Law Council
OF AUSTRALIA

Via email: cartels@med.gov.nz

Cartel Criminalisation
Ministry of Economic Development
P O Box 1473
Wellington
New Zealand

Dear Sir or Madam,

Cartel Criminalisation Discussion Paper

I have pleasure in enclosing a submission in response to the Ministry of Economic Development's discussion paper on *Cartel Criminalisation.*

The paper has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia.

The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions in regard to the submission, in the first instance please contact the Committee Chair, Dave Poddar, on 02-9296 2000 or via email: dave.poddar@mallesons.com

Yours faithfully,

Bill Grant
Secretary-General

26 March 2010

Enc.

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New Zealand Ministry of Economic Development

Cartel Criminalisation Discussion Document

Submission by the Trade Practices Committee of the Business Law Section of the Law Council of Australia

March 2010

Trade Practices Committee of the Business Law Section of the Law Council of Australia

Submission to the New Zealand Ministry of Economic Development on the Discussion Document on Cartel Criminalisation

1. Introduction

The Law Council of Australia welcomes the opportunity to make this submission in response to the Discussion Document on Cartel Criminalisation published by the New Zealand Ministry of Economic Development.

This submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council. The Committee is constituted by experienced lawyers and economists who deal regularly with the provisions of the Australian *Trade Practices Act 1974* and related laws.

The Ministry's Discussion Document raises a series of questions relating to:

- detecting and deterring cartels;
- defining cartel offences; and
- criminal procedures and penalties.

The Discussion Document seeks views on a wide range of policy and legal issues relating to the appropriate regime to govern cartel behaviour, as well as mechanisms for the investigation and enforcement of these laws. The Ministry's willingness to engage with stakeholders on such a wide range of issues, in an area of central importance to the New Zealand economy, is to be welcomed.

As a body representing Australian lawyers and economists, the Committee does not believe its proper role is to make submissions to the New Zealand Government on whether criminal prohibitions for cartel conduct should be established in New Zealand or how they should be enforced. These are matters for New Zealand policy and law makers to consider having regard to the views of New Zealand stakeholders.

The Committee does, however, believe it can contribute to this discussion by commenting on the merits of harmonising laws affecting business in Australia and New Zealand and the extent to which this should influence the development of proposed cartel laws in New Zealand.

Given that the Discussion Document identifies the adoption of Australia's cartel laws as an option for the implementation of such measures in New Zealand, the Committee also believes that it can assist by drawing the Ministry's attention to issues that have emerged under Australia's cartel legislation. The Committee has made submissions on these issues to the Australian Government and to Parliamentary inquiries into Australia's cartel legislation, which can be found at http://www.lawcouncil.asn.au/.

2. Harmonisation of laws

The Ministry has acknowledged the commitments of Governments in Australia and New Zealand under the Memorandum of Understanding on Coordination of Business Law, in

particular the importance of deepening economic ties through coordination of significant areas of business regulation.[1]

The Committee supports these broad objectives. Competition laws are an essential part of the regulatory environment facing investors and traders in both countries. Promoting a common framework for competition regulation is an important step in removing barriers to investment and cross border trade between Australia and New Zealand. We have seen examples of coordination in this area with respect to laws governing the misuse of market power in trans-Tasman markets and in arrangements for cooperation between regulators.

Nevertheless, the Committee is also mindful of paragraph 5 of the Memorandum, which states:

> *'An array of approaches exists to achieve the goal of increased coordination in business law. Both Governments recognise that one single approach would not be suitable for every area, that coordination is multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so they do not create barriers to trade and investment. In working towards greater coordination, the efforts of both Governments will focus on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition.'*

This passage reflects recognition on the part of both Governments that the harmonisation of laws should not be pursued for its own sake, and not at the expense of legislation that is properly adapted to the needs of business and consumers in each jurisdiction. Accordingly, while it is a matter for the New Zealand Government to determine the manner in which it introduces criminal prohibitions relating to cartel conduct (if at all), the Committee submits that the benefits of harmonisation do not, by themselves, demand the adoption of the Australian cartel regime in New Zealand. Rather, coordination can be promoted by ensuring that competition laws in Australia and New Zealand establish comparable standards of behaviour and sanctions for illegal conduct.

