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Response to submissions received on Draft Competitor Collaboration Guidelines

Explanatory paper

Date: 7 August 2014

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Purpose

1. Today we released our revised draft Competitor Collaboration Guidelines (**Revised Draft Guidelines**), together with a draft collaborative activity clearance application form. The Revised Draft Guidelines explain our proposed approach to the new provisions that will be introduced to the Commerce Act 1986 (**the Act**) by the Commerce (Cartels and Other Matters) Amendment Bill (**the Bill**) if passed in its current form.

2. This explanatory paper summarises the changes made to the Revised Draft Guidelines, and our response to the feedback received on the initial draft Competitor Collaboration Guidelines, published on 1 October 2013 (**Initial Draft Guidelines**).

3. By publishing the Revised Draft Guidelines and this accompanying paper in advance of the Bill being passed, we aim to provide the business community with a clear understanding of our revised intended approach to the amendments proposed by the Bill, the changes we have made (and have not made) to the Initial Draft Guidelines, and the reasons for doing so.

Summary of changes in Revised Draft Guidelines

4. The Revised Draft Guidelines include the following key changes from the Initial Draft Guidelines.

    4.1 A new two-stage clearance process, with fact confidentiality available for Stage 1 of that process. This is discussed further at paragraph 25.

    4.2 Refinement of, and further guidance on, our approach to assessing whether the collaborative activity exemption will apply to a cartel provision. This includes both:

        4.2.1 our approach to the 'reasonably necessary' limb, which is discussed at paragraph 18; and

        4.2.2 additional guidance on when parties are likely to be carrying on an enterprise in cooperation. This is not discussed further in this paper.

    4.3 Refinement of, and further guidance on, our approach to the vertical supply exemption. Based on our discussions with interested parties, we gathered that there was confusion about how we would apply this exemption so we have sought to clarify this in the Revised Draft Guidelines.

    4.4 We have added some additional examples, and we discuss our approach to examples at paragraph 13.

    4.5 We removed the franchises chapter, which we will replace with a factsheet for franchises. We discuss this further at paragraph 35.

5. We see merit in the suggestion from some submitters that we update the Guidelines over time by adding examples as our experience in dealing with the new provisions

and case law develops. This would enable us to provide examples based on real-life scenarios that have been considered under the new provisions. Such examples are likely to provide better guidance than hypothetical and abstract examples, or examples using facts from cases that were considered under different provisions.

6. The Revised Draft Guidelines contain a number of minor amendments in response to feedback. A summary of our responses to all the feedback we received is outlined in Attachment A.

Next steps

7. Given the robust feedback provided by submitters on the Initial Draft Guidelines, we do not intend to conduct a further round of consultation on the Revised Draft Guidelines. Rather, we are publishing the Revised Draft Guidelines now so that businesses and their advisors have an up-to-date view of our approach to the new provisions.

8. We will finalise our Guidelines once the Bill is enacted, taking into account any amendments made through the Parliamentary process.

Background

9. The Bill is currently partway through its second reading in Parliament. The Bill proposes (among other things) to amend the prohibition against cartel conduct and the exemptions to that prohibition, and introduces a new clearance regime for collaborative activities that involve one or more cartel provisions.

10. We published the Initial Draft Guidelines on 1 October 2013 and called for submissions on them.[1] The Initial Draft Guidelines (like the Revised Draft Guidelines) explained:

    10.1 the conduct we think is captured by the new cartel prohibition;

    10.2 how we will apply the new exemptions to the cartel prohibition; and

    10.3 our proposed approach to a collaborative activity clearance.

11. In response to a call for feedback on the Initial Draft Guidelines we received 15 written submissions.[2] We also conducted 10 one-on-one meetings with various stakeholders to gain further feedback.

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1 We subsequently delivered presentations on the Initial Draft Guidelines to stakeholders in Auckland (7 October 2013), Wellington (10 October 2013), and Christchurch (11 November 2013).

