Simpson Grierson

14 April 2010

Partner Reference
A M Callinan - Auckland

Writer's Details
Fax: +64-9-307 0331
E-mail: amanda.frazis@simpsongrierson.com

BY E-MAIL

cartels@med.govt.nz

Cartel Criminalisation
The Ministry of Economic Development
P O Box 1473
WELLINGTON 6140

Submissions on Discussion Document on Cartel Criminalisation

We refer to the invitation by the Honourable Simon Power, Minister of Commerce, for written submissions from interested parties on the issues raised by the Discussion Document on Cartel Criminalisation dated January 2010, published by the Ministry of Economic Development.

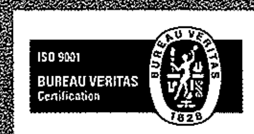
We are pleased to **enclose** our submission on behalf of Simpson Grierson.

Please let us know if you have any questions.

Yours faithfully
SIMPSON GRIERSON

Anne Callinan / James Craig / Amanda Frazis
Partner / Partner / Senior Associate

BARRISTERS AND SOLICITORS
AUCKLAND Lumley Centre, 88 Shortland St, Private Bag 92518, Auckland 1141, New Zealand
Tel +64 9 358 2222 Fax +64 9 307 0331 DX CX10092
WELLINGTON HSBC Tower, 195 Lambton Quay, P O Box 2402, Wellington 6140, New Zealand
Tel +64 4 499 4599 Fax +64 4 472 6986 DX SX11174
Website www.simpsongrierson.com E-mail info@simpsongrierson.com



Simpson
Grierson

KEY POINTS IN SIMPSON GRIERSON'S SUBMISSIONS WITH RESPECT TO CARTEL CRIMINALISATION

1. It goes without saying that hard core cartel conduct is harmful to the economy of New Zealand. However, the sanctions against this type of conduct are already very substantial and we are not convinced that the criminalisation of cartel conduct is warranted. There appears to be little empirical evidence that criminalisation leads to an increase in detection or deterrence of hard core cartel conduct. Further, the costs of criminalisation (for our regulators and in terms of increased compliance costs for business) have not been identified or quantified.

2. Simpson Grierson is concerned that the costs of criminalisation will be disproportionate to any benefits to the New Zealand economy. This is a very real issue for a small economy like ours and it needs to be weighed up before we opt for a significant legislative change in order to harmonise our law with our larger trading partners.

3. If the criminalisation of cartel conduct is to proceed, then certainty is paramount. Persons who conduct business in New Zealand need to know that their actions and decisions are within well defined legal boundaries. Therefore Simpson Grierson does not favour using the "*greenfields*" approach. Experience with new legislation is that it can be years before legislation is defined and interpreted by the Courts. It is our preference that criminal offences should be based on existing legislation, where pre-existing case law can be used as a guide. If not, then the next best alternative is to use the Australian model for criminalisation, modified for the New Zealand legal context.

4. The institutional structures required to implement criminalisation of cartels need further consideration. In particular, thought needs to be given to whether the Commission should have both investigative and prosecution functions. In other criminal contexts the decision to indict a person for a criminal offence is not given to the investigating body, but is given to the Crown Solicitor. Similar issues arise with respect to the leniency policy and whether it remains appropriate for the Commission to be the decision maker on immunity applications.

5. At present the Commerce Commission can compel persons under investigation to attend an interview, with the proviso that their evidence cannot be used against them personally (unless there is a question of perjury). At the very least this protection should remain. However there still needs to be consideration of whether, at a policy level, it is justified requiring a suspect in an indictable case under the Commerce Act to attend a compulsory interview. If permitted, this would create a serious in-road into the usual civil rights of an alleged offender.

Simpson Grierson

SUBMISSION TO THE MINISTRY OF ECONOMIC DEVELOPMENT
BY SIMPSON GRIERSON

CARTEL CRIMINALISATION

Detecting and deterring cartels

1. **Do you consider cartels to be harmful?**

1.1 We accept that "hard core" cartels are harmful to a dynamic economy and consumers. Such cartels include those involving price fixing, bid rigging, market allocation, and output restrictions.