3. Issues that have arisen under Australia's cartel legislation

While the Committee continues to support the criminalisation of serious cartel conduct in Australia, several issues of interest have emerged both during the debate around the introduction of Australia's cartel laws and since their commencement. The Committee wishes to draw the Ministry's attention to these issues in order to allow the Ministry's consideration of the matters raised in the Discussion Document to be informed by Australian experience in this area.

Scope and certainty of per se liability

- The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (CC&OM Act) introduced new civil per se prohibitions on cartel conduct as well as parallel cartel offences (see Div 1, Pt IV of the *Trade Practices Act 1974* (TPA)). The breadth of the new prohibitions is a matter of concern to the Committee. The prohibitions are said to be based on but extend beyond an OECD definition of the types of cartel conduct (often referred to as 'hard-core' cartel conduct) that warrant the toughest of sanctions, namely price fixing, market allocation, output restriction

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1 Discussion Document, paragraph 190.

and bid rigging.[2] The Committee is concerned that the unqualified adoption of the OECD definition as a legislative blue-print is likely to have the result of producing substantial over-reach and uncertainty anti-cartel law, thereby "chilling" pro-competitive commercial activity. It might be noted in this regard that notwithstanding broad support for the OECD definition as a matter of policy, the United Kingdom, Europe and the United States vary significantly in their approach to definition and proscription of 'hard core' cartel conduct. The Committee agrees broadly with the definition of 'hard core' cartel conduct in Section 1.1 of the Discussion Document, and considers that the legislative development being considered in New Zealand should reflect it.

- The new prohibitions (civil and criminal) in Australia extend to conduct that was not unlawful under the previous law and that may be benign from a competition perspective, or potentially even pro-competitive. This is particularly the case in respect of the new prohibition on output restriction which prohibits provisions that have a direct or indirect purpose of reducing production, capacity or supply without requiring that the reduction be directed at any particular person or class of persons, regardless of the extent of the reduction, regardless of whether or not it has any price effect, and irrespective of whether or not it actually occurs or is likely in the sense of probable to occur.

- The Committee's concern about over-reach is heightened by its view that the current exceptions under the TPA are insufficient to off-set the scope of the prohibitions.[3] This is particularly the case in respect of the joint venture exceptions (see further below). Further, the Committee agrees with the view expressed in the Discussion Document that the authorisation process should not be seen as an answer to concerns about over-reach, particularly not in relation to criminal prohibitions.[4]

- The new prohibitions also introduce considerable uncertainty into this area of Australian competition law. Such uncertainty is undesirable in the context of a law that seeks to promote business activity in the interests of the Australian economy and consumer welfare. It is undesirable particularly in the context of prohibitions that impose strict liability, that is, liability without the safeguard of a competition test, and attract severe penal consequences.

- The uncertainty arises in part as a result of the scope of the prohibitions and the relationship between them. In particular, there is considerable overlap between the new prohibitions on output restriction and market allocation and the pre-existing prohibition on exclusionary provisions as defined by s 4D (which has been retained and is substantially broader than s 29 of the *Commerce Act 1986*). The overlap is significant because conduct caught by the new output restriction prohibition may attract civil or criminal consequences, while conduct caught by the prohibition on exclusionary provisions amounts to a civil contravention only.

- Uncertainty is also an inevitable consequence of the introduction of a range of new and untested statutory terms and concepts – for example, 'allocating', 'capacity',

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2 Organisation for Economic Co-operation and Development, 'Recommendation of the Council concerning Effective Action against Hard Core Cartels', C(98)35/FINAL, 14 May 1998, p. 3.

