SUBMISSION ON CARTEL CRIMINALISATION TO MINISTRY OF ECONOMIC DEVELOPMENT

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April 2010

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1 INTRODUCTION

1.1 Meredith Connell is pleased to make a submission on the issues raised by the Ministry of Economic Development discussion document "Cartel Criminalisation". Meredith Connell is the office of the Crown Solicitor for Auckland, Simon Moore SC, who is responsible for the prosecution of all indictable crime in the greater Auckland region. In addition, the firm acts for a wide range of government agencies, including for the Commerce Commission in cartel cases.

1.2 We are conscious that the MED will have received a large number of submissions, focused on the question of whether or not cartel conduct should be criminalised. Given that, and the excellent discussion of the issues in the document itself, we have refrained from any lengthy dissertation on the merits of such a proposal. Instead we have focused on more practical matters that would arise were criminalisation to occur, that being the perspective we expect will be most useful.

1.3 This paper has been primarily prepared by Nick Flanagan, with assistance from John Dixon, Fionnghuala Cuncannon, and Leo Farmer. Please do not hesitate to contact Mr Flanagan with any queries.

2 DETERRENCE

2.1 We are conscious of considerable public comment by various lawyers with a civil practice to the effect that criminalisation will not add to the deterrence of cartel activity. Without engaging in that debate (which would be wholly counter-intuitive to any criminal lawyer, who knows first hand that the prospect of prison is something any client will go to great lengths to avoid), it may be useful to make a number of observations arising out of the only cartel case to go to trial in recent times, the "GIS" litigation.

2.2 Meredith Connell acted for the Plaintiff in *Commerce Commission v Siemens AG (*AK HC CIV 2007-404-2165), a claim in respect of a cartel in the gas insulated switchgear ("GIS") industry. GIS are components in electrical substations. The European and Japanese manufacturers of the equipment participated in a long running world wide cartel, including fixing prices in New Zealand. The Commission launched a case against three European participants with a presence here, Alstom, Siemens, and Schneider. The case against Alstom continues, Schneider admitted liability and paid a fine in excess of $1m, and the case against Siemens went to trial in the High Court at Auckland from 15 to 22 March 2010. Siemens acknowledged having participated in the cartel, but claimed that its conduct in New Zealand was not affected by it. The case appears to have been the first cartel proceeding to go to trial since the 1990s.

2.3 A number of relevant points emerged from the evidence at trial. The first was that the cartel expressly excluded North America, on the basis (as was said by several Siemens witnesses) that "people go to prison" for such conduct there. Obviously, that is the clearest possible evidence that the threat of criminal sanctions has a real and tangible impact on the decisions made by those contemplating anti-competitive behaviour.

2.4 But we also observed from the evidence a more subtle means by which criminalisation works as a deterrent. The primary witness as to the cartel's operation, who had been involved in it from the outset and for 14 years by the time of his retirement, was of the view that (in short) he had done nothing wrong. He explained that the cartel was formed because his company was losing money on GIS and something had to be done. His attitude was that even if it was technically illegal, the company should be grateful for the profits it had made.

2.5 That attitude demonstrates the primary reason for criminalisation: it personalises the penalties for the individuals involved, and elevates the risk beyond a merely financial one that can be weighed on a cost/benefit approach. A senior manager may rationally be prepared to risk financial losses (a fine) for financial gain (the profits of cartel activity). Moreover, even though an individual cannot be indemnified by the company for any pecuniary penalty, that is not well understood because by definition a fine is "only money". However both prison and the serious consequences for a professional person of a criminal conviction send an unmistakable message that cartel activity is the responsibility of those individuals who are involved. It deters the people actually making the decisions, because the punishment is unambiguously directed at them. It also simultaneously sends the signal that cartel conduct is serious, and not merely a legal risk of doing business in the same way a personal grievance action, for example, is.

3 THE VALUE OF CERTAINTY

3.1 Our primary submission in relation to the substance of what is proposed to be enacted is that certainty from the very outset is an important value in and of itself. We think that clarity and certainty are of paramount importance in any criminal provision, more so than in civil regulation. That is appropriately recognised in the draft document, and we endorse it.

3.2 Most importantly, if business people are expected to comply with a prohibition in day to day life or face imprisonment, it must be absolutely clear what is and what is not acceptable. That is not just to reduce compliance costs but as a matter of fairness to those New Zealanders whose jobs open them to sanction if they cross the line.

3.3 Moreover, we note the unfortunate tendency for Commerce Act cases to be weighed down by layers of complexity as lawyers and economists argue about the precise ambit of the law. In our view, it is appropriate to sacrifice a degree of intellectual purity for a clearer, more workable solution. That will shorten trials (and may even eliminate some altogether), saving taxpayer money and meaning greater enforcement of the law, given scare resources. Cartel conduct lends itself to simple absolutes much more than other areas of competition law.

