

6 April 2010

Cartel Criminalisation
Ministry of Economic Development
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SUBMISSION BY BARNZ ON THE CARTEL CRIMINALISATION DISCUSSION DOCUMENT

The Board of Airline Representatives of New Zealand (Inc) (BARNZ) is an incorporated society representing all international carriers and most domestic airlines in New Zealand. A list of members is attached as Attachment 1.

BARNZ's Role With Respect to the Acquisition of Aeronautical Goods and Services

A significant part of BARNZ activities involves coordinating and participating in consultations and, where permissible, negotiations, over terms, conditions and charges levied on airlines by various aeronautical service providers, such as airports, Airways Corporation, Aviation Security and NZ Meteorological Services as well as with some third party service providers used jointly by airlines such as disposal of quarantine waste, provision of baggage authorisation systems, provision of fuel pipelines or provision of electricity to aircraft gates.

In fulfilling this role, BARNZ is extremely cognisant of the provisions of section 30, which, in this context, prohibits 'agreements' which fix, control or maintain the prices of goods or services acquired by parties in competition with each other.

In some of the cases in which BARNZ is involved, there is no acquisition by the airlines in competition with each other so section 30 is not triggered. In other cases, the acquisition is joint and falls within the exemption contained in section 33, enabling prices to be negotiated for the jointly acquired goods or services. However, there are other cases where the services are either not being jointly acquired or it is not clear whether or not section 33 is applicable. In those situations, BARNZ is extremely mindful to ensure it confines its role to one of consultation and not of negotiation, and that no contract, arrangement or understanding is reached between the airlines with respect to any element of the price which could be seen as breaching section 30.

The activities engaged in by BARNZ are constantly reviewed against the provisions of section 30 so as to ensure it is not breached. In addition, BARNZ conducts training for

all new committee members in order to ensure a high degree of awareness exists with respect to the prohibition against price fixing.

Civil Penalties Already Provide Sufficient Deterrence of Price Fixing Activities

From its perspective, BARNZ does not see that criminalisation of cartel activities will lead to a reduced likelihood of price fixing. The threat of civil fines, the cost of defending any proceeding (both of which are unable to be indemnified), the likely loss of employment and the harm to one's professional reputation are all already extremely high costs associated with engaging in price fixing behaviour, and from BARNZ' experience with its members, costs which executives and officers absolutely do not want to risk incurring.

In addition, the focus by the Commission on detecting and prosecuting cartel activities, and the high publicity given to cases such as the Visy cardboard box case, the airline cargo case and the credit card fees case mean there is a high level of public awareness of the prohibition against price fixing.

The per se nature of section 30, and the severity of consequences if it is breached, has resulted in BARNZ desisting from certain activities, even where BARNZ is not certain that section 30 would be breached. Therefore the effect of section 30 in its civil liability form already deters BARNZ from engaging in welfare enhancing conduct, particularly using collective countervailing power so as to reduce the extent and likelihood of airport charges containing monopoly profits. Moreover, the fear of becoming involved in activities which breach price fixing provisions has already led to some airlines overseas withdrawing from Board of Airline Representatives organisations in other countries. If criminalisation of price fixing occurs, then BARNZ fears that some airlines may well decline to participate in any type of joint activity or meetings for the fear of creating even the slightest risk of a potential finding of price fixing. This would not be in the interests of aviation in New Zealand, given the high level of infrastructure assets and services which are used in common by all airlines and where cooperation and agreement on operational issues, designs and processes is essential.

That said, if the Government proceeds with criminalisation of price fixing, then it is imperative that the provisions are drafted in such a way as to first ensure only the most egregious conduct is caught, and secondly, to ensure that there is a clear test, which is able to be applied in a relatively quick fashion by a reasonably well informed executive officer, as to whether or not conduct breaches the price fixing prohibition. This cannot be said to currently be the case.

Only egregious conduct should be criminalised

BARNZ strongly believes that it is inappropriate for all conduct which breaches section 30 to be potentially subject to criminalisation. Criminal penalties should be reserved for the most egregious conduct.

The suggestion in the discussion document that prosecutorial discretion be exercised and criminal prosecutions brought only against the most egregious offenders (refer paragraph 163) is not satisfactory. Consequences as serious as criminal sanctions and

imprisonment should not rest on 'prosecutorial discretion'. This would resemble the 'Chancellor's foot' used to describe the variable application of equity in the seventeenth century and would be likely to vary from prosecutor to prosecutor.