3 As the Discussion Document points out (p 11, p 35), the OECD Recommendation made it clear that the definition of 'hard-core' cartel conduct should exclude conduct that is 'reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies'.

4 See Discussion Document, Section 4.3.4.2, [248]-[251].

'material component (of a bid)'. The uncertainty is aggravated by the highly prescriptive nature of the drafting of the statutory provisions. This style of drafting inhibits the scope for a purposive approach to interpretation which is desirable in this area of economic-legal regulation.

- With a view to minimising over-reach and uncertainty the Committee had recommended that, rather than superimposing a new set of civil per se prohibitions, the pre-existing prohibitions on price fixing and exclusionary provisions under the TPA be retained albeit that they should be amended to address specific issues that had arisen in previous case law and reviews.[5]

Distinguishing between criminal and civil prohibitions

- The Committee supports clear differentiation between conduct that is the subject of a cartel offence and conduct that rises to the level of a civil contravention only. The Committee is of the view that this distinction should be reflected in the statutory elements of the prohibitions and should not be a matter left solely to administrative discretion as is currently the position in Australia. Criminal sanctions should attach to 'serious' cartel conduct only and its seriousness should be captured in the definition of both the physical and fault elements of the offence.

- In Australia the initial proposal was to differentiate between civil and criminal prohibitions by way of the element of an 'intention of dishonestly obtaining a benefit.' The Committee did not consider that this element was an appropriate differentiator and recommended that instead the civil and criminal offences should be defined separately. The dishonesty proposal was subsequently abandoned.

- Under the current scheme, the cartel offences mirror the civil per se prohibitions in their physical elements but are differentiated in their fault elements. Unlike the civil prohibitions, the cartel offences require proof of intention to make a contract or arrangement or arrive at an understanding (or give effect thereto) with the knowledge or belief that it contains a cartel provision.

- The element of intention is unlikely to be a significant differentiator in practice given that such intention will invariably be present where the commitment required for proof of a contract, arrangement or understanding under current Australian law is established. The degree to which the 'knowledge or belief' element is likely to provide a basis for clearly identifying conduct that warrants criminal sanctions is uncertain. Moreover, its interaction with the concept of a 'purpose of a provision'[6] introduces complexity that is arguably unnecessary and may be problematic in the context of a jury trial. The concept of a 'purpose of a provision' has generated substantial debate in the case law under the pre-existing prohibitions and its meaning is yet to be settled. Expansion of 'purpose' to 'direct or indirect purpose' under the Australian cartel prohibitions has not clarified the position.

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5 Law Council of Australia, Trade Practices Committee of the Business Law Section, *Submission to the Treasury on the criminalisation of cartels,* 5 March 2008, p. 7.

6 Such that what has to be proved is that the defendant knew or believed that the 'provision' had the purpose of allocating customers or restricting supply, for example. This raises questions as to whose purpose will be taken to constitute the purpose of the provision and whether this is a matter to be assessed subjectively or objectively. The concept of a purpose of a provision, as appears in the definition of 'cartel provision' in s 44ZZRD is a carry-over from the pre-existing prohibitions in s 45(2) of the TPA.

- The question whether an element of 'commitment' should be required for the establishment of an 'understanding' in the cartel context is currently a matter of debate in Australia.[7] The ACCC has proposed amendments that would make it clear that commitment is not required.[8] It is not clear whether the proposal relates to the cartel offences as well as the civil prohibitions. The Committee has opposed the amendments.[9]

Enforcement policy and discretion

- Co-definition of Australia's new civil and criminal prohibitions means that substantial reliance is placed on ACCC policy and discretion to determine where to draw the line between conduct that warrants prosecution and conduct that warrants civil proceedings. The matter involves the judgement also of the Commonwealth Director of Public Prosecutions (CDPP). Authority to decide whether to prosecute conduct as a cartel offence rests with the CDPP, upon referral by the ACCC. The roles and relationship of these two agencies in relation to enforcement of the cartel offences are outlined in a Memorandum of Understanding (ACCC-CDPP MOU). [10] The implications of having decision-making split between two agencies were of particular concern in relation to the immunity policy (see further below).

