

**THE PROPOSED NZ ANTI-CARTEL LAW:
A KEY-POINT COMPARISON**

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A. Introduction – NZ Builds a Better Anti-Cartel Law

In May 2013 the NZ Commerce Committee recommended that the Commerce (Cartels and Other Matters) Amendment Bill 2011 be passed with various amendments.¹ This follows a gestation period of over three years and two rounds of extensive public consultation.² The Bill as revised by the Commerce Committee (**NZ Anti-Cartel Bill**) is likely to be enacted later this year.

The key-point comparison in Section B below summarises the main features of the proposed NZ legislation and the cartel-related provisions of the Competition and Consumer Act 2010 (Cth) (**CCA**). Although some of these features are similar, there are major and minor differences. The provisions in the NZ Anti-Cartel Bill are better than their Australian counterparts in several significant ways (see Section C – Conclusion).³

B. Key-Point Comparison of Proposed NZ Anti-Cartel Law and Current Australian Anti-Cartel Law

Subject	Commerce Act (proposed)	Competition and Consumer Act (current)
Cartel offences	<ul style="list-style-type: none"> • Entering into a contract or arrangement or arriving at an understanding containing a cartel provision (s 82B(1)(a)). • Giving effect to a cartel provision (s 82B(1)(b)). • Maximum individual penalty – 7 years imprisonment (s 82B(4)); a fine of \$? (s 80(2)(a) provides for a maximum penalty of \$500,000 but applies only to civil penalties; s 82B does not provide for fines against individuals; a fine of up to \$10,000 may be imposed under s 39(4)(a) of the Sentencing Act 2002; a further amendment to the Bill is likely to provide for a fine of up to \$500,000); indemnification is prohibited (s 80A(1)). • Other sentencing options for individual offenders are governed by the same law throughout NZ.⁴ • Maximum corporate fine – the greater of: \$10 million, 3 x value of any 	<ul style="list-style-type: none"> • Making a contract or arrangement or arriving at an understanding containing a cartel provision (s 44ZZRF). • Giving effect to a cartel provision (s 44ZZRG). • Maximum individual penalty – 10 years imprisonment (s 79(1)(e), s 6(5B)); \$340,000 fine (s 79(1)(e), s 6(5B)); no CCA provision relating to indemnification of criminal fines (see s 77A).⁵ • Other sentencing options for individual offenders are not governed by the same law throughout Australia but by a complicated mix of federal, state and territorial sentencing laws.⁶ • Maximum corporate fine – the greater of: \$10,000,000, 3 x total value of benefits obtained by one or more persons that are reasonably attributable to the commission of the offence, or (if court cannot determine total value of

¹ The Report is available at: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH_SCR5848_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm

² See further: <http://www.med.govt.nz/business/competition-policy/cartel-criminalisation>. By contrast, the development of the cartel-related provisions in the CCA was shrouded in secrecy during 2004-2007 and no discussion paper worthy of the name was ever published by Treasury.

³ Disclosure: the author acted as one of several advisers to the Ministry of Business, Innovation & Employment on cartel law reform. The views expressed here are his personal views and do not necessarily represent those of the Ministry.

⁴ See eg Sentencing Act 2002 (NZ); Parole Act 2002 (NZ).

⁵ For a critique see C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) (“*Australian Cartel Regulation*”) pp 470-471.

⁶ See *Australian Cartel Regulation* section 11.4.

	<p>commercial gain resulting from contravention, or (if commercial gain cannot be readily ascertained) 10% of turnover of D and interconnected bodies corporate in each accounting period in which the contravention occurred (s 82B(5)).</p> <ul style="list-style-type: none"> • No provision is made for non-monetary sanctions against corporate offenders (eg probation, community service, adverse publicity). • Persuasive burden of proof on P; standard of proof – proof beyond a reasonable doubt. • Jury trial or trial by judge alone. 	<p>benefits) 10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence (s 44ZZRF(3), s 44ZZRG(3)).</p> <ul style="list-style-type: none"> • Provision for non-monetary sanctions against corporate offenders (probation, community service, adverse publicity) (s 86C).⁷ • Persuasive burden of proof on P; standard of proof – proof beyond a reasonable doubt. • Jury trial.⁸
Civil penalty prohibitions	<ul style="list-style-type: none"> • Entering into a contract or arrangement or arriving at an understanding containing a cartel provision (s 30(1)(a)), or a SLC provision (s 27(2)). • Giving effect to a cartel provision (s 30(1)(b)) or a SLC provision (s 27 (2)). • Maximum individual penalty –\$500,000 penalty (s 80(2)(a)); indemnification prohibited (s 80A(1)). • Maximum corporate penalty – the greater of: \$10 million, 3 x value of any commercial gain resulting from contravention, or (if commercial gain cannot be readily ascertained) 10% of turnover of D and interconnected bodies corporate in each accounting period in which the contravention occurred (s 80(2)(b)). • No provision for non-monetary sanctions against corporate offenders (eg probation, community service, adverse publicity). • Persuasive burden of proof on P; standard of proof – proof beyond balance of probabilities. 	<ul style="list-style-type: none"> • Entering into a contract or arrangement or arriving at an understanding containing a cartel provision (s 44ZZRJ), an exclusionary provision (s 45(2)) or a SLC provision (s 45(2)). • Giving effect to a cartel provision (s 44ZZRK), an exclusionary provision (s 45(2)) or a SLC provision (s 45(2)). • Maximum individual penalty – \$500,000 (s 76(1B)(b)); indemnification prohibited (s 77A). • Maximum corporate penalty for civil cartel contraventions – the greater of: \$10,000,000, 3 x total value of benefits obtained by one or more persons that are reasonably attributable to the act or omission, or (if court cannot determine total value of benefits) 10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the act or omission occurred. • Maximum corporate penalty for civil contraventions relating to an exclusionary provision or a SLC provision⁹ – the greater of: \$10 million, 3 x value of the benefit that the body corporate and any related body corporate have obtained directly or indirectly, or (if the court cannot determine the value of that benefit) — 10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the act or omission occurred. (s 76(1A)(b)). • Provision for non-monetary sanctions against corporate offenders (probation, community service, adverse publicity) (s 86C).

