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MATTHEW KHAN JOHNSTON

COMPETITION LAW PENALTIES UNDER THE COMMERCE ACT 1986: THE CURRENT SYSTEM'S EFFECTIVENESS AND THE NEED FOR CRIMINAL SANCTIONS.

LLB(HONS) RESEARCH PAPER.

COMPETITION LAW. LAWS 531.

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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I INTRODUCTION

In New Zealand, Part VI of the Commerce Act 1986 ("NZCA") formulates the range of penalties that are available for breaches of competition law.[1] Such penalties include cease and desist orders, pecuniary penalties, injunctions and other orders, fines, damages, and the divestiture of assets and shares.[2] It is the aim of the first part of this paper to analyse, both in theory and in practice, how these penalties operate. In addition, this paper also discusses whether these penalties adequately satisfy the objectives of competition law penalties.

An analysis of the competition law penalties of other jurisdictions also provides a tool for examining and assessing the effectiveness of the New Zealand system. For example, in Canada, their Competition Act 1985 ("CCA") contains both civil and criminal penalties with which to enforce their competition law.[3] Conversely, the law of the United Kingdom is similar to New Zealand in that it only has civil provisions available to penalise infringements of their Competition Act 1998 ("UKCA").[4] In July 2001, however, the United Kingdom government announced that they intend to modify competition law in order to make participation in a cartel punishable by criminal penalties.[5] This paper, therefore, will also outline and analyse competition law penalties in these two jurisdictions in order to suggest options for reforming the New Zealand system.

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[1] This paper uses the term "penalties" to refer to all the remedies that are available for competition law breaches. For example, and without limiting its intended meaning, this term would include injunctions, pecuniary penalties, damages and the like. This paper will indicate when it does not intend one to interpret "penalties" in this broad manner. The text of this paper is 14,962 words (not including footnotes, contents page and bibliography).

[2] Commerce Act 1986, Part VI. Section 80E of the NZCA also contains a criminal sanction, but this only applies when a person breaches a court order made under section 80C relating to the exclusion of a person from the management of a body corporate. It is not, therefore, a direct competition law penalty.

[3] Competition Act 1985 (Canada), Parts IV, VI, VII and VIII.

[4] Competition Act 1998 (UK), ss 32-36.

[5] White Paper: A World Class Competition Regime 31 July 2001. The government, however, made the initial announcement in June 2001. See: Graham P Smith "Criminalising U.K. Competition Law: A Step Too Far?" (2001) 12(12) ICCLR 291.

One of the main issues relating to penalties in competition law is the role of criminal sanctions. As mentioned above, of the three jurisdictions that this paper discusses in detail, only Canada currently has criminal sanctions available for breaches of competition law.[6] The New Zealand Ministry of Commerce, however, as recently as 1998, has stated that "there is a case for criminal penalties as punishment for hard core cartel offences."[7] Consequently, the third part of this paper discusses the possibility of criminal penalties for competition law violations in detail and determines whether such penalties would be appropriate in the New Zealand context.

Altogether, this paper contains three main parts. First, Part II outlines competition law penalties in New Zealand and assesses their effectiveness. Part III discusses the law of the United Kingdom and Canada relating to competition law penalties and raises some possible ways to reform the New Zealand system. Given the discussion in Parts II and III, Part IV will then investigate one reform option in more detail: criminal penalties. Overall, this paper shows that, currently in New Zealand, penalties for breaches of competition laws are not as effective as is required. A major way, however, that the New Zealand Parliament could improve this effectiveness is to provide for criminal penalties in the NZCA.

II COMPETITION LAW PENALTIES IN NEW ZEALAND

Historically in New Zealand, courts could enforce certain violations of competition law via criminal proceedings.[8] Part VI of the NZCA, however, does not contain any such provisions, and therefore has completely "decriminalised" New Zealand competition law.[9] Instead, New Zealand's focus is on using and expanding the current

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[6] See: Competition Act 1985 (Canada), s 45.

[7] Ministry of Commerce "Penalties, Remedies and Court Processes Under the Commerce Act 1986: A Discussion Document" (Ministry of Commerce, Wellington, 1998).

[8] See: Commerce Act 1975, s 58; Trade Practices Act 1958, s 23C; Commercial Trusts Act 1910, s 10; Bernard M Hill and Mark R Jones *Competitive Trading in New Zealand: The Commerce Act 1986* (Butterworths, Wellington, 1986) 166.

[9] Hill & Jones, above n 8, 166. As stated previously, section 80E is not a direct competition law penalty.

range of civil penalties available for competition law breaches under the NZCA.[10] This part outlines these civil penalties individually and assesses their effectiveness. First, however, this part identifies the traits that make competition law penalties effective.

A *Effectiveness*

Academics generally agree that there are six main objectives of punishment. These are rehabilitation, incapacitation, retribution, reparation, and specific and general deterrence.[11]In relation to competition law, each of these may be a legitimate purpose of the penalties.

1 Rehabilitation

The rehabilitation objective provides that the courts may direct punishment against an offender in order to correct their behaviour.[12] For example, in the competition law context, this could be an aim of pecuniary penalties or fines, as they may force the offender to see the error of their ways and to correct their behaviour. Strictly speaking, however, rehabilitation aims at placing the offender in certain programmes that enable them to re-enter the community.[13] In relation to competition law penalties, however, the court has no power to place an offender in any such rehabilitative programs and, arguably, these offenders do not even need rehabilitation.[14] Consequently, although rehabilitation may be a beneficial by-product of competition

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[10] Commerce Act 1986, Part VI; Commerce Amendment Act 2001, ss 15, 17 & 18; Hill & Jones, above n 8, 166.

[11] See: M Golding "Punishment: Retribution" in M Golding (ed) *Philosophy of Law* (Prentice-Hall, New Jersey, 1975) 84-105; C Roberson "Purpose of Criminal Sanctions" in C Roberson (ed) *Introduction to Corrections* (Copperhouse, Nevada, 1997) 13-21.

[12] Roberson, above n 11, 18.

[13] Roberson, above n 11, 18.

[14] Ministry of Commerce, above n 7, 8. Conversely, however, one could argue there is no difference between those who breach competition law and those who commit violent crime. My view is that it is arguable that many competition law offenders do require rehabilitation, but this is beyond the scope of this paper.

penalties, it is clear that Parliament has not created such penalties with rehabilitation as its objective.

2 *Incapacitation*

Secondly, incapacitation aims at confining the offender as a means to prevent them from committing future offences against innocent people.[15] In some sense, one can see how competition law penalties may achieve this objective: penalties such as injunctions and cease and desist orders prevent the offender from committing competition law violations in the future by restraining the offender's behaviour. Parliament, however, generally satisfies this objective via the use of imprisonment and the NZCA does not give the courts any such power.[16] Again, therefore, although they may achieve this objective in some sense, one should not measure the effectiveness of competition law penalties in reference to the incapacitation objective.

3 *Retribution*

Thirdly, the retributive objective of punishment states that society needs to punish the offender for their wrongdoing.[17] Commonly, academics refer to this as providing the offender with their "just desserts" and state that the degree of punishment must fit the seriousness of the offence.[18] In relation to competition law, sanctions such as pecuniary penalties and fines may fulfil this objective by punishing the offender for their offence. For example, Smithers J stated that penalties under the Australian Trade Practices Act 1974 "should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act."[19] In my opinion, it is clear that retribution is a legitimate aim of competition law penalties, and

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[15] Roberson, above n 11, 17.

[16] See: Roberson, above n 11, 17.

[17] Golding, above n 11, 84.

[18] Roberson, above n 11, 15.

[19] *TPC v. Stihl Chainsaws* 1978 ATPR 30-091.

to be effective therefore, they must be serious enough to fulfil society's desire to punish the offender for the violation.

4 *Reparation*

The reparation objective of punishment is straightforward, and maintains that the offender should compensate the victims of the violation for the loss that they suffered. In relation to competition law penalties, damages can fulfil this objective by providing the victim of the violation with monetary compensation for their loss. The other competition law penalties, however, do not attempt to fulfil this aim, as the victim does not receive any compensation.[20] In relation to damages, however, reparation is a legitimate purpose, and therefore to be effective, damages should adequately compensate the victim.

5 *Deterrence*

Finally, the theory of deterrence claims that punishment can affect future behaviour and can consequently prevent future offences. Specific deterrence attempts to deter a particular offender by punishing them to such an extent that they will not commit similar offences in the future. General deterrence tries to deter others from committing a similar crime by punishing a certain individual who has committed an offence.[21] In relation to competition law, it is obvious that both types of deterrence can be an objective of the penalties. The Ministry of Commerce has stated that deterring all future competition law offences is the main aim of the penalties under the NZCA,[22] which seems to encompass both specific and general deterrence. In addition, academics and the New Zealand courts have stated that deterrence is a major aim of the competition law penalties.[23] Overall, therefore, when assessing the effectiveness of such penalties, deterrence will be the most important consideration.

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[20] For example, the offender pays pecuniary penalties to the Crown.

[21] Roberson, above n 11, 16.

[22] Ministry of Commerce, above n 7, 3

[23] See: Jill Mallon and Jenny Stevens "Penalties for Corporate Offenders" [2001] NZLJ 389; Jill Mallon and Jenny Stevens "Commerce Act Penalties for Individuals" [2001] NZLJ 339; *Commerce Commission v. Herberts Bakery Ltd* [1991] 2 NZLR 726 (HC).

In sum, the main aim of competition law penalties is deterrence. Retribution, however will also be relevant, as will reparation in relation to damages. Given these aims, this paper now discusses the penalties available to the courts under the NZCA and their effectiveness.

B Current Penalties in the NZCA

1 Pecuniary Penalties

If the High Court finds that an individual has breached a provision in the NZCA relating to restrictive trade practices, the court can impose a pecuniary penalty of up to $500,000. The court can order a body corporate to pay up to $10,000,000, or three times the value of any commercial gain resulting from the breach, or 10% of their turnover if the court cannot readily ascertain the commercial gain.[24] In determining the amount of the penalty, the court must take into account whether it has granted any exemplary damages and, if the penalty is for a body corporate, any commercial gain the company may have obtained through the breach.[25]

If the High Court determines that an individual has violated the prohibition against business acquisitions that substantially lessen competition, it may impose a pecuniary penalty of, again, up to $500,000. In relation to a body corporate, the penalty is lower than for restrictive trade practices: up to $5,000,000.[26] In setting the penalty, the court must look at the kind of act the person has committed, the damage anyone has suffered, the surrounding circumstances and whether the person has engaged in similar conduct before.[27] Important, however, is the fact that the court cannot order a person to pay a pecuniary penalty under both the section relating to restrictive trade

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[24] Commerce Act 1986, ss 80(1), 80(2), 80(2B)(b) & 80(3).

[25] Commerce Act 1986, s 80(2A).

[26] Commerce Act 1986, ss 83(1), 83(3).

[27] Commerce Act 1986, s 83(2).

practices and the section relating to business acquisitions if the same conduct is in question.[28]

In 2001, Parliament inserted another pecuniary penalty provision into the NZCA. This states that if the court finds that a body corporate has indemnified a director, servant or agent of the body corporate, the court can order them to pay a pecuniary penalty of up to two times the value of the indemnity.[29] In addition, in 2002, Parliament inserted a provision that enables the High Court to order a person to pay a pecuniary penalty of up to $500,000 if that person breaches a cease and desist order.[30] Finally, under all four of these pecuniary penalty sections, the burden of proof is the civil standard of the balance of probabilities.[31]

The New Zealand case law on pecuniary penalties under the NZCA is well developed. The courts, however, have stated that they will not generally compare the facts of previous cases to determine an appropriate penalty. Instead, the courts have used previous cases to extract general principles that are applicable to the discussion of pecuniary penalties for both corporations and individuals.[32] For example, in relation to the NZCA's pecuniary penalties, the courts have made it clear that both general and specific deterrence is the most important objective.[33] The court must still, however, set the appropriate pecuniary penalty by looking at the individual facts and circumstances of each case.[34]

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[28] Commerce Act 1986, s 83(6).

[29] Commerce Act 1986, ss 80A, 80B.

[30] Commerce Act 1986, s 74D. This paper will not consider these pecuniary penalties in detail due to space constraints and the fact that there is little discussion on them since Parliament inserted them with the Commerce Amendment Act 2001 and their application seems straightforward.

[31] Commerce Act 1986, ss 80(3), 80(B)(3), 83(3).

[32] *Commerce Commission v. Giltrap City Ltd (Penalty)* (2002) 10 TCLR 305, 308 (HC). "Penalties for Individuals", above n 23, 339.