3.4 Accordingly, we prefer criminalising the existing civil prohibitions because it is likely to involve the least uncertainty of the three options. However, in our view, it would not be appropriate to do so without amendments to address the issues which have arisen with s30 and s31 in particular. The two most significant issues are already addressed in the discussion document:

(a) The need to clarify that s30 only relates to goods and services which the parties compete in relation to (discussed in 4.3.1.3). In a small economy it is particularly important to have certainty about when parties who compete (or could compete) in various respects are permitted to contract with each other, so s30 is not triggered only because the parties compete in some unrelated market;

(b) The fact that the joint venture defence is significantly under inclusive (discussed in para 4.1.4.1). In our view, to be meaningful the joint venture defence (in relation to both criminal and civil prohibitions) needs to be defined in economic terms.

4 SUBSTANTIVE ISSUES

4.1 We address below a number of issues that arise from the discussion document.

Para 1.4.1.3: rewarding whistleblowers

4.2 In our view payments to whistleblowers are likely to harm a case in the eyes of a jury (were criminalisation to involve jury trials). Given the high likelihood of a Defendant alleging that a leniency applicant's witnesses are exaggerating or altering their evidence in order to please the regulator and secure leniency (an allegation made by Siemens in the GIS case) paying for evidence will only reinforce that claim. But this is not a major issue however: indeed in some criminal cases witnesses are presently paid.

Paras 3.2.2 and 3.2.3: the incompetent or unlucky cartelist

4.3 We think that it is important that this behaviour is sanctioned, and not just because even this type of conduct distorts competition. That is because (in addition to the reasons identified) we expect that a frequent defence by cartelists will be that they entered into the arrangements only to trick their

competitors and obtain market intelligence, and never gave effect to it. That is any easy claim to make, and was made by Siemens in GIS, and Visy in the proceedings against it by the ACCC. The law should be clear that it is not acceptable for a cartelist to enter into such an arrangement in any circumstances.

Para 3.4.1: the per se prohibition

4.4 We note that if criminalisation proceeds, in fact there will be little prospect of injustice resulting from a per se prohibition. As the discussion document notes, "cartel offences will be prosecuted using all the criminal procedural rules" (para 341) including the Sentencing Act 2002 (para 354). Accordingly s106 of the Sentencing Act will be available to those charged with cartel offences. That provides for a Judge to order a discharge without conviction which "is deemed to be an acquittal" if a person pleads guilty. Section 107 sets out the basis for the exercise of the Court's discretion, namely "that the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence".

4.5 So any party guilty of a merely technical breach or conduct that otherwise does not require the sanction of the criminal law can expect s106 to apply such that they will be acquitted of the offence, even if technically guilty. That being so, we can see very little downside to the cartel offence being a *per se* one.

Para 6.2.4: obstruction

4.6 We agree that the maximum penalty for obstruction is inadequate. Plainly, at it's current level Defendants may be better off to obstruct the investigation than risk imprisonment. The question of whether imprisonment is warranted is more difficult. As a matter of principle, the penalty for obstructing justice should be no less than that for the underlying offence, or else an incentive exists to take the former penalty so as to avoid the latter. However, were cartel conduct proceeded against on indictment no limitation period would exist, such that no such "gaming" of the system is possible (see para 4.21 below). However, should a limitation period be imposed the problem arises again, which may indicate imprisonment is appropriate for obstruction.

Para 6.6.3: other penalties

4.7 The only issue of any substance in the discussion document which we take a different view on is the question of reparation. Para 355 of the document concludes that reparation should be expressly excluded from the cartel offence, and the fact of a conviction could be used by victims as "proof of conduct in the marketplace", such that they need only prove the extent of damages.

4.8 Firstly, we are not certain that the fact of conviction would indeed allow victims to simply prove damage. The relevant provision is s139 of the Evidence Act, which effectively provides for the Court to produce a certificate attesting to the conviction and "the particulars of the offence charged and of the person".

4.9 We have some experience of the use of s139 (which is rare). Mr Flanagan of our office acted for Housing Corporation of New Zealand ("HNZC") in a case against the participants in a methamphetamine operation that damaged a state house (*HNZC v Tareha & Ors* (DC NAP CIV 2006-085-963, 7 November 2008, Judge Rea)). HNZC successfully sued in tort each person convicted of manufacturing methamphetamine for the damage caused by the production process. The fact of the involvement of each individual was proven by a certificate under s139.

4.10 However, that certificate is very brief. Notwithstanding that it should set out the "particulars" of the offence, that may be no more than that an offence was committed and by what means. That is especially the case where the Defendant has pleaded guilty so there has been no need for extensive findings of fact. Indeed, in *Tareha*, the s139 certificate process was only sufficient because the nature of the offence was such that it itself provided all that needed to be proven for liability: merely that methamphetamine had been manufactured at the property in question.