2 See Attachment A for a list of submitters.

Summary of feedback received

12. The feedback we received on the Initial Draft Guidelines was generally positive, although four major themes emerged during the consultation process.[3] These four themes – which we address in turn below – are:

    12.1 requests for more worked examples;

    12.2 concerns about our approach to assessing whether a cartel provision is reasonably necessary for the purposes of the collaborative activity – in particular, our view that "a cartel provision is reasonably necessary if the parties would be materially hindered in achieving the collaborative activity's purpose if they used a significantly less restrictive alternative to the cartel provision";

    12.3 concerns that the proposed clearance process would not provide sufficient confidentiality protections for parties seeking clearance, which would act as a disincentive for parties seeking clearance; and

    12.4 concerns that franchises were being identified as raising different issues compared to other business models.

Request for more worked examples

13. A number of submitters asked us to include more worked examples throughout the Guidelines.

14. We agree that examples can be a useful way to explain and illustrate issues. It is for that reason that we adopted examples – and real case examples – in many places throughout the Initial Draft Guidelines. We have included a few additional examples in the Revised Draft Guidelines. This includes two worked examples for the collaborative activity exemption.

15. However, our experience has been that drafting these detailed examples in an illustrative manner is challenging. We cannot provide definitive answers about certain types of arrangements without reviewing the specifics. This means our examples tend to be caveated and/or reliant on assumptions. In many cases, the resulting examples simply identify the questions we will be asking. A conclusion of 'it depends' did not seem helpful. For these reasons, we did not consider such examples added much value to the Guidelines.

16. A number of submitters suggested using past cases as case studies for the provisions. We agree that past cases can provide an appropriate factual basis for examples, and they have been used in some places throughout the Revised Draft Guidelines. However, for many past cases the information was gathered with a focus on different statutory questions, and we did not consider these to be wholly applicable.

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[3] As noted above, our response to all submissions made is outlined in Attachment A.

17. Some submitters expressed a desire that we continually update the Guidelines. We think there is real merit in this idea. We intend to do this by including new examples as our experience in dealing with the new provisions develops. This will enable us to provide real-life examples that have been considered in the relevant context. This is likely to provide more hands-on guidance than the hypothetical examples we can make available at this time.

Our proposed approach to reasonably necessary

Approach proposed in the Initial Draft Guidelines

18. Our proposed approach to assessing whether a cartel provision is reasonably necessary for the purposes of section 31 was set out at paragraphs 5.14 to 5.21 of the Initial Draft Guidelines. There were three key paragraphs in this section.

    18.1 First, we clarified that a cartel provision need not be essential for the collaborative activity in order to be reasonably necessary (paragraph 5.15).

    18.2 Second, we explained that "a cartel provision is reasonably necessary if the parties would be materially hindered in achieving the collaborative activity's purpose if they used a significantly less restrictive alternative to the cartel provision" (paragraph 5.17).

    18.3 Third, we said that parties should be able to explain why other alternatives to the cartel provision are inadequate or unavailable, or why such alternatives would not allow the parties to pursue their collaborative activity (paragraph 5.20).

Themes emerging from feedback

19. Three themes emerged from the feedback we received on our proposed approach to the 'reasonably necessary' test.

    19.1 Some submitters felt we provided insufficient guidance on how we will apply the 'reasonably necessary' limb.

    19.2 Several submitters indicated that using the language of 'materially hindered' risked creating additional elements of the test that may be read down by a court. Instead, submitters recommended that the Guidelines maintain a principled approach to 'reasonably necessary', drawing upon existing judicial consideration of reasonable necessity.

    19.3 One submitter suggested that our reference to 'materially hindered' may be setting the bar too low for what is 'reasonably necessary'.

