BELL GULLY

9 April 2010

Bell Gully submission on MED Cartel Criminalisation discussion document

1. Thank you for the opportunity to make submissions on the Ministry's "Cartel criminalisation" discussion document. Bell Gully is a leading competition law practice, advising major New Zealand and overseas companies on all aspects of competition law. Our competition law team has acted for companies and individuals involved in most of the Commerce Commission's (**the Commission's**) major cartel investigations, including timber preservative chemicals, fine paper, corrugated cardboard packaging, freight forwarding, air cargo, refrigerator compressors and credit card interchange investigations/proceedings, among other matters.[1] Our comments below reflect our practical experience gained during those matters (and of course our engagements with the Commission in respect of a wide range of other merger and restrictive trade practices (**RTP**) matters).

2. We welcome the opportunity to make submissions on an issue which is of significant concern and importance to our clients. We would be very happy to discuss our views further with the Ministry. We would also be very happy to assist the Ministry to engage directly with our clients wherever possible. Please feel free to contact us (Phil Taylor, Simon Ladd, Torrin Crowther, and Jenny Stevens on 09 916 8940, 09 916 8934, 09 916 8621, and 04 915 6849 respectively).

Summary

3. Our submission responds to the discussion document in three parts, corresponding to the key sections of the discussion document:

   (a) should we criminalise hard-core cartel conduct?

   (b) developing a legal definition; and

   (c) investigation and prosecution of cartel cases.

4. We are conscious that the Minister and Ministry consider that there is a good case for cartel criminalisation. However, the information contained in the discussion paper falls short of demonstrating a need for cartel criminalisation. There is no empirical evidence of the incidence of cartels in New Zealand and no assessment (empirical or otherwise) of the costs or benefits of criminalisation. As a matter of good policy development, evidence gathering and further analysis is required.

5. Harmonisation with Australia and international trends are relevant matters but they are not the only (or even primary) factors to be considered. Each of the countries that have introduced criminalisation in the last decade has considered carefully its domestic position, and this has been reflected in the markedly different approaches taken to legislation by those countries. Many aspects of New Zealand competition law are not harmonised with Australia. The need to prioritise harmonisation of cartel criminalisation, as opposed to other matters of competition law policy, is unclear. Criminalisation should not be considered in isolation and needs to be considered as part of a broader review of Parts 2, 5 and 6 of the Commerce Act 1986 (**the Act**).

6. We consider that the need for certainty and clarity for the business community is absolutely paramount. We, and our clients, have real concern that criminalisation will discourage companies from engaging in pro-competitive conduct, without any material gains in cartel detection and deterrence. This concern was emphasised by all participants at the Ministry's workshops and, in our view, requires that any cartel offence must be precisely and narrowly defined.

7. In the expectation that the Ministry will now develop a specific proposal for consultation and debate, we consider that key aspects of any changes to the Act should include:

[1] For details of our practice and experience, please see http://www.bellgully.com/areas/area.lo.0006.asp.

(a) precisely and narrowly defining a criminal offence that covers only hard core cartel behaviour (our understanding from the Ministry's workshops is that the proposal is to criminalise only the "smoke-filled room" cartels);

(b) providing a combination of a clearance and exemption regime that enables companies to seek and obtain assurance that they will not commit a criminal offence when engaging in complex, pro-competitive behaviour;

(c) providing for an independent prosecution decision following investigation by the Commission; and

(d) ensuring that the civil rights of those under investigation (who face imprisonment for five to seven years) are not compromised by a carrying over of the Act's existing investigation powers from the civil context to the criminal context.

8. We appreciate the opportunity to attend the Ministry's workshops and to make this submission, but would strongly encourage the Ministry to seek input from the business community (if necessary on a confidential basis), including input of experiences with Commission investigations under the current civil regime and the strengths and weaknesses of that regime. We can see no immediate urgency for the introduction of cartel criminalisation and consider it is more important that the Ministry take the time necessary to "get it right". In this regard, we note that the Dawson Committee conducted a broad, detailed review of the Trade Practices Act 1974 (**TPA**) in Australia, prior to the passage of legislation introducing criminalisation of cartel conduct – and there are already concerns in Australia about the drafting of its legislation.

Should we criminalise hard-core cartel conduct?

9. We understand that consideration of cartel criminalisation is at an early stage, but are concerned that the Minister's view is already that "*there are **compelling** reasons to criminalise cartel behaviour*" (Speech to the Competition Law and Regulatory Review Conference on 22 February 2010, emphasis added) and the discussion document concludes that there is a prima facie case for criminalisation. We consider that, as a matter of good policy development, these views are premature.