4.11 In cartel cases, a s139 certificate may say little more than that a cartel operated in the industry in question. It is unlikely to specify the extent of it or the individual transactions that were rigged. Accordingly, while it will be of some value in a civil case for damages, that may well be limited.

4.12 It may be that a Defendant could plead guilty on the basis of a summary of facts, such that that could said to be an admission admissible under s34 of the Evidence Act. This would be a much more satisfactory approach for a potential civil plaintiff, as such a document is typically more detailed (although still far from exhaustive).

4.13 However, s34 requires an "admission". That is defined as being a "statement made by a person". Statement is defined as an "assertion by a person of any matter". It is not the universal practice for a Defendant to formally acknowledge the truth of a summary of facts, and indeed there is no obligation to do so. Accordingly, Defendants wary of civil proceedings could simply not contest the Prosecution evidence rather than actually admitting it, such that there is no "statement made" by them and s34 is not triggered. Therefore, once again we expect that it will not necessarily be straightforward for a potential Plaintiff to rely upon a criminal conviction as the basis for a civil proceeding.

4.14 Moreover, we think that the reparation procedure may be of some use. Firstly, we observe that reparation is at the discretion of the Judge. There may be cases where it is appropriate, and it seems to add little to have a blanket exclusion, rather than allow for it where the Court considers it workable.

4.15 We accept that the procedure in the Sentencing Act for ordering reparation reports from a probation officer is not an appropriate way to determine reparation. But that need not be the only way, as the Act itself acknowledges. A reparation report can be ordered from "any other person designated for that purpose" (s33(1)), which would allow an economist to be commissioned to assess the harm from the conduct and losses to victims. If that proves impossible, the Act expressly provides that the report can simply state that it is not possible to agree the appropriate sum (s34(3)). The Act also provides for disputed facts hearings to determine issues that arise on sentencing and require factual findings (s24). So if the parties dispute the report by the Court appointed economist, a means exists by which it can be challenged. Accordingly, in our view the Sentencing Act reparation procedure is flexible enough for cartel cases, if the sentencing Judge was inclined to use it.

4.16 We favour some form of compensation for victims built into the criminal case itself for several reasons. Firstly, in our view it is fundamental that in the ordinary course victims are entitled to have the state seek compensation on their behalf from those who have done them criminal wrong. While there may sometimes be departures from that principle, in general one of the basic purposes of the criminal justice system is to protect the rights of victims and redress the wrongs that they have suffered. They should not be forced to launch their own legal action for criminal wrongs other than in exceptional cases (indeed, that is why regulators exist and enforcement is not left to private individuals).

4.17 Moreover, we think that invariably requiring separate proceedings to be brought in order for harm to be compensated for may lead to unnecessary duplication of litigation, increasing costs for all parties and the system itself. We have already noted above our reservations that s139 of the Evidence Act may in fact not greatly assist victims and any civil claim may need to traverse a great deal of the matters already detemined in the criminal case. But even if that is not the case, the extent of the conduct and therefore the damage will be a primary issue that the trial Judge who has heard the criminal proceedings may be well placed to determine.

4.18 We also note for completeness that it is not an answer for the Judge who heard the criminal matter to also hear the civil one. There is no guarantee that will occur: indeed it did not in the reverse situation in the vitamins litigation, where one High Court Judge heard the damages claim and another the pecuniary penalties action (in fact reaching different conclusions). Issues might even arise as to whether it is proper to do so.

4.19 Finally, we note that the amount of damage done, and reparation paid, is plainly a relevant factor for the Court on sentencing. Defendants are entitled to have payments made to victims taken into account, and as such may prefer all matters to be dealt with together. An assessment of damages will further increase the overlap between any criminal and civil proceedings.

4.20 Accordingly, we agree that there will be cases where it is preferable for a subsequent civil case to deal with the issue of damages. That may be inevitable in certain cases, such as where the civil case relates to a longer period of conduct than can be proven beyond reasonable doubt. But there may be some cases where it is not, and that is something the trial judge in the criminal action will be best placed to decide. In our submission, that route should not be sealed off.

Limitations

4.21 One issue not canvassed in the discussion document is the limitation period. The current limitation period for cartel conduct is contained in s80 of the Commerce Act, which the proposal for criminalisation using the existing s30 would bypass. The combined effect of sections 5 and 11 of the Crimes Act is that that Act would apply to a criminal cartel offence. As a result, it is likely that the limitation period would be governed by s10 of the Crimes Act meaning that there would be none (assuming that the maximum penalty is more than three years imprisonment, as presently proposed).

4.22 In our view there is no reason to depart from the ordinary principle that there is no limitation period for serious criminal offending. Given that the Court has the power to stay any criminal case if the passage of time means that justice demands it, that is a sufficient safeguard. So too is s106 of the Sentencing Act.

