JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW

ON

THE NEW ZEALAND MINISTRY OF ECONOMIC DEVELOPMENT'S DISCUSSION DOCUMENT ON CARTEL CRIMINALISATION

March 26, 2010

The Section of Antitrust Law and the Section of International Law of the American Bar Association ("the Sections") appreciate the opportunity to present their views concerning the New Zealand Ministry of Economic Development's (**the Ministry**) Discussion Document on Cartel Criminalisation. The views expressed in these comments are those of the Sections and have been approved by the Sections' Councils. They have not been approved by the ABA's House of Delegates or its Board of Governors and should not be construed as representing the policy of the ABA.

Introduction

The Sections commend the Ministry for its efforts to consider criminal penalties for serious cartel conduct in New Zealand. The Sections believe that criminal sanctions are the most appropriate and effective response to cartel conduct and will increase the level of deterrence considerably. The development of criminal sanctions for cartel conduct would align New Zealand's sanctions for cartel activity with those of a number of other jurisdictions, including the United States, Canada, the United Kingdom and Australia.

The Sections' membership includes over 33,000 lawyers, economists, and other professionals from over forty-five countries, although most are based in the United States. The Sections have developed considerable experience with criminal sanctions for hard-core cartel conduct in several jurisdictions, particularly the United States. The Sections have relied on that experience in formulating these comments and hope that they may be of value to the Ministry.

The Ministry's Discussion Document explores options for the design of a criminalisation regime and canvasses the following three general approaches:

1. establishment of a new criminal offence based upon the existing civil prohibitions in the Commerce Act;

2. adoption of the Australian offence provisions;

3. pursuit of a green fields approach by developing new offences based on first principles.

As with their past comments concerning the various approaches taken by other jurisdictions in relation to cartel criminalisation,[1] the Sections proceed from the premise that, while consistency among the various

[1] See: Comments of the American Bar Association Section of Antitrust Law and the Section on International Law in response to the Commonwealth Government of Australia's Request for Public Comment on the Draft Legislation Providing Criminal Penalties for Serious Cartel Conduct, February 2008 (http://www.treasury.gov.au/documents/1350/PDF/American_Bar_Association.pdf); Comments of the American Bar Association Section of Antitrust Law and the Section on International Law on the Prospective Amendments to Japan's

enforcement systems is desirable, no particular system is preferred. Accordingly, the Sections do not take a position as to which of the three approaches should be adopted.

Further, the Discussion Document poses thirty-five questions for public comment, most of which raise issues that are specific to New Zealand law and practice, as to which the Sections defer to the views of the New Zealand legal community. Instead, the Sections focus their comments on the importance of criminal sanctions for deterring cartel conduct and the key features that make a criminal enforcement system most effective.

The Sections' comments address five issues:

1. The effectiveness of criminal sanctions as a response to cartel conduct;

2. The importance of maintaining a clear distinction between civil and criminal enforcement;

3. The need for utmost clarity in defining criminal conduct so that legitimate business activities may continue without inhibition;

4. The importance of an effective leniency program; and

5. Issues raised by the extraterritorial reach of the criminal provisions.

The Sections address each of these issues in turn below.

1. The effectiveness of criminal sanctions as a response to cartel conduct

The Sections believe that criminal sanctions are the most appropriate and effective response to "hard-core" cartel conduct and will increase the level of deterrence considerably.

"Hard-core" cartel conduct has been defined by the Organisation for Economic Co-operation and Development (**"OECD"**) as:

> "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce."[2]

The Sections view hard core cartel conduct as involving individuals who intentionally and covertly cause harm to society for private gain. In addition to providing deterrence, effective criminal sanctions serve to punish the individuals who intentionally caused the harm, and also (when the knowledge and conduct can properly be attributed to the corporation) the companies for whom the individuals work.

Anti-Monopoly Act (http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/Comments.Japan.AML.Comments.SAL.SIL.FINAL.3.08.pdf)

[2] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (1998), available at: http://www.oecd.org/dataoecd/39/4/2350130.pdf.

Criminal sanctions provide the greatest inducement to cooperation by cartel participants.[3] Because individuals facing imprisonment stand to lose the most, avoiding this harsh personal punishment is the greatest incentive to come forward to the authorities to seek immunity from prosecution.

