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Cartel Criminalisation
Ministry of Economic Development
PO Box 1473
Wellington 6140

By email: cartels@med.govt.nz

Dear Ms Hutchins

Commerce (Cartels and Other Matters) Amendment Bill

1. Thank you for the opportunity to comment on the draft Commerce (Cartels and Other Matters) Amendment Bill.

2. The draft Bill makes some helpful amendments to the current legislation.

3. However, this submission focuses on areas of the Bill that in our view require further consideration.

4. As a general observation we note that from an operational perspective it would be highly desirable for the provisions to be aligned as closely as possible with the Australian legislation.

Key points

- The wording of the Bill may introduce a requirement in any prosecution under s 30 for the Commission to define an ecomonic market for the purposes of determining whether or not parties are in competition with each other. We understand that is not MED's intention.

- The Bill is not sufficiently clear on the issue of jurisdiction, which is the single most litigated aspect of our cartel programme. MED should take this opportunity to provide greater clarity in order to avoid expensive litigation for both parties.

- The current wording of the amendments regarding merger jurisdiction creates the unusual position of allowing overseas firms to acquire a larger share of a business before the Commerce Act applies, than domestic firms could. This could provide an incentive for schemes to be developed to avoid the application of s 47.

- The definitions of the prohibited conduct are in some instances quite narrow, and would exclude behaviour that we consider should be prohibited under a per se prohibition.

- "Effect" and "likely effect" should be retained in s 30 so that the prohibition includes cases where price fixing may not have been the parties' aim, but is the ultimate effect of their conduct. Alternatively, the criminal offence could be directed to deliberate breaches and could exclude likely effect, if this appeared a low threshold for criminal offending.

- The proposed collaborative activity exemption is broad and novel and will therefore be difficult to apply and to enforce.

- The proposed clearance regime will lead to increased operational costs and resource demands for the Commission and it is not clear how these will be funded.

Requirement to define a market

5. We are concerned that the current wording of the draft Bill arguably varies the current law by requiring the Commission to define an economic market for the purposes of determining whether or not parties are in competition with each other. It is not clear that this is MED's intention.

6. We recognise that in determining whether or not parties are in competition with each other there will necessarily be reference to the market in which the parties compete. But in our view that market should not need to be defined and made an ingredient or element of proof of the offence.

7. Section 30A retains the requirement that for a breach of the cartel prohibition the parties must "supply or acquire *in competition with each other."* This is essentially the same as the present wording in s 30. However, it is arguable that this phrase has been varied by the inclusion of s 30B(2).

8. Section 30B(2) provides that:

> "in relation to a cartel provision, a reference to persons in competition with each other includes a reference to persons who, but for the cartel provision, would, or would be likely to be, in competition with each other **in a market** [our emphasis]."

9. This section is aimed at the same point as the current s 30(2), which is the issue of ensuring that the price fixing prohibition extends to those parties who would have competed *but for* the illegal arrangements.

10. However, the words "in a market" can be read to require the Commission to define a market in New Zealand, in order to establish that the defendants competed in it.[1] These are the words that have been read into the current legislation by the airlines in the recent Air Cargo litigation.

[1] "A market" is defined in s 3(1A) of the Act as "a market in New Zealand".

11. Our view is that proof of a market would seriously undermine the operational efficacy of the Commerce Act. Further:

    - The purpose of s 30 is to prohibit price fixing per se (because it is presumptively harmful). MED state in the Explanatory Material that the draft reforms are not intended to alter the per se character of price fixing, (eg at paragraphs 23 and 52). Proof of a market would seem unnecessary when Government has made the policy decision that price fixing is harmful to the markets in which it occurs.

    - The relevant ingredients of price fixing are therefore (i) that the parties compete and (ii) that they agree a price etc. The Explanatory Material discloses no intention to change those foci; they emphasise that proof of the *effect* on a market is not required.

    - Matt Sumpter's 2010 text correctly states that the prohibition might give rise to incidental market definition when identifying whether the parties compete, but that requiring market definition would "introduce the complexity and evaluative uncertainty which per se rules are designed to avoid in price-fixing matters."[2]

12. We understand that it was not MED's intention to include in the cartel provision a new statutory requirement to define a market.

13. One option is to remove the words "in a market" from s 30B(2), leaving the words "in competition with each other" with no further qualification. This would in our view be better than including the words "in a market". But it could be expected to lead to the same uncertainty caused by that same wording ("in competition with each other") in the current legislation.