10. In particular:

(a) The discussion document does not present any empirical evidence regarding key issues such as the incidence of cartels in New Zealand or the benefits of criminalisation. Nor does the discussion paper enunciate the Minister's "compelling reasons" for criminalisation (or attempt to do so).

(b) The concerns expressed contrast with the public statements of the Commerce Commission regarding the success of its anti-cartel policies (including its recently updated leniency policy) and enforcement action.

(c) Although the discussion paper acknowledges the need to weigh the magnitude of the costs and benefits of criminalisation, there is no assessment (empirical or otherwise) of costs or benefits that would enable this weighing.

(d) The need to prioritise criminalisation, as opposed to other matters of competition law policy, is unclear. The practical reality in other countries that have introduced criminalisation during the last decade is that there have been very few criminal investigations or prosecutions.

(e) The focus on criminalisation in isolation is piecemeal. It is evident from the concerns raised at the Ministry's workshops (in particular about potential chilling effects on pro-competitive conduct) that criminalisation should not be considered in isolation and must be considered as part of a broader review of Parts 2, 5 and 6 of the Act. In this regard, we note the broad, detailed review of the TPA conducted by the Dawson Committee in Australia, prior to introduction of legislation proposing criminalisation of cartel conduct in Australia.

(f) The early views expressed raise concern that a similar, careful, considered approach is not envisaged here. Each of the countries that have introduced criminalisation in the last decade has considered carefully the likely costs and benefits of criminalisation.

(g) That consideration must focus on local circumstances. Harmonisation with Australia and international trends are relevant matters but they are not the only or even primary factors. Each of the countries that have introduced criminalisation in the last decade has considered carefully its domestic position, and this has been reflected in the different approaches taken to legislation by those jurisdictions (contrast the United Kingdom under the Enterprise Act 2002, Australia under the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, and Canada under the 2009 amendments to its Competition Act 1985). In particular, there is a need to weigh in the balance the potentially very high cost of implementation and enforcement of a criminal regime in an extremely small economy. Those costs (financial and management time diverted from productive activities) are tangible, significant, and represent a deadweight loss to the economy.

Grounds for criminalisation

11. The grounds for criminalisation set out in the discussion paper are, in summary:

(a) concerns that there is undetected cartel conduct occurring in New Zealand and that the existing civil penalty regime under the Act may not be effective at deterring cartel conduct;

(b) a belief that criminalisation will improve detection and deterrence of cartel conduct by increasing penalties and incentives for cartel members to break ranks and seek leniency;

(c) harmonisation of business laws with Australia, recognising that an important goal of the Single Economic Market Outcomes Framework is that firms operating in New Zealand and Australia face the same consequences for the same anti-competitive conduct; and

(d) international practice, that is, a number of our trade and investment partners, such as the United States, United Kingdom, Canada, Australia, Japan and Korea have criminalised cartel activity, and the OECD recommends criminalisation where this is consistent with social and legal norms.

Undetected cartel conduct

12. There is, however, no empirical evidence of the extent of cartel conduct or of the ineffectiveness of the existing civil penalty regime. Instead, the discussion paper notes briefly that:

(a) most international cartels operating in New Zealand are detected as a result of enforcement activity or leniency applications in other jurisdictions, that is, those jurisdictions are more successful at detecting cartels; and

(b) following the introduction of criminal penalties in Australia, the Australian Competition and Consumer Commission (**ACCC**) has reported an increase in leniency applications.

13. That is a very thin basis for advocating the introduction of criminalisation (especially when enforcement and compliance costs will be increased by criminalisation and when the increased risk of deterring pro-competitive conduct is considered). It discounts:

(a) the steady increase in the detection of domestic cartels (see for example, *Giltrap City Limited v Commerce Commission* [2004] 1 NZLR 608, *Commerce Commission v Ellingham* (2005) 2 NZCCLR 753, the Commission's warning to Manawatu funeral directors regarding a joint tender in May 2005, *Commerce Commission v Koppers Arch* (2006) 11 TCLR 581, and the Commission's proceedings against Waikato pathology service providers, filed in July 2008) and cartels generally;

(b) the public statements of the Commerce Commission regarding the success of its current enforcement policies and actions. For example, the Commission's 2008-2009 annual report noted, "*The leniency programme has gained momentum with an increasing number of cases being brought to the Commission. The Commission now has a considerable programme of cartel cases in both the litigation and investigation phases.*" In releasing its updated leniency policy on 1 March 2010, the Commission's General Manager Enforcement stated "*So far the Commission's leniency policy has been very effective at bringing cartels to light and we expect these changes, which are in line with those in many other countries, to further improve the effectiveness of our cartel detection programme*"; and

(c) our experience with companies involved in Commission investigations under the current civil regime, which confirms that the threat of investigation and proceedings is perceived as a real threat from a very active regulator, involving significant financial and opportunity costs (time diverted from productive activity) which the companies do not regard as merely a cost of doing business (as has been suggested). That experience is reflected by the rapid increase in the number of companies putting in place internal compliance programmes.

