

**NEW ZEALAND GOVERNMENT PROPOSES NEW ANTI-CARTEL LAW WITH  
COLLABORATIVE ACTIVITY EXEMPTION THAT HIGHLIGHTS FLAWS IN AUSTRALIAN  
JOINT VENTURE EXCEPTIONS**

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## 1. The collaborative activity exemption under the proposed anti-cartel amendments to the Commerce Act 1986 (NZ) <sup>1</sup>

In May 2013 the NZ Commerce Committee recommended that the Commerce (Cartels and Other Matters) Amendment Bill 2011 (**NZ Anti-Cartel Bill**) be passed with various amendments.<sup>2</sup> The Bill provides for new cartel offences and civil prohibitions, defines the concept of a “cartel provision” and sets out exemptions for collaborative activity, vertical supply contracts between competitors and joint buying and promotional agreements. Other features of the Bill include 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.

The Bill follows a gestation period of over three years and two rounds of extensive public consultation.<sup>3</sup> It is likely to be enacted later this year.

The new collaborative activity exemption<sup>4</sup> is a cornerstone of the proposed anti-cartel amendments to the Commerce Act. This exemption recognises that collaborations between competitors are often pro-competitive (or not anti-competitive) and that per se prohibition is unjustified for such collaborations. The exemption has been influenced by the approach taken to collaborative ventures between competitors under s 1 of the Sherman Act (US) and Article 101 of the EU Treaty.<sup>5</sup> It also avoids the shortcomings of the joint venture exceptions under Australian competition law.

This commentary outlines the elements of the proposed collaborative activity exemption (section 2) and outlines the practical advantages it offers in comparison to the Australian joint venture exceptions (section 3). The conclusion (section 4) is that the NZ collaborative activity exemption heralds the need for root and branch legislative revision of the Australian joint venture exceptions and the adoption of a similar exemption.

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<sup>1</sup> Disclosure: the author has 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.

<sup>2</sup> The Commerce Committee Report is available at: [http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH\\_SCR5848\\_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/0/8/4/50DBSCH_SCR5848_1-Commerce-Cartels-and-Other-Matters-Amendment-Bill.htm). For a comparison of the cartel-related provisions of the NZ Anti-Cartel Bill with those of the Competition and Consumer Act 2010 (Cth), see B Fisse, “The Proposed NZ Anti-Cartel Law: A Key Point Comparison” (2013) (June) LexisNexis Competition and Consumer Law News.

<sup>3</sup> See further: <http://www.med.govt.nz/business/competition-policy/cartel-criminalisation>.

<sup>4</sup> Commerce Act 1986 (NZ), proposed s 31.

<sup>5</sup> See e.g., FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>; European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (January 2011) at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

## 2. The proposed NZ collaborative activity exception

Under the NZ Anti-Cartel Bill, the prohibitions against cartel conduct will not apply to a person who enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or who gives effect to a cartel provision in a contract, arrangement, or understanding,

“if, at the time of entering into the contract, arrangement, or understanding or giving effect to the cartel provision

- (a) the person and 1 or more parties to the contract, arrangement, or understanding are involved in a collaborative activity; and
- (b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.”<sup>6</sup>

The test of reasonable necessity seeks to limit the exemption to cases where there is a commercial justification for including a cartel provision in a contract, arrangement or understanding between competitors. It is roughly comparable to the rule of reason test that applies to collaborative ventures under s 1 of the Sherman Act but the statutory test adopted avoids the need to untangle the US case law.<sup>7</sup> It may also be noted that, unlike US and Canadian antitrust law, the test avoids the need to grapple with the meaning of the concept of an “ancillary restraint”<sup>8</sup> or the concept of “the core activity of the joint venture” that was central to the decision of the US Supreme Court in *Texaco Inc v Dagher* (2006).<sup>9</sup>

“Collaborative activity” is defined to mean:

“an enterprise, venture, or other activity, in trade, that

- (a) is carried on in co-operation by 2 or more persons; and

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<sup>6</sup> Commerce Act 1986 (NZ), proposed s 31(1).

