restriction on the right to counsel would need to be very carefully considered before being applied.

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### 34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Counsel may act for multiple corporate defendants provided that this can be achieved in compliance with the Rules of Professional Conduct relating to conflicts of interest (see question 33).

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### 35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

The Act forbids a body corporate to indemnify its employees against legal costs incurred by or penalties imposed upon an employee in respect of price-fixing conduct in breach of the Act. Any body corporate that contravenes this prohibition will be liable for a pecuniary penalty of up to twice the value of the indemnity in question.

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### 36 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions?

In the absence of legislative guidance on the relevance of overseas penalties to domestic penalty setting, there is High Court precedent to suggest that the courts may take into account the risk or fact of penalties in other jurisdictions in assessing a civil pecuniary penalty in New Zealand. A reduction may be warranted in light of those other penalties. The Court will be careful not to offend against the principle of international comity. In the course of the air cargo litigation, an airline argued that the payment of penalties in other jurisdictions will serve as a future deterrent and that this diminished the need for the imposition of deterrent-based penalties in New Zealand. The Court did not discard this point, but in the overall scheme of things found it a relatively minor factor. Ultimately, under the Commerce Act, the Court is concerned with the deterrent effect of penalties in the New Zealand market, and it is expected that the courts will take the approach that the New Zealand element of global conduct is a separate offence and, therefore, is liable to a domestic New Zealand penalty.

If the Cartels Bill introduces cartel criminalisation, section 26 of the Bill of Rights Act 1990 will apply, so that a person who has been tried once in proceedings that involve the imposition of true penal consequences (for instance, criminal sanctions in respect of cartel conduct) cannot be tried again on a charge that is substantially the same as the original charge.

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### 37 Getting the fine down

What is the optimal way in which to get the fine down?

All decisions on what fine will be sought by the NZCC are made by the NZCC commissioners themselves (specifically, the division responsible for Commerce Act matters). The prosecutor's office does

not have authority to agree a penalty, nor does the NZCC staff. That can make negotiations more difficult, because a party will not be dealing directly with the commissioners but the prosecutors and staff.

In simple terms, the best way to get the fine down is full and early cooperation. The extent to which the NZCC staff considers that disclosure has been full and frank rather than grudging, and that the attitude of the applicant and its advisers has been open and collaborative rather than unduly technical or legalistic, will have a significant impact.

Accordingly, the decision on whether to cooperate must be made early. It is not uncommon for a defendant and the NZCC to have quite different views on whether there has been cooperation, simply because the defendant initially took a more assertive approach that it then revised once it realised the seriousness of the breach.

In addition, it is also advisable to implement or improve the organisation's competition compliance programme, discipline offending staff and otherwise indicate a culture of compliance, as these factors may be looked on favourably when the court is assessing an appropriate penalty.

Finally, in major cartel cases where setting an appropriate level of fine can be difficult, good economic advice is essential. The input of the NZCC's own economists can be critical in its decision-making process, and defendants will benefit from having someone who can engage directly with them.

\* *Please note that, as Mr Hamlin is a Crown prosecutor and acts for the NZCC on cartel cases, he is unable to accept private instructions.*

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