Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi
to the
Ministry of Economic Development

on the
Cartel Criminalisation Discussion Document

P O Box 6645
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5. Exemption of collective negotiations between sole (individual) contractors, and a purchaser of their services.

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1. Introduction

1.1. This submission is made on behalf of the 39 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 350,000 members, the CTU is the largest democratic organisation in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. This submission on the proposal to harmonise New Zealand and Australian law on hard core cartels, and in particular to criminalise cartels in New Zealand, does not address all the matters in the Ministry of Economic Developments January 2010 discussion paper, although we reserve our position on matters we have not raised. Instead we focus on the interaction of competition law and employment law and the increasing problem of employees being transferred onto contracts of service.

2. General

2.1. In general we support stronger penalties and criminalisation of hard core cartel behaviour (an agreement to not compete with each other, and especially price-fixing, bid-rigging, market allocation and output restrictions). We believe it would be an additional disincentive for senior executives to face lengthy terms of imprisonment, and for both them and their companies to suffer loss of reputation.

2.2. Cartels can cause significant losses to individuals, and can dwarf common criminal offences of dishonesty in the damage they can cause.

2.3. We also note that international cartels (as well as international markets in which there is only limited competition because only a small number of firms are present) can have a significant economic effect. Any action that strengthens the hand of New Zealand authorities in this regard is valuable,

including criminalisation. We also urge further international agreements to combat, cooperate in prosecuting and share information on cartels.

2.4. However we are also mindful that not all behaviour that could fall under the definition of "cartel" is necessarily damaging. Examples include sectors where there are significant economies of scale in which case pricing arrangements may lead to lower long run costs and greater stability. The focus in such cases should be on regulating these sectors, prices and firms to ensure the lower costs are passed through. To put this another way, if price fixing is in the public interest it should be fixed by public agencies, not by private interests. In some such cases (electricity generation is one) there are also issues of public interest such as long term planning for future provision and the infrastructural nature of the industry which demand regulatory solutions (including public ownership) which may be specific to the industry.

3. Exemptions

3.1. There are a number of specific exemptions from Part 2 of the Commerce Act, which deals with activities that "substantially lessen competition".

3.2. In Question 15, you ask "Are there any existing exceptions to Part 2 that should not be applied to the cartel offence (or more broadly)? Are there any exemptions from the Commerce Act in other legislation that should not be applied to the cartel offence?"

3.3. One is for "the remuneration, conditions of employment, hours of work, or working conditions of employees" (s44(1)(f)). We deal with this and related matters in the following section.

3.4. Another is for export or import of goods carried by sea (s44(2)). We would support the withdrawal of this exemption. Shipping conferences are a form of price fixing which merits investigation. They should not be given exemption from cartel law.

3.5. However we support the continued exemption for export price arrangements (s44(1)(g)), which underpin the status and role of producer cooperatives.

4. Employment and individual contracting

4.1. With regard to your Question 15, our emphatic response with regard to conditions of employment is "no" – this should continue to be an exemption. There are many good reasons why employment should be covered by its own legislation, among them the significant difference in bargaining power. This is recognised in the Objects of the Employment Relations Act 2000: "to build productive employment relationships ... by acknowledging and addressing the inherent inequality of power in employment relationships" (s3(a)(ii)).

4.2. The Employment Relations Act as a consequence has among its objectives "promoting collective bargaining" (s3(a)(iii)) and "to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively" (s3(b)) recognising the formal international recognition given to these and other special aspects of the employment relationship.

4.3. We note that the exemption is currently relatively narrow, limited to "the remuneration, conditions of employment, hours of work, or working conditions of employees". Matters affected by the employment relationship are considerably broader than that. In addition, not all matters of industrial relations are strictly matters of employment, as we discuss below.

4.4. We therefore **recommend** that that the exemption in s44(1)(f) be widened to recognise the role of unions as provided for in the Employment Relations Act 2000 and the Trade Unions Act 1908 by covering the actions of unions and their members in general, including matters discussed below.

4.5. There has been an increasing trend for employers to put pressure (sometimes at threat of dismissal) onto employees to transfer them to various forms of individual contracting: that is, contracts for service rather than

contracts of service. Under these contracts, employees lose all the protections of the Employment Relations Act, including the right to take industrial action, and any collective agreements negotiated under it.

4.6. A current example involves Telecom which has for some time contracted out maintenance services to firms and at times individuals. A recent very public and hard fought dispute was between one such firm, Visionstream, and the employees of a firm from which it had won a contract from Telecom. Visionstream insisted on hiring those former employees on the basis of individual contracts for service ("owner-operators").