(We would strongly encourage the Ministry to seek out and talk confidentially with participants in investigations about their experiences).

14. We do not consider that the fact that some (or even a majority) of the cartels currently under investigation by the Commission are international in origin and are detected as a result of enforcement activity in other countries is evidence that the existing New Zealand regime is ineffective. In particular:

(a) The international nature of some of the cartels operating in New Zealand more likely reflects the impact of increasing globalisation on a small, open economy. In its 2007-2008 annual report, the Commission noted "*The Commission faces an increasing major litigation work programme. This is due to factors such as increasing globalisation and action against major international cartels ...* " See also the observations of the Court of Appeal regarding globalisation in *Harris v Commerce Commission* (2009) 12 TCLR 379, at paragraph 44.

(b) Almost inevitably, participants in international cartels seek leniency and/or are detected in their home country first. That is, an American company engaged in a cartel will seek leniency in the United States before other countries such as New Zealand.

(c) We note also that New Zealand is internationally regarded as having very low levels of corruption (see, in relation to the public sector, "Perceived Corruption": http://www.socialreport.msd.govt.nz/civil-political-rights/perceived-corruption.html). We expect that what is true of the public sector is similarly true of New Zealand's private sector – and this suggests that claims there is a significant problem with detection of cartel conduct in New Zealand should be considered with caution.

15. We agree that, intuitively, criminalisation should increase the incentive for cartel members to break ranks and seek leniency. However, the observation (which the discussion document takes from a single newspaper article) that the ACCC has noted an increase in leniency applications is not compelling evidence of a need for criminalisation.

Detection and deterrence of cartel conduct

16. The discussion document states that "*The single intervention most likely to have a significant impact on deterrence and detection is the possibility of imprisonment. This requires criminalisation which brings with it a number of costs and benefits. A greater deterrence of the most serious forms of cartel behaviour will have significant benefits.*"

17. The basis for the statement that the possibility of imprisonment will have a significant impact on deterrence and detection is unclear. Intuitively, a threat of imprisonment must be more significant than the threat of a fine. However, as noted above the number of prosecutions in countries that have

criminalised cartel conduct has been very small and, of course, those countries continue to experience cartel conduct.

18. During the Ministry's workshops, the observation was made that the United States is sometimes "carved out from" or omitted from the territory of international cartels, that is, the American approach to criminalisation deters at least some cartels from operating in the United States. We are uncertain of the basis for this observation, but we note that there are a number of relevant factors why this might be so, including the American approach to damages and the ever present threat of class action litigation. Of course, cartels continue to operate in the United States even in the presence of these deterrent factors.

Harmonisation

19. We understand the arguments for criminalisation based on harmonisation with Australia and international trends. However:

    (a) In the absence of more cogent evidence of problems with the extent of cartel conduct in New Zealand and the effectiveness of the existing civil regime, we do not consider that these factors justify the priority being given to criminalisation.

    (b) We note that there are many aspects of New Zealand's competition law which are not currently harmonised with Australia and for which harmonisation does not appear to be under consideration despite the greater substantive importance of such matters (for example the additional "per se" prohibitions under the TPA and access rules for infrastructure). This reinforces our view that consideration of criminalisation should occur as part of a broader consideration of Parts 2, 5 and 6 of the Act and reflect the needs of a different and much smaller economy.

    (c) We note also the irony that harmonisation is intended to reduce compliance costs for companies operating in New Zealand and Australia but criminalisation is likely to increase compliance costs for New Zealand companies and individuals (whether they operate in New Zealand and Australia or in New Zealand alone).

    (d) The harmonisation and international trend "drivers" need to be weighed against the costs of implementation and deterring pro-competitive conduct in New Zealand.

Costs

20. Although the extent of the need for criminalisation and the benefits that might result are unclear (and not addressed in the discussion document), it is clear that criminalisation will involve considerable additional costs compared to the current civil regime.