Our response to the feedback received

20. In response to the submissions made on our interpretation of "reasonably necessary", we have made amendments to Chapter 5 of the Guidelines to provide additional guidance. Our amendments build on the work contained in the Initial Draft Guidelines and draw more explicitly on:

20.1 the way the courts have interpreted the phrase 'reasonably necessary' in other legal contexts;

20.2 how that phrase is used in the US and Canadian Guidelines; and

20.3 the interpretation of 'reasonably necessary' under the common law doctrine of reasonable restraint of trade.

21. Our view is that courts have been reluctant to delve too deeply into defining what 'reasonably necessary' means. As was recently said in one High Court judgment, 'reasonably necessary' is a standard used in everyday language that should require no undue elaboration.[4]

22. Nevertheless, what does appear clear to us is that 'reasonably necessary':

22.1 does not impose a 'but for' test;

22.2 does implicitly require a consideration of alternatives;

22.3 does require something more than a mere preference – Whata J recently said that for something to be reasonably necessary it needed to be clearly justified;[5] and

22.4 is a matter of judgement for the Commission or the Court to make (and the burden lies with the parties to the collaboration, except in the case of criminal proceedings).

23. We have removed the 'materially hindered' language used in the Initial Draft Guidelines. That said, we do not accept that this language imports a different test to the 'reasonably necessary' test. Rather, we consider that the words simply assist in explaining that test. Nevertheless, given the feedback we received we chose to remove this phrase.

24. The Revised Draft Guidelines do, however, break down our proposed approach into more stages, with the objective of guiding parties through our logic. Our approach focuses on:

24.1 the interests the parties are seeking to protect through the cartel provision;

24.2 the importance of those interests to the wider collaboration;

24.3 the scope of the cartel provision; and

24.4 the alternative options available to the parties.

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4 *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347, at [93].

5 *Queenstown Airport* at [93].

Confidentiality and the clearance process

Concerns raised by submitters

25. A number of submitters raised concerns about the lack of confidentiality for their clients' collaborative activities if they were to utilise the proposed clearance regime. This feedback was consistent with feedback given to MBIE and the Commerce Select Committee.

26. Specifically, submitters considered that collaborative activities will often be commercially sensitive, even after they have been entered into. This, it is said, is especially true if the arrangement involves the development of a new product or system in competition with other market participants. The public nature of the clearance process is therefore seen as a real disincentive to parties seeking clearance for their collaborative activities.

27. Submitters put forward two main alternatives to the approach proposed in the Initial Draft Guidelines, which were thought to provide greater confidentiality protections.

    27.1 An informal 'letter of comfort'-type regime. This would allow parties to test their arrangements containing cartel provisions with us, as we would provide advice as to whether we consider an exemption applies (without any substantial lessening of competition assessment). We would conduct this assessment on a confidential basis.

    27.2 A formal two-stage clearance process. This option was proposed by Simpson Grierson. Simpson Grierson's detailed description of the two-step process is set out below:[6]

> **Stage One:** The Commission determines by way of an interim non-binding decision:
>
> (i) whether there are reasonable grounds for believing there is a cartel provision in the relevant contract, arrangement or understanding;
>
> (ii) whether the parties are involved in a collaborative activity; and
>
> (iii) whether the cartel provision is reasonably necessary for the purposes of the collaborative activity.
>
> If the Commission answers "yes" to all of these questions, it moves on to Stage Two, and the applicant cannot withdraw their application at this point. If the Commission answers "no" to any of these questions, the applicant will have the option of either withdrawing their application or requesting that the Commission moves on to Stage Two regardless.
>
> We do not envisage Stage One as typically requiring any publicity relating to the application, nor do we consider that the Commission should take a substantial amount of time to consider an application at this stage.

6 Simpson Grierson, *Comments on Draft Competitor Collaboration Guidelines*, 12 November 2013, at [24].

> **Stage Two:** The Commission determines whether entering into or giving effect to the contract, arrangement or understanding will be likely to have the effect of substantially lessening competition in a market. At this stage, the Commission would be required to publicise the application and consult with market participants. If the Commission is satisfied that there will be no substantial lessening of competition, it will grant clearance, unless any information it has received in Stage Two leads it to change its interim conclusion from Stage One.