[33] *Giltrap*, above n 32, 313; *Commerce Commission v. Carter Holt Harvey Building Products Group Ltd (Penalty)* (2000) 9 TCLR 636, 646 (HC); *Commerce Commission v. Caltex New Zealand Ltd (Penalty)* (2000) 9 TCLR 366, 369, 372 (HC).

[34] *Commerce Commission v. Eli Lilly and Co (New Zealand) Ltd* (30 April 1999) unreported, High Court, Auckland Registry, CL 19/98, 3.

The court continues this analysis by first discussing the matters they must consider in determining the amount of the pecuniary penalty under sections 80(2A) and 83(2).[35] The New Zealand courts, however, will also consider the factors outlined in the Australian decision of *TPC v. Annand & Spencer Pty Ltd.*[36] These factors are:

(a) whether the conduct was deliberate;
(b) whether damage was caused by the conduct to the public or to the retailer;
(c) the size of the corporation's activity in the relevant market;
(d) the degree to which the conduct was initiated or condoned by senior management;
(e) what steps were taken by the employer to educate its employees prior to the contravention;
(f) the existence or otherwise of a policy by the corporation against breaches of the provisions of the Act;
(g) whether the conduct was the result of a mistake on the part of the employee;
(h) whether there has been similar conduct in the past;
(i) whether, since the occurrence, controls over employees, particularly sales personnel, have been increased or improved to prevent a repetition of the conduct;
(j) whether the corporation has made a full and frank disclosure and co-operated with the Commission.

Certain New Zealand decisions have added further relevant factors to this list, but several have quite a degree of overlap with those already mentioned. Some of the more original are:

(a) Whether the Commission has settled the case with other defendants;
(b) Whether the corporation has suffered adverse publicity;
(c) The need to deter large corporations with larger penalties;

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[35] See: *Giltrap*, above n 32, 307.

[36] *TPC v. Annand & Spencer Pty Ltd* (1987) 8 ATPR 40-772, 48,394. The New Zealand courts have adopted this case in numerous decisions. For example: *Carter Holt*, above n 33, 646; *Caltex*, above n 33, 368-369.

(d) If it is a minor breach, whether the penalty needs to be hefty to send a signal of disapproval;

(e) Whether the corporation has made certain concessions; and

(f) Whether it was easy to detect the breach.[37]

Despite the fact that the list seems relatively complete, the courts retain some discretion by asserting that the criteria are still open and flexible. In addition, the court is fully aware that it must adapt the pecuniary penalty to suit the facts of each case.[38]

In relation to the pecuniary penalties for restrictive trade practices and business acquisitions for corporations, two main issues arise from the above discussion. First, the courts decided all the cases that discussed the above factors before the Commerce Amendment Act 2001 came into force. One effect of the Commerce Amendment Act 2001 was to repeal section 80(2), which used to be identical to section 83(2), and directed the court to consider factors that looked at the nature of the conduct and any past offending. Consequently, an issue is whether the court will still consider all the factors mentioned above, given that it must now, under the NZCA, only have regard to whether it granted any exemplary damages, and the nature and extent of any commercial gain.[39] The way the court assesses the pecuniary penalties for a breach of the NZCA's provisions on restrictive trade practices, therefore, may differ from its approach in relation to business acquisitions. Mallon and Stevens argue that the court will still observe these factors, but that it may focus more upon the nature of the commercial gain, the size of the infringing company and whether the company co-operated with the Commission.[40] This is the correct approach but, more specifically, the court should simply consider the previous section 80(2) factors with the other factors case law has developed, while giving the issues of exemplary damages and

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[37] *Giltrap*, above n 32, 308; *Caltex*, above n 33, 369; *Carter Holt*, above n 33, 464. For some additional factors that do not seem to be as relevant in the recent cases see: Ministry of Commerce, above n 7, 18.

[38] *Commerce Commission v. Herberts Bakery Ltd* [1991] 2 NZLR 726, 729.

[39] Commerce Act 1986, s 80(2A); Commerce Amendment Act 2001, s 17(2); "Penalties for Corporate Offenders", above n 23, 389.

[40] "Penalties for Corporate Offenders", above n 23, 389. Importantly, however, is the fact that it does not seem that Mallon and Stevens are attributing any possible increased significance of the co-operation concept to the changes in the Commerce Amendment Act 2001.

commercial gain more prominence. If, therefore, the court does approach its consideration of pecuniary penalties relating to restrictive trade practices differently from that of business acquisitions, it will only differ in the factors that it emphasises; the factors themselves, however, will remain the same.

The second main issue relates to the size of the pecuniary penalties in sections 80 and 83. The Commerce Amendment Act 2001 changed the maximum penalty for a body corporate that breaches the NZCA's provisions relating to restrictive trade practices.[41] Previously, as with section 83, the maximum penalty was $5,000,000.[42] In my opinion, the reason that Parliament left the pecuniary penalty relating to business acquisitions at $5,000,000 was simply that courts have not made any penalty orders under this section. There was, therefore, little need to increase the maximum penalty.

The more important question is why Parliament decided to increase the penalties under section 80. The main reason was a perception that the court was setting the penalties at too low a level to fulfil the deterrence objective.[43] For example, before 1998, the highest individual penalty was only six percent of the maximum $5,000,000 amount.[44] In addition, after analysing the decisions, the Ministry of Commerce concluded that "the High Court has consistently set penalties at levels that are unlikely to achieve deterrence."[45] After 1998, however, the courts seemed to increase the penalty awards under this provision. For example, in *Commerce Commission v. Taylor Preston Ltd*,[46] the court set the highest single pecuniary penalty to date of $1,500,000. Subsequent cases appear to be continuing this trend.[47] The question

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[41] Commerce Amendment Act 2001, ss 17(1), 17(2).

[42] Commerce Act 1986, s 80(1) (repealed). This paper mentions the current penalties at page 7 above.

[43] Peter Allport "Competition Law "An Evolution"" [1998] NZLJ 275.

[44] Allport, above n 43, 275; Ministry of Commerce, above n 7, 19, 54.

[45] Ministry of Commerce, above n 7, 31.

[46] *Commerce Commission v. Taylor Preston Ltd (No 2)* (1998) 6 NZBLC 102, 598 (HC).

[47] See: *Carter Holt*, above n 33, 649 ($525,000); *Caltex*, above n 33, 373 ($450,000, $350,000 and $375,000); *Eli Lilly*, above n 34, 5 ($500,000 and $200,000).

remains, however, as to whether these increased pecuniary penalties were achieving deterrence since, if they were, then there was no need for the amendments.

The most recent case decided by the High Court under the repealed section 80(2) is *Commerce Commission v. Giltrap City*.[48] This case considered many of the factors relevant to pecuniary penalties mentioned above, and it is therefore useful in illustrating whether the penalties were sufficient to achieve deterrence. The High Court decided that the nature, extent and circumstances of the breach did not warrant a small penalty,[49] although it did find that there was little loss or damage and that the defendant had no history of NZCA breaches.[50] In relation to the factors not mentioned in the NZCA, the High Court found that the conduct of the defendant was deliberate and performed by senior management. In addition, the company had a high standing, was large, and had more extensive financial resources than other like businesses. Finally, the defendant had little in the way of compliance programs and they only co-operated with the Commission as much as was required by law. Despite this, the High Court accepted that the defendant had suffered some adverse publicity. The main mitigating factor, however, was the fact that the Commission conceded that it was constrained in the size of the penalty it could seek, as it had set penalties for other defendants in the same case.[51]

Many of the factors, therefore, were in favour of a large penalty and the Commission also believed this as it was seeking a penalty that was five times larger than it had set for the other defendants. In the end, the court granted a pecuniary penalty of $150,000, which was $100,000 less than the Commission wanted.[52] In my opinion, this decision indicates that the courts were still conservative in granting pecuniary

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[48] *Giltrap*, above n 32, 305.

[49] *Giltrap*, above n 32, 308-312. One could previously find these factors in the Commerce Act 1986, ss 80(2)(a) and (c).

[50] *Giltrap*, above n 32, 312-13. The Commerce Act 1986, ss 80(2)(b) and (d) used to contain these factors.

[51] *Giltrap*, above n 32, 313-319.

[52] *Giltrap*, above n 32, 306, 319.

penalties, even for relatively serious anti-competitive conduct. Parliament, therefore, had to make a change in order to fulfil the deterrence objective.

As previously stated, Parliament increased the maximum penalties under section 80(2B) to better deter offenders. The next issue, therefore, is whether this increase will result in higher awards by the courts. The Ministry of Commerce stated that, from the cases, it seemed that the courts would increase they size of the penalties if Parliament decided to increase the maximum limit.[53] In addition, the government has admitted it is hopeful that the increase will result in the courts doubling the level of penalties they impose,[54] but there is also an argument that the courts will simply interpret the amendments as a tool giving them more flexibility in their penalty awards.[55] Nevertheless, given the clear message from Parliament and the Ministry of Commerce, it would seem that the courts will increase the size of the awards. Finally, however, Peter Allport argues that "while increasing statutory maxima may give Courts a mandate for heavier sentences, the Commission believes that further steps must be taken to raise the level of penalties imposed consistently, to deterrent levels."[56] This paper will now discuss the further steps Parliament has taken.

In 1998, the Ministry of Commerce stated that Parliament should consider whether the court should be able to set the maximum penalties based on the turnover of the body corporate or the commercial gain from the competition law breach.[57] As previously stated, Parliament did implement these changes in section 17(2) of the Commerce Amendment Act 2001. In relation to the new NZCA provision on the turnover of the body corporate, clearly this will have the result of dramatically

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[53] Ministry of Commerce, above n 7, 20.

[54] "Penalties for Corporate Offenders", above n 23, 390.

[55] "Penalties for Corporate Offenders", above n 23, 390. Gallen J has stated that "to some extent the size of the maximum penalty is designed to allow flexibility to cover the wide variation which will occur in individual cases" (*Commerce Commission v. BP Oil* [1992] 1 NZLR 377, 381).

[56] Allport, above n 43, 275.

[57] Ministry of Commerce, above n 7, 15. Section 2 of the NZCA defines turnover as:

the total gross revenues (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by that body corporate within New Zealand.

increasing the maximum penalty available to the court.[58] This change has the potential to allow the court to better deter offenders under the NZCA, but whether the higher penalties actually achieve deterrence will depend on how the court uses this power.[59] Currently in New Zealand, the amount of the corporation's turnover has not influenced the size of the penalty, and this must change if this amendment is to have any effect in deterring competition law breaches. Overseas experience, however, does suggest that having the 10% turnover rule will result in the courts imposing larger penalties against corporations.[60]

In relation to the court being able to impose a penalty of up to three times the value of the commercial gain, the NZCA does not define the term "commercial gain", nor does it provide any guidance as to how the court should go about determining what the commercial gain is in the cases before it.[61] This concept, however, is crucial, since the courts can only consider the provision relating to turnover if they cannot readily ascertain the commercial gain. Nevertheless, this provision will still allow the courts to increase the maximum penalty in appropriate cases.

There is one main issue relating to pecuniary penalties for individuals who breach the NZCA's provisions against restrictive trade practices and business acquisitions; this again arises from the Commerce Amendment Act 2001 and a comparison between sections 80 and 83. Both sections have a maximum penalty of $500,000, but section 80(2) creates a presumption that the court must order an individual to pay a pecuniary penalty unless there is a good reason for not doing so.[62] The Commerce Amendment Act 2001 created this presumption and the reason for this was a concern that the courts were very rarely imposing pecuniary penalties upon individuals. Indeed, the

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[58] "Penalties for Corporate Offenders", above n 23, 391.

[59] Mallon and Stevens outline some views of the European Court of Justice relating to penalties based on turnover. Firstly, that one cannot simply base the penalty on turnover and, secondly, that the 10% turnover rule was to make sure that the offending corporation could pay the penalty ("Penalties for Corporate Offenders", above n 23, 391).

[60] "Penalties for Corporate Offenders", above n 23, 391.

[61] "Penalties for Corporate Offenders", above n 23, 390.

[62] Again, no cases have imposed a pecuniary penalty on an individual under section 83. The following discussion, therefore, focuses on section 80.

courts have required a pecuniary penalty from an individual under the NZCA on only three occasions, and the highest was $10,000.[63] Clearly, therefore, the previous section 80(2) was not sufficiently deterring individuals from breaching the NZCA. The amendment attempts to achieve deterrence by indicating to the court that it must impose penalties on individuals more often and by informing the individuals that the courts are more likely to penalise them personally for the breach.