- The ACCC-CDPP MOU identifies the following criteria as relevant to decisions by the ACCC to refer a matter for prosecution and decisions by the CDPP to prosecute (in addition to the criteria under the *Prosecution Policy of the Commonwealth*):

    - *the conduct was longstanding or had, or could have had, a significant impact on the market in which the conduct occurred*

    - *the conduct caused, or could have caused, significant detriment to the public, or a class thereof, or caused, or could have caused, significant loss or damage to one or more customers of the alleged participants*

    - *one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil*

    - *the value of the affected commerce exceeded or would have exceeded $1 million within a 12-month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed $1 million within a 12-month period)*

    - *in the case of bid rigging, the value of the bid or series of bids exceeded $1 million within a 12-month period.*[11]

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7 Treasury, *Discussion Paper: Meaning of 'understanding' in the Trade Practices Act*, 8 January 2009.

8 ACCC, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol,* December 2007, pp. 228–9.

9 Law Council of Australia, Trade Practices Committee of the Business Law Section, *Submission on the Australian Government information and consultation paper on the Meaning of 'Understanding' under the Trade Practices Act',* 31 March 2009.

10 *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct*, July 2009.

11 *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct*, July 2009, [4.4], [5.2].

- In the Committee's view these criteria provide insufficient guidance to the business community and its advisers as to when a matter is likely to be pursued as a cartel offence. It is particularly uncertain as to when the ACCC and/or CDPP will regard the circumstances as involving 'significant' impact or detriment. Moreover, the 'value of affected commerce' factor is unlikely to act as an effective filter. To address this particular issue the Committee recommended that the value of affected commerce factor be framed as a minimum percentage (say 20%, as under the United States Sentencing Guidelines) of the combined value of all sales by all competitors who competed over the relevant period in the specific line of commerce in the relevant geographic market affected by the cartel.[12]

- The Senate Economics Committee that reviewed the CC&OM Bill recommended that the ACCC release detailed guidelines that would provide business with greater certainty regarding the types of behaviour likely to be prosecuted.[13] The ACCC subsequently released guidelines on its approach to cartel investigations.[14] However, the guidelines did not elaborate substantively on the ACCC-CDPP MOU but rather simply emphasised that the list of criteria in the MOU is non-exhaustive and that, in deciding whether to refer a matter for prosecution, the ACCC will take a 'holistic approach' to its consideration of relevant factors (para [16]). In the Committee's view, the guidelines fell short of fulfilling the Senate Economics Committee's recommendation.

- The question of whether a matter is approached as a potential cartel offence (as distinct from a potential civil contravention) has practical implications for investigation and evidence-handling. This is acknowledged in the ACCC investigation guidelines which state that 'in the absence of a clear indication that a matter will be prosecuted criminally or subject to civil proceedings', ACCC investigators will conduct investigations 'in a manner that will preserve its capacity to seek criminal prosecution' (para [24]). However, in the absence of clear indicia marking the distinction between matters appropriate for civil or criminal treatment, more substantial time and resources may be allocated to criminal investigations than would otherwise necessarily be warranted or appropriate. For the businesses subject to investigation, uncertainty as to whether the matter is viewed as a potential prosecution will hamper decision-making about the nature and degree of cooperation that they provide in the investigatory phase.

Corporate liability

- The Committee supports the view that cartel offences should be subject to corporate criminal liability if cartel conduct is to be made subject to individual criminal liability. The Committee does not believe that there is any sufficient policy or other reason in this context for limiting criminal liability to the conduct of individual directors, employees or agents.

- The TPA provides for corporate criminal and civil liability for contraventions of the prohibitions against cartel conduct under Part IV Division 1 of the Act. That approach

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12 Law Council of Australia, Trade Practices Committee of the Business Law Section, *Submission to the Senate Economics Committee on the Latest Draft of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* 30 January 2009, p. 5.