Several developed nations have already taken the approach of criminalising cartel conduct, including the United States, the United Kingdom, and Australia. The Sections strongly encourage the Ministry to follow the lead of such nations and take steps towards making hard-core cartel conduct criminal in New Zealand.

2. The importance of maintaining a clear distinction between civil and criminal sanctions

While the Sections believe that hard-core cartel conduct deserves criminal sanctions, they believe it is just as important that there be a clear legal distinction between conduct that will be treated as criminal and that which may be subject only to civil liability.

A clear distinction between conduct subject to criminal sanctions and conduct subject to civil sanctions is necessary to ensure transparency and predictability. As a matter of both efficiency and a degree of consistency essential to the rule of law, those potentially subject to a law should be able to determine, clearly and in advance, the rules that will be applied to and the consequences that will follow from their actions.[4] This is particularly the case here where a fine line exists between hard-core cartel conduct and certain pro-competitive forms of cooperation and interaction that may lawfully occur between competitors that enhance welfare and economic growth. Uncertainty about the scope of the former will have an undesirable chilling effect on the latter. Legal uncertainty will also reduce the chances of early settlements and admissions in some cartel cases.

The Sections submit that the distinction may be drawn either by definition or by a specific element of the offence. The Sections recognize the difficulty in defining with precision the conduct constituting the criminal offence (the *actus reus*). The formulation must capture only "hard-core" cartel behaviour involving criminality and concealment, leaving restrictive arrangements that do not involve well-recognised indicia of felonious behavior to the realm of civil enforcement.

In the United States, the basis for designating certain conduct for criminal (as opposed to civil) prosecution has been achieved through the exercise of prosecutorial discretion. The United States Department of Justice (**"DOJ"**) has described the key factors it considers when distinguishing cartel conduct in the following terms:

> [T]he cartels that . . . have [been] prosecuted criminally invariably involved hard core cartel activity — price-fixing, bid-rigging and market and customer-allocation agreements. The conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover up their actions . . . . Moreover, the cartels typically involve senior executives at firms — executives who have

[3] Scott Hammond, Director of Criminal Enforcement, U.S. Dept. of Justice, *Cornerstones of an Effective Leniency Program*, ICN Workshop on Leniency Programs, (Nov. 22, 2004) ("Cornerstones"), www.usdoj.gov/atr/public/speeches/206611.htm.

[4] The need for clarity is even greater where the investigating body is also the body making the decision to prosecute. The Sections note, however, that the New Zealand Commerce Commission has recently expressed some support for the notion that decisions to prosecute should be made and prosecutions should be brought by an independent agency, most likely the Solicitor-General. See Hamlin, "The Devil in the Detail: prosecuting cartel conduct under criminalisation" (Bright*Star Competition Law and Regulatory Review, February 22, 2010).

received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs.[5]

3. The need for utmost clarity in defining criminal conduct so that legitimate business activities may continue without inhibition

The Sections believe that it is critically important that any criminal statute be drafted clearly and narrowly so as not to prohibit legitimate business activities. Examples of legitimate conduct that could be inadvertently caught by a broad definition of criminal cartel offences include legitimate joint ventures between competitors, other joint marketing activities between business rivals, and industry-wide information exchanges carried on with a view to enhancing efficient decisions.

In this respect, joint ventures may be entered into for many benign purposes, including for example, research and development, or exploration where there may be no clear intention or ability on the part of the co-venturers to produce or supply the goods or services. Joint ventures may even be entered into solely for the purpose of ownership of assets. There is a significant range of legitimate joint venture activities other than production joint ventures. Any joint venture exemption should be broad enough to capture the full range of legitimate joint ventures, so that parties are not forced to use less efficient or less competitive (or commercially unviable) structural solutions merely for the purpose of avoiding risk based on uncertainty surrounding the definition of criminal liability.

Accordingly, the Sections respectfully recommend that there be specific defenses that exclude from the criminal provisions restraints included in a joint venture that are necessary for the venture to accomplish its core purposes, as well as collateral restraints and conduct ancillary to the main commercial arrangement.[6] Both of these types of restraints should be subject to a rule of reason approach in a civil proceeding.