Mallon and Stevens identify four reasons that the courts may classify as "good" under section 80(2):

(a) the offending was not deliberate;

(b) the individual took and followed legal advice before acting;

(c) the individual played only a minor role in prohibited conduct;

(d) the offending did not involve a breach of section 30.[64]

In my opinion, the court might agree that the first three of Mallon and Stevens' possible "good" reasons do justify them not imposing a penalty upon an individual. The fact that the offending did not involve a price fixing contract under section 30, however, should not be a good reason. If the court did decide this was a good reason, this could limit the effect of section 80(2), as it would be clearly contrary to the broad wording of that provision. If Parliament intended this to be a purpose of section 80(2), it would undoubtedly have mentioned this in the amendments. Nevertheless, what will be a "good" reason will depend upon how the court interprets and applies this section, but it should not be used as a means to continue the trend of infrequent penalties having little deterrent effect.

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[63] "Penalties for Individuals", above n 23, 339; Miriam R Dean, Dr Lindsay Hampton and Douglas White *The Laws of New Zealand: Competition Law* (Butterworths, Wellington, 2001) para 255. These cases were *Commerce Commission v. BP Oil New Zealand Ltd* [1992] 1 NZLR 377 ($8,000); *Commerce Commission v. Wrightson NMA Ltd* (1994) 6 TCLR 279 ($10,000 and $5,000); *Commerce Commission v. Christchurch Transport Ltd* (21 August 1998) unreported, High Court, Christchurch Registry, CP 72/98 ($10,000).

[64] "Penalties for Individuals", above n 23, 340.

2 *Damages*

If someone suffers damage that is caused by another person engaging in conduct that violates the NZCA's prohibitions on restrictive trade practices, or its prohibitions on certain business acquisitions, they may bring an action against that person for damages.[65] In addition, if a person has violated the NZCA's prohibitions on restrictive trade practices, the court may also require them to pay exemplary damages. The court retains this discretion even if it has ordered that person to pay a pecuniary penalty for the same conduct under section 80, although such an order will influence the amount of exemplary damages, if any, that the court grants.[66]

The principles surrounding general damages in New Zealand are well established. First, the court should grant a plaintiff an amount of money in damages that will place the plaintiff in the same position that they would have been in if the defendant had not committed the wrong.[67] Secondly, certain factors may reduce the amount of damages that the court will grant, such as contributory negligence, mitigation of loss and the remoteness of the damage.[68] When actually calculating the amount of damages, the court must remember four main principles. These are: (1) that it must award damages as a lump sum; (2) it must be able to measure the damages in money; (3) the plaintiff must have mitigated their loss; and (4) the plaintiff being entitled to insurance is irrelevant.[69]

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[65] Commerce Act 1986, ss 82 & 84A. More specifically, the court will find the person liable if they engage in conduct that constitutes:

(a) A contravention of any of the provisions of [Part 2 and section 47] of this Act:
(b) Aiding, abetting, counselling, or procuring the contravention of such a provision:
(c) Inducing by threats, promises, or otherwise the contravention of such a provision:
(d) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention of such a provision:
(e) Conspiring with any other person in the contravention of such a provision.

[66] Commerce Act 1986, s 82A.

[67] *Livingstone v. Raywards Coal Co* (1880) 5 AC 25, 39.

[68] Ministry of Commerce, above n 7, 33.

[69] Ministry of Commerce, above n 7, 35.

In New Zealand, the courts have awarded a plaintiff compensatory damages only once under the NZCA,[70] although plaintiffs on several occasions have unsuccessfully claimed compensatory damages. For example, in *Union Shipping v. Port Nelson*, the plaintiffs sought damages, but the court stated that there was not a sufficient connection between the illegal act and the plaintiff's loss.[71] Overall, the courts have greatly underused their powers relating to compensatory damages.

The next issue concerns the role of compensatory damages under the NZCA. As previously stated, the main aim is to compensate the victim. There is an argument, however, that deterrence should be an aim of damages under the NZCA. This argument claims that the courts should view damages as "the public enforcement equivalent of pecuniary penalties."[72] In my opinion, however, exemplary damages are better suited to fulfilling the deterrence objective. It seems that Parliament is also of this view, as in 2001 it explicitly gave the courts the power to force an offender to pay exemplary damages.[73] The aim of exemplary damages in general, and seemingly under the NZCA, is to fulfil the retributive objective of punishment.[74] Furthermore, New Zealand courts have recognised that another legitimate purpose of exemplary damages is to deter offenders from future breaches.[75]

There are also some general principles surrounding exemplary damages that will be relevant to their role under the NZCA. First, the plaintiff must have been the victim of behaviour that justifies punishment. Secondly, the award should be moderate, and finally, the court should consider the parties' resources.[76] The Ministry of Commerce

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[70] "Penalties for Individuals", above n 23, 341. This was a case between Clear and Telecom.

[71] *Union Shipping New Zealand Ltd v. Port Nelson Ltd* (1990) 3 NZBLC 101, 618 (HC).

[72] Ministry of Commerce, above n 7, 32.

[73] Commerce Amendment Act 2001, s 20. Also, see the discussion above.

[74] Ministry of Commerce, above n 7, 33.

[75] *Cook v. Evatt* [1992] 1 NZLR 676 (HC).

[76] *Rookes v. Barnard* [1964] AC 1129, 1227-1228.

has also stated that the amount of general damages awarded and the conduct of each of the offenders is relevant to the size of the exemplary damages award.[77]

It is uncertain, however, whether the exemplary damages provision will have any impact on competition law generally, or more specifically, the objective of deterrence. The reason is that the courts already under-utilise their powers relating to compensatory damages, and so it is unlikely that they will use the exemplary damages section anytime soon. In addition, even if the plaintiff did satisfy the court that the conduct in question was so outrageous that it justified granting exemplary damages, the amount of the award is likely to be relatively small. This is because the size of exemplary damage awards in other fields of law has been modest and the size of awards under the NZCA has also been low.[78] This trend, therefore, is likely to continue in relation to exemplary damages.

3 *Injunctions and Other Orders* [79]

The Commerce Commission or a private party may apply to the court for an injunction preventing a person from engaging in a wide range of anti-competitive conduct. First, the court may grant injunctions to prevent a person from breaching the NZCA's provisions relating to restrictive trade practices and those relating to business acquisitions.[80] In relation to potential breaches of the provisions on business

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[77] Ministry of Commerce, above n 7, 34.

[78] "Penalties for Individuals", above n 23, 341-342. Mallon and Stevens also state that it is unlikely that a court would grant exemplary damages against an individual offender.

[79] In my opinion, it is best to consider these two penalty provisions together, as there is a great degree of overlap between the two. In addition, the Ministry of Commerce treats these two penalty provisions in this manner (Ministry of Commerce, above n 7, 39-46).

[80] Commerce Act 1986, ss 81 & 84. More specifically these sections state that the court may grant an injunction if the conduct would constitute:

(a) A contravention of any of the provisions of [Part 2 or section 47] of this Act:
(b) Any attempt to contravene such a provision:
(c) Aiding, abetting, counselling, or procuring any other person to contravene such a provision:
(d) Inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision:
(e) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision:
(f) Conspiring with any other person to contravene such a provision.

acquisitions, the court may require any person to meet certain obligations relating to the conduct of the business or the safeguarding of the business or its assets.[81] Under section 87, the court may also grant an injunction to restrain someone from supplying goods or services in breach of section 55. In addition, under this section the court may require any person to supply those goods or services in accordance with any authorisation, provisional authorisation or undertaking made under sections 70, 71 and 72 respectively.[82] In relation to all the sections mentioned above, however, the applicant for the injunction must satisfy the court that the person has engaged, or is likely to engage, in anti-competitive behaviour.[83]

If a person engages in conduct that breaches the NZCA's prohibitions on restrictive trade practices, and this has caused, or is likely to cause, someone loss or damage, the court may also make any order against that person that it thinks appropriate.[84] In addition, if someone enters a contract or a covenant that would contravene any part of the NZCA, the court may vary or cancel the contract or vary the covenant. The court may also require any person who would benefit from the covenant or who is party to the contract to pay the other party restitution or compensation.[85]

Under the NZCA, the courts have the power to grant permanent injunctions, interim injunctions and mandatory orders.[86] Permanent injunctions are just that, and stop a person from committing conduct that breaches the NZCA. Interim injunctions aim to temporarily restrain the defendant from doing something that will cause people damage for which they cannot be compensated at the full hearing. Finally, mandatory injunctions can be either permanent or interim, and force the defendant to do

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[81] Commerce Act 1986, ss 84(b) & 84(c).

[82] Commerce Act 1986, s 87.

[83] Commerce Act 1986, ss 88(2) & 88(3). The court can also grant interim injunctions to restrain these kinds of conduct but, under section 88(3A), they must "give any weight that the Court considers appropriate to the interests of consumers or, as the case may be, acquirers."

[84] Commerce Act 1986, s 89(1). The court may also make an order against someone who did any act that is mentioned in section 81(b) to (f) of the NZCA (see: Commerce Act 1986, s 81(b)-(f), above n 36.

[85] Commerce Act 1986, ss 89(2) & 89(3).

[86] Commerce Act 1986, ss 84, 87, 88 and 89 (discussed below).

something to prevent damage to others.[87] Most of the discussion, both judicial and academic, has been on interim injunctions, and that is the focus of this paper. First, however, this paper looks briefly at permanent and mandatory injunctions.

In addition to the NZCA's requirements mentioned above, the court will only grant the plaintiff a permanent injunction if damages would not be an adequate remedy.[88] In relation to competition law, however, there is no further discussion than this. Mandatory injunctions have been more relevant to competition law, but in the courts, plaintiffs seeking them as a remedy have been unsuccessful. The reason for this is that the courts do not want to continually monitor whether the parties adhere to the terms of the mandatory injunction. In addition, the idea that in the future the court may encounter a case involving similar conduct bothers the courts; more specifically, they do not want to feel bound to grant mandatory injunctions in like cases. Overall, it seems that the court will only grant mandatory injunctions when this is the only means to deal with a serious breach of the NZCA.[89]

There are six factors the court considers in deciding whether to grant an interim injunction under competition law. These are (1) whether the plaintiff has established a prima facie case; (2) the balance of convenience; (3) the adequacy of damages as a remedy; (4) the strength of the parties' cases; (5) discretionary factors; and (6) overall justice.[90] The main question, however, is whether the plaintiff has "shown that the risk of injustice to an ultimately successful, but temporarily unassisted, plaintiff is greater than the risk of injustice to a temporarily restrained, but ultimately successful, defendant."[91]

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[87] Ministry of Commerce, above n 7, 42.

[88] John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 2.

[89] See: Ministry of Commerce, above n 7, 45-46.

[90] *Telecom New Zealand Ltd v. Clear Communications Ltd* (18 July 1997) unreported, High Court, Auckland Registry, CL 20/97, 17; Ministry of Commerce, above n 7, 39. The courts, however, will only consider factors 4 and 5 in appropriate cases.

[91] *Telecom v. Clear*, above n 90, 17.

Under competition law, however, the courts must also give weight to the public interest when considering whether to grant an interim injunction.[92] The reason for this is that, if the defendant's conduct is anti-competitive, society as a whole is likely to suffer damage. For example, this damage may result from higher prices or general market inefficiencies. When the court finally decides at a full hearing, however, that the conduct is anti-competitive it will be too late for most of those who suffered damage to receive any compensation. The court, therefore, must consider this at the interim injunction stage.[93]

Before section 88(3A) of the NZCA made it a clear requirement for the courts to consider the interests of consumers when granting interim injunctions, the cases had already established that public interest was an important factor. For example, in *Direct Holdings v. Feltex* the High Court indicated that the protection of consumers was an important objective.[94] The court in subsequent cases, however, has rarely granted interim injunctions and the Ministry of Commerce suggests four reasons for this. These are: (1) overlooking the relevance of consumer interest to public interest; (2) confusion between "*the consumer*" and "*consumers*"; (3) protecting rights of essential facilities owners and; (4) optimism about how long it takes a case to reach full hearing.[95]

Section 88(3A) of the NZCA, however, may remove some of these reasons and thereby make the courts more likely to use interim injunctions. Namely, the courts now surely will not overlook the relevance of consumer interest given the clear wording of the section. In addition, the section states "the interests of consumers" and consequently the courts clearly must now consider the interests of all consumers effected by the conduct. Conversely, however, section 88(3A) does not deal with the Ministry of Commerce's claim that the courts have a desire to protect the rights of essential facilities owners. Furthermore, the section will not effect the fact that the

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[92] Commerce Act 1986, s 88(3A) inserted by the Commerce Amendment Act 2001, s 22.