⁷ See *Australian Cartel Regulation* section 11.3.5.

⁸ By reason of s 80 of the Constitution.

⁹ See *Australian Cartel Regulation* section 11.3.4.

		<ul style="list-style-type: none"> Persuasive burden of proof on P; standard of proof – proof beyond balance of probabilities.
Collusion: definition	<ul style="list-style-type: none"> Contract, arrangement or understanding. Arrangement or understanding interpreted as requiring consensus or expectation and not necessarily “commitment”.¹⁰ No prohibition of unilateral disclosure to competitor of price-related or competitively sensitive information. 	<ul style="list-style-type: none"> Contract, arrangement or understanding. Arrangement or understanding interpreted as requiring “commitment”.¹¹ Additional prohibitions against unilateral disclosure to competitor of price-related or competitively sensitive information.¹² These prohibitions currently apply only in relation to the services of taking money on deposit or making advances of money by a bank, building society or credit union.¹³
Cartel offences: fault elements for offences and exemptions	<ul style="list-style-type: none"> Explicit requirement for each cartel offence of “intention” to engage in price fixing, restricting output or market allocating (s 82B(1)(2)). Implicit requirement of intention or recklessness in relation to the elements of: <ul style="list-style-type: none"> (a) entering into a contract or arrangement or arriving at an understanding; and (b) giving of effect to a provision.¹⁴ “Intention” undefined – common law meaning.¹⁵ Limited defence of honest belief in relation to collaborative ventures exemption (s 82B(2)). No excuse or defence in relation to mistake of fact as to the existence of an exemption.¹⁶ 	<ul style="list-style-type: none"> Explicit requirement for each cartel offence of “knowledge” or “belief” that cartel provision was contained in the CAU (s 44ZZRF(2), s 44ZZRG(2)). Requirement of “intention” implied under Criminal Code in relation to: <ul style="list-style-type: none"> (a) entering into a contract or arrangement or arriving at an understanding; and (b) giving of effect to a provision.¹⁷ “Knowledge” defined by s 5.3 of Criminal Code (a person has knowledge of a circumstance or result if he or she is aware that it exist or will exist in the ordinary course of events). “Belief” undefined – meaning to be decided by reference to interpretation of “belief” in various other statutory contexts.¹⁸ “Intention” as defined by s 5.2(1) Criminal Code (a person has intention with respect to conduct if he or she means to engage in that conduct). No excuse or defence in relation to mistake of fact as to the existence of an exemption under CCA or Criminal Code

¹⁰ *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608, [15]–[23]. See further M Sumpter, *New Zealand Competition Law and Policy* (CCH, 2010) (“*New Zealand Competition Law and Policy*”) pp 101-112.

¹¹ *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, 464 [47]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321, 335 [37]. See further *Australian Cartel Regulation* section 3.3.

¹² CCA ss 44ZZW, 44ZZX. See further C Beaton-Wells and B Fisse, 'Australia's Proposed Information Disclosure Legislation: International Worst Practice', *Competition Policy International*, Antitrust Chronicle, 30 August 2011.

¹³ Competition and Consumer Amendment Regulation 2012 (No.1)

¹⁴ See AP Simester and WJ Brookbanks, *Principles of Criminal Law* (Thomson, 3rd ed 2007) (“*Principles of Criminal Law*”), pp 144-145.

¹⁵ See *Principles of Criminal Law*, pp 94-105.

¹⁶ See s 82B(2).

¹⁷ Criminal Code (Cth) s 5.6(1).

¹⁸ See *Australian Cartel Regulation* section 5.4.3.