Our view and proposed changes to the clearance regime

Informal letter of comfort regime

28. We do not consider it appropriate to adopt an informal letter of comfort regime. There are a number of reasons why we hold this view, three of which are set out below.

    28.1 An exemption-only clearance regime was considered and rejected during the policy making process. We do not consider it appropriate for the Commission to introduce this via an informal backdoor method.

    28.2 It would create an inconsistency between the merger clearance regime and the collaborative activity clearance regime which, in our view, has been determined not to have any policy justification.

    28.3 It may potentially turn the Commission into a legal advisor of last (or even first) resort for these types of arrangements. This would divert Commission resources into processing letters of comfort, and away from its other functions.

Simpson Grierson's two-stage clearance proposal

29. Nor do we consider we could adopt Simpson Grierson's approach as proposed. This is mainly because we do not consider we can prevent an applicant withdrawing an application once they have met the first step (ie, the collaborative activity exemption criteria) of the application process.

Our revised proposed approach

30. However, there are aspects of Simpson Grierson's proposal we are likely to adopt in practice in any event.

31. As a result, we have amended our proposed clearance process into a two-stage process. This change is made to reflect the fact that in order to grant clearance we must be satisfied that:

    31.1 the collaborative activity exemption applies; and

    31.2 entering into or giving effect to the arrangement will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

32. As explained in the Revised Draft Guidelines, in Stage 1, we reach a view as to whether the collaborative activity exemption applies.

    32.1 If our preliminary view is that we are satisfied that the exemption applies, we then proceed to Stage 2.

    32.2 If we are not satisfied that the collaborative activity exemption applies, then we would decline clearance, issue our Determination, and not proceed to Stage 2.

33. In Stage 2 we would conduct our substantial lessening of competition assessment and confirm our preliminary view that the collaborative activity exemption applies.

34. To reflect parties concerns about confidentiality:

    34.1 we have indicated that we are open to granting fact confidentiality on request during Stage 1 of our investigation;

    34.2 if granted, we will not disclose the names of the parties on the public register, nor seek third party views during Stage 1 (although this may have timing implications for Stage 2); but

    34.3 we are highly unlikely to grant requests for fact confidentiality for Stage 2;

    34.4 otherwise, the normal rules associated with confidentiality apply.

Franchises

35. We included a specific chapter on franchises in the Initial Draft Guidelines in response to a request from the Select Committee to provide guidance to this sector.

36. Our objective was to explain that the normal rules applied to franchises, and that our treatment of franchises is unlikely to vary materially from our treatment of other business models.

37. However, it is not clear it had this effect. While some submitters considered it useful to have a franchise-specific chapter, we were left with the impression that singling out this one variety of business model has had the unintended consequence of implying that we consider franchises raise particular competition concerns.

38. That said, like any other form of business model, franchises are not immune from breaching the prohibitions in the Act. We are therefore not prepared to offer a broad assurance to all parties involved in franchises that they will not be capable of breaching the Act.

39. Reflecting on the feedback, we have decided to remove the specific franchise chapter and instead create a franchise factsheet.