[93] Ministry of Commerce, above n 7, 40.

[94] *Direct Holdings v. Feltex* (1986) 2 TCLR 61 (HC). The case of *Bond & Bond v. Fisher & Paykel* (1986) 2 TCLR 79 (HC) affirmed this approach.

[95] Ministry of Commerce, above n 7, 43-44.

courts have been optimistic about how long it takes a competition law case to reach full hearing. Only the courts themselves can deal with these impediments to the granting of interim injunctions by changing their mindset. Overall, however, section 88(3A) does have the potential to make the courts more likely to grant interim injunctions in competition law cases.

The final issue relevant to interim injunctions, and injunctions generally, is the fact that the courts should also have regard to the role injunctions can play in deterring competition law offences. Namely, if an offender knows that the courts readily grant injunctions (whether standard, interim or mandatory), then the offender may be less likely to engage in the conduct.[96] The reality, however, is that the court has not established or mentioned any relationship between its granting of injunctions and the role this penalty can play in deterring competition law offences.[97] As previously stated, deterrence is a valid aim of injunctions and, by not establishing this link, the courts have not fully comprehended this penalty's role under competition law.

4 Fines

Section 55 states that no person can supply controlled goods or services unless the Commerce Commission has authorised the supply, or unless the person has given the Commission an undertaking consistent with Part V of the NZCA. In addition, the person supplying the goods or services must do so in accordance with either the authorisation or undertaking.[98] If a person breaches this section, and they are not a body corporate, they are liable on summary conviction to a fine of up to $50,000. If they are a body corporate, the maximum fine is $500,000. In addition, the court may order the offender to pay to the defendant an amount not exceeding the difference between the price that the offender did charge and that which they should have charged.[99]

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[96] See: Ministry of Commerce, above n 7, 41.

[97] Ministry of Commerce, above n 7, 45.

[98] Commerce Act 1986, s 55.

[99] Commerce Act 1986, ss 86(1), 86(2).

The courts and academics have not yet directly considered either the application of this section or any issues that it raises. The main reason is that this section is relatively uncomplicated, although it does raise two minor issues. First, it is unclear whether the court can only order the defendant to pay the difference between what they should have charged and what they did charge for a single good or service. For example, if bread was a controlled good and the defendant supplied 10,000 loaves at ten cents over the set price, it is unclear what the penalty would be. Common sense, however, would indicate that the defendant would have to pay $1,000 as opposed to 10 cents.

Secondly, the court has the discretion to, instead of simply accepting the fine as outlined in the Summary Proceedings Act 1957, make the fine payable to someone that has suffered loss due to the defendants breach of section 55.[100] This is an important addition to the power of the court, as it shows that Parliament wanted this penalty to fulfil a reparative objective as well as those of deterrence and retribution. In relation to these objectives, the lack of case law and literature on this penalty makes it impossible to decide whether section 86 is adequately satisfying these aims. The lack of section 86 fines, however, does indicate that offenders breaching section 55 is not that bigger a problem under New Zealand competition law.

5 *Divestiture of Assets or Shares*

If the court decides, or has previously decided, that a person has breached the prohibitions on business acquisitions that substantially lessen competition, they may make an order that that person dispose of any assets or shares. The person must dispose of these assets or shares in accordance with either a court order or that person's undertaking.[101]

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[100] Commerce Act 1986, s 86(4).

[101] Commerce Act 1986, s 85(1). The person must make the undertaking under section 69A of the NZCA.

The only New Zealand case that has considered the divestiture of assets and shares in any detail was *Commerce Commission v. Fletcher Challenge*.[102] One can extract some certain general principles from this case. First, although this penalty is discretionary, the court must have a jurisdictional foundation before exercising this discretion. Namely, the plaintiff must prove that the defendant breached section 47 of the NZCA.

Secondly, the plaintiff can only seek divestment of an acquisition if that acquisition occurred through a breach of section 47. Related to this is the Australian case of *Trade Practices Commission v. Australia Meat Holdings*.[103] This case stated that a company could undertake to divest assets not part of the acquisition that was in breach, as long as divesting the assets resulted in the defendant losing their prohibited market dominance. This seems like a sensible approach and, in my opinion, if the issue arose in New Zealand the courts would take a similar view. The Australian courts have made similar sounding comments about divestment in general. For example, the Australian courts have regard to the public interest and aims at restoring the competitive environment that existed before the prohibited business acquisition.[104] The Australian Federal Court further developed the ideas of public interest and the desire not to overly harm the defendant when they stated that:

> It is better to mould the order to the necessities of the case, going only so far as to remove from the control of the acquirer those assets that contribute to its market dominance. There is no public interest in forcing the divestiture of those that do not.[105]

Again, in my opinion, the Australian courts have approached the issue in a reasonable and simple manner, while still emphasising the crucial factor of public interest. The

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[102] *Commerce Commission v. Fletcher Challenge Ltd* (23 August 1999) unreported, High Court, Auckland Registry, CL 46/97. Affirmed on appeal in *Commerce Commission v. Fletcher Challenge Ltd* [2000] 3 NZLR 670 (CA).

[103] *Trade Practices Commission v. Australia Meat Holdings Pty Ltd (No 2)* (1988) ATPR 49,462 (HCA).

[104] *Trade Practices Commission v. Australia Meat Holdings Pty Ltd* (1988) ATPR 49,465, 49517 (FCA).

[105] *Australia Meat Holdings*, above n 104, 49,517; Dean, Hampton and White, above n 63, para 260.

New Zealand courts would do well to adopt a similar approach to Australia should the issue arise.

The final principle that one can extract from *Commerce Commission v. Fletcher Challenge* is the fact that section 85 does not apply to persons that are merely parties to the section 47 breach. Namely, the courts may only subject the principal offenders to a divestiture of assets or shares order. The court gave four reasons for this: (1) the court should not take away more property rights than necessary; (2) the court interprets penal provisions strictly; (3) there are already adequate penalties for parties; and (4) other penalties specifically state that parties are included, whereas section 47 does not.[106] In my opinion, the court has approached this issue correctly. It would be absurd for the court to order a party to divest their assets or shares when they were not directly involved in the prohibited business acquisition. Moreover, as the court stated, there are already enough penalties in the NZCA for the courts to utilise if the party has committed a wrong.

Overall, the main problem with assessing the effectiveness of this penalty is the lack of judicial and academic comment in New Zealand. The penalty itself, however, is developing well.

6 *Cease and Desist Orders*

The cease and desist order is a recent and very important part of the NZCA's enforcement provisions.[107] The importance lies in the fact that the Commerce Commissioner may make an order restraining perceived anti-competitive conduct for any period and on any terms.[108] A cease and desist order may also require a person to do something, but only if restraining the person from the conduct will not by itself restore competition.[109] There are certain safeguards on this enforcement power, such

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[106] *Fletcher Challenge* (HC), above n 102, 12, 13, 15, 16.

[107] Commerce Act 1986, s 74A as inserted by the Commerce Amendment Act 2001, s 15.

[108] Commerce Act 1986, s 74A(2). The Commissioner, however, must specify the period and terms in the order.

[109] Commerce Act 1986, s 74A(3)(a).

as the Commissioner having to be satisfied that there is a prima facie case that the person's conduct will justify a pecuniary penalty. In addition, the Commissioner must be satisfied that urgent action is in the public interest and is necessary to prevent a person, or consumers, from suffering serious loss or damage.[110] As previously mentioned, if a person fails to comply with a cease and desist order, the court may order that person to pay a pecuniary penalty of up to $500,000.[111]

Parliament inserted this penalty provision into the NZCA in 2001, and it is important because it extends the Commissioner's enforcement powers under the NZCA.[112] There, however, has been no judicial or academic writing on cease and desist orders in New Zealand, but one can still make some general comments. First, it is a power of the Commissioner, not the courts and, at first, it does seem to be a very wide discretionary power. As mentioned above, however, section 74 does limit the Commissioner's powers. In my opinion, a good way to understand this power is to see it as a power of injunction that the Commissioner can, in certain circumstances, enforce quickly without having to apply to the court. In addition, one can interpret the cease and desist order as providing the Commissioner with the powers of general, mandatory, permanent and interim injunctions.

Overall, this penalty has the potential to be hugely relevant to competition law and, if used well, it may provide an effective deterrent to anti-competitive behaviour. The main reason for its effectiveness will be the fact that the Commissioner can implement it relatively quickly. In addition, the cease and desist order may be able to stop serious harm to people and consumers before it is too late for them to obtain an adequate remedy. We must wait for specific cases, however, to see whether the cease and desist order will reach its full potential.

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[110] Commerce Act 1986, ss 74A(1)(a) and 74A(1)(b). There are also more safeguards in section 74B, which relate to investigation into the conduct, recommendations, the serving of notices and the opportunity to be heard. Section 74C also provides some procedural safeguards.

[111] Commerce Act 1986, s 74D.

[112] Commerce Amendment Act 2001, s 15.

Overall, these are the main penalties in the NZCA and, although none are of a criminal nature, their scope and application is still reasonably extensive.[113]

III COMPETITION LAW PENALTIES IN OTHER JURISDICTIONS

This part of this paper introduces and discusses the competition law penalties of the United Kingdom and Canada.

A United Kingdom

The UKCA is a relatively recent piece of legislation, which the United Kingdom Parliament introduced "after years of concern that U.K policy was in need of reform."[114] The penalty provisions in the UKCA are relatively simple, but extremely broad.

1 Directions

If the Director General of Fair Trading ("Director") decides that an agreement violates the UKCA's prohibitions relating anti-competitive agreements and concerted practices, they may give any directions that they consider appropriate to stop the violation.[115] This power also applies if the Director decides that someone's conduct breaches the prohibitions relating to the abuse of a dominant position.[116]

In addition, if the Director has not finished their investigation into a possible breach of the UKCA, but they have a reasonable suspicion that someone has committed a

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[113] A penalty that this paper has not mentioned is section 80C. This section allows the court to exclude a person from the management of a body corporate for up to five years. This section applies if the person entered into, or gave effect to (1) an agreement that has the purpose of substantially lessening competition in a market or; (2) an exclusionary provision.

[114] David Parker "The Competition Act 1998: Change and Continuity in U.K. Competition Policy" (July 2000) JBL 283.

[115] Competition Act 1998 (UK), s 32.

[116] Competition Act 1998 (UK), s 33.

breach, they may also make directions. These directions, however, must be to prevent serious, irreparable damage to a person, or to protect the public interest.[117]

The Director's power to make directions, therefore, is extremely wide and it seems to include the ability to make orders such as injunctions and cease and desist orders. One fundamental principle, however, governs this power. This is whether, in practice and viewed as a whole, the directions would be sufficient to encourage conditions that would promote competition in the market.[118] For example, in the leading case of *Napp v. Director General*, the Director was able to make directions that prohibited Napp from setting prices without the Director's consent, unless they did so in accordance with other certain directions. In addition, the Director also ordered Napp to cease all infringements of the UKCA and to refrain from similar conduct in the future. On appeal, the Competition Commission Appeal Tribunal ("CCAT") upheld these directions as the Director was acting within their powers and the directions would promote competition in the market.[119]

This penalty provision, therefore, seems somewhat similar to the situation under the NZCA. The difference, however, lies in the fact that the Director has a wider range of powers than the New Zealand Commissioner. There could be benefits in New Zealand adopting this approach, as the Commissioner may be able to deal with breaches of the NZCA more quickly and efficiently than a court. In addition, so long as the defendant had the right to appeal the penalty, as is the case under the UKCA, the benefits of this approach may well outweigh the detriments caused by the possibility of the Commissioner occasionally imposing unjustified penalties.

2 *Penalties*

If the Director decides someone has intentionally or negligently breached the prohibitions relating to anti-competitive agreements and concerted practices, or the

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[117] Competition Act 1998 (UK), s 35.

[118] *Napp Pharmaceutical Holdings Limited and Subsidiaries v. Director General of Fair Trading (Napp 4)* [2002] ECC (CCAT) 13 para 560.