4.7. Andrew Little, national secretary of the Engineering, Printing and Manufacturing Union (EPMU) which represented these employees, described the situation in the following terms:

> "Telecom wants them to go from having certainty in terms and conditions of employment, with rights to paid leave, to negotiate wages and conditions and have a say on work issues, and against unfair treatment, to a contract with no certainty of income, no minimum rights and with all control handed over to a new Telecom sub-contractor, Visionstream."[1]

4.8. This case was particularly harsh on the former employees. They were to become dependent contractors. As Little described it:

> "The contractor is controlled by and dependent on the one source of work and income. Telecom and Visionstream say contractors will be able to do work for other phone companies, but this is hardly likely under a requirement to be available to Telecom 12 hours a day, seven days a week. The reality is there is no business opportunity for the individual worker. There is no ability to grow the 'business' through skilled management of work or to specialise in high value work – you only get the work that is eked out to you. It's not possible to set a competitive price that covers overheads and other costs. It's not possible to build

[1] "Cost-cutting exercise dressed up as business opportunity", by Andrew Little, *New Zealand Herald*, 28 July 2009.

goodwill, the real value in a small business, so that you have something to sell when you decide to get out."[1]

4.9. This is by no means the only case of this type in New Zealand. The Telecom contractor, Visionstream has also used similar contracting arrangements in Australia.

4.10. While the Commerce Act is not the right place to address this matter in its entirety, what these examples do reveal is that many of the same elements exist in such contracting of individuals as exists in employment relationships: the "inherent inequality of power", and the day-to-day dependence of individuals on such contracts for their livelihoods. The Commerce Act should at the minimum be permissive of a solution.

4.11. In Australia, the Trade Practices Act 1974 (TPA) through the Australian Competition and Consumer Commission (ACCC) allows for collective negotiations between a group of contractors and the purchaser of their goods or services on the basis of authorisation by the Commission. It has done so for several years, including a recent simplification of the process. Since January 2007, authorisations have been possible through a process of notification to the ACCC. Their authorisations have permitted for example

- Present and future Tasmanian Farmers and Graziers Association members to collectively negotiate the terms and conditions of vegetable growing contracts with McCain Foods (Aust) Pty Ltd and Simplot Australia Pty Limited (February 2010)[2]

- Owner-drivers to collectively negotiate the terms and conditions upon which they provide earthmoving services in the commercial and civil construction sectors in south-east Queensland, picking up and delivering materials to and from construction sites. According to ACCC, "Most operate as small businesses and are engaged on a job-by-job basis, The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland will provide support services to

[2] "Collective contract negotiations working well for Tasmanian vegetable growers", ACCC news release 24 February 2010, http://www.accc.gov.au/content/index.phtml/itemId/915706.

facilitate the collective negotiations but will not conduct negotiations on behalf of the owner-drivers." (June 2009)[3]

- A group of Western Australian newsagents to seek to collectively negotiate the terms and conditions of their contracts with West Australian Newspapers, publisher of *The West Australian*, and a similar arrangement in Queensland (June 2009)[4]

- The Container Logistics Action Group, a group of container carriers, customs brokers and freight forwarders involved in the transportation of containers to and from Port Botany, to engage in collective negotiations with the stevedores at Port Botany. The authorisation enables the Group's members to collectively negotiate with the stevedores on the terms of access to the Port Botany container terminals. Other matters for negotiation include the price of a number of services supplied by the stevedores, such as container washing and storage. The ACCC noted that "there is a significant imbalance of negotiating power between stevedores and container carriers, arising from the features of the industry". (July 2006)[5]

- Corporate bookmakers, through the Association of Australian Bookmaking Companies, to collectively negotiate information access fees with certain racing and sporting bodies in Victoria which charge for access to information used by bookmakers and TABs regarding racing events. (July 2006)[6]

4.12. Authorisations are commonly for periods of up to five years, and recognise aspects which bring more efficient outcomes and net benefit to the public such as increased flow of information, reductions in transaction costs, greater opportunity to influence the purchasing party, as well as recognising

[3] "Owner-drivers to collectively negotiate", *ACCC Briefing*, June 2009, p. 9.
[4] "WA newsagents allowed to collectively bargain", and "Newsagents allowed to collectively bargain", *ACCC Briefing*, June 2009, pp. 7, 8.
[5] "ACCC allows collective negotiations at Port Botany", ACCC news release, 6 July 2006, http://www.accc.gov.au/content/index.phtml/itemId/751599
[6] "ACCC allows collective negotiations by corporate bookmakers", ACCC news release, 20 July 2006, http://www.accc.gov.au/content/index.phtml/itemId/754496/fromItemId/2332

imbalances of power. In all cases the ACCC considered that the risk of any public detriment was low.