    (a) Ben Hamlin, Senior Legal Counsel at the Commission, has noted in a recent paper, "The Devil in the Detail: prosecuting cartel conduct under criminalisation" (Competition Law and Regulatory Review Conference, 22 February 2010) that the Commission will need to treat <u>all</u> investigations as criminal investigations:

> "*There are obvious practical difficulties with, say, ruling out a criminal prosecution at an early investigative stage given the potential that information may be acquired that would have made criminal prosecution the more appropriate course. This means that all, or nearly all, investigations would be conducted to a criminal standard. Meeting the procedural requirements for criminal prosecution would also protect the ability to bring civil proceedings.*"

    (b) For the Commission to conduct criminal investigations, it will need additional staff, resources, and training to meet the standards required to prove offences beyond reasonable doubt while recognising the rights of those subject to serious criminal investigation (the Commission's existing criminal jurisdiction does not require proof to this standard).

(c) At a time when the Commission already carries heavy responsibilities for telecommunications, energy, airports and dairy (among other areas) and Government entities face strict budget constraints, it is difficult to see why priority should be given to the funding necessary for cartel criminalisation (especially when greater economic benefit can be obtained by advancing reform in other areas such as electricity pricing and security of supply and telecommunications).

As well as increased implementation costs, those subject to investigation will also face additional unrecoverable costs. Under the current civil regime, those costs are very significant (potentially hundreds of thousands of dollars for major investigations), and detract from productive activity by consuming management time and reducing profitability. Criminalisation will materially increase those costs.

Uncertainty and the risk of deterring pro-competitive activity

21. Although the discussion document's foreword says "Cartels are relatively easily recognised – we know them when we see them", our experience is that is often not true. In markets with few participants producing the same or very similar goods or services it can be hard to distinguish between competitive and cartel conduct (petrol prices are an often-cited example). In the presence of a cartel you would expect to see near identical prices that move in parallel and, in the absence of a cartel, the same behaviour is economically rational.

22. The United States Supreme Court has recognised this difficulty in its recent judgment, *Bell Atlantic Corp v Twombly* 550 US 554 (2007), stating "*The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.*"

23. In a complex area of law, it is critical that the law is certain and clear. As the discussion paper notes, defining the offence too broadly or uncertainty about whether conduct is legal or illegal risks deterring pro-competitive activity. That is, managers and executives concerned about whether competitive conduct (joint ventures involving competitors, certain restrictions contained in distribution/franchise agreements, etc) may appear illegal and therefore expose them to the risk of criminal prosecution, may decide not to engage in that activity.

Developing a legal definition

24. Given the risks of over-deterrence, and the ramifications of a breach (in both a civil and in any criminal context) the need for certainty should be paramount. With this in mind, we believe any cartel offence should mirror as closely as possible the civil provisions, rather than seek to import new concepts such as the notion of conspiracy.

25. The Ministry's review should also be used to address some of the uncertainty that surrounds the application of the existing section 30 and its various exemptions. Currently, the strict, per se approach means that certain pro-competitive (and at worse competitively benign) conduct is caught by the per se offence. Some examples include the imposition of a genuine maximum resale price by a supplier that also has retail operations, the real uncertainty that pervades the application of the joint venture exemption, and other technical price fixing that is ancillary to a broader pro-competitive arrangement, but which amounts to a breach under current New Zealand law.

26. Per se prohibitions and criminal sanction should be reserved for "hardcore" cartel conduct (i.e., the "smoke-filled room" cartels). When drafting any cartel offence, and when amending the current civil provisions, it is important to keep in mind that:

(a) there are very real costs to society if efficiency enhancing behaviour is deterred as a result of an over-inclusive per se prohibition; and

(b) conduct that escapes condemnation as a per se price-fix or cartel offence, but which nevertheless substantially lessens competition, will nevertheless be caught by section 27.

27. This means that, where faced with a decision as to the breadth of an amended price fixing prohibition and any cartel offence, we should err on the side of under-reach – because conduct that actually has an adverse impact on competition will continue to be caught by section 27.

28. As we have noted above, we consider that the physical element of any cartel offence should mirror the civil provisions rather than import new notions. If, as we understand, the intention is to criminalise only the "smoke-filled room" cartels and there is acceptance of the need to avoid deterring pro-competitive activity, then we consider that the mens rea element that best fits this intention – and provides greatest certainty for business – is a dishonesty requirement (as in the United Kingdom).