Attachment A: Submissions received

Submitter	Summary	Commission's response
Meat Industry Association	Recommended that additional worked examples are introduced to the document, especially in relation to collaborative activities.	See discussion in paragraphs 13 to 17 above.
	A 'self-assessment check list is developed and attached to the guidelines.	Noted. Commission will consider whether to develop a factsheet for clearances.
	Commission should consider a clearance approach which minimises exposure of information in connection with a clearance application.	See discussion in paragraphs 25 to 34 above.
New Zealand Shippers Council	Endorses Meat Industry Association submission.	See response to Meat Industry Association submission above.
New Zealand Retailers Association	Endorsed submission made by Business New Zealand with particular emphasis given to call for worked examples.	See response to Business NZ submission below.
	Specific questions raised in relation to franchises.	Noted. Commission will consider as part of the factsheets. See paragraphs 35-37 above.
Aviation New Zealand	Examples are very manufacturer orientated. Value in including some service examples in the guidelines.	Noted. See Refrigerant Licensing Board examples used on pages 37 and 39 in the Revised Draft Guidelines.
	Commission sets up section on its website that is updated regularly to give examples of types of arrangements that are being approved.	There will be a register of agreements for which clearance has been sought and the Commission intends to publish reasons.
	Proposes an offshore collaboration exemption where New Zealand companies	This is beyond the Commission's remit, although the Commission notes s 44(g) of the Commerce Act.

Submitter	Summary	Commission's response
	that compete onshore but collaborate abroad to improve prospects of international success.	
Business NZ	Guidance material should not be locked in but instead should allow for modification and additions over the short to medium term. Also suggests that the guidelines and the website should not be treated as separate resources and should provide useful links.	Agreed. See discussion in paragraph 17 above.
	Suggests modifying chapters 6 and 7 to ensure businesses have a clear understanding of what they must go through. In particular, both chapters could have a summary box outlining what is involved from start to finish and a theoretical example.	The Commission considers that Chapters 6 and 7 deliver this. However, the Commission will consider whether to develop a factsheet for clearances.
	Suggests that it would be helpful to provide a summary of potential compliance costs for certain businesses going through an application process.	This is a matter beyond the Commission's knowledge.
	Suggests increasing the number of examples; including both simple and more complicated examples; including a combination of both traditional New Zealand industries and others that are likely to provide an increasing proportion of NZ's GDP growth; and including a section on the Commission's website where examples	See discussion in paragraphs 13 to 17 above.

Submitter	Summary	Commission's response
	could be added to over time.	
	Encourages the Commission to ensure that the regional and industry associations are made aware of the guidelines' existence through various means.	Noted.
Meredith Connell	Suggests that the application of 'in competition' is a key concept and could justify its own chapter.	Agree that in competition is a key concept but disagree it warrants its own Chapter. We consider the right balance is struck in the Revised Draft Guidelines.
	Raises concerns about the proposed interpretation of s 32. The exemption is only insofar as a cartel provision 'relates to' the supply/likely supply to a customer. 'Relates' requires a nexus between two things, but there is significant scope for argument about how close a nexus is required. MC's view is that the Commission has taken an overly permissive approach to the nexus required and in MC's view does not support the examples in 3.7.	Agree that 'relates to' requires a nexus between the supply and the cartel provision. See discussion in paragraphs [3.8] to [3.14] of the Revised Draft Guidelines.
	The guidelines adopt an objective approach to purpose. In Meredith Connell's view the objective/subjective approach is not free from doubt.	Amendments made to paragraphs [3.16] and [5.19] of the Revised Draft Guidelines to reflect the fact that evidence of subjective purpose is relevant.
	The Commission should make it clear that the reasonably necessary test is a much higher standard than merely preferable or desirable. MC's view is that by referring to 'materially hindered' it may be setting the bar too low.	See discussion in paragraphs [129] to [131] of the Revised Draft Guidelines and paragraphs 18 to 24 above.