2. **Are the current penalties for cartel activity sufficient to deter and detect cartels? Is there any evidence to support this judgement?**

2.1 The current penalties for cartel conduct under sections 80 and 82 of the Commerce Act are already substantial. They involve:

2.1.1 Under section 80 penalties against companies up to the greater of $10 million, three times the value of any commercial gain, or 10% of turnover. Against individuals, penalties can go up to $500,000. Under section 80A, companies cannot indemnify officers in respect of penalties or legal costs ordered for price fixing. Under section 80C the Court can order individuals to be excluded from management.

2.1.2 Under section 82 damages can be awarded against individuals and companies for conduct causing loss. Exemplary damages can also be awarded under section 82A.

2.2 It is important to note that the maximum penalties have not been ordered by the Courts in cases to date. The maximum penalty awarded against a company to date remains a penalty of $3.6 million (excluding costs) in the timber preservative cartel, while the maximum penalty awarded against an individual is just over $100,000 (also in the timber preservatives cartel). This reflects the fact that the conduct in that case took place in part prior to May 2001 when the present penalties came into force, and therefore took into account the previous lower penalty regime. It also reflects the fact that the penalties in that case were discounted as a result of the defendants settling with the Commission.

2.3 In light of the fact that the Courts have not come close to date to awarding the maximum level of penalties currently in the Commerce Act, we do not consider there is a sufficient basis to argue that the current penalties are insufficient to deter and detect cartels. Future cases that involve conduct post May 2001 which falls squarely within the current penalty regime will no doubt lead to higher penalty awards against companies and individuals.

2.4 Indeed, our experience (including acting in the timber preservative cartels proceeding) is that the penalties at the current levels awarded by the Courts do deter and assist in detecting cartels. In particular the prohibition on companies indemnifying individuals for penalties and legal costs acts as a significant deterrence on cartel conduct. We are not aware of a situation where a company or individual has decided to risk entering into a cartel because the penalties make that conduct economically rational.

3. What do you consider would be the most effective means of increasing the deterrence and detection of cartels?

3.1 The most effective means of increasing the deterrence and detection of cartels in our view are to:

3.1.1 Continue to enhance the existing leniency policy. In our view the leniency policy acts as a significant factor in helping the Commission to detect cartels.

3.1.2 Improve co-operation with enforcement agencies in other jurisdictions. Our experience is that many cartel investigations are commenced by leniency applications in multiple jurisdictions.

3.1.3 Continue to prosecute cartel conduct with the Commission seeking higher penalties under the existing penalty regime. This would assist in establishing precedents for greater penalties which more closely reflect the maximum penalties available under section 80 of the Commerce Act.

4. What are the costs and benefits of the options outlined for increasing deterrence and detection?

4.1 We consider that the three options above (in particular the first two options) can be achieved with relatively low cost and high benefits. The enhancement of the Commission's leniency policy is likely to have the least cost and greatest benefits for increasing deterrence and detection. We seriously question whether the costs of criminalisation will outweigh the benefits. Before any legislation is proposed there should be a hard look at the institutional costs such a regime will impose.

5. Are there any other options that should be considered?

5.1 See above.

6. **Should New Zealand introduce criminal penalties for "hard-core" cartel conduct?**

6.1 We are not convinced that the case for criminal penalties for cartel conduct has yet been established.

6.2 As noted above, the current maximum penalties have not yet been applied by the Courts. As a result, there is no basis at present to maintain that they are insufficient.

6.3 There is limited empirical evidence that criminalisation of cartel conduct that is already unlawful will lead to a reduction in the incidents of that behaviour or an increase in detection. The Discussion Document published by the Ministry of Economic Development in January 2010 (**Discussion Document**) refers to a report in the Australian financial press, that, since the cartel criminalisation provisions of the Trade Practices Act came into force, there has been an increase in leniency applications. However, it is equally possible that an increase in the resources of the ACCC, together with a wide leniency programme, has led to the increase in leniency applications.