14. We submit that the opportunity should be taken to clarify the position in the new legislation.

15. We suggest that a sensible alternative amendment might therefore be rewording s 30B(2) to read:

    > "… in relation to a cartel provision, a reference to persons in competition with each other includes a reference to persons who, but for the cartel provision, would, or would be likely to be, in competition with each other **either wholly or partly in New Zealand."**

16. Alternatively, or in addition, a clarification of 'competition' along the lines that follow could be adopted:

    > "For the purposes of determining that parties are in competition with each other, it shall not be necessary to establish the market in which the parties compete."

Jurisdiction

17. The Commission is concerned that the Bill is not sufficiently clear on the issue of jurisdiction. The question of jurisdiction is the single most litigated aspect of our cartel

[2] Sumpter, *New Zealand Competition Law and Policy*, p147.

programme. The legislation needs to be clear on this issue in order to avoid expensive preliminary litigation (for all parties), and to give certainty to businesses whether their activities could see them called to account in a New Zealand court.

18. We believe further consideration should be given to the following issues:

- Criminal v civil jurisdiction.
- Section 4(1) jurisdiction over acts outside New Zealand (extra-territoriality).
- Section 4(3) merger jurisdiction.

Criminal v civil jurisdiction

19. The draft Bill read together with the Explanatory Material suggests that jurisdiction for the criminal offence will be broader than for the civil offence, which is in our view an undesirable outcome.

20. We favour an outcome where the principles are the same for each type of breach, and where the only difference is the mens rea requirement. We agree with the extended criminal law jurisdiction, which will allow the Commission to pursue overseas conspirators who take steps in furtherance of a cartel in a way that affects New Zealand. We would prefer that this was matched for civil breaches.

21. The different tests created by the current draft for jurisdiction for the New Zealand courts depending on whether cartel conduct is proceeded against criminally or civilly are as follows:

- **Criminal offence:** s 7 of the Crimes Act 1961 *deems* an act that takes place offshore to be committed in New Zealand, wherever the accused is located then or now, if it was an act or omission forming part of any offence or was necessary for completion of an offence. Accordingly, there is no relevant conduct outside of New Zealand and s 4(1) does not need to be satisfied.

- **Civil contravention:** offshore acts are only able to be pursued where s 4(1) is satisfied, including the residency requirement.

22. In other words, although the consequences are more serious when pursued criminally, the jurisdiction is broader. This may be MED's intention, but it may lead to uncertainty for business. It may also put the Commission in the position of having to decide whether to pursue a criminal claim for the sole reason that there is no jurisdiction for a civil prosecution.

23. The Explanatory Material explains that the Crimes Act 1961 extends jurisdiction to overseas acts in furtherance of a New Zealand-targeted criminal conspiracy. The Material then goes on to note that it is problematic to expand jurisdiction for civil contraventions.

24. Regarding the civil law, MED points to the *Poynter*[3] decision and principles of international comity as providing difficulties when considering extending New Zealand's jurisdiction.

[3] *Poynter* v *Commerce Commission* [2010] NZSC 38.

25. However, the *Poynter* decision was a determination of the meaning of the current law, and should not prevent amendment of the legislation in this area. The relevant principle from that decision is that the clearest and most express language is required of any provision having extra-territorial effect.

26. Principles of international comity were extensively argued in the recent Air Cargo Phase 1 litigation. But there is no principle of international law which precludes a nation proscribing conduct targeted at damaging its economy.

Section 4(1)

27. The draft Bill contains no amendment to s 4(1). However, the Explanatory Material notes (at paragraph 85) that "the Government is open to ways of clarifying the law so that persons are not able to circumvent the jurisdiction set out in the Commerce Act." We will now propose three amendments to s 4(1) to clarify the law on jurisdiction.

28. First, s 4(1) could be usefully amended to state that the Act applies to persons:

> "carrying on business in New Zealand **directly or indirectly, or through a subsidiary, agent or other intermediary**…"

or similar, to ensure that it is clear that having a subsidiary or other entity engage in your New Zealand business does not (as commonly thought) mean that the principal is therefore not itself carrying on business here. Alternatively, "carrying on business" could be defined in s 2 in this way.

29. A further useful clarification might be that both an individual and a body corporate may "carry on business", since it is sometimes argued that a person can only be *resident* and that the "carrying on business" test applies only (disjunctively) to companies.

30. Lastly, for the reasons that follow, s 4 could be redrafted to extend jurisdiction to overseas conduct that:

> "affects **or is directed towards affecting** a market in New Zealand"

or similar. Or, alternatively, the legislation could clarify what is meant by "affects a market" in this section.