<sup>7</sup> See further American Bar Association, *Antitrust Law Developments (Seventh)* (2012) volume I, ch 4; A Devlin and M Jacobs, “Joint Venture Analysis after *American Needle*” (2011) 7(3) *Journal of Competition Law & Economics*, 543. The analysis in A Harpham, D Robertson and P Williams, “The Competition Law Analysis of Collaborative Structures” (2006) 34 *Australian Business Law Review* 399 needs to be read in light of the later US Supreme Court decision in *American Needle, Inc. v NFL*, 130 S Ct 2201 (2010).

<sup>8</sup> Compare G Werden, “The Ancillary Restraints Doctrine after *Dagher*” (2007) 8 *Sedona Conference Journal* 17; Competition Act 1985 (Canada) s 45(4). For a critique of the Canadian defence of ancillary restraint see C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) (*Australian Cartel Regulation*), pp 294-295.

<sup>9</sup> 547 US 1, 6 (2006). The *Texaco Inc v Dagher* distinction between core conduct and conduct outside a joint venture is ill-defined and prone to manipulation: see *Australian Cartel Regulation*, p 288.

(b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.”<sup>10</sup>

This definition is broad. It extends the application of the collaborative activity exemption to joint ventures, consortia, partnerships, strategic alliances, syndicated lending arrangements, lender work-out arrangements for insolvent borrowers, collective litigation settlement agreements, franchisors and franchisees under a franchise arrangement, and almost any other kind of collaborative arrangement between competitors.<sup>11</sup> The limitation that the collaborative activity not be for the dominant purpose of lessening competition between any parties to the collaboration reflects the dominant purpose safeguard adopted by the US Supreme Court in *Timken Roller Bearing Co v United States*.<sup>12</sup> and is intended to guard against the obvious danger of sham joint ventures or other collaborations where the prime reason for collaboration is naked price fixing, restriction of output or market sharing.<sup>13</sup>

For a cartel offence, the Bill provides a defence for a defendant involved in a collaborative activity if:

- “(a) the defendant honestly believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity; and
- (b) that belief existed at the time the defendant entered into or arrived at the contract, arrangement, or understanding that contained the cartel provision, or at the time the defendant gave effect to the cartel provision, as the case requires.”<sup>14</sup>

A defendant that wishes to claim that the collaborative exemption or the defence of honest belief applies must give notice before trial and the notice must “provide sufficient details about the application of the relevant section to fully and fairly inform the prosecution of the manner in which the exemption or defence is claimed to apply.”<sup>15</sup>

A person seeking to rely on the collaborative activity exemption in civil proceedings carries the persuasive burden of proof as well as the evidential burden of proof. The standard of proof is proof on the balance of probabilities.<sup>16</sup> For the defence to a cartel offence of honest belief that the cartel provision was reasonably necessary for the purposes of the collaborative

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<sup>10</sup> Commerce Act 1986 (NZ), proposed s 31(2).

<sup>11</sup> Consistently with e.g., FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000) which focuses on “competitor collaborations”

<sup>12</sup> 341 US 593, 597–8 (1951).

<sup>13</sup> See further *Australian Cartel Regulation*, pp 285-286.

<sup>14</sup> Commerce Act 1986 (NZ), proposed s 82B(2).

<sup>15</sup> Commerce Act 1986 (NZ), proposed s 82B(3).

<sup>16</sup> Commerce Act 1986 (NZ), proposed s 80(2C).

activity, a defendant carries an evidential burden of proof but not a persuasive burden of proof.

Vertical supply arrangements between competitors may qualify for exemption as a collaborative activity. However, in practice reliance generally would be placed on the proposed specific exemption for vertical supply contracts between competitors.<sup>17</sup> That bright-line rule avoids the need to decide whether or not a cartel provision in a supply contract is “reasonably necessary” for the purpose of the collaboration.

The collaborative activity exemption does not require that the activity be unlikely to substantially lessen competition in a market (**SLC**). However, the Commerce Act prohibits entering into a contract, arrangement or understanding that contains a SLC provision, or giving effect to a SLC provision.<sup>18</sup>

The NZ Commerce Commission is preparing draft guidelines on the collaborative activity exemption. These will be published for consultation.

### **3. Advantages of the proposed NZ collaborative activity exemption in comparison with Australia’s joint venture exceptions**

#### **(a) One exemption, not six as in Australia**

The collaborative activity exemption under the proposed s 31 of the Commerce Act applies to criminal and civil prohibitions against cartel conduct.