6.4 There will be an increased cost to society with cartel criminalisation. Criminal investigations and prosecutions are more expensive and time-consuming than civil investigations. These costs arise as a result of the limitation of certain evidence in a criminal trial, the treatment of criminal informants, and the cost of a criminal trial. There is a risk that, unless the Commerce Commission is adequately resourced, resources may be diverted from its other activities to the investigation and prosecution of a few expensive criminal investigations. Criminal prosecutions also face a higher burden of proof, making securing a conviction a more difficult task than under civil standards.

6.5 Notwithstanding the lack of evidence in New Zealand as to the prevalence of cartel behaviour, or the effectiveness of criminalisation, we do acknowledge that criminalisation of cartel behaviour is a growing international trend. In particular, the OECD recommends the introduction of criminal sanctions in cartel cases. The United Kingdom, United States of America, Canada and also Australia have all criminalised cartel behaviour. Criminalisation of cartel conduct in New Zealand would align New Zealand with these countries in the treatment of serious cartel behaviour. To us, this seems the main justification for introducing criminalisation of cartel behaviour in this country.

6.6 For the reasons in this section, we respond to the remaining questions below with the caveat that we do not consider that the case for cartel criminalisation has yet been sufficiently made out.

Defining the Offence

7. **Are there any categories of cartel conduct, not included in the OECD recommendations that should be criminalised in New Zealand?**

7.1 The OECD has identified four practices or arrangements that the OECD regards as hard core cartel conduct. These are:

7.1.1 Fixing prices.

7.1.2 Bid rigging (collusive tenders).

7.1.3 Establishing output restrictions.

7.1.4 Sharing or dividing markets for allocating customers, supplies, territories, or lines of commerce.

7.2 We consider that these categories are sufficient, and that it is not necessary to criminalise other categories of conduct.

8. Should the cartel offence be a per se prohibition or a rule of reason approach?

8.1 We strongly support a per se prohibition.

8.2 If there is to be criminalisation, then it is vital that there be certainty as to what constitutes a breach. A per se prohibition would achieve this. In contrast, a rule of reason approach would leave significant room for uncertainty.

9. What should the physical elements of the cartel offence be?

9.1 The proposed physical elements according to the Discussion Document are:

9.1.1 An agreement, arrangement or understanding.

9.1.2 With a competitor.

9.1.3 To engage in cartel behaviour or to implement a cartel agreement.

9.2 We agree with these basic elements.

9.3 The key element that will need to be carefully defined is the third element (ie cartel behaviour). The Discussion Document distinguishes "hard core" cartel behaviour from "other" behaviour. The difficulty is drafting a definition that captures what is considered to be criminal conduct from non criminal conduct. The definition of a criminal cartel must be drafted with as much certainty as possible, even if this results in under reach for the criminal sanction (bearing in mind there is still a civil sanction). What is required is a tightly worded prima facie offence, so that a person engaging in legitimate commercial activity does not come within the ambit of the conduct.

10. Should "conspiracy" be brought into the offence?

10.1 We do not consider it is necessary to have "conspiracy" separately brought into the offence.

10.2 As the Discussion Document notes at para. 200, previous Australian case law has found that it is inappropriate to charge separately for

conspiracies that are themselves already proscribed arrangements or understandings.

11. Should there be a competition element, and if so, how should it apply?

11.1 There should be a competition element. This is necessary to ensure that the offence covers horizontal conduct, rather than vertical conduct between companies at different levels of the supply chain.

11.2 We would recommend that the competition element be expressed in the same or similar form as that currently in section 30 (ie the conduct must be in relation to goods or services supplied or acquired by the parties in competition with each other). This has the advantage of having been interpreted by existing New Zealand case law.

12. Should there be a separate offence of implementing a cartel agreement?

12.1 Yes. This would help in distinguishing between cartels where a cartel has been entered into but not implemented, and more serious cartels where they have been entered into and implemented.

13. Should there be a descriptive or basic approach to defining the mental elements of the offence? What should the specific mental elements of the offence be?

13.1 We submit that a descriptive element, such as fraud or dishonesty, should not be included as one of the mental elements of the offence.

13.2 Instead, we prefer the "basic" approach where the proposed mental elements are:

13.2.1 Intention to form an agreement.

13.2.2 Knowledge that the agreement is one to engage in cartel conduct.

13.3 This accords more closely with the Australian provisions.

14. Which of the OECD categories of hard-core cartel (price fixing, market allocation, output restriction and bid rigging) should be explicitly covered by a cartel offence? Should they be included directly or only indirectly by reference to effects on price?