[119] *Napp*, above n 118, paras 553, 560.

prohibitions relating to abuse of a dominant position, they may impose a penalty on that person. This penalty can be up to 10% of the party's commercial turnover in the United Kingdom, but it is likely that in most cases the penalty will be around the 4-5% mark.[120]

The first interesting point relating to this penalty is the requirement that someone either intentionally or negligently breaches the UKCA. This is a threshold issue, but the Director does not have to decide whether someone has breached the UKCA intentionally or negligently if they are satisfied the person comes under one of these components. Whether the person has breached the UKCA intentionally or negligently, however, is a factor that can mitigate the size of the penalty. The Director therefore may have to decide this when considering the seriousness of the breach.[121]

Another issue relating to intention and negligence is the fact that the CCAT has stated that the criminal law principles of mens rea are irrelevant to this penalty.[122] Instead, the CCAT has provided its own definitions of intention and negligence. The CCAT states that a person will intend the breach if they must have been aware that their conduct would restrict or distort competition. In addition, the person does not have to know that they were breaching the UKCA provided they were aware of the anti-competitive nature of their conduct. This, therefore, is a very low level of intention and, assuming the Director deems the anti-competitive effects of the conduct as readily foreseeable, they can impute the person with the requisite intention.[123]

Conversely, the CCAT has stated that someone will have negligently breached section 36 if that person ought to have known that their conduct would restrict or distort competition.[124] The difference, therefore, between intention and negligence under section 36 is insignificant. The only difference is that a person who actually foresees a

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[120] Competition Act 1998 (UK), s 36; Parker, above n 114, 289.

[121] *Napp*, above n 118, paras 453-455.

[122] *Napp*, above n 118, para 458.

[123] *Napp*, above n 118, para 456.

[124] *Napp*, above n 118, para 457.

anti-competitive consequence will have intended the breach, while someone who fails to foresee such a consequence, but should have, will be negligent.

The next point relating to section 36 is the size of the penalty. Generally the CCAT, and hence the Director, will assess what the penalty should be in a broad manner and they will have regard to the individual circumstances of each case.[125] Penalties under this section, however, must meet certain objectives. First, the size of the penalty must reflect the seriousness of the breach, and secondly, the penalty must satisfy the objectives of general and specific deterrence. These objectives are why there should be large penalties for acts such as price fixing under the UKCA.[126]

In setting the amount of the penalty under the UKCA, the CCAT and the Director must have regard to five relevant principles. Firstly, they must apply a certain percentage rate to the turnover relevant to the infringement. This percentage can be as high as 10% and hence the penalty can be up to 10% of the relevant turnover, which is "the relevant product market and relevant geographic market affected by the infringement in the last financial year."[127] Secondly, the CCAT or the Director can adjust the penalty in reference to the duration of the breach. For example, they can multiply the penalties for infringements continuing more than one year by an amount up to the number of years the infringement has lasted. Thirdly, the CCAT or the Director can adjust the penalty with reference to other factors they deem relevant. This principle allows them to change the penalty to an amount that they believe will achieve deterrence. Fourthly, the CCAT and the Director must consider other mitigating factors, such as whether the person intended the breach, which may reduce the size of the penalty. Finally, the CCAT or the Director must make sure that the penalty they have arrived at does not exceed the statutory maximum.[128]

As stated previously, New Zealand has now adopted the percentage of turnover as a way to assess the size of pecuniary penalties and, unlike the UKCA, the NZCA does

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[125] *Napp*, above n 118, para 535.

[126] *Napp*, above n 118, para 474.

[127] *Napp*, above 118, para 475.

[128] *Napp*, above n 118, paras 474-480.

not encounter issues of intention and negligence. In my opinion, however, there is one attractive option for reform that New Zealand could investigate in reference to the NZCA's provisions on pecuniary penalties. Namely, Parliament or the courts should formulate a series of principles, similar to the United Kingdom, that better organise all the relevant factors they presently consider relating to the size of the pecuniary penalty. This, however, is a minor reform option as opposed to one of substance that adopts the law of the United Kingdom. In addition, however, New Zealand may want to look at giving the Commissioner the power to impose pecuniary penalties, but otherwise the law in the United Kingdom is relatively similar.

3 Damages

Although there is no express section in the UKCA, there is an argument that victims may have a case in damages where they have suffered loss because of anti-competitive conduct. During the parliamentary debates concerning the UKCA, Ministers stated that the remedy of damages could be possible under competition law. It also seems that the courts will hear the actions for damages and that any decisions by the Director or the Tribunal of Fair Trading will be relevant as evidence.[129] In addition, it is interesting to note that the United Kingdom Parliament is considering allowing the CCAT to hear the damage claims of people who are victims of competition law breaches under the UKCA.[130]

Overall, there are some differences between competition law penalties in the United Kingdom and New Zealand. Namely, the Director has more powers than the New Zealand Commissioner, the United Kingdom Parliament has phrased the penalty provisions more broadly and simply and the United Kingdom has some useful general guidelines that New Zealand may wish to consider. Nevertheless, as regards the actual penalties available for breaches of competition law, there is not a great deal of difference between the law of the United Kingdom and that of New Zealand.

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[129] Parker, above n 114, 289.

[130] Barry J Rodger "Early Steps to a Mature Competition Law System: Case Law Developments in the First 18 Months of the Competition Act 1998" (2002) 23(2) ECLR 52, 67.

B Canada

The CCA as it relates to penalties for breaches of competition law is, in my opinion, the most comprehensive and detailed of the three countries under consideration. Some of the penalty provisions, however, were somewhat ineffectual until the early-1990s. This is especially so in relation to the criminal conspiracy provision in section 45 of the CCA which, between 1970 and 1983, the courts only used to convict defendants on 29 occasions.[131] Nevertheless, the Canadian courts and legislature have been continuously modernising the CCA, with the result being a very extensive and efficient piece of legislation.[132] This part introduces and analyses some of the CCA's main penalty provisions.

1 Section 45

Part VI of the CCA outlines the violations of competition law that are punishable by criminal sanctions. Undoubtedly the most significant penalty provision is section 45.[133] This section provides that anyone who conspires or agrees with another person to unduly limit facilities, to unduly prevent or lessen the manufacture of a product or the competition relating to this product, to unduly enhance the price of a product or to otherwise unduly restrain competition is guilty of an indictable offence. On conviction, the court may imprison the offender for up to five years and/or impose a fine of up to $10,000,000.[134]

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[131] Richard Janda and Daniel M Bellemare "Canada's Prohibition Against Anti-Competitive Collusion: The New Rapprochement with U.S. Law" (1993) 38 McGill LJ 620, 622.

[132] Paul Francois Famula "Section 45 of the Competition Act: Partial Rule of Reason or Partially Reasonable Rule" (1999) 62 Sask L Rev 121, 171. Janda and Bellemare, above n 109, 622.

[133] See: Janda and Bellemare, above n 131, 620; Famula, above n 132, 121.

[134] Competition Act 1985 (Canada), s 45. This section states that:

Everyone who conspires, combines, agrees or arranges with another person
(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
(d) to otherwise restrain or injure competition unduly

Clearly, the plaintiff must satisfy many elements under this section before the court can exercise its discretion. The first such element is the fact that there must be two or more parties who come to a mutual agreement that will breach section 45. Consequently, that is why academics and the courts refer to this section as a criminal conspiracy provision.[135] Important, however, is the fact that the plaintiff does not have to prove that the defendant actually carried this agreement into effect. In addition, the courts will not find all agreements that would have the prohibited anti-competitive effects criminally blameworthy under this section, as it contains numerous exceptions.[136]

An important part of this first element is that the parties to the offence must have done the acts "in pursuance of a criminal purpose held in common between them."[137] Generally, academics and the courts refer to this as the requirement that the parties have a "meeting of the minds" regarding the carrying out of the prohibited conduct. In addition, the plaintiff will have to prove that the defendant fulfilled this requirement to the criminal standard of beyond reasonable doubt.[138] Related to this, however, is the notion of "conscious parallelism." The Canadian courts have held that people can behave in a way that suggests a meeting of the minds when in fact they are merely acting in this way due to unilateral, but interdependent, decisions. Namely, people are simply promoting their own interests, but it so happens that each person is doing this in the same way. The Canadian courts have actually refused to find a person guilty based on this theory.[139]

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is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

[135] Famula, above 132, 121.

[136] See: Competition Act 1985 (Canada), s 45(3)-(8).

[137] *R v. Meyrick & Ribuffi* (1929) 21 Cr. App R 94, 102 (CCA).

[138] Famula, above n 132, 130.

[139] *R v. Canada Cement Lafarge Ltd* (1973) 12 CPR (2d) 12 (Ont. PCC Div); *R v. Aluminium Co of Canada Ltd* (1975) 22 CPR (2d) 216 (Que. CSP).

Overall, the plaintiff does not have to provide the court with direct evidence proving the existence of this meeting of the minds. The plaintiff may actually prove this via circumstantial evidence, the reason being, that cases where the plaintiff will actually have any direct evidence of this will be very rare.[140]

The second element refers to whether the agreement will have an undue effect on competition and three main issues arise. First, the court must define the market. Generally, the courts will define the market in reference to the smallest group of products, and the smallest geographical area, in which a sole seller could impose a profitable price increase.[141] In addition, the courts have to define the market because this definition influences whether the conduct has an undue effect on competition. Namely, if the court defines the market as wide, this is likely to reduce the defendant's market power and lessen the chances that an injury to competition will follow.[142]

This, however, gives rise to one main problem with the plaintiff having to illustrate to the court the relevant market. This is the fact that the plaintiff must have the correct definition, or the court may define the market as broader and the plaintiff's case may be harder to prove. The relevant market, however, will constantly be changing and consequently the plaintiff may have trouble convincing the court of what they see to be the correct definition, especially given the need to prove the relevant market beyond reasonable doubt.[143]

The second factor relevant to whether the conduct will have an undue effect on competition, is the market power of the defendant. The defendant must have a certain degree of market share before they can have any market power. If, however, the defendant does have market share, the judicial finding of market power is not

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[140] Competition Act 1985 (Canada) s 45(2.1); Famula, above n 132, 131.

[141] Famula, above 132, 139-140. This is the definition relating to mergers and abuse of a dominant position, but the language in these provisions is similar to section 45 and Famula claims that adopting this test is appropriate (Famula, above n 132, 138).

[142] Famula, above n 132, 148.

[143] Famula, above n 132, 150.

automatic. At present in Canada, the defendant must have 35% of the market share before the court will consider whether they have market power. In addition, many other factors are relevant to this issue under section 45. For example, the case of *R v. Nova Scotia Pharmaceutical Society* identified the following factors:[144]

(a) the number of competitors and the concentration of competition;
(b) barriers to entry;
(c) geographical distribution of buyers and sellers;
(d) differences in the degree of integration among competitors;
(e) product differentiation;
(f) countervailing power; and
(g) cross-elasticity of demand.

The amount of factors the court can consider, however, is not closed.[145] Nevertheless, the Canadian courts mainly use market share and the above factors in determining whether the defendant has market power under section 45.

The third factor relevant to whether the conduct unduly affects competition is the behaviour of the defendant. The court undertakes this analysis by looking at the aim, and the likely effect, of the alleged anti-competitive agreement. Namely, if the agreement will unduly influence competition, this will obviously make a finding against the defendant more likely. In addition, the courts can also look at how the defendant carried out the agreement and any other behaviour that the court believes may decrease competition.[146] Finally, the court will then combine its findings on the defendant's market power and behaviour to determine whether the agreement will have an undue effect on competition. For example, the court may find a defendant liable under section 45 if they do not have substantial market power providing that their behaviour will cause great injury to competition.[147]

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[144] *R v. Nova Scotia Pharmaceutical Society* (1992) 74 CCC (3d) 289, 321 (SCC).

[145] Famula, above n 132, 151.

[146] *Nova Scotia*, above n 144, 323-324; See: Famula, above n 132, 153.

[147] See: *Nova Scotia*, above n 144, 324; See: Famula, above n 132, 154.

The final element of section 45 relates to mens rea. Clearly since section 45 is a criminal provision, the plaintiff must prove that the defendant had a certain mental element. The CCA states that the plaintiff must prove that the defendant intended to enter the agreement, but not that they intended the agreement to unduly injure competition.[148] The Canadian case law has further developed these ideas by stating that the plaintiff could prove the required mens rea by showing two components. First, the plaintiff must show that the defendant intended to enter the agreement and had knowledge of the agreement's terms. By proving this component, therefore, the plaintiff shows the court that the defendant intended to carry out the agreement. Secondly, the plaintiff must show that, objectively speaking, the agreement would unduly lessen or prevent competition.[149] This objective test, therefore, is whether:

> A reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known the likely effect of such an agreement would be to unduly lessen competition.[150]

If the plaintiff can prove these subjective and objective components beyond reasonable doubt, the court will find that the defendant had the requisite mens rea to be guilty under section 45.

Overall, the Canadian legislature and courts have developed the criminal conspiracy provision in section 45 well. In addition, Canada has a record of aggressive prosecutions under this section.[151] New Zealand may wish to look to this section as a means to deter competition law offenders more effectively in the future.