		– possible common law defence of reasonable mistake of fact. ¹⁹
Cartel provision	<ul style="list-style-type: none"> • Price fixing – purpose/effect condition (s 30A(2)). • Reduction of output – purpose condition (s 30A(3)). • Market allocation – purpose condition (s 30A(4)). • Market allocation is defined to include restriction of acquisition of goods or services (s s 30A(4)). • Bid rigging is not covered separately – price fixing is relevant category (s 30A(2)).²⁰ • Competition condition – parties to CAU must be in competition or likely competition with other in relation to goods or services they supply or acquire (s 30A(2)(3)94), s 30B(c)). 	<ul style="list-style-type: none"> • Price fixing – purpose/effect condition (s 44ZZRD(2)). • Reduction of output – purpose condition (s 44ZZRD(3)(a)). • Market allocation – purpose condition (s s 44ZZRD(3)(b)). • Market allocation under s 44ZZRD(3)(b) does not include restriction of acquisition of goods or services – contrast the definition of an exclusionary provision (s 4D) which applies to restrictions on acquisition as well as restrictions on supply. • Bid rigging covered separately – purpose condition (s 44ZZRD(3)(c)). • Competition condition – complex definition (s 44ZZRD(4)).
Exclusionary provision	<ul style="list-style-type: none"> • Repeal of s 29 (relating to exclusionary provisions). • Restrictions of supply or acquisition covered by definition of “cartel provision” under heads of reduction of output and market allocation. • Conduct that is not anti-competitive was saved by the s 29(1A) defence of absence of SLC – that defence largely avoided the need for strained interpretations of the “purpose” element of an exclusionary provision. 	<ul style="list-style-type: none"> • Prohibitions relating to exclusionary provisions remain.²¹ The definition of an exclusionary provision under s 4D has not been incorporated in the definition of a cartel provision under s 44ZZRD. • Restriction of acquisition of goods or services falls within the definition of an exclusionary provision in s 4D but is not covered as a reduction of output in the definition of a cartel provision in s 44ZZRD. • There is no defence of absence of SLC. Conduct that is not anti-competitive may be saved in some cases by absence of an exclusionary “purpose”.²²
Joint ventures and collaborative ventures	<ul style="list-style-type: none"> • Repeal of s 31 (which exempted limited types of joint venture pricing).²³ • New exemption for collaborative activity (s 31) where: <ul style="list-style-type: none"> (a) D and 1 or more parties to the CAU are involved in a collaborative activity; and (b) the cartel provision is reasonably necessary for the purpose of the collaborative activity. • “Collaborative activity” means an 	<ul style="list-style-type: none"> • A joint venture exemption applies to cartel offences (s 44ZZRO) and a similarly defined exemption applies to civil cartel prohibitions (s 44ZZRP).²⁴ • “Joint venture” is defined by s 4J but it is uncertain what exactly this concept means. For instance, it is unclear whether or not “joint venture” includes consortia or other collaborations between competitors that the parties do not regard as being joint ventures.²⁵

¹⁹ See *Australian Cartel Regulation* p 153.

²⁰ See further *Australian Cartel Regulation* pp 121-122.

²¹ See *Australian Cartel Regulation* section 4.4.

²² As in *News Limited v South Sydney District Rugby League Football Club Ltd (South Sydney)* (2003) 215 CLR 563. See the critique in *Australian Cartel Regulation* section 4.4.1.

²³ See A Lear, “Joint Ventures: Treatment under New Zealand, United States and European Competition Law” (2005) 11 NZBLQ 187.

²⁴ See further *Australian Cartel Regulation* section 8.3.

²⁵ Note that the special competitor collaboration exceptions under s 44ZZZ(3A)(5) and (6) would be unnecessary if “joint venture” in s 44ZZZ(3) encompassed consortia and other collaborations that are not characterised as joint ventures by the parties.