14.1 We agree that all four OECD categories of hard core cartel conduct should be covered by the cartel offence.

14.2 Pricing fixing itself should be defined directly or indirectly by the fixing, controlling or maintaining of price.

14.3 The other categories should be included directly since they will not always have effects on price. For instance, under the current wording of section 30, market allocation will not necessarily have an effect on price so as to amount to a breach of section 30.

15. 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?

15.1 We query the continued application of the exception for carriage of goods by sea to/from New Zealand under section 44(2). Apart from this, the remaining exceptions remain relevant.

16. How can we achieve greater ex-ante predictability in the application of the cartel offence?

16.1 We deal below with the proposals in relation to notification and clearances.

16.2 Apart from this, the best way to achieve greater ex-ante predictability would be to adapt the existing wording of section 30. A second best option would be to follow the Australian criminal provisions for cartel conduct although these in themselves are new and untested. Either of these options would have the benefit over a greenfields approach that existing precedents could be used.

17. Should there be a notification scheme, which provides for immunity from criminal prosecution?

17.1 We do not object to a notification scheme in principle (since any scheme where the Commission gives guidance on the application of the criminal provisions would assist in providing ex ante predictability).

17.2 However, practically, we query to what extent parties would take up a notification scheme where they would have immunity from criminal prosecution, but no protection from civil penalties. It would be more appealing to companies if notification provided immunity from criminal and civil proceedings.

17.3 There are also institutional structures that need to be considered when providing for a notification scheme as an answer to potential overreach. At present, only the Solicitor General can grant immunity to a person from prosecution for a criminal offence. This is clearly set out in Chapter 12 of the Prosecution Guidelines as at 1 January 2010.

17.4 Consequently, for a notification scheme to be effective, notification must be included as a specific defence to cartel conduct. The notification scheme needs to have a mechanism whereby, once accepted by the Commission, the notification is a defence to the alleged conduct.

18. Should there be a clearance regime for joint ventures?

18.1 We consider such a regime would be valuable. A clearance regime would assist in providing certainty. This would be particularly important where there is criminalisation.

18.2 The existing joint venture defence has proved problematic to interpret and apply and is due for revision in any case, as it fails to capture legitimate pro-competitive joint venture structures. In our view this should be revised, and the joint venture exception broadened.

19. Should there be a clearance regime for other potentially restrictive trade practices?

19.1 Again, we consider this would be helpful if criminalisation is introduced.

20. What are the appropriate defences and exceptions to the cartel offence? In particular, how should joint ventures, franchises and networks be treated?

20.1 We do not support a "competition" principle-based defence as proposed in the Discussion Document at paras. 268-270 as this would introduce a significant level of uncertainty into whether there would be criminal cartel conduct which is undesirable.

20.2 We agree there is merit in further exploring a principle-based defence of ancillary restraint and or legitimate primary intention proposed in the Discussion Document at paras. 271-281. This would need to be examined in more detail.

20.3 In terms of specific defences, we consider that it is appropriate to exclude genuine joint ventures from the cartel criminalisation provisions. Instead, such joint ventures should be assessed individually for their competitive effects under section 27 of the Commerce Act. While the Discussion Document appears to take the view in para. 111 that a pricing agreement may well not be central to the operation of a legitimate joint venture, in our view this will often be the case.

20.4 As regards franchises and networks, rather than these being specific defences, we agree that they are better dealt with under a principle-based exception. This more closely accords with the existing situation under the Commerce Act.

21. Should there be a specific legislative exemption for agreements of more than 50 people?

21.1 We agree there is little justification for a specific legislative exemption of agreements of more than 50 people as currently provided in section 32.

22. Should there be a legislative exemption for joint buying arrangements?

22.1 Joint buying can have pro-competitive effects if the savings achieved through joint buying are passed on to consumers.

22.2 We would therefore support there being a legislative exemption from such joint buying arrangements falling within the cartel criminalisation provisions. Such arrangements should instead continue to remain assessed under section 27.