By contrast, under Australian competition law there are three joint venture exceptions, a joint venture defence and two stopgap exceptions designed to fill gaps in the operation of a joint venture exception:

- i. the joint venture exception under s 44ZZRO of the Competition and Consumer Act 2010 (Cth) – this applies in relation to the cartel offences under s 44ZZRF and s 44ZZRG of the Act;<sup>19</sup>
- ii. the joint venture exception under s 44ZZRP – this applies in relation to the civil cartel prohibitions under s 44ZZRJ and 44ZZRK of the Act and parallels the

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<sup>17</sup> Commerce Act 1986 (NZ), proposed s 32. There is no exemption for vertical supply agreements between competitors in Australia. This puts excessive weight on the competition condition in the definition of a cartel provision in s 44ZZRD(4) – situations arise where pro-competitive supply arrangements are not saved by the competition condition and are not exempted unless authorised by the ACCC: see *Australian Cartel Regulation*, section 8.6.

<sup>18</sup> Commerce Act 1986 (NZ), s 27.

<sup>19</sup> See further *Australian Cartel Regulation*, section 8.3.

exception under s 44ZZRO;<sup>20</sup>

- iii. the joint venture defence under s 76C – this applies in relation to the civil prohibitions under s 45(2) of the Act that relate to an exclusionary provision as defined by s 4D (unlike the exceptions under ss 44ZZRO and 44ZZRP, s 76C imposes a substantial lessening of competition test);<sup>21</sup>
- iv. the joint venture exception under s 44ZZZ(3) – this applies in relation to the civil prohibition under s 44ZZW of making private disclosure of pricing or other competitively sensitive information to a competitor;<sup>22</sup>
- v. the exception under s 44ZZZ(3A) for disclosure of information relating to the provision of loans or credit by competing loan or credit providers – this applies in relation to the civil prohibition under s 44ZZW of making private disclosure of pricing or other competitively sensitive information to a competitor; and
- vi. the exception under s 44ZZZ(5) for disclosure of information relating to an insolvency work-out by several competing lenders – this applies in relation to the civil prohibition under s 44ZZW of making private disclosure of pricing or other competitively sensitive information to a competitor.

This labyrinth is the result of piecemeal legislative changes and invites repeal. First, the exceptions under s 44ZZRO and 44ZZRP should have been consolidated in one set of provisions. Secondly, the s 76C defence is a hangover from the failure to define a cartel provision in s 44ZZRD in terms that incorporate the definition of an exclusionary provision.<sup>23</sup> As the NZ Anti-Cartel Bill shows, the concept of an exclusionary provision can and should be abolished. Thirdly, the exceptions under ss 44ZZRO, 44ZZRP, 44ZZZ(3)(3A) and (5) could all be covered by a collaborative activity exemption along the lines of the NZ model.

**(b) No unduly restrictive or obscure requirement that there be a “joint venture”**

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<sup>20</sup> See further *Australian Cartel Regulation*, section 8.3.

<sup>21</sup> See further *Australian Cartel Regulation*, section 8.3.4.4.

<sup>22</sup> The prohibition under s 44ZZW applies only to goods or services prescribed by Regulation under the Act. To date, the only goods and services prescribed are the services of taking money on deposit or making advances of money by a bank, building society or credit union; see Competition and Consumer Amendment Regulation 2012 (No.1). For a critique of the prohibition of unilateral disclosure of information under s 44ZZW and s 44ZZX, see C Beaton-Wells and B Fisse, “Australia's Proposed Information Disclosure Legislation: International Worst Practice”, Competition Policy International, Antitrust Chronicle, 30 August 2011.

<sup>23</sup> Retaining the prohibitions against exclusionary provisions notwithstanding the prohibitions relating to cartel provisions has led to an elliptical definition of a cartel provision under s 44ZZRD(3) and generates inconsistent substantive outcomes and undue complexity; see *Australian Cartel Regulation*, section 4.4.