31. A likely reading of s 4(1) as currently worded is that it can only apply to the giving of effect to agreements, and not to attempts or to the entering into of the agreement. By their very nature attempts can have no effect in New Zealand. And, it is not clear that the entering into of an agreement on its own will have an effect in New Zealand.

32. The Commission has investigated cases of conduct that targeted New Zealand (ie, an overseas agreement with the purpose of price fixing in New Zealand) that does not always have an "effect" here. The consequence is that although the draft s 30 requires only purpose (not effect or likely effect), in fact an agreement that has the proscribed purpose but no "effect" here could not be brought before the New Zealand courts. This was the "gap" referred to by the Commission in the Air Cargo case.

Section 4(3): repealed

33. Section 4(3) has in effect been replaced by new ss 47A-47D, which give the Commission a useful tool to enforce a merger clearance decision against an overseas company.

34. However, the current wording of the amendments does create the unusual position of allowing overseas firms to acquire a larger share of a business before the Commerce Act applies, than domestic firms could. The different rules for overseas acquisitions could provide an incentive for schemes to be developed which will, in essence, seek to avoid the application of s 47.

35. Section 47(1) prohibits *the acquisition of assets of a business or shares* by a person if the acquisition is likely to result in a substantial lessening of competition.

36. Section 47(2) states that a person includes two or more persons that are interconnected or associated. Parties are treated as interconnected if there is a parent and subsidiary relationship. In addition, under s 47(3), parties are treated as associated if they are able to exert a substantial degree of influence over the other.

37. The provisions of the proposed s 47A refer to *the acquisition of acquiring a controlling interest in a New Zealand company.* The section goes on to define "controlling interest". Controlling interest is essentially the same test currently applied to assessing interconnection between parties (ie, subsidiary and parent).

38. Section 47A does not include a test for association (as is found in s 47(3)). This is most likely due to a desire to follow Australia's legislation. However, unlike New Zealand, the Australian legislation does not include a test for association.

39. Excluding the association test from s 47A leaves the Commission assessing 'association' for domestic parties, but applying the less strict test of 'controlling interest' for overseas parties. This would result in overseas interests being able to acquire up to 50% of the shares in a company before the Commerce Act applies. But the Commission may, for example, consider domestic parties to be associated (depending on the facts of each case) at as little as 15-20%. In the case of acquisitions of a public company it may often be the case that a 15-20% shareholding will confer control or a substantial degree of influence over the target company.

40. This appears to provide a loophole for overseas entities to bypass the Commerce Act, while domestic entities cannot.

41. By way of example, say the Commission was approached by an overseas company with a majority shareholding in New Zealand Company X and an indirect 10-15% shareholding in Company Y. Company Y sells products in New Zealand by way of a licensing agreement. Company X and Company Y sell competing products in New Zealand. The overseas company proposes to increase its interest in Company Y such that it would have a 30-35% shareholding. Under the present legislation, that acquisition could give rise to a substantial lessening of competition (depending on the degree of control afforded by the enhanced shareholding). However, if the proposed amendment is enacted the Commission would no longer have jurisdiction to consider the acquisition under s 47.

42. In the Commission's experience a scenario such as this is not unlikely.

43. In addition, the definition of overseas person in this section refers to a person that is *neither resident nor carrying on business in New Zealand.* It is unclear whether the overseas person is deemed to be carrying on business in New Zealand if it owns or partially owns a subsidiary that does carry on business in New Zealand.

Bid-rigging

44. In our view the definition of bid-rigging in section 30A(5) is capable of two possible interpretations that could create uncertainty in situations where cartel members have not bid for certain work:

    - A narrow interpretation – that it covers situations only where a party is forced not to bid; or
    - A broad interpretation – that it includes a situation where there is agreement that one or more parties will not bid.

45. We would support the broad interpretation as we have investigated cartels in which there have been agreements that certain parties would not bid for certain projects.

46. We suggest that this could be clarified by, for example, replacing the words "restraining 1 or more parties to the contract, arrangement, or understanding from making a bid" with the following:

> "**providing that** 1 or more parties to the contract, arrangement, or understanding **will not make** a bid…".

Market allocating

47. In our view the definition of market allocating in s 30A(4) is also too narrow. It is confined to allocation by "persons" or "geography." Markets can be otherwise allocated, for example temporally (seasonally, or alternate years, for example), in terms of product (say, 330ml soft drink cans versus 500ml bottles) or by tender/contract (by discussing each contract as it comes up for tender and allocating it to an agreed cartel member).