5 PROCEDURAL ISSUES

Para 6.2.3: Use of evidence in criminal and civil proceedings

5.1 We agree that it would be preferable to expressly provide in the Commerce Act for the privilege against self-incrimination (so think that the answer to questions 27 and 28 should be "yes"). We note the concern that the specific (and appropriate) restrictions on the use of powers to compulsorily acquire information may pose difficulties in an investigation, when it will not be clear which of criminal or civil proceedings are contemplated. However, we think that this issue is likely to be less problematic in practice.

5.2 The bulk of the materials gathered by the Commerce Commission in a cartel investigation are documents already in existence. As such, they will not be affected by the privilege against self-

incrimination. Moreover, the use of "proffers" (statements by a company about its conduct) likewise will not trigger that right, given it does not apply to bodies corporate. We note for completeness that such statements would be admissible against the company that made them, but not individual defendants, under ordinary principles anyway.

5.3 However, we do see a potential difficulty with the application of s27(1) of the Evidence Act 2002. That provides that "evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, but not against a co-defendant in the proceeding". Statement is defined widely in s4, including as "a spoken or written assertion by a person of any matter".

5.4 A variety of issues arise. If one cartel participant pleads guilty, then any statements made by that person will be inadmissible in the continuing case against the other defendants. In large part that will be overcome by the fact that s27 does not prohibit testimony by one defendant against another. However, it might preclude documentary evidence corroborating the testimony that is given: for example, emails recording the agreement that was entered into. To a large extent that issue will in turn be ameliorated by the operation of s35, but that exception (the prior consistent statements rule) does not apply where the allegation is that the witnesses has been wrong from the outset. Moreover, there may be cases where a particular witness is not available or statements by the company rather than any identifiable individual are to be used, and s27 may prohibit that.

5.5 More significantly, if a cartel case is brought against the company and its employees then statements of each cannot be used against another. The implications are obvious. An email by an employee saying "we are now in a cartel" is admissible only against that individual defendant, and not against the company or any other defendant. In effect, s27 will operate to exclude "smoking gun" evidence of anti-competitive agreement, namely contemporaneous assertions that one has been reached.

5.6 Before the passage of the Evidence Act, the common law provided for the "co-conspirators rule" as an exception to the principle now enshrined in s27. The co-conspirators rule was originally omitted by mistake and s12A of the Act added to replace it. But the difficulty remains that it is necessary to show a conspiracy. If the cartel was entered into by an individual, and that person and the company are charged, it is hard to say that the individual and the company have "conspired": the company's only involvement is through that same person, and nobody can conspire with themselves. Likewise, if the company has no knowledge of the cartel other than the individual employees or agents that are co-defendants, it is hard to see that the "conspiracy" extended to it. Of course that is not to say that the company is not liable for the actions of those employees: merely that an evidential point arises.

5.7 Accordingly, in our view cartel prosecutions will face difficulties unless the co-conspirators rule is modified to make it clear that a statement of an employee acting in the course of their employment is admissible against their employer, even if they are co-defendants. Given the obvious attraction of the point to defendants, and the potential for it to derail proceedings, we think the issue should be dealt with expressly by an amendment to s90 of the Commerce Act.

Para 6.3.1: Prosecutors panel

5.8 We note the proposal in the discussion document is to mirror the prosecution panel arrangements used for the Serious Fraud Office. We observe for completeness that the panel is not just comprised of "barristers in private practice" (for example, six partners of Meredith Connell are on it). We make two further, more substantive, observations.

5.9 The first is that in major fraud cases a solicitor (invariably a Crown Solicitor's office) is often appointed, whether or not a barrister has been too, because of the sheer volume of the work involved. Cartel cases are likely to be much more complex and intensive than other panel prosecutions, even major fraud cases, and such support is likely to be necessary. In fact, that is how cartel cases are currently staffed. We understand that the Serious Fraud Office is considering going further and making specific provision for multiple tiers on the panel, so that certain work can be subcontracted if need be.

5.10 We also note that as cartel cases are likely to continue to require the appointment of Queen's Counsel, an issue will arise if the legislation requires the panel to act at Crown rates. The highest Crown rate is presently less than $200 an hour, and plainly that will be inimical to instructing specialised competition lawyers. Given the desirability of having Senior Counsel with experience in competition matters instructed, we suggest that provision be made for rates to simply be set by the Commerce Commission (as they currently are, at a significant discount from commercial rates).

6 CONCLUSION

6.1 Overall, we think that the discussion document is excellent. It comprehensively reviews the issues at stake. However, were criminalisation to occur there will be a range of specific issues to be identified and overcome (and no doubt more than our initial review has identified). As usual, the "devil will be in the detail" and a careful review of the proposed legislative framework from a criminal practice and procedure perspective will be essential.

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