The proposed NZ collaborative activity exemption adopts the element of a “collaborative venture” instead of the narrower element of a “joint venture” under the present s 31 of the Commerce Act.<sup>24</sup> This change is consistent with US, Canadian and EU competition law<sup>25</sup> and reflects the policy position that many different kinds of collaborations between competitors are pro-competitive and/or welfare-enhancing and hence do not warrant per se prohibition.<sup>26</sup>

By contrast, the joint venture exceptions and the s 76C joint venture defence in Australia require a “joint venture”. As defined by s 4J of the Act, one requirement for a “joint venture” is the joint carrying on of an activity. That requirement is narrower than the requirement under the proposed NZ exemption of an activity that is carried on “in co-operation”. Moreover, it remains unclear whether or not the term “joint venture” imports the need for something more than joint activity under a contract, especially if the parties to the contract stipulate that the relationship is not a joint venture.<sup>27</sup> If something more is required, it is unclear what exactly that additional requirement is.

**(c) No requirement that the venture must necessarily be for production and/or supply of goods or services**

The collaborative activity exemption proposed for NZ applies to a wide range of collaborative activities (see section 2 above). There is no limitation on the particular kinds of commercial endeavours or the particular kinds of economic actors that can qualify for the exemption.

By contrast, the joint venture exceptions in ss 44ZZRO and 44ZZRP of the Competition and Consumer Act require the joint venture to be “for the production and/or supply of goods or services”.<sup>28</sup> This requirement arbitrarily excludes joint ventures solely (or primarily?) concerned with the acquisition of goods or services or with research and development

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<sup>24</sup> For a critique of the current s 31, see A Lear, “Joint Ventures: Treatment under New Zealand, United States and European Competition Law” (2005) 11 NZBLQ 187.

<sup>25</sup> See FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>; European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (January 2011) at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>; Canadian Bureau of Competition *Competitor Collaboration Guidelines* (2009) at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

<sup>26</sup> See e.g., FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000), section 3; A Harpham, D Robertson and P Williams, “The Competition Law Analysis of Collaborative Structures” (2006) 34 *Australian Business Law Review* 399.

<sup>27</sup> Note that the stopgap exceptions under s 44ZZZ(3A) and (5) 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. See further *Australian Cartel Regulation*, section 8.3.2.1.

<sup>28</sup> Competition and Consumer Act 2010 (Cth), ss 44ZZRO(1), 44ZZRP(1).

activity. There is no cogent policy justification for such a requirement. It is an Australian aberration.<sup>29</sup>

**(d) No requirement that the cartel provision be “for the purposes” of the venture without a test of reasonable necessity**

The connection between the cartel provision and the collaborative activity required under the NZ proposal is that the cartel provision be “reasonably necessary for the purpose of the collaborative activity”.<sup>30</sup>

In contrast, the Australian joint venture exceptions require that the cartel provision be “for the purposes of” the joint venture.<sup>31</sup> Similarly, the s 76C joint venture defence requires that the exclusionary provision be “for the purposes” of the joint venture. Although this is a core element of the joint venture exceptions and joint venture defence, it remains unclear what is meant by the wording “for the purposes of” the joint venture. For instance:

“Is it sufficient that the cartel provision (or exclusionary provision) is in furtherance of the purposes of the joint venture? Or is there some test of necessity? Is it necessary and sufficient that D believes, or believes on reasonable grounds, that the provision was necessary to achieve the purposes of the joint venture? Is the test an objective test of reasonable necessity irrespective of the belief of D?”<sup>32</sup>

The NZ formulation of the requisite relationship between a cartel provision and the purpose of a collaborative activity avoids the above-mentioned uncertainty of the Australian formulation. A test of objective reasonable necessity is specified as an element of the proposed s 31 exemption. In the context of the cartel offences, a subjective test also applies: a defendant has a defence of honest belief in the reasonable necessity of the cartel provision.<sup>33</sup>

**(e) No requirement that the cartel provision must necessarily be contained in a contract**

The proposed collaborative activity exemption applies in relation to a cartel provision that is contained in a contract, arrangement or understanding.<sup>34</sup>

By contrast, the joint venture exceptions under s 44ZZRO and 44ZZRP (but not the joint venture defence under s 76C or the joint venture exception under s 44ZZZ(3)) require that the cartel provision be contained in a contract or proxy contract (a proxy contract exists where all

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<sup>29</sup> See further *Australian Cartel Regulation*, section 8.3.2.2.

<sup>30</sup> Commerce Act 1986 (NZ), proposed s 31(1).