29. Inevitably, a degree of uncertainty will remain. In the merger context, firms faced with uncertainty can seek a clearance from the Commission. There is no equivalent for RTPs.

30. There is very little case law on the application of price fixing (and the exemptions in particular). We do not have a readily accessible register of past RTP decisions serving as precedents, and the Commission's current RTP guidelines largely restate the Act providing very few practical examples upon which firms can rely. Further, the guidelines issued by the Commission are often its then view on particular issues and do not provide a binding outcome for business on which it can rely. As a result, businesses in New Zealand are heavily reliant on their lawyers to provide advice. Particularly for large-scale investment projects (e.g. those involving joint venture arrangements), parties will at times require more certainty as to the legal status of their proposals than their legal advisers necessarily are able to provide. A formal clearance process would provide greater certainty for business and, ultimately, enable businesses to compete more effectively and efficiently.

31. We believe that a clearance system should apply not only to long term agreements, but should extend to sections 27, 28, 29, 30 and in the case of section 37, to the extent that the RTP arises directly from any contract, arrangement or understanding. We believe the clearance process for RTP's should essentially mirror the clearance process for mergers.

32. Moreover, as noted by the Ministry in the discussion document in relation to the "Review of the Clearance and Authorisation Provisions Under the Commerce Act 1986" published in May 2007, jurisdictions like the United States have advocated the application of a rule of reason approach to per se offences. In New Zealand, however, the per se provisions of the Act make certain activities illegal regardless of their competitive effect. Our experience is that there are a number of situations where a technical breach may occur but the competitive impact is benign or de minimis, for example, an agreement with pro-competitive effects (but with an ancillary impact on price) between two small players in a highly competitive and unconcentrated market. Allowing the Commission to grant a clearance in such situations would be efficiency enhancing. While, in theory, applications for authorisation are available for such circumstances, in practice the cost and time involved in that process render that route impracticable.

33. We appreciate the Commission has, in the past, said that it is inappropriate for firms to seek to pass cost onto the regulator rather than forming their own view. In our view, the same arguments could be made in relation to mergers, and more importantly, in our experience firms would still much prefer to obtain comfort without seeking a clearance (as is the case in the merger context), so we do not anticipate a large number of applications. Both we and many of our corporate clients believe the benefits of greater certainty and hence a greater level of efficiency enhancing conduct far outweigh any costs of extending the current merger regime to RTPs.

34. We agree that the exemptions to price fixing need to be clarified. Putting aside their precise scope for a moment, we believe they should continue to be framed as exemptions, rather than as defences. In terms of clarifying the exemptions, addressing the scope of the joint venture exemption is the most pressing need. However, clarification is also required in relation to the collective acquisition exemption. In particular whether it applies where:

    (a) the agreement which provides for a collective negotiation followed by individual purchasing at the collectively negotiated price; and

    (b) an intermediary took title to the goods and sold them in his or her own right to the parties to the collective agreement.

What procedures should be adopted?

35. There are two key investigation related issues on which we wish to make submissions at this stage.

Right against self incrimination

36. The right against self incrimination is a basic and fundamental right in criminal law recognised by the New Zealand Bill of Rights Act 1990. If there is to be criminalisation of cartels, then the starting point must be that the usual right against self incrimination will exist for individuals accused of, or being investigated in respect of, that crime.

37. In our view, the Ministry must adopt a first principles approach to the question of whether the cartel offence has any unique features from other crimes such that an erosion of those rights can be justified. Thus, the starting point should be that a person need not answer questions that may incriminate them. The starting point should not be what the discussion document seems to suggest, which is the existing civil regime (which requires a person to answer all questions, whether written or oral, regardless of whether they self incriminate) applies to the new criminal context unless there is good reason for it not to. (Indeed, the appropriateness of the section 98 power itself should be reconsidered in the light of criminalisation. The powers are intrusive and used extensively and a fundamental change to the consequences of infringement of the Act should see a corresponding rethink of the way the powers are granted to those investigating alleged infringements.)

38. The Ministry points to the similarities to the Serious Fraud Office and the Securities Commission regimes, for both of which self incrimination is not an excuse for not answering questions (although like the Act, there are then limitations on the uses to which incriminatory statements can later be put). However, we query whether those regimes are appropriate reference points for a cartel offence. While they may both be other examples of "white collar" crime, the usual fraud or securities offences investigated would be quite different from the cartel offence.