	<p>enterprise, venture, or other activity, in trade, that:</p> <p>(a) is carried on in co-operation by 2 or more persons; and</p> <p>(b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties. (s 31(2))</p> <p>The narrower and ill-defined concept of a “joint venture” is not used.</p> <ul style="list-style-type: none"> • There are no special or arbitrary limitations. Thus, the cartel provision need not necessarily be in a contract. The collaboration need not necessarily relate to the production and/or supply of goods or services. • A person seeking to rely on the collaborative activity exemption in civil proceedings carries the persuasive as well as the evidential burden of proof. The standard of proof is proof on the balance of probabilities. (s 80(2C)). • In relation to cartel offences, it is a defence that D honestly believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity (s 82B(2)). For this defence D carries an evidential but not a persuasive burden of proof. • Notice of proposed reliance on this defence in criminal proceedings must be given to the prosecution (s 82B(3)), • Commerce Commission guidelines on the application of the collaborative activity exemption are urged and anticipated. 	<ul style="list-style-type: none"> • The joint venture exemptions under s 44ZZRO and s 44ZZRP are subject to a number of special requirements.²⁶ The cartel provision must be in a contract or a proxy contract (s 44ZZRO(1A)(1B), s 44ZZRP(1A)(1B)) and be “for the purposes of” the joint venture. The joint venture must be for the production and/or supply of goods or services. • A joint venture defence applies to the civil prohibitions relating to exclusionary provisions (s 76C). Unlike the exemptions under ss 44ZZRO and 44ZZRP, this defence is defined in terms of a SLC test. • An evidential but not a persuasive burden of proof applies to the joint venture exemptions under ss 44ZZRO and 44ZZRP. By contrast, a persuasive as well as evidential burden of proof applies to the joint venture defence under s 76C. • Notice of proposed reliance on s 44ZZRO must be given to the prosecution (s 44ZZRO(2)). • In the context of unilateral disclosure of competitively sensitive information, there is a joint venture exception under s 44ZZZ(3) and special competitor collaboration exceptions under s 44ZZZ(3A)(5) and (6). Anomalously, there are no corresponding exceptions to those under s 44ZZZ(3A)(5) and (6) in relation to the cartel prohibitions under s 44ZZRF, s 44ZZRG, s 44ZZRJ and 44ZZRK. • Various notes or guidelines issued by the ACCC discuss cartels. None adequately discusses the joint venture exemptions.²⁷
Related corporations	<ul style="list-style-type: none"> • A parent corporation (or other related corporation) is not liable for the cartel conduct of a subsidiary (or other related corporation) by reason of the fact that it is an interconnected corporation. There are various possible bases of liability (eg liability for an agent if the subsidiary engaged in the alleged conduct as agent of the parent) but a parent-subsidiary (or other related corporation) relationship is insufficient. 	<ul style="list-style-type: none"> • As under the NZ Anti-Cartel Bill, a parent corporation (or other related corporation) is not liable under the CCA for the cartel conduct of a subsidiary (or other related corporation) by reason of the fact that it is a related corporation.²⁸ • Under s 44ZZRC, for the purposes of Division 1 of Part IV of the CCA, if a body corporate is party to a CAU, each related body corporate is taken to be a party to that CAU. The view has been expressed in some quarters that s

²⁶ For a critique see *Australian Cartel Regulation* sections 8.3.2 – 8.3.4.

²⁷ See eg ACCC, “Price Fixing” at: <http://www.accc.gov.au/business/anti-competitive-behaviour/cartels/price-fixing> (“The joint venture exception is complex, and legal advice should be sought by anyone considering a joint venture that may otherwise breach the cartel provisions.”).

²⁸ See *Australian Cartel Regulation* section 7.4.8.

	<ul style="list-style-type: none"> Under s 30B, if D is a party to a CAU, then “in relation to a cartel provision”, each of D’s interconnected bodies corporate is taken to be a party to the CAU. This extended meaning of the term “party” relates only to the definition of a cartel provision. Plainly s 30B does not relate to “party to an offence or contravention” in the sense of the rules that govern liability as a principal offender or contravener or as an accomplice or person knowingly concerned. 	<p>44ZZRC makes a corporation automatically liable for a cartel offence or cartel contravention committed by a related corporation.²⁹ That view is based on a misreading of the relevant provisions. The defined term “party” appears in the definition of a cartel provision but not in the provisions defining the elements of the cartel prohibitions in Part IV. The term “party” appears in s 76(1)(e) and s 79(1)(c) but s 44ZZRC does not apply to those provisions:</p> <ul style="list-style-type: none"> (a) s 76(1)(e) and s 79(1)(c) are concerned with a party “to the contravention” (ie with liability as a principal or accomplice) whereas s 44ZZRC relates only to a party to a CAU; (b) s 76(1)(e) and s 79(1)(c) are in Part VI of the CCA whereas s 44ZZRC applies only for the purposes of Division 1 of Part IV.
Vertical supply contracts	<ul style="list-style-type: none"> Vertical supply contracts between competitors are exempted by s 32 from the cartel prohibitions where: <ul style="list-style-type: none"> (a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and (b) the cartel provision: <ul style="list-style-type: none"> (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, or to the maximum price at which the customer or likely customer may resupply the goods or services; and (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract. 	<ul style="list-style-type: none"> No exemption for vertical supply agreements as such. However, in some situations the purpose/effect or purpose condition or the competition condition may not be satisfied.³⁰ The setting of a maximum resale price in a supply contract between competitors is exempted under the “anti-overlap” provision in s 44ZZRR of the CCA.
Collective acquisition of goods or services and collective bargaining	<ul style="list-style-type: none"> Exemption under s 33 for joint buying and promotion agreements between competitors where cartel provision: <ul style="list-style-type: none"> (a) relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by some or all of the parties to the CAU; or (b) provides for joint advertising of the price for the resupply of goods or services acquired in 	<ul style="list-style-type: none"> The cartel offences under ss 44ZZRF and 44ZZRG and the civil cartel prohibitions under ss 44ZZRJ and 44ZZRK are subject to exceptions under s 44ZZRV for: <ul style="list-style-type: none"> (a) collective acquisition of goods or service; and (b) joint advertising of goods or services collectively acquired. The exemption is limited to price fixing

²⁹ See eg R Miller, *Australian Competition and Consumer Law Annotated*, 35th ed, 2013, p 453 (s 44ZZRC will draw related corporations “into the group of potential defendants”).

³⁰ See the critique and worked examples in *Australian Cartel Regulation* section 8.6.

