COMMERCE COMMISSION

Please refer to:

Project No. 11144
984425_1

31 March 2010

Cartel Criminalisation
Ministry of Economic Development
PO Box 1473
Wellington 6140

By email: cartels@med.govt.nz

Dear Ms Yasbek

Discussion Document: Cartel Criminalisation

1. Thank you for the opportunity to comment on the possible criminalisation of cartel conduct in terms of the Ministry of Economic Development's (MED) Discussion Document of January 2010.

2. The Commission has no position on the policy issue of whether or not cartel conduct should be criminalised.

3. If the Government decides to introduce criminalisation, there will be operational impacts for the Commission. The impacts would of course depend on the detail of the legislation. The comments below outline what we expect these impacts would be on the basis of the issues covered in the Discussion Document.

4. We have grouped our comments under four thematic headings that we consider are more appropriate for discussing the operational impacts on the Commission rather than responding to the individual questions in the Discussion Document, namely:

    - Nature of the cartel offence;
    - Immunity from criminal prosecution;
    - Court processes; and
    - Resource Implications for the Commission.

Nature of the cartel offence

5. If the cartel offence is clearly and accurately defined, a *per se* prohibition of cartel conduct would provide operational benefits without introducing many practical problems. It would allow more cost-effective investigation and enforcement than would a "rule of reason" type analysis. For a criminal offence, a *per se* prohibition

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would provide a greater degree of certainty for the business community, the Commission and the High Court.

6. If the physical elements for the civil prohibition and the criminal offence were the same, it would be simpler and more cost-effective for the Commission to investigate and to take enforcement action. Similarly, having the same defences and exceptions for the civil prohibition and the criminal offence would increase the Commission's effectiveness in taking enforcement action and ensuring compliance.

7. The Commission has found its Leniency Policy to contribute significantly to the detection and investigation of cartels. If criminalisation is introduced, the current policy would be revised, to ensure that it is consistent with the amended Commerce Act. However, the Commission notes that it is important that any amendment to the Commerce Act would continue to allow the operation of an effective leniency policy. We are aware from the International Competition Network that in some jurisdictions with criminal provisions covering cartel conduct, where prosecutions are undertaken by another body, the competition authorities consider that the wording of the legislation might hinder the operation of the relevant leniency policies.

Immunity from criminal prosecution

Notification

8. The Discussion Document outlines a possible notification scheme. The proposal reflects the view that, as cartel conduct is covert, notification would provide an avenue for businesses to demonstrate that the conduct is not covert and therefore should not attract criminal liability. The main benefit would be to give certainty for businesses.

9. We are not clear on how the proposed process would work in practice, and the costs and benefits of any particular process that was being considered would need to be assessed. There are three principal possible models that might be considered for a notification scheme.

10. One model would provide for the parties to notify the Commission, and to obtain automatic immunity if the required details were provided within a prescribed time frame. This is the model that already applies under s 44(1)(g) of Commerce Act for contracts, arrangements or understandings that relate exclusively to the export of goods from New Zealand or exclusively to the supply of services wholly outside New Zealand. (Some notifications have been received by the Commission under s 44(1)(g), but not in recent years.)

11. This model would minimise compliance and administrative costs, and would increase certainty for business. However, if the number of notifications was large, the process could lead to more risk of "hiding in plain sight". Further, in the absence of a review of the notified information by the Commission or by customers, the efficacy of the process could be questioned.

12. The second model would be for the parties to notify the Commission of the arrangement, with the Commission having a specified, fairly short, time to object. If the Commission did not object within the prescribed time, the parties would have

immunity. The agency objection model would reduce the risk of hiding in plain sight. It would involve more costs to the Commission than the other two models, and would require a diversion of Commission resources from other Commerce Act activities. There would also be a delay for businesses in getting certainty. We are aware that, this model is used by the ACCC for some types of arrangements.

13. The third model requires the parties to notify their customers of the arrangement. This model would involve no direct costs to the Commission, and the compliance costs for business would be low. This model is used in Canada for joint bidding arrangements, and it appears to achieve the objective of publicising relevant arrangement to customers who are well placed to assess the arrangement quickly and to consider if a complaint to the competition authority is warranted. This would be consistent with the principle underlying much of the Commerce Act that notification to the Commission is not necessary. This avoids unnecessary compliance costs for businesses, and administrative costs for the Commission.

Clearance

14. The Discussion Document considers a possible clearance regime for joint ventures, but it does not provide much information on what types of joint ventures might be covered by a clearance regime.

15. While the impact of introducing such a regime is hard to predict, depending on the scope of the regime and the uptake, it is possible that a widely drawn clearance process could result in a large number of applications that would require substantial Commission resources to assess[1]. The Commission would also incur significant costs to develop internal and external guidelines for any new process and for staff training.

16. We note that a clearance process for joint ventures would be inconsistent with the practice in Australia.

17. A possible clearance regime for other potentially restrictive trade practices, particularly long term contracts, appears to be outside the scope of cartel conduct.

Court Processes

18. If sentencing judges do not have access to civil orders or their equivalents, (such as management exclusion orders) the Commission would need to bring multiple proceedings. This would introduce unnecessary cost and delay both to the Commission and to the other parties.

19. If cartel conduct by companies was not subject to criminal penalties, and the Commission brought criminal proceedings against an individual, it might be necessary for the Commission also to bring separate civil proceedings against the company to obtain an appropriate financial penalty. This would involve extra cost and time.

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[1] The Commission's submission of August 2007 to MED on the clearance and authorisation provisions of the Commerce Act continues to be relevant.

Resource Implications for the Commission

20. If cartel conduct is criminalised, the Commission would need to identify any changes that might be required in its processes to undertake criminal cartel investigations and undertake training of staff. Similarly, if any new notification and clearance processes were to be introduced, some internal and external preparation work would be required, and costs would attach to this.

21. The Commission is aware that overseas competition authorities have issued guidance on the circumstances in which they will seek to prosecute cartel conduct criminally and their approach to the offence, defences and related provisions.[2] Prior to the entering into force of any cartel criminalisation provisions, the Commission would endeavour to consult upon and issue similar guidance. The Commission would also update its Leniency Policy to cover criminalised conduct and would engage with businesses to increase awareness of the implications of the new provisions. These steps would increase certainty for businesses and would increase the likelihood of compliance.

22. The Commission would need to review the adequacy of its facilities and systems for the secure handling of evidence. This would likely require some capital expenditure, for example for larger evidence rooms and video equipment for recording interviews.

23. We recommend that, if cartel conduct is criminalised, any legislation to give effect to this comes into force a year from when it is passed, to allow preparations to be carried out fully and efficiently.

24. I hope that this response is useful in your deliberations. Commission staff are happy to continue to talk with MED about the operational and resource implications of any criminalisation of cartels.

25. If you have any specific questions on this submission, please contact Richard Sanders, Manager, Competition Policy and Development on (04) 924 3636 (direct line) or email Richard.Sanders@comcom.govt.nz in the first instance.

Yours sincerely

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[2] On 14 July 2009, the ACCC issued "Guidelines – ACCC approach to cartel investigations", which is available on www.accc.gov.au. On 23 December 2009 the Competition Bureau of Canada issued "Competitor Collaboration Guidelines", available on http://competitionbureau.gc.ca.