<sup>31</sup> Competition and Consumer Act 2010 (Cth), ss 44ZZRO(1), 44ZZRP(1).

<sup>32</sup> *Australian Cartel Regulation*, p 283.

<sup>33</sup> Commerce Act 1986 (NZ), proposed s 82B(2).

<sup>34</sup> Commerce Act 1986 (NZ), proposed s 31(1).



the parties to an arrangement or understanding intended the arrangement or understanding to be a contract and reasonably believed that the arrangement or understanding was a contract).<sup>35</sup>

The contract requirement in Australia has been criticised on various grounds.<sup>36</sup> Most fundamentally, the requirement that the cartel provision be contained in a contract is incapable of achieving its apparent purpose of guarding against sham joint ventures (see the discussion in (g) below).

Another criticism is that it is unclear whether or not the exceptions under ss 44ZZRO and 44ZZRP apply where there is an umbrella joint venture contract between competitors with a general cartel provision for the joint selling of a product produced by the joint venture, with the determination of price or non-price terms and conditions of sale for each particular sale delegated to a marketing committee on which the joint venture parties are represented.<sup>37</sup> A deal arrived at by the marketing committee may easily include a cartel provision and that cartel provision may be in an arrangement, not a contract (or proxy contract). On one possible view, the joint venture exceptions under ss 44ZZRO and 44ZZRP do not apply in that situation because there is a later cartel provision and that later cartel provision is contained in the arrangement agreed by the marketing committee, not the umbrella joint venture contract.<sup>38</sup> The proposed NZ collaborative activity exemption avoids this potential pitfall: the exemption applies to cartel provisions in arrangements or understandings as well as to those contained in contracts.

**(f) Additional fault element for the collaborative activity exemption in the context of the cartel offences**

Under the NZ Anti-Cartel Bill, a special defence – the defence of honest belief that the cartel provision is reasonably necessary for the purposes of the collaborative activity – applies to the collaborative activity exemption in relation to the cartel offences.<sup>39</sup>

In contrast, the Australian joint venture exception under ss 44ZZRO does not require an additional fault element: the joint venture exception under s 44ZZRO (criminal) and that under s 44ZZRP (civil) are defined with common elements and there is no defence of honest

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<sup>35</sup> Competition and Consumer Act 2010 (Cth), ss 44ZZRO(1)(1A)(1B), 44ZZRP(1)(1A)(1B).

<sup>36</sup> See further *Australian Cartel Regulation*, section 8.3.3.

<sup>37</sup> See *Australian Cartel Regulation*, section 8.3.3.2.

<sup>38</sup> See *Australian Cartel Regulation*, section 8.3.3.2. The Supplementary Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), [1.13] (example 1.4) does not give a clear indication of legislative intention. It states merely that the type of situation discussed ‘would appear to be covered’ by the joint venture exceptions. It does not say that the joint venture exceptions are to be interpreted as overriding the accepted meaning of the concepts of ‘provision’ and ‘arrangement’ or ‘understanding’ under the Act.

<sup>39</sup> Commerce Act 1986 (NZ), proposed s 82B(2).

belief as to necessity.<sup>40</sup> That approach is inconsistent with the view that, since the cartel offences are punishable by jail, criminal liability should require subjective blameworthiness on the part of the offender.<sup>41</sup>

**(g) Safeguard designed specifically to exclude sham ventures that are created to evade per se prohibitions against cartel conduct**

The proposed NZ collaborative activity exemption requires that the collaborative activity not be carried on for the dominant purpose of lessening competition between any 2 or more of the parties to the collaboration. This requirement and the further requirement that the cartel provision be reasonably necessary for the purpose of the collaborative activity are aimed directly at sham joint ventures that might otherwise succeed in disguising cartel conduct as “legitimate” collaborative activity.

The contract requirement for the joint venture exceptions under ss 44ZZRO and 44ZZRP of the Australian Competition and Consumer Act has been criticised on the fundamental basis that, although this requirement seems to be aimed at sham joint ventures, it is incapable of preventing sham ventures from exploiting the exceptions:

“[T]he requirement for the joint venture exceptions under ss 44ZZRO and 44ZZRP that the cartel provision be contained in a contract is an ineffective way of preventing the use of sham joint ventures. Clothing a joint venture in a contract is a paradigm method of disguising the sham nature of a joint venture. This is apparent from the most insidious form of sham joint venture in modern commerce – the ‘JV Ultra-Light’. A JV Ultra-Light is a joint venture created on a contractual basis for the dominant purpose of evading a per se prohibition against cartel conduct and which is also calculated to achieve enough efficiencies to create a substantial smokescreen. Effective solutions to [the problem of JV Ultra-Lights] do not depend on a requirement that a cartel provision be contained in a contract. ... they depend on clarifying and strengthening the requirement that a provision be ‘for the purposes of a joint venture’.”