22.3 The wording of section 33 should be reviewed in the context of criminalisation to ensure it is clear and its scope appropriate.

23. Should a new civil prohibition mirror the physical elements of the new criminal offence?

23.1 See our comments in paragraph 24 below.

24. Should the defences and exceptions for the new civil prohibition be the same as those for the criminal offence?

24.1 We agree that the civil prohibition should mirror the physical elements of the criminal offence, and include the same defences and exceptions.

24.2 Depending on the facts of the case, the prosecution team will then be able to make a decision on whether to proceed criminally or civilly in a particular case.

Choice of Options

25. Which of the three approaches – adaptation of section 30, adopting Australian legislation, or greenfields – should be adopted?

25.1 Whilst a greenfields approach may have some academic appeal, as practitioners, it is critical that we have as much stability and certainty as possible in order to advise our clients and conduct defences. Experience tells us that it takes many years to develop case law guidance in this area so it would be sub-optimul to start again with a greenfields approach rather than building on existing legislative wording. This is even more so given that there is no real concern with the section 30 wording as it stands – apart from the present issue of whether it is criminalised. We are therefore of the view that adoption of the greenfields approach will only add to the uncertainty associated with the proposed new legislation.

25.2 The principal justification for criminalisation of cartel conduct is to bring New Zealand in line with other OECD nations. In addition, there is public interest in having a degree of consistency or (harmonisation) with provisions in Australia.

25.3 However, the transplantation of Australian provisions (Part IV Division 1 of the TPA) may not have this effect. These provisions were drafted in the context of Australian criminal law, and in particular the Criminal Code.

25.4 The Australian provisions, at least in relation to price fixing, have strong resemblances to the repealed section 45A in relation to price fixing. Consequently, much of the case law developed with respect to section 45A of the TPA can be used when interpreting the provisions of Division 1 of Part IV of the TPA.

25.5 It is our view that, where possible, the existing provisions of the Commerce Act, namely section 30, should be used to draft the proposed criminalisation provisions. This will add to certainty.

Criminal Procedures and Penalties

26. Should corporations be criminally liable for cartel offences?

26.1 It is generally accepted that for a criminal offence of this nature corporations should be liable.

26.2 In the situation of a possible "rogue" employee engaging in criminal conduct, it should be up to the corporation in sentencing to show that it had the practices, policies and procedures in place to prevent its officers and employees engaging in cartel conduct.

27. Should the existing protections on the use of self-incriminating statements in the Commerce Act stand?

27.1 We consider that the existing protections on the use of self incriminating statements (ie such statements should not be used against the individual except where there is perjury etc) in the Commerce Act should stand. It is important that they do, especially if the penalties for cartel conduct are being increased.

27.2 However, more fundamentally, the Discussion Document seems to proceed on the assumption that there will be a power to require a compulsory interview even when contraventions are criminalised. This assumption should be critically examined, as discussed below.

28. Should the existing provisions on self-incrimination be amended to allow the use of self-incriminating statements when a defendant contradicts those statements in evidence, or the defence proffers other contradictory evidence?

28.1 A criminal suspect has a right to silence. This right is recognised in subsection 25(d) of the New Zealand Bill of Rights Act 1990.

28.2 Section 98(c) of the Commerce Act requires a person, upon service of notice in writing, to appear before the Commission and give evidence, orally or in writing. Section 106 of the Commerce Act provides that a person is not excused from answering any questions, or producing any document, on the grounds that to do so may tend to incriminate them.

28.3 However, the existing provisions of the Commerce Act, namely subsection 106(5), provide that a statement made by a person in answer to a question may not be admissible against that person in criminal proceedings or in proceedings for pecuniary penalties (except in relation to perjury or offences relating to providing false information).

28.4 The power to compel someone to make statements may be appropriate in the context of civil investigations and fact finding enquiries undertaken by the Commission in the exercise of its powers and duties. However, it is a different question altogether whether the right to silence should be abrogated where a person is being investigated for an indictable criminal offence. There would need to be a sound policy reason for curtailing the right to silence for a suspected cartelist when other types of criminal can rely on that constitutional protection. This policy issue has not been explored in the Discussion Document. It should not be automatically

assumed that because this approach has been taken in relation to other white collar crime, this is appropriate under the Commerce Act where there is a leniency policy and cartel conduct is often detected in the absence of interviews with the suspect.