4.13. In a 2004 address to the Victorian Taxi Association, John Martin, ACCC Commissioner, described the rationale as follows:

> "The most common form of collective negotiation occurs where a number of small businesses must deal with larger and more powerful business for supply or purchase of their goods and services. In order to redress this imbalance in bargaining power, small businesses will sometimes apply for authorisation to negotiate terms and conditions as a group, usually allowing them to come to a more beneficial agreement."[7]

4.14. We **recommend** that cartel legislation should allow for exemption of collective negotiations between sole (individual) contractors, whether independent or dependent, and a purchaser of their services.

4.15. Examples of its use could include

- Visionstream contractors collectively negotiating with Visionstream on payment rates, penalty rates, arrangements for termination of contracts, influence over work arrangements such as availability of work and availability to work, rights to contract independently, bulk purchasing of insurance, equipment and materials, and other conditions of contracting.

- Taxi drivers collectively negotiating with a dominant taxi company on matters such as fare rates, rates of payment to the company, and minimum hours of work.

- Owner-drivers negotiating with transport firm on payment rates, vehicle requirements and other conditions.

[7] Address to 2004 Victorian Taxi Association State Taxi Conference, "Taxis & Trade Practices", John Martin, Commissioner, ACCC, 9 November 2004, p.15.

4.16. The Australian legislation is far from perfect and has failed to address its objective with regard to these provisions, which were reviewed by the 2003 Dawson Review and concluded that

> "In some industries a number of competing small businesses must bargain with big business. Individually, the small businesses may lack bargaining power and so may seek to join together and bargain collectively, thereby exercising a degree of countervailing power to that of big business. Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business."[8]

4.17. A recent review of the working of the TPA by University of Sydney Law academic Shae McCrystal[9] has noted the low uptake of these provisions, contrary to the expectations of the ACCC. McCrystal analyses the reasons for the failure of the legislation and gives illustrative examples, including one concerning an unsuccessful attempt by contractors of telecommunications service company, Service Stream[10], whose employment practices bear considerable similarity to those of Visionstream, to gain authorisation from the ACCC to bargain collectively. She concludes that the TPA "produces an absurd outcome. Access to collective bargaining for contractor workers is stripped of meaning for all circumstances but the most innocuous. Any hint of pressure or power will result in refusal of the notification."

> "Parties with no market power may, if a notification is allowed, collectively try to pursue efficiency gains provided that the collective does not seek to exercise any muscle. Groups with existing market power, however

[8] "Review of the Competition Provisions of the Trade Practices Act (2003)", by Daryl Dawson, Jillian Segal and Curt Rendell, p.115. Available at http://tpareview.treasury.gov.au/content/report.asp.
[9] "Is there a 'public benefit' in improving working conditions for independent contractors? Collective bargaining and the Trade Practices Act 1974 (Cth)", by Shae McCrystal, *Federal Law Review*, Vol. 37, No. 2, pp. 263-293, 2009. Available at http://ssrn.com/abstract=1491855.
[10] Ibid, p. 284-288.

theoretical, cannot combine. Countervailing market power as an objective is relevant in theory only." [11]

4.18. In particular, McCrystal notes the "futility of collective bargaining by powerless labour market actors without at least the potential for a degree of collective pressure"[12]. The legislation should therefore include the right for them to boycott their target (analogous to the right to strike) as part of the collective negotiating process.

4.19. We **recommend** that the legislation should exempt boycotts as part of collective negotiations between sole (individual) contractors and a purchaser of their services, where that boycott is directed at the purchaser.

4.20. There are other considerations that should be addressed in such exemptions, including criteria for such exemptions, the role of unions, and processes for exemptions. We do not address these here but would wish to be consulted further if and when provision for such an exemption proceeds.

5. Conclusion

5.1. The New Zealand Council of Trade Unions supports criminalisation of hard core cartels, and stronger penalties in general. We urge deeper consideration of the issues surrounding international cartels.

5.2. However there are some behaviours that could be described as cartels which merit different treatment. Among these are sectors where significant economies of scale mean that pricing arrangements may have public benefits, in which case regulation is a better policy response.

5.3. The Commerce Act currently has a list of exemptions to cartel (and other competition-reducing) activities. We **recommend** the removal of international shipping from the list but the retention of export price arrangements.

5.4. We strongly support the retention on the list of conditions of employment and **recommend** its extension to the activities of unions and their members.

[11] Ibid, p.292-293.
[12] Ibid, p. 291.

5.5. We have pointed out the increasing number of employment-like relationships between individual contractors and purchasers of their services. We **recommend** exemptions for collective negotiations between individual contractors and a purchaser of their services, and for boycott action in the context of such negotiations.

5.6. While we have not submitted on other aspects of the MED's discussion document, we reserve our position on matters we have not raised and will maintain an interest in how these matters progress.