	<p>accordance with (a); or</p> <p>(c) provides for a collective negotiation of the price for goods or services followed by individual purchasing at the collectively negotiated price; or</p> <p>(d) provides for an intermediary to take title to goods and resell or resupply them to another party to the CAU.</p> <ul style="list-style-type: none"> • The s 33 exemption is limited to price fixing but should be extended so as to apply to other types of cartel conduct especially reduction of output. • No notification procedure for collective bargaining – collective negotiation falls within the s 33 exemption (s 33(c)). The collective negotiation limb of s 33, like the other limbs of s 33, is not limited to any transaction value. 	<p>but should be extended to apply to other types of cartel conduct especially reduction of output.³¹</p> <ul style="list-style-type: none"> • The meaning of “collectively acquire” remains uncertain. In particular, it is unclear whether or not the parties must acquire joint title to the goods acquired or joint rights to the services acquired. The better view is that joint title or joint rights are unnecessary. • Collective bargaining is not exempted by s 44ZZRV but is subject to a separate notification procedure.³² That procedure is limited to various arbitrary transaction values.³³ By contrast, the exemption under s 44ZZRV is not subject to any limits on transaction value.
Exclusive dealing	<ul style="list-style-type: none"> • There is no prohibition against exclusive dealing in the Commerce Act. Accordingly there is no need in NZ to address the relationship between cartel prohibitions and a prohibition against exclusive dealing. 	<ul style="list-style-type: none"> • The exemptions under s 44ZZRS and 45(6) exclude exclusive dealing conduct from the application of the cartel prohibitions and the prohibitions relating to exclusionary provisions. The exemptions depend on the technical definition of exclusive dealing in s 47. This can create a pitfall for the unwary.³⁴
Intellectual property	<ul style="list-style-type: none"> • The NZ Anti-Cartel Bill does not repeal or amend the intellectual property exemptions under s 45 of the Commerce Act. These exemptions are very narrow.³⁵ • The collaborative activity exemption under s 31 is likely to apply in many situations where competitors license their intellectual property to each other.³⁶ This exemption is not limited to collaborations involving the intellectual property rights specified in s 45 but extends to collaborations that relate to intellectual property in a wider or even non-legal sense. • The requirement that a cartel provision be reasonably necessary for a collaborative activity serves as safeguard against attempts by competitors to use cross-licensing and 	<ul style="list-style-type: none"> • The cartel prohibitions and the prohibitions against exclusionary provisions and SLC provisions are subject to the intellectual property exemptions under s 51(3) of the CCA. • The intellectual property exemptions under s 51(3) create a loophole that can be used by competitors in some cases to evade not only the cartel prohibitions and the prohibitions against exclusionary provisions but also the prohibitions against SLC provisions.³⁸

³¹ See *Australian Cartel Regulation* section 8.4.2.

³² CCA ss 93AA- 93AD.

³³ See ACCC, *Guide to Collective Bargaining Notifications* (2011) p7, at: <http://transition.accc.gov.au/content/item.phtml?itemId=776297&nodeId=146dc7da282c04acc1e927806d9ea913&fn=Guide%20to%20collective%20bargaining%20notifications.pdf>

³⁴ See eg *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1.

³⁵ See I Eagles, “Regulating the Interface Between Competition Law and Intellectual Property in New Zealand” (2007) 13 NZBLQ 95.

³⁶ See *Australian Cartel Regulation* pp 315-316.

	other intellectual property avenues to evade the cartel prohibitions. ³⁷	
Franchise arrangements	<ul style="list-style-type: none"> No specific provision is made for franchise arrangements. The collaborative activity exemption and the clearance mechanism under the NZ Anti-Cartel Bill offer useful alternatives to authorisation or trying to enter into separate agreements with each franchisee without creating a “hub and spokes” arrangement or understanding.³⁹ The Commerce Committee urges the Commerce Commission to develop specific guidelines for its application of the provisions of the Anti-Cartel Bill to various franchise systems.⁴⁰ 	<ul style="list-style-type: none"> No specific provision is made for franchise arrangements under the cartel-related provisions of the CCA. The main escape routes are: structuring the arrangements to attract the “anti-overlap” provisions (eg s 44ZZRS); structuring the franchise agreements in a way calculated to avoid creating a CAU between competing franchisees;⁴¹ reliance on the joint venture exemptions (with the exercise of extreme care and subject to the uncertainty of what is meant by a “joint venture”); and obtaining authorisation by the ACCC.
International shipping	<ul style="list-style-type: none"> The Commerce Committee did not see any good reason for treating international shipping differently from other sectors regulated by the Commerce Act. The carriage of goods by sea between places in New Zealand and places outside New Zealand should be subject to the generic competition regime under the Commerce Act.⁴² The separate competition regime established under the Shipping Act 1987 is to be repealed, with a two-year transitional period. 	<ul style="list-style-type: none"> Part X of the CCA regulates international liner cargo shipping services. The main exemptions relate to ‘conference agreements’. A conference agreement that is registered with the ACCC receives a limited and conditional exemption from the per se cartel prohibitions under ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK and the prohibitions against anti-competitive conduct under ss 45 and 47.⁴³ The Productivity Commission recommended in 2005 that Part X be repealed.⁴⁴ The Coalition Government announced that Part X should be reviewed after 5 years. Part X survives.
Individual liability	<ul style="list-style-type: none"> Cartel prohibitions and the prohibitions relating to a SLC provision are defined in terms of the liability of a “person”. An individual is liable on the basis of vicarious responsibility for the state of mind and conduct of an employee or agent in civil but not criminal proceedings (s 90(3) and (4)). 	<ul style="list-style-type: none"> Cartel prohibitions and the prohibitions relating to exclusionary and SLC provisions are defined in terms of the liability of a corporation. Under s 6 the application of these prohibitions is extended to individual persons in certain situations where there is power under the Constitution to do so.⁴⁵ Under the Schedule version of the Competition Code that applies in States and Territories, the prohibitions apply to a “person”. An individual is liable on the basis of