Submitter	Summary	Commission's response
	Suggests that the Commission considers how it could give guidance to someone seeking clearance for both a merger and collaborative activity.	Noted but the Commission does not consider this is necessary in the Guidelines.
	Suggests some minor technical alterations.	Changes made.
	Public scrutiny is important and should be maintained and the Commission should not be more flexible in permitting clearances to occur in a confidential way.	Noted, but see discussion in paragraphs 25 to 34 above.
Bell Gully	Suggests that the Commission should clarify that in the vertical supply exemption a restriction on a supplier is also protected by the vertical supply exemption.	Amendments made to paragraph [3.12] of the Revised Draft Guidelines.
	Recommends giving examples of reasons for vertical restraints that would not generally be expected to be anticompetitive.	Noted. New worked examples provided.
	Suggests including a reference to the difference in dominant purpose between the vertical supply exemption and the collaborative activities exemption.	See paragraph [3.15] of the Revised Draft Guidelines.
	Suggests including an example which clarifies that syndicated loan arrangements would fit in the collaborative activities exemption.	Noted, but the Commission does not consider this is necessary.
	Recommends that the Commission should confirm that new exemptions contained in the Bill will apply from day one for existing	This has not been addressed in the Revised Draft Guidelines. Our view is that the new exemptions are likely to apply from Day 1. However, the Bill is silent on this and this is an issue that parties should raise with MBIE.

Submitter	Summary	Commission's response
	agreements.	
	Believe it would be hugely beneficial if there were scope for a confidential discussion in which parties can obtain guidance as to whether a provision qualifies for the collaborative activities exemption.	See discussion in paragraphs 25 to 34 above.
Buddle Findlay	Suggested some minor technical and grammatical changes.	Changes made.
	More worked examples.	See discussion in paragraphs 13 to 17 above.
Vodafone New Zealand Limited	Suggests it would be helpful to provide more detailed guidance on situations where potential entry by an upstream service provider will form part of the Commission's analysis.	Noted but we consider this is too detailed for the Guidelines. This may be something which is elucidated in the future through examples.
	Helpful to expand further on the relatively limited guidance on hub and spoke arrangements.	Noted but we consider the Guidelines strike the appropriate balance.
	Helpful to provide further guidance as to how the reasonably necessary test will be assessed in practice – perhaps in the form of examples.	See discussion in paragraphs 13 to 17 above, and 18 to 24.
	If the Commission's intention is that new clearance is required only when change to a collaborative arrangement involves addition of or amendment to a cartel provision contained in an arrangement that has been given clearance, then we suggest rewording	The paragraphs referred to note that if parties who have clearance for one agreement (agreement A) seek to enter a new or additional agreement (agreement B), the parties would need to obtain a separate clearance for agreement B if they want clearance from agreement B.

Submitter	Summary	Commission's response
	[6.3] to make this clear.	
	Not necessarily clear whether any change to an existing agreement that has the benefit of a clearance, including narrow technical changes that could not on any view affect competition, would result in that arrangement being treated as a new agreement needing further clearance, and where the line should be drawn in such cases. We understand that in each case where an arrangement is amended, the parties will need to assess whether that amendment would or might alter the assessment on which a decision to give clearance was based. However, we doubt that the interests of business or the Commission would be well served by a suggestion any change to a collaborative arrangement, irrespective of its potential impact on competition, would require new clearance. This would, in our view, risk the Commission being asked to consider an increased volume of clearance applications that are essentially 'administrative' in nature, including in circumstances where there may be no change to cartel provisions already assessed.	Noted, however the clearance applies to the agreement which the parties submit to the Commission. Clearance gives immunity against both the Commission and third parties bringing action against the transaction. The process for revoking a clearance is set out in section 65D.
	Suggests that other factors, such as coordinated effects, could be included.	Noted, but the Commission does not regard this as necessary for the Guidelines.
Roading New Zealand	RNZ believes that the guideline's processes and procedures required for seeking clearances are primarily designed around	Noted, amendments made to the description of a collaborative activity to reflect that fact that in some cases a one-off collaboration may be sufficient.