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[148] Competition Act 1985 (Canada), s 45(2.2).

[149] *Nova Scotia*, above n 144, 325-326; Famula, above n 132, 155.

[150] *Nova Scotia*, above n 144, 326.

[151] Bill Batchelor and Howard Adler Jr "Antitrust Criminalization Goes Global: Multinationals Should Beware" (2001) 8 No 10 Bus Crim Bul 1.

2 *Section 36*

This section only provides for civil penalties and is somewhat similar to sections 82 and 84A of the NZCA. This section states that any person who has suffered loss or damage that was caused by a person committing an offence under Part VI, or by a person's failure to comply with a CCA court order, can sue for an amount equal to this loss or damage.[152] This section, therefore, gives the possibility of a civil action when a criminal action under Part VI may be inappropriate.[153]

An important rationale behind this section is that certain anti-competitive conduct may be illegal, but not deserving of a criminal sanction under the CCA.[154] Consequently, section 36 gives any individual who has suffered damage due to the defendant's anti-competitive conduct a civil right of redress.[155] The first point to note concerning this section is that the plaintiff must only prove that the conduct breached the CCA on the balance of probabilities. Section 36, therefore, makes it easier for the plaintiff to prove the actus reus of the offence and consequently the section provides the plaintiff with a remedy for a wider range of anti-competitive conduct.[156]

Secondly, the plaintiff does not have to prove that the defendant had any mens rea under this section. All the plaintiff needs to prove to the civil standard is that the behaviour was anti-competitive and that it caused him or her damage. Consequently, this also results in the plaintiff having an easier case to prove and the court being able to remedy more anti-competitive conduct.[157]

Thirdly, a private party is able to apply to the court for a remedy under this section. Section 36, therefore, enables private citizens to monitor and seek a remedy for anti-

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[152] Competition Act 1985 (Canada), s 36.

[153] Janda and Bellemare, above n 131, 637.

[154] Janda and Bellemare, above n 131, 669.

[155] Competition Act 1985 (Canada), s 36.

[156] Janda and Bellemare, above n 131, 670.

[157] Janda and Bellemare, above n 131, 670; See: Competition Act 1985 (Canada), s 36(1).

competitive conduct themselves as opposed to having to rely on the Commissioner of Competition for a referral. Given all these factors, academics believe that this section has great potential to deter competition law offences.[158]

The final important point is that section 36 does not specifically outline what remedies for which the plaintiff can apply. From the section, it is clear that the plaintiff can recover both damages and the costs of their investigation of the case and the proceedings.[159] Academics have also argued, however, that plaintiffs may also be able to apply to the court for an injunction,[160] and the Canadian Federal Court has stated that there is a definite possibility that section 36 will allow the plaintiff to gain an injunction.[161] The range of remedies under section 36, therefore, has the potential to be extensive.

As stated previously, section 36 of the CCA is similar to sections 82 and 84A of the NZCA. Section 36, therefore, does not offer much guidance as to possible reform options for New Zealand law.

3 Section 79

Someone breaches this section if they are in a position of market dominance and they engage in anti-competitive acts that substantially lessen competition. As a penalty, the Canadian Competition Tribunal may prohibit those people from taking part in that practice or take any action that is reasonable and necessary to remedy the market effects of these practices.[162] This section, therefore, also provides for civil penalties, but it does have degree of overlap with the criminal penalties in Part VI.[163]

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[158] Janda and Bellemare, above n 131, 671, 677; See: Competition Act 1985 (Canada), s 36(1).

[159] Competition Act 1985 (Canada), s 36(1).

[160] Janda and Bellemare, above n 1031672.

[161] *Industrial Milk Producers Assn v. British Columbia Lightweight Aggregate Ltd* [1989] 1 FC 463, 487 (FC).

[162] Competition Act (Canada), s 79.

[163] Janda and Bellemare, above n 131, 637; Famula, above n 132, 150. The overlap is between sections 79 and 45(1)(d). It is not a complete overlap, however, because two or more people do not have to enter an agreement under section 79. In addition, the court cannot proceed, using the same facts,

Obviously, this is a general section that aiming at preventing those in a dominant position from undertaking acts that substantially lessen competition. If a defendant has market power, the Competition tribunal will hold them to be in a dominant position under this section. For example, the Tribunal has stated that:

> In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the ability to earn supra-normal profits by reducing output and charging more than the competitive price for a product.[164]

As with section 36, the plaintiff need only prove that the defendant was in a dominant position on the balance of probabilities.[165]

In addition, the plaintiff does not need to prove that the defendant had mens rea as the Competition Tribunal deems the offender to intend the consequences of their actions under section 79. This section, therefore, also avoids the complex evidentiary issues that arise under section 45.[166]

The final issue is what penalties the Competition Tribunal may enforce against an offender. In addition to the prohibition orders mentioned above, the Competition Tribunal may also, under section 79, order the divestiture of assets or shares or make any other orders that are necessary to remedy the anti-competitive effects.[167] The Competition Tribunal, therefore, has extensive penalty powers to remedy this kind of

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against a person under both section 45 and section 79 (Competition Act 1985 (Canada), ss 79(7)(a) and 45.1).

[164] *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd* (1992) 40 CPR (3d) 289, 325 (Competition Tribunal).

[165] Janda and Bellemare, above n 131, 677.

[166] Janda and Bellemare, above n 131, 673-674.

[167] Competition Act 1985 (Canada), s 79(2).

conduct, without the plaintiff having to recourse to the courts. This could be a valid option for New Zealand; namely, Parliament could provide the Commission with more extensive powers with which to remedy breaches of section 36. The cease and desist order provisions in section 74A, however, may adequately fulfil this function in the future.

4 Section 92

This section prohibits mergers that do, or are likely to, substantially prevent or lessen competition. The Competition Tribunal has a variety of civil penalties at their disposal, such as the power to dissolve the merger, order the merger not to proceed or dispose of assets or shares.[168] This section also largely overlaps with section 45; namely, a merger that will substantially lessen competition under section 92 may also be an agreement that will unduly injure competition under section 45(1)(d).[169]

Under this section, the Commissioner applies to the Competition Tribunal and the Tribunal has to decide whether the merger has, or is likely to, substantially prevent or lessen competition.[170] In determining this, the Competition Tribunal looks at four factors. Firstly, the Tribunal defines the relevant product and the geographic market that the merger will influence.[171]

Secondly, the Tribunal calculates the market share and the concentration ratios in the market, and compares this with the merger threshold levels. Under this section, the threshold for a merged entity exercising a co-ordinated market power is a market share of at least 10% in a market where the largest four firms have a combined share of at least 65%. Conversely, for a merged entity under the exercise of unilateral market power the threshold is at least 35% of market share.[172]

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[168] Competition Act 1985 (Canada), s 92. The Tribunal does have other powers under this section.

[169] Note, however, that one can only choose to proceed under one of the sections 45, 79 or 92 (Competition Act 1985 (Canada), ss 98, 79(7) and 45.1).

[170] Competition Act 1985 (Canada), s 92.

[171] Garry K Goddard "Bank Mergers Policy and Competition Law Enforcement: A Comparison of Recent Experience in Australia and Canada" (1999-2000) 15 Bank Finance L Rev 181, 208.

[172] Goddard, above n 171, 208.

Thirdly, the Tribunal contemplates the impact of certain factors that are relevant to their evaluation of whether the merger is anti-competitive.[173] The most important considerations are whether the merger will fail, barriers to entry and whether effective competition will remain after the merger. Generally, if the defendant can show that these factors are in its favour, the Tribunal will allow the merger to proceed.[174]

Finally, the court assesses whether the merger will produce economic efficiencies and if these outweigh the anti-competitive damage that the merger will cause.[175] Overall, therefore, the Tribunal undertakes a thorough analysis of the merger under section 92. In my opinion, this analysis has to be this detailed as the Tribunal has many penalties at its disposal under this section. Nevertheless, the NZCA also provides for a wide range of penalties for anti-competitive mergers and, in my opinion, section 92 of the CCA provides New Zealand with no further penalty options that may provoke reform.

Overall, the penalty provisions in the CCA are comprehensive and developed. Sections 36 and 92, however, provide little in the way of reform options for New Zealand. The main reason for this is that New Zealand already contains similar penalties for like conduct under the NZCA. The above discussion, however, does show that at least New Zealand competition law penalties are consistent with other jurisdictions. In relation to section 79, the CCA does outline some extensive and wide penalty powers and New Zealand could look at such wide provisions to improve the range of competition law penalties available to the Commission. The new cease and desist order provision in the NZCA, however, may provide the Commission with enough power to achieve the same objectives as section 79 of the CCA. Nevertheless, by far the most interesting part in the CCA is the criminal conspiracy provision in section 45. New Zealand may do well to look at whether we should have criminal sanctions for serious competition law violations, or hard core cartel offences, and this paper focuses on this issue in Part IV.

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[173] Competition Act 1985 (Canada), s 92(1).

[174] Goddard, above 171, 208, 209.

[175] Goddard, above n 171, 208.

IV CRIMINAL SANCTIONS

This part discusses the idea of criminal sanctions for certain anti-competitive behaviour in more detail. This part will first determine whether New Zealand does require criminal sanctions for competition law violations and, if so, what form these sanctions will take. In addition, this part outlines and analyses the general issues and arguments surrounding the idea of criminal sanctions. Secondly, this part discusses the idea of criminal liability for corporations. Overall, this part will show that criminal sanctions are appropriate for some competition law violations and that both individuals and corporations may be liable under this proposed reform option.

A Criminal Sanctions Generally

The first issue is whether New Zealand courts should be able to impose criminal sanctions upon a defendant for all, or just some, breaches of the NZCA.[176] One could argue that, if they were available, the courts should be able to impose criminal sanctions for any breaches of the NZCA. Certain kinds of anti-competitive conduct outlined in the NZCA, however, are more serious; consequently, criminal sanctions are more suitable for these offences. For example, Peter Allport argues that New Zealand should only have criminal sanctions for restrictive trade practices that Part II of the NZCA prohibits.[177] In my opinion, however, New Zealand should adopt an approach similar to that in Canada; namely, the courts should only be able to impose criminal sanctions for anti-competitive conspiracies or "hard core cartel" offences ("cartel offences"). The reasons are that these competition law violations are obviously harmful, hard to detect and clearly illegal.[178] The courts, therefore, should not be able to impose criminal sanctions upon offenders who breach the NZCA's

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[176] This paper refers to the court having this power and not the Commission. The reason for this is that the courts may be better equipped to deal with criminal sanctions. In addition, the courts currently have the majority of the penalty powers under the NZCA. It is far-fetched at present, therefore, to argue that the Commission should have the power to impose criminal sanctions. This is also consistent with the approach in Canada.

[177] Allport, above n 43, 276.

[178] Ministry of Commerce, above n 7, 24.

provisions on other anti-competitive conduct, such as business acquisitions and use of a dominant position. The reasons being that these are not as serious as cartel offences and it would be difficult for a plaintiff to prove these offences beyond reasonable doubt.[179] More reasons why the courts should only have criminal sanctions available for cartel offences will become apparent from the following discussion. At this point, however, it is crucial to note that the rest of this part only discusses the possibility of criminal sanctions in relation to cartel offences.

The idea of deterrence is of the utmost importance to whether criminal sanctions are appropriate for cartel offences under the NZCA. As stated previously, before the Commerce Amendment Act 2001, certain penalties were not adequately deterring competition law offences. This was especially so in relation to the pecuniary penalty provisions in Part II of the NZCA.[180] Consequently, these penalties were not deterring people from committing cartel offences and therefore one could have argued that Parliament should have included a criminal penalty provision in the Commerce Amendment Act 2001. The 2001 amendments however still aim at deterring cartel offences and, since only recently in-force, one view is that New Zealand should wait and see whether these amendments will achieve deterrence before looking at the option of criminal sanctions.[181] Nevertheless, in my opinion there are persuasive reasons illustrating why criminal sanctions are the only true way to deter cartel offences and, consequently, New Zealand must seriously consider them as a reform option.

In the United Kingdom, the Parliament's recent White Paper claims that only criminal sanctions, including imprisonment, are an adequate penalty for cartel offences. For example, the White Paper states that, to achieve deterrence, a penalty must recognise the fact that the United Kingdom only discovers one in six cartels. The penalty, therefore, must be six times greater than the offender's illegal cartel gain. In relation to monetary penalties, however, this results in the penalty being from six to ten times

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[179] See: Ministry of Commerce, above n 7, 24.