48. We consider that these forms of market allocation should also be prohibited in s30A(4)).

"Providing for"

49. The draft s 30A(2) applies to price fixing provisions and those arrangements "providing for" the fixing of price.

50. We suggest that the other three cartel provisions in s 30A should also allow for "providing for" cartel mechanisms, such as agreements providing for output restriction or market allocation. We are not aware of any reason for the different treatment of the remaining cartel mechanisms.

Purpose, effect and likely effect

51. The draft s 30 is concerned only with cartel "purposes", but in our view it would be preferable to retain "effect" and "likely effect" to include cases where price fixing may not have been the parties' aim, but is the ultimate effect of their conduct.

52. One possibility would be to retain effect and likely effect, but to make these civil only. This option reflects that the inclusion of "likely effect" could create a low threshold for criminal liability.

53. The Explanatory Material states that price fixing "effects" should not be included as an element of the prohibition. The Material says that a purpose-only prohibition provides greater certainty (paragraph 25), and avoids the need for economic evidence of effects (paragraph 26).

54. We agree that if an effect is pleaded this requires supporting economic evidence, and this can make cartel trials more complex. But in our view this resulting complexity does not necessitate a move away from price fixing effects as an element of the prohibition:

- In cases where the price fixing may not have been the parties' aim but it is the effect of their conduct; the negative consequences of price fixing flow. Yet without having that purpose a defendant would not be in breach of the new s 30.

- Our outreach efforts and enforcement experience continue to demonstrate a lack of awareness of the potentially negative effects of certain collaborative conduct. A purpose-only cartel provision could result in a number of agreements with price fixing type effects that the Commission can take no action against.

- From an enforcement perspective, 'purpose' can be more difficult to prove than 'effect'.

- Where purpose is assessed objectively, effects and likely effects of the conduct become relevant to the analysis and so may have to be assessed in any event (discussed further below).

- The effect of cartel conduct is relevant to the question of detriment and so will often need to be assessed in any event.

- The Courts are becoming increasingly confident in, and adept at, receiving expert economic evidence, and the hot-tub has been a major development which evidences that change.

- Cartel trials are inherently complex. Sometimes economic evidence is required whether effect is in issue or not, as with the week-long expert hot-tub in the Air Cargo Phase 1 trial on the issue of "what is the relevant market"?

- In our view it is undesirable to shape the prohibition around the implications for the hearing. Many cases are complex and require expert evidence (including many criminal cases), but that implication should not govern the policy-setting.

Objective vs subjective purpose

55. We suggest that it is important to define what is meant by "purpose".

56. In our view it is likely that purpose will primarily be assessed objectively (rather than subjectively), in which case likely effects of the conduct will become relevant to the analysis.

57. The Explanatory Material states that the draft Bill seeks to use concepts that already have an established meaning in the Commerce Act. Jurisprudence to date regarding s 27 indicates, as stated above, that purpose will primarily be assessed objectively. [4]

58. The view that purpose will be assessed objectively is also backed up by our reading of the draft Bill and the Explanatory Material. For example:

    - Draft s 30A uses language consistent with a search for the objective of the cartel provision, rather than directed towards the subjective intention of the parties. It is akin to looking for the meaning of a contractual term (emphasis added):

      > … cartel provision **means a provision** contained in a contract, arrangement or understanding **that has 1 or more of the following purposes**…

    - The Explanatory Material (at paragraph 14) reads similarly, and contrasts the civil offence from a criminal breach as being "conduct that is engaged in **unwittingly**."

59. There is a further, and subtle, problem with only including purpose in s 30. It gives rise to two finely-distinguished mens rea elements that may be relevant: subjective purpose (s 30) and "knowing" oneself to be entering into a cartel provision (draft s 82B). The effect is this:

    - Entering into a cartel provision with the **purpose** of price fixing etc: civil only, s 30.

    - **Knowingly** entering into a cartel provision with the **purpose** of price fixing: criminal, s82B.

    This raises the question: how does one enter into a cartel provision with the purpose of price fixing, but *not* do so knowingly? Answer: only if your purpose is inferred/ objective, rather than subjective.

60. If effect and likely effect were retained for civil matters, the mens rea for the criminal offence could then be 'having the subjective purpose'. A distinction of this kind would draw a clear line between the civil and criminal offence that is easily understood.