³⁸ See *Australian Cartel Regulation* p 313.

³⁷ See *Australian Cartel Regulation* p 316.

³⁹ See S Corones, *Competition Law in Australia* (Thomson, 5th ed 2010) p 624.

⁴⁰ Report, at p 7.

⁴¹ See S Corones, *Competition Law in Australia* (Thomson, 5th ed 2010) p 624.

⁴² Report, at p 7.

⁴³ See *Australian Cartel Regulation* section 8.10.

⁴⁴ Productivity Commission, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, Inquiry Report No. 32, 23 February 2005. See also Australian and New Zealand Productivity Commissions, *Strengthening trans-Tasman economic relations*, Final Report, November 2012, p 119.

⁴⁵ See further *Australian Cartel Regulation* pp 159-160.

		vicarious responsibility for the state of mind and conduct of an employee or agent in civil and criminal proceedings (s 84(3) and (4)), but is not punishable by imprisonment if he or she would not have been convicted if s 84(3) and (4) had not been enacted (s 84(4A)). ⁴⁶
Corporate liability	<ul style="list-style-type: none"> A corporation may be held civilly or criminally liable on the basis of either the common law directing mind principle⁴⁷ or the vicarious responsibility provisions under s 90(1) and (2). 	<ul style="list-style-type: none"> A corporation may be held criminally liable under s 44ZZRF or s 44ZZRG and civilly liable under s 44ZZRJ or 44ZZRK on the basis of either the directing mind principle or the vicarious responsibility provisions under s 84(1) and (2).⁴⁸ A corporation may be held civilly liable for contravening the s 45(2) prohibitions relating to an exclusionary provision and a SLC provision on the basis of the common law directing mind principle but not on the basis of the vicarious responsibility provisions under s 84(1) and (2).⁴⁹
Ancillary liability	<ul style="list-style-type: none"> Civil liability for attempt, complicity, inducement, attempted inducement and conspiracy are prescribed by s 80(1). The elements of these forms of ancillary liability are based on the common law, with the exception of liability for being knowingly concerned, a statutory variant of complicity. Criminal liability for attempt, complicity, and conspiracy is governed by the Crimes Act 1961 (NZ) (eg s 66 (parties to offences) and, to the extent unmodified by the Crimes Act, the common law.⁵⁰ There is no liability for being knowingly concerned in a cartel offence. An individual is civilly liable for ancillary forms of liability under s 80(1) on the basis of vicarious responsibility for the state of mind and conduct of an employee or agent (s 90(3) and (4)). However, the vicarious responsibility provisions in s s 90(3) and (4) do not apply to ancillary liability for cartel offences. 	<ul style="list-style-type: none"> Civil liability for attempt, complicity, inducement, attempted inducement and conspiracy is prescribed by s 76(1). The elements of these forms of ancillary liability are based on the common law, with the exception of liability for being knowingly concerned, a statutory form of complicity.⁵¹ Criminal liability for attempt, complicity, inducement, attempted inducement and conspiracy is prescribed by s 79. The elements of these forms of ancillary liability are defined partly by reference to Criminal Code provisions on “extensions” of liability, partly by reference to the common law and, in the case of liability for being knowingly concerned, on the basis of the case law interpreting this statutory variant of complicity. There is no apparent need for this complexity.⁵² An individual is liable on the basis of vicarious responsibility for the state of mind and conduct of an employee or agent in civil and criminal proceedings for ancillary forms of liability (s 84(3)

⁴⁶ It is unclear whether or not s 80 of the Constitution requires a special verdict on this issue of fact.

⁴⁷ See *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

⁴⁸ See *Australian Cartel Regulation* pp 210-211.

⁴⁹ See *Australian Cartel Regulation* p 210.

⁵⁰ See further *Principles of Criminal Law*, chs 6 and 8.

⁵¹ See *Australian Cartel Regulation* sections 6.3-6.4.