There needs to be a clear test of what conduct breaches the price fixing provisions of the Commerce Act, and what the potential range of consequences is. Defining criminal conduct on a wide over-inclusive basis, and then relying on the variable application of prosecutorial discretion to attempt to ensure that pro-competitive or efficiency enhancing conduct or only minor inadvertent price fixing do not lead to criminal sanctions, will only lead to excessive uncertainty for the commercial community and will likely significantly deter welfare enhancing conduct and result in a large degree of over-reach of the offence. This will likely deter efficiency enhancing conduct.

The criminal statute book is full of offences which are designed to reflect a graduated range of severity of conduct, for example:

- Murder, as opposed to manslaughter
- Aggravated assault or assault with intent to injure, as opposed to common assault
- Reckless driving, as opposed to careless driving

In BARNZ view, Parliament has a responsibility to expressly legislate for an aggravated element within any price fixing criminal offence which would distinguish it from price fixing which is not intended to attract criminal penalties. Otherwise, one will find that conduct such as funeral directors or doctors rostering after hours work in rural areas so as to be assured of a weekend off and to guarantee a minimum level of service to the local population will be potentially criminal conduct. Relying on prosecutorial discretion is not appropriate or fair to the individuals concerned. Ordinary commercial people, with no intention of operating a cartel, will become afraid to talk to one another or work together in a cooperative and sensible manner on any number of day to day issues such as rosters, safety practices, operational issues, allocation of and timetabling use of common facilities etc.

A clear test needs to exist as to whether or not conduct is permissible

If price fixing conduct is to be criminalised, then Parliament has an obligation to ensure that an easily applied, 'bright line' test is specified.

Where the consequences of conduct are as serious as criminal sanctions, then those individuals subject to the law need to be able to apply it 'on the spot' and be able to come to a fairly clear understanding as to whether the proposed conduct would or would not breach the law. Much conduct which could fall foul of the price fixing prohibitions occurs in the day to day toil of commerce – it is not deliberated on for hours by an experienced legal practitioner.

The test for whether conduct amounts to price fixing therefore needs to be one able to be applied by a reasonably well educated commercial executive on a moment's consideration. Otherwise Parliament will be ascribing the standard of an experienced and highly qualified QC to an ordinary commercial executive, which is neither appropriate nor reasonable. In practice, executives would be constantly seeking legal

advice, which is costly and inefficient, or would refuse to contemplate any cooperative matter, despite it benefiting the wider public.

BARNZ trusts this submission is clear to the review team. However, if any queries arise, please feel free to contact me.

A handwritten signature in blue ink that reads "John Beckett". The signature is written in a cursive style with a large initial 'J'.

John Beckett
Executive Director

BARNZ PROFILE

1. The Board of Airline Representatives New Zealand Inc (“BARNZ”) is an incorporated society comprising 20 member airlines operating scheduled and code share international and domestic services. Its members are:

Full membership:

<i>Air Calin</i>	<i>Air New Zealand (Group)</i>
<i>Air Pacific</i>	<i>Airwork</i>
<i>Air Tahiti Nui</i>	<i>Air Vanuatu</i>
<i>Tasman Cargo Airlines</i>	<i>Cathay Pacific Airways</i>
<i>Emirates</i>	<i>EVA Airways (code share)</i>
<i>Fieldair</i>	<i>Japan Airlines (code share)</i>
<i>Korean Air</i>	<i>LAN Airlines</i>
<i>Malaysia Airlines</i>	<i>Pacific Blue</i>
<i>Qantas Airways (incl Jetstar)</i>	<i>Royal Brunei</i>
<i>Singapore Airlines</i>	<i>Thai Airways International</i>

Associate membership:

Menzies Aviation (NZ) Ltd

2. The objectives of BARNZ include:
 - (i) the establishment of recognised means of communication between member airlines and other bodies whose interests or actions affect member airlines and the aviation industry;
 - (ii) representation of members in matters affecting their common interests;
 - (iii) determining the position of members on legislative, judicial and administrative actions affecting the provision of air services and the representation of member airlines before decision-making bodies;
 - (iv) the promotion and advancement of the interests of its members in relation to scheduled international and domestic airline operations at New Zealand Airports.