61. Lastly, for clarity, if MED contemplates that the Court may look to an "effect" in order to establish purpose, this should be stated in the draft (as it is in the current s36B "Purposes may be inferred").

[4] *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* [2006] 3 NZLR 351 (CA).

Collaborative activity exemption

62. We are concerned that the new collaborative activity exemption will be difficult to enforce and believe that much greater clarity is needed in the legislation.

63. The proposed exemption has several disadvantages:

- It is broad and uncertain. Breadth can be desirable, as long as it is clear and readily applicable, which this is not.

- It appears novel, and so New Zealand cannot use Australian, UK, US or Canadian jurisprudence to help interpret the exemption. This is a major practical disadvantage that should not be underestimated. The cost of making the law work will be considerable, and not just on the Commission, as it will be necessary over the next decade or so to determine how the provision operates.

- As a matter of policy, it seems unusual that the legislation permits a joint activity to have the purpose of lessening competition as long as it is not the *dominant* purpose. We suggest a better caveat might be that it must not be a "substantial purpose". This will allow for more than one substantial purpose, and takes into account how important the purpose to lessen competition was.

- As a further matter of policy, it seems unusual that MED appears to allow collaborations that do have a purpose (not dominant) of lessening competition, with no requirement that the activities be in any way efficiency-enhancing or economically beneficial. To our knowledge this would make the provision internationally unique; every other jurisdiction of which we are aware exempts only demonstrably efficient or pro-competitive collaborative arrangements. We understand that it is MED's intention that the Commission use existing ancillary restraints jurisprudence (case law from the US, Canada and Europe) in assessing the "reasonably necessary" requirement in the definition of collaborative activity. This does take efficiencies into account, but only to a limited extent. It would provide clarity if there were an express reference to efficiencies in the legislation.

- It is not comparable to the Australian position. We are of the view that this is an area that should be better aligned with the Australian legislation to increase understanding by businesses and assist the Commission to enforce the provisions.

64. We recognise that, as set out in the Explanatory Material, defining a joint venture can be difficult. However, we believe it can be done in a way that creates more certainty for business, and is easier for the Commission to enforce.

65. The approach currently applied by the Commission may assist.

66. In determining whether the current joint venture exemption is available it is necessary to first assess whether the first or second limb of the test in s 31(1) is satisfied. We then consider for the purposes of an assessment under s 31(2) whether the alleged joint venture is a genuine joint venture or is instead a sham, and merely a vehicle to avoid competition.

67. In order to assess whether or not a joint venture is genuine, we consider the following:

- Whether the joint venture is bona fide or is used as a cloak for price fixing;[5]
- Whether the objectively intended purpose or likely effect of the joint venture is lower prices or increased output as measured by quantity or quality;[6]
- Whether the joint venture is likely to create significant new enterprise capability in terms of new productive capacity, new technology, new product or entry into a new market;[7]
- Whether there is a substantial, even if not total, integration of production, managerial, distribution, financial and other operations;[8]
- Whether the joint venture restricts the ability of participants to increase output;[9]and
- Whether any price agreements are reasonably necessary to realise the efficiencies that justify entry to the joint venture by the competitors.[10]

68. We consider that the test under the first bullet point above is subjective. It depends on subjective good faith and not the intention or belief of a reasonable person in the position of the parties who entered into the joint venture. The test under the remaining points is objective – subjective good faith is not enough to meet those criteria.

69. The failure of a joint venture to meet the first two points above may be sufficient for those competitors to fail to meet the requirements of the s 31 exemption. It is also possible that failure to meet only one or some of the remaining criteria could lead to the conclusion that an arrangement is not a valid joint venture.

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[5] Heydon, *Trade Practices Law* at 4.860; *Timken Roller Bearing Co. v US*, 341 US 593 (1951); *Mandeville Island Farms v American Crystal Sugar Co*, 334 US 219 (1948); *State of New York v St Francis Hospital, Vassar Brothers Hospital and Mid-Hudson Health*, 94 F Supp 2d 402 (2000); FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at 3.2; DOJ/FTC, Statements of Antitrust Enforcement Policy in Health Care (1996), Policy Statement 8, Statement of Department of Justice and Federal Trade Commission Enforcement on Physician Network Ventures.