⁵² See *Australian Cartel Regulation* sections 6.3-6.4.

		and (4)), but is not punishable by imprisonment if he or she would not have been convicted if s 84(3) and (4) had not been enacted (s 84(4A)).
Clearance	<ul style="list-style-type: none"> The NZ Anti-Cartel Bill provides for a clearance regime to allow corporations to apply to the Commerce Commission to test whether a proposed collaboration with a competitor would breach the Commerce Act (ss 65A-65D). The Commerce Commission may must give a clearance under s 65A if it is satisfied that: <ul style="list-style-type: none"> (a) the applicant and any other party to the proposed CAU are or will be involved in a collaborative activity; and (b) the every cartel provision in the CAU is reasonably necessary for the purpose of the collaborative activity; and (c) the collaborative activity entering into the arrangement, or arriving at the understanding, or giving effect to any provision of the CAU, will not have, or would not be likely to have, the effect of substantially lessening competition in a market. If clearance is not given within 30 working days the Commerce Commission is deemed to have declined to give the clearance, subject to any alternative timetable agreed between the Commission and the person applying for clearance. The clearance regime is additional to the avenue of authorisation. 	<ul style="list-style-type: none"> There is no cartel-related clearance regime under the CCA.
Authorisation	<ul style="list-style-type: none"> Authorisation is available to exempt conduct that would otherwise be a cartel offence or a civil cartel contravention (s 58). Authorisation is available whether or not the cartel provision is in a contract that is conditional on authorisation and whether or not application for authorisation is made within eg 14 days (see s 59A). If authorisation is not granted within 120 working days the Commerce Commission is deemed to have declined the application, subject to any alternative timetable agreed between the Commission and the applicant (s 61(1A)). 	<ul style="list-style-type: none"> Authorisation will exempt conduct that would otherwise be a cartel offence or a civil cartel contravention (s 44ZZRM). Authorisation is available only if the cartel provision is in a contract that is conditional on authorisation and if application for authorisation is made within 14 days (s 44ZZRM(1)(b)).⁵³ There is no statutory decision period.

⁵³ See the critique in *Australian Cartel Regulation* pp 326-327.

Territorial jurisdiction	<ul style="list-style-type: none"> • If the conduct of a person in New Zealand is attributable to an overseas person under s 90, the conduct of the overseas person is to be treated as occurring in New Zealand (s 5).⁵⁴ • Under s 90, in civil proceedings conduct by a person (person B) is deemed to be the conduct of an individual (person C) if, at the time of the conduct: <ul style="list-style-type: none"> (a) person B was acting at the direction, or with the consent or agreement (express or implied), of person C; or (b) person B was an employee or agent of person C and acting within the scope of person B's actual or apparent authority; or (c) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of an employee or agent of person C who was acting within the scope of the employee's or agent's actual or apparent authority. 	<ul style="list-style-type: none"> • The territorial jurisdiction provisions in CCA do not include an extension equivalent to that proposed under the NZ Anti-Cartel Bill for s 5 of the Commerce Act.
Transition	<ul style="list-style-type: none"> • D is liable for giving effect to a cartel provision where the CAU was entered into or arrived at before or after s 30 comes into force, and whether or not it has been suspended at any time (s 30C(2)). • Civil proceedings for giving effect to a cartel provision may not be commenced during the first 9 months after s 30C comes into force, in relation to a CAU entered into or arrived at before s 30C came into force (s 30C(3)). • The cartel offences come into force 2 years after the Bill has received Royal Assent. 	<ul style="list-style-type: none"> • Liability for giving effect to a cartel provision applies in relation to a CAU made before, at or after the time of commencement (s 44ZZRG(4), s 44ZZRK(2)). The same applies to liability for giving effect to an exclusionary provision or a SLC provision (s 45(2)(b)). • No transitional period applied in relation to the cartel offence or civil cartel prohibitions when they were introduced. This caused a problem given the danger of giving effect to cartel provisions existing in CAUs created before the time of commencement and the practical difficulty of unearthing those provisions.⁵⁵

⁵⁴ For the background to this extension of territorial jurisdiction see *Poynter v Commerce Commission* [2010] NZSC 38; *New Zealand Competition Law and Policy* pp 430-431.

⁵⁵ See the critique in *Australian Cartel Regulation* section 8.3.3.1.

C. Conclusion – Main advantages and implications of the NZ Anti-Cartel Bill

The comparative table in Section B above shows that the proposed NZ anti-cartel law differs in numerous ways from the anti-cartel provisions of the CCA. The table also indicates that many of the differences reflect a determined attempt by NZ's competition law makers to find better solutions than those reached in Australia's anti-cartel law.