[180] See: Ministry of Commerce, above n 7, 24, and 31.

[181] See: Smith, above n 5, 291. The author made this statement in reference to Parliament's recent enactment of the UKCA and then their subsequent White Paper outlining a desire for criminal sanctions for cartel offences. This argument, however, is also applicable to the New Zealand scenario.

greater than the UKCA's statutory maximum and it has the potential to make the defendant insolvent. Conversely, a criminal sanction will be a better deterrent as the prospect of a criminal record, or a term of imprisonment, will make the potential offender less likely to engage in the prohibited conduct.[182]

The New Zealand Commission has also raised the idea of criminal sanctions as having the potential to be an effective deterrent to competition law violations.[183] The Ministry of Commerce, however, has provided New Zealand with the most comprehensive discussion on this issue. The Ministry raises the point that cartels cause such great harm, and are so difficult to detect, that a civil monetary penalty that actually deters would be too large for the majority of offenders to pay. The only way to deter those offenders guilty of cartel offences, therefore, is for the court to impose upon them a criminal fine or term of imprisonment. The seriousness of these penalties would make any potential offender question their actions and, at the least, the threat of criminal sanctions would make people more aware of the law and the consequences of any violation.[184] Given this, the Ministry concludes that there is:

> A case for criminal fines for hard core cartel offences...in the event that offenders cannot afford to pay the fines then imprisonment is appropriate...if a corporate offender cannot pay the fine the directors should go to jail. [185]

Some academics, however, claim that criminal sanctions will not be an effective deterrent to competition law violations. The common argument is that criminal sanctions will result in a number of procedural issues that reduce the ability of such sanctions to deter cartel offences.[186] These procedural issues are wide-ranging. For example, criminal sanctions will result in the plaintiff having to prove the case beyond reasonable doubt via compelling evidence and having to prove that the offender had

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[182] Batchelor and Adler, above n 151, 2.

[183] See: Allport, above n 43, 276.

[184] Ministry of Commerce, above n 7, 24-26.

[185] Ministry of Commerce, above n 7, 26.

[186] Smith, above n 5, 292.

the requisite mens rea.[187] In addition, criminal sanctions may result in the New Zealand Commission having less effective powers of investigation as the criminal law has more safeguards to protect the suspect.[188] Finally, the New Zealand Parliament would have to define precisely what is meant by a cartel offence, otherwise the criminal sanctions could deter conduct that is actually pro-competitive and, therefore, the sanctions would defeat their own objective.[189] Overall, criminal sanctions may reduce deterrence as these factors would make the law harder to enforce and would result in fewer convictions for cartel offences.[190]

These, however, are only procedural factors and the New Zealand Commerce Commissioner has stated that Parliament would be able to resolve these difficulties.[191] In my opinion, this is clearly correct. Parliament could amend the NZCA enabling the Commission to have certain powers of investigation when seeking a criminal sanction, and they could quite easily define what they want cartel offences to encompass. In relation to the higher burden and the need to prove mens rea, this is a reason why the courts should only be able to apply criminal sanctions to cartel offences. Namely, other competition law offences would be too difficult for the plaintiff to prove under the criminal standards, but this is not the case for cartel offences.[192] In addition, there are further factors supporting the argument that criminal sanctions are required for cartel offences in New Zealand.

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[187] Smith, above n 5, 291, 292; See: Famula, above 132, 155-157.

[188] Smith, above n 5, 292. For example, the suspect has the right to silence and the right not to incriminate oneself. This could result in suspects not explaining certain issues that are crucial to the prosecution.

[189] Smith, above n 5, 291. Smith states:

> If the definition is too wide the offence may cover many forms of behaviour regarded by the public at large-and juries-as less morally reprehensible that price-fixing per se. If the offence is too narrowly drawn then businessmen intent on co-ordinating their prices will simply adopt form of behaviour that have that effect but fall short of the offence (sic).

[190] There are other factors against the view that criminal sanctions are appropriate for cartel offences. These include that arguments that they would discourage whistle blowing. Will such sanctions catch the right people? Will prison be the only sanction? Can the jury understand the issues? In my opinion, however, academics have not developed these arguments enough; they are mere speculation. This paper, therefore, does not deal with them. Note, however, that this paper is of the view that both criminal fines and imprisonment are appropriate sanctions for competition law violations.

[191] Allport, above n 43, 276.

[192] See the discussion above on the criminal penalties under the CCA.

A point in favour of criminal sanctions that closely resembles the above discussion is that such penalties stigmatise the offender, whether it be a corporation or an individual, and this is advantageous for two reasons.[193] Firstly, the threat of criminal stigmatisation may add to the deterrent effect of the penalty by making the potential offender more aware of the consequences of their actions. Secondly, the fact that the penalty will stigmatise the offender relates to, and reflects the fact that, cartel offences are morally blameworthy.[194] The reason that cartel offences are morally blameworthy comes back to the principle of public interest. Since competition is supposed to be in the public interest and a competitive environment is a public benefit, if a cartel interferes illegally with this environment, the cartel's interference is criminally blameworthy.[195]

To illustrate this point further, people generally attempt to compare cartels with other, similar, illegal conduct. Commonly, people tend to compare cartel offences to theft. Obviously, in New Zealand theft is punishable by criminal sanctions. One could argue, however, that if New Zealand could create a civil penalty that would be an effective deterrent against theft, then we should abandon our criminal penalties in this respect.[196] This view, however, fails to see that retribution or punishment is a valid objective of the criminal penalties for theft. Namely, even if New Zealand could deter theft with civil sanctions, this would be inappropriate as criminal penalties formally condemn theft as morally blameworthy and can lead to stigmatisation and punishment.[197] Some people attempt to argue that cartel offences are similar to theft and, therefore, criminal sanctions are the only appropriate penalty. Namely, as with theft, the participant in a cartel takes wealth from other consumers in society. Differently from theft, however, is the fact that consumers actually consent to the

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[193] Ministry of Commerce, above n 7, 26.

[194] Janda and Bellemare, above n 131, 633; Ministry of Commerce, above n 7, 24; Famula, above n 132, 160-161.

[195] Famula, above n 132, 160-161; Janda and Bellemare, above n 131, 636.

[196] Janda and Bellemare, above n 131, 634.

[197] Janda and Bellemare, above n 131, 634.

cartel taking their wealth. Nevertheless, the cartel removes the consumers' ability to choose between competitive prices and, consequently, the cartel vitiates any consent the participants obtain.[198]

There are two other reasons why cartel offences are similar to theft. First, as with theft, the cartel does not simply transfer the wealth from the consumer to the producer, but a "dead-weight" loss also occurs. This refers to the loss that the participants in the cartel do not capture.[199] For example, this could include decreased consumer confidence in the principle of a competitive market or the fact that consumers cannot choose to apply to other areas of the economy the wealth the cartel has taken. Secondly, participants in a cartel use quite elaborate techniques to keep their activities secret, and this shows that they fear prosecution and people defining their conduct as anti-consumer. As with theft, therefore, the offenders know they are guilty of wrongful behaviour that is deserving of punishment and public outrage.[200]

In my opinion, the analogy of cartel offences with theft is a valid one for the reasons already mentioned. There is no persuasive reason, from either common sense or philosophical perspectives, why Parliament should define cartel offences as civil wrongs and theft as criminally blameworthy. All that the difference between theft (criminal wrong) and cartel offences (civil wrong) shows, is that the mindset of "white-collar" offences being less blameworthy than other "blue-collar" crimes still largely applies to policy makers in New Zealand.[201]

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[198] Janda and Bellemare, above n 131, 635. The authors also argue that cartels are similar to criminal fraud in this respect. Namely, the cartel participants do not disclose how they set the price to consumers and there is the false appearance of competition. A cartel, or price fixing arrangement, therefore, is analogous to a fraudulent price.

[199] P S Crampton and J T Kissack "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities" (1993) 38 McGill LJ 569, 586.

[200] Famula, above n 132, 162; P L Warner and M J Trebilcock "Fixing Price-Fixing Laws" (1996) 17 C Comp Rec 48, 51.

[201] The Ministry of Commerce, above n 7, 27-30 has also raised the point that cartel offences could be similar to tax and customs duty evasion, which are offences punishable by criminal penalties in New Zealand. The Ministry did not come to any final view on this issue, but their discussion does indicate that the comparison may be valid. From the Ministry's discussion of the issue, it is my opinion that this comparison is also accurate. In fact, cartel offences may be more serious than tax and customs duty evasion, the reason being that cartel offences more directly affect the public and the economy. A cynical view, however, could be that Parliament will only make white-collar offences that directly affect their wealth criminal, as with tax evasion, while those having a more direct affect on the public will merely be civil wrongs.

Overall, it is my opinion that New Zealand should, under the NZCA, have available the option of criminal fines and imprisonment for cartel offences. These offences are serious, clearly illegal and difficult to detect. The option of criminal penalties would be a greater deterrent for potential offenders and would consequently reduce the amount of cartel offences in New Zealand. In addition, criminal penalties will rightly stigmatise the offender as cartel offences are morally blameworthy and contrary to the public interest. There are also persuasive arguments that cartel offences are analogous to theft and tax and customs duty evasion, which are all punishable by criminal penalties in New Zealand. Criminal sanctions are, therefore, a valid option for reform and, in my opinion, one that Parliament must implement to reflect the seriousness of, and better deter, cartel offences under the NZCA. The final issue, however, is exactly how the Courts in New Zealand will be able to find corporations criminally liable for cartel offences if Parliament does adopt the reform option of criminal sanctions.

B Corporate Criminal Liability

To find a corporation liable for a cartel offence, the court must be able to impute the corporation with the conduct of its employees.[202] The courts will do this via the doctrine of corporate criminal liability and, in short, this refers to the extent to which a court can hold a corporation criminally responsible for acts and omissions of individuals within the company.[203] This part discusses the law in New Zealand relating to corporate criminal liability for mens rea offences. In addition, this part briefly compares the law in New Zealand with that in Canada and the United States. This part also outlines the three main policy arguments for and against the doctrine of corporate criminal liability.

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[202] This is because, in the strict sense, the corporation never does anything; only by acting via individuals can the corporation act at all.

[203] See: Joseph DiMento, Gilbert Geis and Julia Gelfand "Corporate Criminal Liability: A Bibliography" (2000/2001) 28 Western St UL Rev 1, 2.

1 *New Zealand law*

The leading case in New Zealand relating to corporate criminal liability is *Nordik v. Inland Revenue*.[204] This case directly concerned s 228(1)(b) of the Land and Income Tax Act 1954, but is more important for the comments of Cooke J (as he then was) in relation to corporate criminal liability in New Zealand. Cooke J referred to the decision of the House of Lords in *Tesco v. Nattrass*[205] and decided that the law of the United Kingdom was applicable in New Zealand.[206] The principle one extracts from these decisions is that corporations will be criminally liable for mens rea offences if the individual committing the offence acted as the company and if this individual's mind was the mind of the company.[207] Generally, if the individual was the "directing mind" of the corporation, the corporation will be criminally liable for the mens rea offence.[208] Commonly, individuals in a corporation satisfy this "directing mind" element if they are included in the board of directors, managing directors, or other superior members of the corporation who carry out managerial functions and act and speak for the company.[209] Academics and judges have conveniently labelled this principle as the doctrine of identification.[210]

After applying this test, the House of Lords in *Tesco v. Nattrass* determined that a manager of one of Tesco's supermarkets could not be included among the directing minds of the company.[211] Conversely, Cooke J in *Nordik v. Inland Revenue* found that one could easily class a managing director as the directing mind of the company.[212]

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[204] *Nordik Industries Ltd v. Regional Controller of Inland Revenue* [1976] 1 NZLR 194 (SC).

[205] *Tesco Supermarkets Ltd v. Nattrass* [1971] 2 All ER 127 (HL).

[206] *Nordik v. Inland Revenue*, above n 204, 201.

[207] *Tesco v. Nattrass*, above n 205, 131 per Lord Reid, 140 per Lord Morris, 148 per Lord Pearson; *Nordik v. Inland Revenue*, above n 204, 202-203.

[208] *Tesco v. Nattrass*, above n 205, 132 per Lord Reid; *Nordik v. Inland Revenue*, above n 204, 199.

[209] *Nordik v. Inland Revenue*, above n 204, 201-202.

[210] *Nordik v. Inland Revenue*, above n 204, 199; Celia Wells "A Quiet Revolution in Corporate Liability for Crime" (1995) 145 N Law J 1326.

[211] *Tesco v. Nattrass*, above n 205, 127. It must be borne in mind, however, that there were several hundred Tesco supermarket managers, each located in one of Tesco's many stores.