[6] Areeda & Havenkamp *Antirust Law* at 1906a; *Texaco Inc v Dagher*, 547 US (2006); *Arizona v. Maricopa County Medical Society*, 457 US 332 (1982); *Broadcast Music, Inc. v. CBS*, 441 US 1 (1979); *Northwest Wholesale Stationers v Pacific Stationery and Printing Co.*, 472 US 284 (1985); FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at 3.2; DOJ/FTC, Statements of Antitrust Enforcement Policy in Health Care (1996), Policy Statement 8, Statement of Department of Justice and Federal Trade Commission Enforcement on Physician Network Ventures.

[7] Lear, "Joint Ventures: Treatment under New Zealand, United States and European Competition Law" (2005) 11 NZBLQ 187; *Broadcast Music, Inc. v. CBS*, 441 US 1 (1979).

[8] Pengilley, "Thirty years of the Trade Practices Act: Some thematic conclusions" (2004) 12 CCLJ 6 at 45; DOJ/FTC, Statements of Antitrust Enforcement Policy in Health Care (1996), Policy Statement 8, Statement of Department of Justice and Federal Trade Commission Enforcement on Physician Network Ventures; *Southbank IPA, Inc.*, 114 F.T.C. 783 (1991); Werden, "Antitrust Analysis of Joint Ventures" (1998) 66 Antitrust LJ 701.

[9] *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984); *COMPACT v. Metropolitan Government of Nashville & Davidson County*, 594 F. Supp. 1567 (1984).

[10] DOJ/FTC, Statements of Antitrust Enforcement Policy in Health Care (1996), Policy Statement 8, Statement of Department of Justice and Federal Trade Commission Enforcement on Physician Network Ventures.

Clearance regime

70. The clearance regime gives rise to real operational costs and resourcing demands for the Commission that could not be met from existing baselines. In the Explanatory Materials MED acknowledges that "Given the broad scope of the clearance regime in the exposure draft Bill, further consideration will need to be given as to how the clearance regime should be funded."

71. We consider it unlikely that, as was stated in paragraph 7.15 of the EGI Cabinet minute of 20 October 2010, the cost of a clearance regime would be recovered via fees. Presently the fee for a merger clearance is $2,000 plus GST, which does not cover the cost of even a straightforward clearance (approximately $45,000). It is unlikely that the fee would be set at a level that would cover our costs. If the fee is set at a level that does cover our costs this is likely to impact on the number of applications we receive, which would hinder our ability to build up a useful body of precedent.

72. Further, we are concerned that the Commission currently lacks the staff numbers to complete the required work within the proposed timeframes. Our current funding would not allow us to employ the necessary staff.

Attributing conduct

73. We are concerned that the proposed amendment to s 90, which seems to deal with the issues that arose in the *Poynter* case, may not actually have the result of solving the issues that arose in that case.

74. The amendment attempts to solve the issue by making persons liable for the conduct of those whom they direct, but the drafting requires the conduct to be engaged in "on behalf of a person other than a body corporate (Person A)." While Person A is *directing* Person B, Person A would maintain that the benefit of B's conduct would accrue to A's company or employer, not to A directly. In other words, B is not really acting "on behalf of" A, but rather A's company or employer. So A would not be liable, notwithstanding that he engineered the conduct.

75. Applying this to the facts of *Poynter*, Mr Poynter would not be liable under this attribution amendment. The conduct engaged in by Mr Greenacre and others was "on behalf of" the business, Osmose New Zealand, and interconnected companies, not on behalf of Mr Poynter. And so it appears that the amendment fails to close the loophole it was intended to close.

76. We suggest that the section be redrafted, to keep the (a) to (c) alternatives, but to apply them where the conduct of a person (Person B) is "initiated, requested or directed" by Person A, regardless of whom the conduct is on behalf of.

Penalties

77. We find it unusual that the corporate penalty for a criminal breach is identical to that for a civil breach, and it is not clear to us why that would be.

78. As the Explanatory Material acknowledges, at paragraph 14:

> "The exposure draft Bill distinguishes using the additional fault element of knowledge. This seems appropriate because deliberate conduct is more culpable than conduct that is engaged in unwittingly.'

79. If that is the case, and we think it is, it follows that a company that has knowingly breached the law should be fined more than a company that has inadvertently breached. This is the case for the individual sanctions.

Contact details

80. We hope that this response is useful. Commission staff are happy to continue to talk with MED about any aspect of this submission or cartel criminalisation.

81. If you have any specific questions on this submission, please contact Rebecca McAtamney, Chief Adviser, Advocacy & Development on (04) 924 3633 (direct line) or email rebecca.mcatamney@comcom.govt.nz in the first instance.

Yours sincerely

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