The main comparative advantages of the proposed NZ model are as follows:

- The definition of cartel offences and civil cartel prohibitions and the exemptions that apply to them is largely straightforward and concise. For instance, the definition of a cartel provision is about half the length of the treatment of the same subject in the CCA. The definition of the collaborative activity exemption takes about half a page compared with the 6 pages devoted to the main exemptions relating to joint ventures under the CCA. The relative brevity and clarity achieved will be welcomed by businesses, lawyers, judges and juries in NZ.
- The NZ Anti-Cartel Bill consolidates the law relating to cartels and thereby avoids the pointless retention of outmoded provisions and the mindless multiple expression of definitions and rules that can and should be set out once. For instance, the outmoded concept of an exclusionary provision in s 29 is repealed and the relevant ground is covered by the definition of a cartel provision in s 30. By contrast, under the CCA the concept of an exclusionary provision is retained, the definition of a cartel provision is hobbled by excluding restrictions on the acquisition of goods or services, and there is a considerable and messy overlap between the definition of a cartel provision and that of an exclusionary provision (eg restrictions on the supply of goods or services can easily be cartel provisions and exclusionary provisions).
- The potential problem of overreach of per se prohibitions against cartel conduct is greatly reduced under the NZ Anti-Cartel Bill by means of the collaborative activity exemption under s 31. This exemption recognises that a wide range of collaborations between competitors are pro-competitive or not anti-competitive and that per se prohibition is unjustified. The collaborative activity exemption also avoids the prolixity, uncertainty and sheer commercial unreality of the CCA provisions relating to joint ventures.⁵⁶ However, as is widely recognised, further work is needed if these advantages are to be realised in full. In particular, the requirement that a cartel provision be “reasonably necessary” for the collaborative activity needs to be fleshed out in a way that avoids excessively narrow or rigid interpretation (eg by insisting that the cartel provision be the one and only way of achieving the collaborative activity). The pragmatic approach taken on this issue in the DOJ/FTC *Antitrust Guidelines for Collaborations among Competitors* (2000) is to be commended.⁵⁷

Some provisions in the NZ Anti-Cartel Bill are open to question. Several points may be noted:

⁵⁶ See *Australian Cartel Regulation* section 8.3.

⁵⁷ Available at: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>. See especially §3.36(b).

- The fault element for the cartel offences is “intention” but this concept is undefined. One unresolved question is the state of mind required by the element of intention in relation to the alleged cartel provision. Must D know or believe the facts that constitute the circumstances under which there is a cartel provision? Or is it sufficient that D is aware that there is a significant risk of there being a cartel provision but means to go ahead nonetheless?⁵⁸
- The unsatisfactory concept of “purpose of a provision” is retained in the definition of a cartel provision in s 30.⁵⁹
- The Commerce Committee recommended against providing a defence to the cartel offences that D honestly believed that an exemption under s 31, s 32 or s 33 applied and confined the defence to an honest belief that the cartel provision was reasonably necessary for the purposes of the collaborative activity.⁶⁰ The defence proposed in the earlier version of the Bill would have made mistake of law or fact a defence.⁶¹ However, it is difficult to see why a defence of mistake of fact as to the existence of an exemption should be excluded. For example, D may believe that a provision in a CAU relates to price in circumstances that fall within the joint buying exemption under s 33 but that belief is mistaken because the relevant provision in the CAU does not in fact relate to price. The Commerce Committee report does not address that type of honest mistaken belief.⁶²
- The joint buying exemption under s 33 does not preclude the use of the exemption by buyers’ cartels that wish to engage in naked price-fixing.⁶³ The wording does not limit the application of the exemption to situations where there is an economic justification for excluding the conduct from per se liability. One possible fix would be a requirement that the dominant purpose of the joint buying arrangement be to lower transaction costs and not to lessen competition between any 2 or more of the parties to that arrangement.

The NZ Anti-Cartel Bill adds to the already long list of differences between NZ and Australian competition law.⁶⁴ However, there may be an opportunity to revisit Australia’s anti-cartel law and to revise the CCA in light of the NZ reform. The Coalition has announced that, if it is elected at the forthcoming federal election, it will initiate a “root and branch” review of Australian competition law.⁶⁵ Conceivably, the cartel-related provisions of the CCA may receive tree surgery, including lopping, removal of twisted roots, and stem-grafts.

⁵⁸ See further *Principles of Criminal Law*, section 4.2.5 (arguing in support of the view that intention requires knowledge or belief as to circumstances).

⁵⁹ See *Australian Cartel Regulation* pp 91-92.

⁶⁰ Commerce Act s 82B(2) as per the Commerce Committee’s proposed amendment.

⁶¹ The former version of s 82B(2) read: “In a prosecution under this section, it is a defence if the defendant honestly believed at the relevant time that an exemption in section 31, 32, or 33 applied.”

⁶² See Report at p 6.

⁶³ See the critique in *Australian Cartel Regulation* pp 298-299.

⁶⁴ One contributing factor is the apparent lack of an effective mechanism for trans-Tasman consultation about competition law reforms that are proposed in Australia or New Zealand. For example, the general counsel of a NZ corporation expressed the view at a seminar in Auckland in 2011 that the 2009 cartel reforms in Australia had no legitimacy in NZ because NZ businesses had never been consulted about them.

⁶⁵ See Ausvotes 2013, Coalition Policies, at: <http://ausvotes2013.com/policies-2/coalition-policies> (“We will review competition policy and deliver more competitive markets because there will be, for the first time in two decades, a root and branch review of competition laws”).