13 Senate Standing Committee on Economics, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* 2008, pp. 32–3 [4.9]–[4.10] Recommendation 1.

14 ACCC, *ACCC approach to cartel investigations,* July 2009.

is consistent with the general common law principle that corporations are criminally liable for offences committed on their behalf, as reflected in Part 2.5 of the *Criminal Code* (Cth).

- The question of whether or not corporations should be subject to criminal liability for cartel conduct was reviewed in Australia in the Dawson Committee's *Review of the Competition Provisions of the Trade Practices Act* (2003). The Dawson Committee expressed the view that it "was not inclined in principle to favour the criminal prosecution of individuals, on the one hand, and civil proceedings against the corporation on the other, for the same conduct" (at p. 158).

- A concern of the Committee is that the cartel offences under the TPA are not subject to the general principles of corporate criminal responsibility under Part 2.5 of the *Criminal Code* (Cth) of the TPA. Corporate criminal liability for cartel offences under the TPA does not necessarily require corporate fault and can be imposed on the basis of the state of mind of a director, employee or agent acting within the scope of their actual or apparent authority (TPA s 84(1)). In consequence, corporations may be held liable for cartel offences on the basis of vicarious responsibility for the state of mind of an employee or agent and without proof of corporate fault.

Joint ventures

- The Committee believes that it is essential from the standpoints of consumer welfare and justice that a cartel offence or cartel civil penalty prohibition be subject to a joint venture exception that recognises the general importance to the economy of legitimate collaborations between competitors and does not impose unnecessary or commercially unrealistic restrictions on business. Unfortunately, the joint venture exceptions under ss 44ZZRO and 44ZZRP of the TPA are flawed in these fundamental respects. The Committee has several practical concerns about those exceptions.

- The joint venture exceptions under ss 44ZZRO and 44ZZRP are limited to cartel provisions in contracts, and do not apply to cartel provisions in arrangements or understandings. The standard definition of collusion under the TPA, as under the Commerce Act, is not limited to contracts but is expressed in terms of a "contract, arrangement or understanding." A practical concern is that operational decisions or agreements by joint venturers may easily contain a cartel provision (as defined by s 44ZZRD) without being enshrined in a contract even though they are made for the purposes of a legitimate joint venture. Allowance is made under ss 44ZZRO and 44ZZRP for cases where the parties believe that there is contract, but the relaxation falls far short of resolving the problem. It is instructive to consider the policy reason for the contract requirement under ss 44ZZRO and 44ZZRP. The policy reason appears to be to seek to ensure that the most serious cartelists cannot claim that their cartel is a joint venture. However, given that "hardcore cartelists" can mask their collusion in a contract, that policy reason lacks persuasion. The requirement of a contract is unlikely to thwart hard-core cartels but may easily trip up those who enter a pro-competitive joint venture arrangement. Accordingly, the view of the Committee is that the joint venture exceptions should apply to a cartel provision contained in an arrangement or understanding and not be limited to a cartel provision contained in a contract.

- Second, the exceptions under ss 44ZZRO and 44ZZRP are limited to joint ventures that are *"for the production of goods and/or supply of goods or services"*. This limitation is over-prescriptive and unduly narrow. The Committee does not support the proposition that the only legitimate joint venture is one that *"produces goods"* or

"supplies services" as its sole or dominant function. Moreover, the limitation in question is contrary to the wider definition of joint venture in section 4J which does not seek to prescribe the type of activity in trade or commerce that a legitimate joint venture may pursue.