[212] *Nordik v. Inland Revenue*, above n 204, 202-203. Note that these two cases are clearly reconcilable.

In recent times, however, the doctrine of identification has come under scrutiny in both the United Kingdom and New Zealand. Some academics have argued that modern cases have confused the identification doctrine and now the doctrine of vicarious liability, or the "scope of employment test", is the test the court should use to hold corporations liable for mens rea offences.[213] This means that if any of a corporation's employees commit a mens rea crime, the court can attribute this to the corporation provided the employee committed the crime in the course of their employment.[214]

In New Zealand, Lord Hoffman in the Judicial Committee addressed this point when the Committee used the scope of employment test to find a company liable for the acts of their employees.[215] The Court of Appeal in *Linework Ltd v. Department of Labour*[216] followed this reasoning when they found that the scope of employment rule could attribute to the company the criminal conduct of a foreman in charge of a work site. Wickins and Ong argue that *Meridian v. Securities*, and therefore *Linework Ltd v. Department of Labour*, disposes of the identification doctrine and restricts it to exceptional circumstances.[217] With respect, however, in my opinion this is overstating the effect of the *Meridian v. Securities* case. Lord Hoffman states in *Meridian v. Securities* that what test the court will use depends upon the statute the court is interpreting and only that this was such a case where use of the identification doctrine was inappropriate.[218] In addition, *Linework Ltd v. Department of Labour* provides no

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[213] R J Wickins and C A Ong "Confusion Worse Confounded: The End of the Directing Mind Theory" [1997] JBL 524, 553. The authors refer to the following cases in detail: *El Ajou v. Dollar Land Holdings PLC* [1994] 2 All ER 685 (CA); *Re Supply of Ready Mixed Concrete (No. 2), Director of Fair Trading v. Pioneer Concrete* (U.K) Ltd [1995] 2 All ER 135 (HL); *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 3 NZLR 7 (Judicial Committee).

[214] Wickins & Ong, above n 213, 553.

[215] *Meridian v. Securities Commission*, above n 213, 7, 16.

[216] *Linework Ltd v. Department of Labour* [2001] 2 NZLR 639 (CA).

[217] Wickins & Ong, above n 213, 553.

[218] *Meridian v. Securities Commission*, above n 213, 7, 16. Lord Hoffman states:

> Their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether

support for the view that the identification doctrine is inappropriate for mens rea crimes. This is because this case concerned section 50 of the Health and Safety in Employment Act 1992, which is an offence not requiring any mens rea.[219] Furthermore, general texts on corporate criminal liability state that the identification doctrine is still the primary way for a court to hold a corporation criminally liable for mens rea offences in the United Kingdom and New Zealand.[220]

Overall, it seems that the courts will still use the identification doctrine in most circumstances to find corporations liable for mens rea crimes. It is likely, therefore, that the courts will use this doctrine to find corporations liable if Parliament was to make cartel offences punishable by criminal sanctions.

2 *Canada*

The law relating to corporate criminal liability for mens rea offences in Canada is, for the most part, identical to that of the United Kingdom. The leading decision in Canada is *Canadian Dredge*, and this case adopts the law of the United Kingdom from *Tesco v. Nattrass*.[221] The court in *Canadian Dredge* stated that, when dealing with criminal offences requiring mens rea, whether or not the court finds the corporation liable depends on the application of the identification doctrine.[222] The Canadian courts, however, have qualified this by stating that it can only operate when:

> The action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company (sic).[223]

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the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.

[219] *Linework Ltd v. Department of Labour*, above n 216, 639.

[220] Buddle Findlay *The Laws of New Zealand: Companies* (Butterworths, Wellington, 1997) 20-23; Lord Hailsham *Halsbury's Laws of England: Companies* (4 ed, Butterworths, London, 1996) paras 1157, 1158; Lord Hailsham *Halsbury's Laws of England: Criminal Law, Evidence and Procedure* (4 ed, Butterworths, London, 1996) para 35.

[221] *Canadian Dredge & Dock Co Ltd et al v. The Queen* (1985) 19 DLR (4th) 314 (SCC).

[222] *Canadian Dredge*, above n 221, 328.

[223] *Canadian Dredge*, above n 221, 351.

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In addition, another minor difference between the law of Canada and the United Kingdom is that in Canada the courts have applied the doctrine more widely. Namely, more individuals within the relevant corporation will come within the meaning of the "directing mind" under Canadian law.[224]

3 *United States*

Conversely, courts in the United States use the doctrine of respondeat superior to find corporations criminally liable for mens rea offences.[225] This doctrine contains three main elements. First, an individual must have committed the actus reas with the required mens rea.[226] Secondly, the individual must have been acting within the scope of his or her employment.[227] Finally, the individual must have committed the crime with the intention of providing the corporation with a benefit.[228] As well as having a different test, therefore, it is clear that corporate criminal liability in the United States is much wider than that of the United Kingdom, New Zealand or even Canada.[229] As stated previously, however, some authors have argued that courts in the United Kingdom and New Zealand are moving towards a "scope of employment" doctrine.[230]

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[224] Eric Colvin "Corporate Personality and Criminal Liability" [1995] Crim LF 1, 10. In addition, in Canada a corporation may have more than one directing mind (*Canadian Dredge*, above n 221, 337).

[225] See: *New York Central & Hudson River v. United States* (1909) 212 US 481.

[226] V S Khanna "Corporate Criminal Liability: What Purpose Does It Serve?" (1996) 109 Harv L Rev 1477, 1489. Khanna expand on this at 1489:

> If a particular agent, regardless of rank in the corporation, had the necessary state of mind, this mens rea can be imputed to the corporation. Alternatively, mens rea can be shown on the basis of the 'collective knowledge' of the employees as a group.

[227] Khanna, above n 226, 1489. At 1489, Khanna states:

> The scope of employment includes any act that 'occurred while the offending employee was carrying out a job-related activity. In fact, this requirement is so broad that courts may hold corporations liable even when corporations have forbidden the wrongful activities.

[228] Khanna, above n 226, 1490. At 1490, Khanna explains:

> The employee need not act with the exclusive purpose of benefiting the corporation, and the corporation need not actually receive the benefit.

[229] Khanna, above n 226, 1490.

[230] Wickins & Ong, above n 213, 554.

In part at least, this could be due to a desire to be more in line with the law of the United States, especially given that countries strong economic standing.[231]

4 Policy arguments

There are three main arguments used both in support, and in opposition, to the doctrine of corporate criminal liability. First, supporters of corporate criminal liability argue that only by holding a corporation criminally liable can the law adequately deter future criminal acts by corporations.[232] More specifically, by finding a corporation criminally liable and by imposing on that corporation criminal penalties, the courts will be able to reduce offences by that, and other, corporations.[233] Opponents of this doctrine, however, reply to this by claiming that the courts will be able to meet this deterrence objective just as well, if not better, by finding corporations only civilly liable.[234] Overall, there is no conclusive statistical evidence relating to this point, but my opinion is that finding a corporation criminally liable will be a better deterrent. The main reason being that the public perception is that criminal penalties are more serious than civil sanctions. Common sense suggests, therefore, that corporations will be less likely to breach laws carrying the more serious criminal penalties.

Proponents of the doctrine also claim that corporate criminal liability is the best method to fulfil the retribution rationale for punishment. Namely, corporate criminal liability is the only doctrine that will adequately punish corporations for their criminality.[235] Opponents reply to this argument by claiming that corporate criminal

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[231] Compare: Wickins & Ong, above n 213, 554. Differently to me, the authors at 554 state that English courts may actually be striving for compatibility with European law:

> Another reason [for the change in doctrines] may be a desire to harmonize English company law with continental law, where rigid categorization of how the acts of directors and others bind a company appear less in evidence.

[232] DiMento, Geis & Gelfand, above n 203, 2.

[233] See: Stephen A Saltzburg "The Control of Criminal Conduct in Organisations" (1991) Bost UL Rev 421, 430.

[234] For a detailed formulation of this argument see: Khanna, above n 226, 1477.

[235] For a detailed argument in support of this point see: Lawrence Friedman "In Defense of Corporate Criminal Liability" (2000) 23 Harv JL & Pub Pol'y 833.

liability is not the only way to satisfy the retribution doctrine. Opponents do this by arguing that the courts can adequately punish a corporation via civil liability, and therefore courts do not need to rely upon criminal liability.[236] Opponents also claim that corporate criminal liability exceeds the intended purpose of the retribution doctrine, as it punishes people who are innocent of the crime. Such people could include shareholders, employees and those who live in the community around the relevant corporation.[237] Nevertheless, even if corporate criminal liability does punish innocent people, this is even the case with individual criminal liability.[238] The fact is that, the need to punish the corporation for the crime outweighs the suffering the penalty causes to innocent people and corporate criminal liability is the most effective way to fulfil this retributive objective. In my opinion, therefore, corporate criminal liability is the best means to punish the corporation.

Finally, supporters of the doctrine also argue that corporate criminal liability stigmatises the company. This, supporters claim, has the beneficial result of damaging the corporation's reputation, and any criminal conviction "constitutes a lasting public statement that the organisation itself should be blamed for the violation."[239] Opponents, however, reply to this with the claim that stigmatisation of the corporation is hardly ever socially desirable and, even when it is, civil sanctions can adequately fulfil this need.[240] In my opinion, however, civil sanctions do not adequately stigmatise the corporate offender because of the correct public perception that criminal penalties are more serious. In addition, it is often socially desirable to stigmatise the corporation as the corporation itself may be criminally responsible for certain acts and not just the employees. For example, there is no reason why a court

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[236] Khanna, above n 226, 1532.

[237] DiMento, Geis & Gelfand, above n 203, 3.

[238] For example, if a someone is a court convicts someone of murder and sentences them to ten years in prison, this may punish innocent people. Namely, what if this person is the single parent of a child? The innocent child clearly suffers from not having a parent, but the need to fulfil retribution outweighs even this innocent child's suffering. This is what happens with corporate criminal liability; the need to punish the corporation outweighs the harm the penalty causes to innocent people. In addition, it is arguable that shareholders, and maybe even employees, are not innocent of the offence in the first place. People in the community, however, would probably be innocent.

[239] Saltzburg, above n 233, 431-432.

[240] Khanna, above n 226, 1499, 1508.

should not be able to state that a corporation that encourages breaches of the criminal law is responsible for the crime in question.

Overall, if Parliament made cartel offences punishable by criminal sanctions, the courts could find the corporation itself liable and it is likely that they would do this via the identification doctrine, as would the courts in the United Kingdom and Canada. The United States, however, uses the doctrine of respondeat superior and there is an argument that New Zealand and the United Kingdom may be moving more in line with the law of the United States. Relating to the policy arguments, there are persuasive claims both for and against corporate criminal liability. In my opinion, however, if one has to come to a view it should be that they all favour the doctrine of corporate criminal liability. The general doctrine of corporate criminal liability, therefore, is unlikely to change substantially in the near future, and it will provide a means for the court to hold corporations liable for cartel offences should Parliament make these punishable with criminal sanctions.

V CONCLUSION

To be effective in New Zealand, competition law penalties under the NZCA must satisfy the main objectives of specific and general deterrence, and retribution. Currently, the penalties under the NZCA are reasonably extensive and have many admirable features. In my opinion, however, they are not fulfilling these objectives as well as they could, and Parliament should look to other jurisdictions to try to identify whether they can make any improvements to the penalty provisions in the NZCA.

The penalty provisions under the UKCA are reasonably broad and give the Director a wide range of powers, but certain principles justifiably narrow how the Director can use these penalties. In Canada, the penalty provisions under the CCA are also extensive and, as of late, have been very effective. The New Zealand Parliament may want to look at some of the reform options this paper has raised in order to make the NZCA more effective. In my opinion, however, the most appealing reform option for Parliament is to give the courts the power to impose criminal sanctions upon offenders who commit cartel offences.

This paper's general discussion on criminal sanctions for cartel offences has determined that Parliament must seriously discuss the possibility of adding such criminal sanctions to the NZCA. In fact, it is my opinion that Parliament must make cartel offences punishable by criminal sanctions. In addition, if Parliament was to adopt this reform option, the courts could impose these sanctions upon both the individual offender and the corporation itself. Although it is undergoing some minor judicial changes, the courts may still find a corporation criminally liable for cartel offences under the doctrine of corporate criminal liability.

Overall, this paper maintains that the penalty provisions under the NZCA are not a effective as they could be and that the reform option of criminal sanctions for cartel offences is something that Parliament must seriously consider.

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