**(h) Guidelines**

As noted earlier, the Commerce Commission is preparing draft guidelines on the proposed collaborative activity exemption. It is expected that these guidelines will flesh out the elements of the exemption, including the test of reasonable necessity and the extent to which a collaborative activity must be based on an economic integration of functions and likely to

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<sup>40</sup> Nor is mistake of fact relevant under the Criminal Code (Cth): see *Australian Cartel Regulation*, p 153.

<sup>41</sup> See *Australian Cartel Regulation*, pp 285, 289.

generate efficiencies. Doubtless the draft guidelines will take into account the FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000),<sup>42</sup> the European Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (January 2011)<sup>43</sup> and the Canadian Bureau of Competition *Competitor Collaboration Guidelines* (2009).<sup>44</sup>

Various notes or guidelines issued by the Australian Competition and Consumer Commission (ACCC) discuss cartels. However, notwithstanding the many practical difficulties that arise in interpreting and applying the Australian joint venture exceptions, none of the ACCC guidelines clarify the application of those exceptions.<sup>45</sup> In part this may be because the main joint venture exceptions under ss 44ZZRO and 44ZZRP are riddled with defects of legislative design that the Commission cannot be expected to repair.<sup>46</sup>

#### **4. Conclusion – revision of the Australian joint venture exceptions in line with the NZ collaborative activity exemption?**

The NZ Anti-Cartel Bill includes a proposed collaborative activity exemption that is congruent with US and EU competition law and, as discussed in section 3 above, far superior to the joint venture exceptions that apply in Australia. The proposed exemption has been well received in NZ and will also be welcomed by overseas businesses wishing to undertake a commercial venture in NZ together with a competitor. Overseas businesses will also wonder how they will be placed under Australian law for similar Australian or Australasian collaborative ventures. A short answer is they need to unravel a tangled mess of over-reaching and ill-defined rules in Australia that are out of touch with US and EU antitrust laws and the forthcoming NZ collaborative activity exemption.<sup>47</sup>

The NZ collaborative activity exemption will add to the long list of differences between NZ and Australian competition law. This is despite the political ideal of Australian and NZ economic integration.<sup>48</sup> The proposed NZ collaborative activity exemption differs in major

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<sup>42</sup> Available at: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>43</sup> Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

<sup>44</sup> Available at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

<sup>45</sup> See e.g., 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.”).

<sup>46</sup> The main problems that result from inept legislative design include the uncertainty as to what is meant by the terms “joint venture” and “for the purposes of the joint venture”. Note also that ACCC guidelines do not have the same legal force as e.g., a directive issued by the European Commission; see *Australian Cartel Regulation*, pp 29-30.

<sup>47</sup> Authorisation by the ACCC is a possible escape route but the authorisation process is cumbersome, costly and time-consuming; see *Australian Cartel Regulation*, section 8.13.

<sup>48</sup> See e.g., Australian and New Zealand Productivity Commissions, *Strengthening trans-Tasman economic relations*, Final Report, November 2012.

respects from Australia's joint venture exceptions (see section 3 above) and may often lead to different outcomes. This divergence is economically irrational and an unnecessary hurdle for Australasian as well as foreign businesses to jump.

There may be an opportunity for the Australian government to revisit Australia's anti-cartel law and to revise the main joint venture exceptions in light of the NZ reform. The Coalition has announced that, if it is elected at the federal election later this year, it will initiate a "root and branch" review of Australian competition law.<sup>49</sup> The joint venture exceptions under ss 44ZZRO and 44ZZRP and the joint venture defence under s 76C call for removal and replanting with provisions that are more closely aligned to the antitrust treatment of collaborative ventures in the US, the EU, Canada and, in the near future, NZ.

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<sup>49</sup> 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").