Submitter	Summary	Commission's response
	long term enduring arrangements and as such may be impractical and unworkable to implement in certain situations because of the relatively short time frames involved from project notification to project tender. RNZ is concerned that the strict application of the Act/guidelines could appear to put RNZ members in breach of the requirements and thus seek clarification on the matter or input into resolving it.	
New Zealand Contractors Federation	Endorses the submission from Business NZ and makes additional observations.	See response to Business NZ submission above.
	The guidelines seem mainly to anticipate, and be predicated upon, long term JVs involving capital investment that can withstand the cost of more upfront regulatory investment. They don't seem to accommodate the transitory JVs that will be formed, dissolved and reformed in the tender space as parties jockey for position and align with counterparties that will give them the best opportunity to secure particular tendered work. The tender process is expensive – this often motivates parties to provide joint bids to reduce cost and risk. This is a genuine and legitimate business consideration, but does not fit well with conventional competition policy. A lot of these allegiances are	Noted, amendments made to the description of a collaborative activity to reflect the fact that in some cases a one-off collaboration may be sufficient. Other points raised are outside the Commission's remit.

Submitter	Summary	Commission's response
	favoured/sought by clients who believe it will preserve multiple players in the market for the future. Some members have suggested an express exception for a situation of a collaboration which doesn't SLC in a market and which the client knows about and endorses. Suggests a concession for client driven alliances should be considered. Other members suggest that this doesn't necessarily avoid collusion or imply that clients act with a well-developed understanding. Some suggest that the bid rigging exemption should have been broadened as opposed to being removed all together.	
Mitre 10	Given that the guidelines indicate that the Commission will likely draw an inference that the dominant purpose is to lessen competition between parties where parties fail to demonstrate the need for collaboration, Mitre 10 considers better guidance should be provided to assist organisations to understand what it is that the Commission requires. Guidance could be provided by specifying the types of information that are likely to assist the Commission to determine what the dominant purpose of the collaboration	Amendments made to Chapter 5 of the Revised Draft Guidelines. See also discussion in paragraphs 13 to 17 above, and 18 to 24 above.

Submitter	Summary	Commission's response
	is.	
	More worked examples, especially arrangements with Horizontal and Vertical aspects and collective structures.	See discussion in paragraphs 13 to 17 above.
	The Commission could better describe what it is looking for in assessing whether a cartel provision is reasonably necessary, as well as the approach the Commission will take to inherently indeterminate questions.	See discussion 18 to 24 above.
Russell McVeagh	Notes that guidelines are significantly shorter than overseas equivalents and do not provide specific examples of types of collaboration, the Commission's approach to those types of collaboration, or how they may apply to certain agreements. Suggests providing guidance to how the Commission would have applied the new regime in relation to some of the difficult collaboration situations that have arisen in the past.	Amendments made to Chapter 5 of the Revised Draft Guidelines. See also discussion in paragraphs 13 to 17 above, and 18 to 24 above.
	Views the requirement that an activity carried out in cooperation must be on-going as limiting the potential scope and usefulness of the exemption. Suggests providing further examples.	See footnote [57] of the Revised Draft Guidelines.
	Suggests that the brevity with which this part of the test is discussed will lead to parties to arrangements obtaining a false sense of security about the extent to which the Commission is likely to agree that their	Amendments made to Chapter 5 of the Revised Draft Guidelines – see paragraphs [103] to [109].

Submitter	Summary	Commission's response
	submitted prevailing purpose was in fact the prevailing objectively determined purpose. This can be made clearer by expressly stating the manner in which the Commission will carry out its inquiry and the documents it will typically examine in its analysis.	
	Believes that the Commission's adoption of the existing, highly public, merger clearance process is a missed opportunity to take a more commercial approach and fails to recognise the differences between mergers and potential collaborations. Due to the sometimes rapid pace of collaborations the same level of public consultation is not necessary. RMcV believes that given that confidentiality is a key commercial consideration, the current structure will act as a material disincentive for parties to apply.	See discussion in paragraphs 25 to 34 above.
	Guidelines indicate that the Commission will adopt an overly broad interpretation of when parties are 'in competition' with each other for the purposes of considering vertical supply contracts. Suggests that the guidelines would benefit from additional clarity around the Commission's interpretation of when upstream and downstream players are 'in competition' for the particular product that is the subject of the supply contract.	Disagree that the Commission has taken an 'overly broad' approach.
	Suggests that the guidelines should	We do not consider that is necessary for the Guidelines.