39. The cartel offence will, by its very nature, have to involve more than one participant. This is different to fraud and securities offences which will often involve only one accused and therefore often only one key witness/defendant. Further, the Commission benefits from its relatively unique leniency and cooperation policies when conducting its investigations. In those circumstances, it is reasonable to assume that in the majority of cases the Commission will have a number of sources of information and it is hard to see on what basis the erosion of the fundamental right not to answer questions that may self incriminate can be justified when the potential penalty would now be imprisonment. We doubt such erosion is justified.

40. The discussion document refers to the Evidence Act provisions on self incrimination which relate only to oral testimony. The discussion document also suggests that the Act may need to be clarified to ensure the extent of the privilege against self incrimination is consistent with the Evidence Act. To the extent this comment may mean that any protection afforded would apply to only oral evidence, we disagree. The section 98 power allows the Commission to require answers to questions in written form or in interviews. We cannot see any basis for distinguishing between the two when seeking to preserve the right against self incrimination.

41. Finally, the opportunity should be taken to clarify that once a person has been charged with the cartel offence the Commission would no longer have any power to force a person to attend interviews or otherwise provide information. (The view is commonly held that the Commission could not issue further section 98 notices once proceedings have been issued but there is very limited judicial authority regarding this issue – see *Commerce Commission v Air New Zealand*, High Court, Auckland, CIV 2009-404-1554, 21 October 2009, Andrews J.)

The prosecution decision

42. The discussion document raises the issue of who should make the prosecution decision. Separation between those who investigate and those who conduct prosecutions is particularly important in the criminal context; prosecutorial independence is a touchstone of our law.

43. A need for a separation between the two functions is recognised as important in competition law enforcement in other jurisdictions. Examples of where there is a division between those who investigate and those who decide whether to prosecute include, in addition to Australia (discussed below):

    (a) Canada, where the Competition Bureau refers a matter to the Attorney General of Canada for an independent determination of whether a prosecution is in the public interest; and

    (b) Ireland, where the Competition Authority refers decisions to prosecute on indictment to the Irish Director of Public Prosecutions.

44. As is referred to in the discussion document, Australia has addressed concerns relating to entrenched views or a risk of a lack of objectivity following a lengthy investigation by requiring that the decision to prosecute be referred to the DPP (Commonwealth Director of Public Prosecutions). New Zealand does not have an equivalent of Australia's and Ireland's DPP and we accept it may be cost prohibitive to establish one for only the cartel offence. However, we query whether a New Zealand DPP is an innovation that could usefully be deployed in a number of areas where regulatory authorities have the power to prosecute.

45. Assuming a DPP model is not practicable, an alternative may be a hybrid of the proposed prosecution panel referred to in the discussion paper and some of the other approaches taken overseas. For example, a prosecution panel could still be maintained to advise on the merits of a proposed prosecution (and to conduct the prosecution) but the ultimate prosecution decision could be made by another independent third party e.g. the Solicitor General (in whose name the prosecution would ultimately be brought in any case) or the Attorney General (as is the case in Canada). See further section 4 of the Crown Law Office Prosecution Guidelines.

46. If a panel of expert prosecutors to conduct cartel prosecutions is established (which we would support in the absence of some other separate body like a DPP being able to fill this role) then we consider there should be a variation to the SFO model - one practitioner should be charged with making the final decision whether to prosecute a cartel offence and a different practitioner should conduct the prosecution.

47. New Zealand is a small legal market and the pool of candidates for appointment to the cartel prosecution panel would be small. The cases will be large and complex and there may be personal incentives to recommend the prosecution of a cartel offence in circumstances where the decision may be a "line call". Unlike SFO prosecutions, which are more frequent, the cartel offence prosecutions are likely to be rare. That is, there would not be the same turnover of work such that if a member of the panel indicated a particular prosecution should not be bought, they could not necessarily expect another more promising case to come their way in the near future. While this would undoubtedly have costs (two practitioners needing to be sufficiently familiar with the case), the issue of appearances and ensuring that justice is done, as well as being seen to be done, needs to be considered.

48. In this context we also agree with the comment made in the paper that if the prosecution decision is to be made by a third party then legislative force would likely need to be given to the Commission's leniency and cooperation policies.

Other matters

49. We consider that the limitation period for prosecution of a cartel offence should be the same as under the existing civil regime. Cartel cases are document intensive and with the passage of time, relevant documents may no longer be available. There is a justice issue if relevant documents that may have supported an accused's defence are no longer available.

50. We also agree that, for practical reasons, if there is to be a dual (i.e. a civil and criminal) regime that this regime will need to apply to both individuals and companies.

Bell Gully