- In our experience, legitimate joint ventures may be created to cooperate in activities which may not be covered by the exceptions under ss 44ZZRO and 44ZZRP. In particular:

  (a) joint acquisition of goods and/or services can occur in a number of industries, including among small businesses that intend to pool their resources in order to obtain more favourable terms of trade;

  (b) joint ventures for research and development may occur in cutting-edge industries such as biotechnology or defence - where research is conducted without a specific end product being produced, it is uncertain whether or not the joint venture has the requisite characteristic of being "for the production of goods and/or supply of goods or services"; or

  (c) joint marketing or advertising – although the purpose or end result of joint marketing ventures is unlikely to be anti-competitive and may in fact provide choice to consumers, doubt may arise as to whether or not this type of joint venture is 'for the purpose of producing goods or services' or for the purpose merely of marketing or advertising goods or services.

- The narrow scope of a requirement that, to qualify for a joint venture exception, the joint venture must be for the production and/or supply of goods or services is likely to prejudice innovation in a range of sectors which play a vital role in the Australian or New Zealand economy, including financial services, information technology and the important resources sector. It may also result in unwarranted criminalisation of legitimate activity. The Committee is therefore of the view that the wording of ss 44ZZRO and 44ZZRP requires amendment to read *"for the production and/or supply and/or acquisition of goods or services"*.

- Thirdly, the joint venture exceptions under ss 44ZZRO and 44ZZRP require that the joint venture be carried on jointly *"by the parties to the contract"* under consideration (ss 44ZZRO(1)(c) and 44ZZRP(1)(c)). The Committee believes that this requirement may preclude reliance on a joint venture exception in cases of legitimate joint venture activity where all the parties to the contract do not carry on the joint venture activity jointly. For example, where unincorporated joint venture parties enter into a contract with a third party (e.g., to acquire output produced by the joint venture), that contract may contain a cartel provision. However, as that third party is not a joint venture participant, the exceptions under ss 44ZZRO and 44ZRP do not appear to apply to any of the parties to the joint venture contract. This problem is best avoided by defining the joint venture exceptions in terms that do not necessarily require that the joint venture be carried on jointly by all parties to the contract, arrangement or understanding that contains the alleged cartel provision.

- Fourthly, the approach taken under ss 44ZZRO and 44ZZRP has been to define the joint venture exceptions in terms of narrow rules that lack a clear and cogent economic rationale. The Dawson Committee highlighted the importance in United States antitrust practice of a "rule of reason" test in relation to joint ventures. Under such a test, the focus is on whether or not the restrictions imposed by the parties are *"reasonably related to, and reasonably necessary to achieve pro-competitive benefits*

from, an efficiency-enhancing integration of economic activity" (Dawson Committee Report, pp. 138-139). The United States Congress has also provided that certain contracts established to carry out a range of research and development and production joint ventures can only be examined under the rule of reason. If, at the completion of the rule of reason analysis, the agreements are deemed reasonably necessary to produce the *"cognizable efficiencies"* flowing from the collaboration, any challenge to the agreement will be withdrawn. The Committee suggests that further analysis of the benefits of adopting a rule of reason test in relation to joint venture agreements be undertaken. The Committee notes that the defence of ancillary restraint now provided under s 45(4) of the *Competition Act 1986* (Can) illustrates one possible way of incorporating a rule of reason test into a defence or exception to per se liability for cartel conduct.

Implications for immunity/leniency and cooperation policies

An effective immunity policy is essential to the success of the regulatory regime given the difficulty of detecting and investigating cartels without the cooperation of at least one of the cartel members. To encourage cartelists to come forward, it is important to provide a high degree of certainty and confidence in the process for applying and obtaining civil and criminal immunity or leniency.

A related issue is the consistency with which immunity policies are administered, both within a jurisdiction with regard to civil and criminal immunities, and between jurisdictions. In the Committee's view, companies which have exposure for their cartel conduct in multiple jurisidictions are more likely to seek immunity simultaneously in those jurisdictions which have civil and criminal immunity application processes which are aligned.