Submitter	Summary	Commission's response
	expressly state that government bodies or local councils cannot sanction behaviour that is in breach of the Act.	
	Suggests that it is important to clarify that joint submissions to central or local government bodies will be permissible.	We do not consider that is necessary for the Guidelines.
	Suggests expressly clarifying the types of information exchange that are permissible.	Noted but disagree this is a matter for the Guidelines.
Simpson Grierson	Potential Competitors example – suggests that this example may be too simplistic. The Commission should rework the example by including reference to further factors that would suggest the hard drive manufacturer is a potential competitor with the computer manufacturer.	Amendments made to example below paragraph [2.12] of the Revised Draft Guidelines.
	Suggests that it would be helpful for the guidelines to deal with whether a general restraint of trade would be prohibited under the market allocation limb of the cartel prohibition.	Disagree. A restraint of trade will be prohibited under the market allocation limb of the cartel prohibition when the requirements of that limb are met.
	Suggests that the guidelines make it clear that the exemption in the new section 32 applies only to a contract, and not arrangements and understandings.	See paragraph [3.6.1] of the Revised Draft Guidelines.
	The guidelines should make it clearer that the joint buying exemption only applies to the price fixing limb of the cartel prohibition.	See paragraph [4.2] of the Revised Draft Guidelines.

Submitter	Summary	Commission's response
	The guidelines could expand on what amounts to 'collective negotiation' under s 33(c).	See footnote [47] of the Guidelines.
	Collaborative Activities Exemption – requests more examples based on well-known NZ joint venture cases.	Further examples provided in Chapter 5.
	Proposed two-stage clearance process.	See discussion in paragraphs 25 to 34 above.
John Land Barrister	The guidelines suggest that during the transitional period no person can commence legal proceedings against any person giving effect to an arrangement containing a cartel provision that was entered into prior to the date of assent. JL believes that this is incorrect and that the transitional period only applies to proceedings under s 80 of the Act.	See paragraphs [1.22] to [1.24] of the Revised Draft Guidelines.
	Does not agree with the Commission's interpretation of the vertical supply contract exemption. In particular, disagrees with the Commission position that restrictions that A imposes on B's resupply are likely to 'relate to' the supply of goods from A to B if they form part of the contractual obligations giving rise to the supply. JL contends that restrictions of this nature relate to the resupply by B and not to the supply by A to B.	Disagree. But changes made to clarify the Commission's interpretation of 'relates to' to in Chapter 3 of the Revised Draft Guidelines.
	Suggests it would be helpful to have an appendix containing some specific examples	No Appendix included but see discussion in paragraphs 13 to 17 above.

Submitter	Summary	Commission's response
	of the application of the guidelines.	
	The guidelines say that the Commission can only consider clearance applications if the arrangement containing a cartel provision has not yet been entered into or given effect. There is however an exception in relation to shipping arrangements.	Noted, but no change made as the Guidelines are intended to provide enduring general guidance.
	Disagrees with the approach that written reasons will not be published on the date that the decision is issued.	Noted, but no changes made.
	Para 8.2 states that if the Commission is not satisfied that an arrangement will SLC it must decline to authorise the arrangement. This is not correct and that the Commission only needs to be satisfied that the conduct lessens competition in a market in some way – it need not be a substantial lessening.	Amendments made to paragraphs [8.2] of the Revised Draft Guidelines.
	Suggests that s 30D needs to be explained more clearly.	Noted, but no changes made. See footnote [101].
	Disagrees with the suggestion that many franchise arrangements will fall outside the cartel prohibition because many arrangements between the franchisor and franchisee are not arrangements between competitors.	Noted. See discussion in paragraphs 35 to 39 above.