In addition, the Ministry has contemplated a public notification defense that would exempt the parties from criminal prosecution if they have notified the relevant aspects of the agreement.[7] The Sections understand the rationale for the exemption to be that public notification is inconsistent with secretive cartel conduct, and hence the parties should benefit from some immunity. If after investigation the arrangements are still deemed to substantially lessen competition, the parties would be subject to a civil prosecution. The Sections believe this could be a useful way to provide greater certainty to parties regarding the operation of the new provisions.

4. The importance of an effective leniency program

The Sections believe that an effective leniency program is required to achieve the full policy benefits of criminalizing serious cartel offences. In the Sections' experience, an effective leniency program is indispensable to successful efforts to detect, prosecute, and deter cartels. The opportunity to obtain a grant of leniency will often lead cartel members to disclose their conduct to authorities even before an investigation is opened, thereby greatly assisting government enforcement efforts. In other cases, the availability of leniency

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[5] *See* Scott Hammond, Deputy Asst. Attorney General, U.S. Dept. of Justice, *Caught in the Act: Inside an International Cartel*, OECD Competition Committee Working Party No. 3: Public Prosecutors Program, at 2-3 (Oct. 18, 2005), www.usdoj.gov/atr/public/speeches/212266.htm; *see also* R. Hewitt Pate, Asst. Attorney General, U.S. Dept. of Justice, *Vigorous & Principled Antitrust Enforcement: Priorities & Goals*, ABA Antitrust Section Annual Meeting, at 6 (Aug. 12, 2003) ("The cases we criminally prosecute at the Division are not ambiguous."), www.usdoj.gov/atr/public/speeches/201241.htm.

[6] Discussion Document paragraphs 271-281.

[7] Discussion Document paragraphs 257-261.

will induce firms and individuals already under investigation to abandon their unlawful activities and provide evidence against other cartel members.[8]

In the United States, the vast majority of international cartel investigations and prosecutions conducted by the DOJ have been built on the cooperation of a corporate leniency applicant. Moreover, since 1986, more than 90 percent of corporate defendants charged with criminal antitrust offences negotiated plea agreements with the DOJ under the terms of which they admitted their participation in the alleged cartels and cooperated in ongoing investigations.

The Sections believe that the key components of an effective leniency program are transparency, predictability, the provision of necessary incentives to self-report and cooperate, and the protection of confidentiality and applicable legal privileges. [9]

5. Issues raised by the extraterritorial reach of the criminal provision

The comments on jurisdiction issues in the Discussion Document are important, particularly for an economy like New Zealand that depends heavily on international trade. While there is a basis for the position that extraterritorial conduct targeted at causing harm in New Zealand should be subject to prosecution under New Zealand law, factors the Sections consider important for New Zealand in this respect are:

- ensuring that criminal prohibitions having extraterritorial reach will be generally consistent with (or at least no broader than) other jurisdictions' definitions of hard-core cartel conduct;

- allowing extraterritorial prohibitions to accommodate principles of international comity - - for example, the law recognizing exceptions for foreign sovereign compulsion and for foreign conduct subject to regulation;

- ensuring that the substantive rules applying to private antitrust claims are generally consistent with (or no broader than) foreign rules, so as to avoid forum-shopping by third parties and nuisance suits motivated predominantly by self-interest.

Conclusion

The Sections hope that these comments are useful. We would be pleased to respond to any questions that the Ministry may have and to offer any further assistance that may be appropriate, possibly including a further submission to the Ministry should a bill creating a criminal cartel offence be released and adequate time be afforded for public comment.

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[8] Scott Hammond, Director of Criminal Enforcement, U.S. Dept. of Justice, *Cornerstones of an Effective Leniency Program*, ICN Workshop on Leniency Programs, (Nov. 22, 2004) ("Cornerstones"), www.usdoj.gov/atr/public/speeches/206611.htm.

[9] ibid. See also, International Competition Network, Anti-Cartel Enforcement Manual: Drafting and Implementing an Effective Leniency Program, April 2006, available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FINALFormattedChapter2-modres.pdf ; Joint Comments of the ABA Section of Antitrust Law and Section of International Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position, May 29, 2009, pp. 6-8, 27-31, available at http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/abaprcamlsaicdraftregs5-09finalcombo%282%29.pdf.