The Committee therefore considers that in order to provide immunity applicants with sufficient certainty and confidence in coming forward:

- applications for civil and criminal immunity should be processed together and preferably by the same body;

- the criteria for determining whether immunity should be granted for civil contraventions and criminal offences should be the same and should minimise the exercise of discretion.[15]

In Australia, unfortunately, we do not have a single decision-maker. However, the ACCC and DPP recognised the need for close cooperation and consultation in the criminal investigation and prosecution process and developed the ACCC-CDPP MOU. Broadly, an individual or corporation can apply to the ACCC for immunity for both civil and criminal proceedings in accordance with the ACCC's Immunity Policy. If the ACCC considers that its criteria for immunity are satisfied, it can grant civil immunity and may also recommend that the DPP grant criminal immunity. The Director of the DPP applies

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15 In this regard, the Committee notes the revisions made to the US immunity policy in 1993 to largely eliminate prosecutorial discretion increased enormously the effectiveness of the policy (Scott D Hammon, 'Cornerstones of an Effective Leniency Program' (Paper presented at the Cracking Cartels conference, Sydney, 24 November 2004) 3). At the same conference, Simon Williams, Director of Cartel Investigations of the UK Office of Fair Trading, explained:

'If a criminal offence for cartel conduct is to be introduced, then any existing leniency policy operating in the context of the civil regime for cartel enforcement would be significantly undermined without parallel capacity to grant immunity from criminal sanction.'

Simon Williams, 'Cracking Cartels: Trends and Issues: The UK Perspective' (Paper presented to the ACCC Conference, Sydney, 2004).

the same criteria as the ACCC in deciding whether to grant criminal immunity and the two decisions are communicated to the applicant simultaneously.

If the Commerce Commission were to have the power to grant conditional immunity for both civil and criminal matters then the New Zealand regime would provide even greater certainty for applicants than the Australian regime which ultimately relies on DPP discretion in granting immunity from criminal proceedings. However, if the Commerce Commission needs to rely on a decision by the Crown-Solicitor then the Commerce Committee will need to align the immunity policies of both bodies as Australia has sought to do through the ACCC-CDPP MOU.

In the Committee's view, the adoption of an immunity process of the kind described above should harmonise New Zealand's and Australia's immunity policies and should provide sufficient encouragement to applicants in both jurisdictions to apply for immunity with some confidence that their applications will face similar treatment in both jurisdictions.

The Committee is also of the view that in examining whether or not to adopt a criminal regime, it is important to consider the implications for the enforcement agency's cooperation policy. We note in this regard the recent adoption by the Commerce Commission of a new Cartel Leniency Policy and Process Guidelines (March 2010), that deals with cooperation as well as immunity/leniency in cartel cases, and is intended, amongst other things, to provide greater transparency and certainty to prospective applicants.

In Australia, traditionally the ACCC has 'settled' a high proportion of cartel cases under its Cooperation Policy for Enforcement Matters (2002). Upon introduction of the new dual civil/criminal regime, the ACCC has made it clear that it will not negotiate with parties under this policy until it is evident that the matter is not to be referred for prosecution.[16] If referred, any question of cooperation will be dealt with pursuant to the CDPP's policy on charge negotiation (under the Prosecution Policy of the Commonwealth).[17] That policy is more restrictive and less transparent than the ACCC's Cooperation Policy. It does not provide for joint submissions on penalty, for example – a key feature of the ACCC's approach in attracting cooperation to date. The ramifications of this difference for the extent to which defendants will cooperate and cartel cases will be resolved without trial in Australia are uncertain. They have not been dealt with in any policy document released by the ACCC and/or CDPP.

In New Zealand, the Discussion Document indicates that under a criminal regime immunity/leniency decisions would be made by the Commerce Commission rather than by an independent prosecutor so as to preserve the effectiveness of the Commission's leniency policy.[18] It is not clear how it is proposed to have decisions made in relation to incentives for cooperating defendants other than those eligible for leniency. In the Committee's view, this is a matter that merits consideration.

March 2010

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16 Australian Competition and Consumer Commission, *ACCC Approach to Cartel Investigations*, July 2009, [37]-[40].

17 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, 1992 (as amended March 2009), Section 6.

18 Discussion Document, [327].