28.5 We appreciate that the Commission may not know at the outset if the matter it is investigating is hard core cartel behaviour. However, at the very least, the moment the Commission decides to commence a criminal investigation (as opposed to a civil investigation), then the power to compel a witness to make statements should cease.

28.6 If, however, the Commission is to continue to have the power to coerce those who are the subject of a criminal investigation to make statements or provide documents, then the existing provisions on self-incrimination should remain as they are, and should not be amended in the way proposed in the Discussion Document.

29. What should the maximum fine for the obstruction offences be under section 103? Should imprisonment be a possible penalty?

29.1 We consider the current level of fines for obstruction offences under section 103 of the Commerce Act to be adequate. We are aware from having acted in a section 103 prosecution that companies and individuals take the prospect of criminal conviction and these fines seriously.

29.2 To the extent that it is felt necessary to have higher sanctions for more serious cases of obstruction, this already exists under the Crimes Act 1961 in respect of the provisions relating to perverting the course of justice (which include the prospect of imprisonment). The Commission has expressly reserved its position on a number of previous occasions to use these provisions.

30. Should provision be made for the appointment of a panel of expert prosecutors to conduct cartel prosecutions?

30.1 We consider that it is important for investigation and prosecution decisions to be separated. The actual prosecution should be carried out by legal counsel independent of the Commission investigative team. This is necessary to ensure that an additional layer of objectivity is brought to the prosecution.

30.2 The concern about the proposed prosecutors panel is that the Discussion Document states in para. 329 that the prosecutions would continue to be managed by the Commission (as they are currently by the Serious Fraud Office), and the Commission Chair would determine which member of the panel would prosecute a particular case.

30.3 Our preference would instead be for a similar process to be followed to that set out in para. 328 of the Discussion Document for offences triable on indictment, where the informant (ie the Commission) would cease to be the prosecutor from the point at which the accused is committed for trial. At that point, only the Attorney General, Solicitor General or Crown Solicitor may lay an indictment. The body which usually presents the

indictment is the Crown Solicitor which acts independently of the investigating authority, and is not subject to its instructions.

31. Should the right of a cartelist to trial by jury be restricted?

31.1 We do not support the right to trial by jury being restricted. More empirical information should be obtained before a cartelist's right to a jury trial is abolished.

31.2 In Australia, those charged with an offence against the cartel provisions of the Trade Practices Act have a constitutional right to a jury trial. An offence against section 44ZZRF(1) of the TPA is in indictable offence. Section 80 of the Australian Constitution guarantees the right to a trial by jury of an indictable offence against the Commonwealth.

31.3 A person being prosecuted for criminal cartel conduct should not be deprived of the right to a jury trial solely on the grounds that the trial may be shorter or cheaper. The issue should be the quality of justice.

32. What should be the appropriate maximum term of imprisonment for a cartel offence?

32.1 We consider that the appropriate maximum term of imprisonment should be around 5 years. This is consistent with analogous offences such as insider trading, and market manipulation or deception in New Zealand.

33. Should there be a maximum fine and, if so, at what level should it be set?

33.1 The maximum fine for criminal cartel conduct should be set no higher than the existing penalties in section 80 of the Commerce Act. Indeed, we note that under the TPA the criminal penalties are less than the pecuniary penalties under the civil regime. This is in recognition that other consequences will flow from a criminal conviction. There would be a case for a similar approach in New Zealand.

33.2 In particular, we see no basis to increase the current maximum individual penalty from $500,000 to a fine of $5 million. The existing individual penalty is already substantial taking into account the fact that the individual has to meet this penalty themselves, together with their legal costs. Moreover, if individuals are imprisoned as well under the new regime, that will act as a further significant sanction.

34. Should the sentencing judge have discretion to impose civil orders (i.e. damages, management exclusions and/or adverse publicity orders) as part of the sentence?

34.1 The sentencing judge should not have the discretion to impose civil orders for damages on top of a sentence in the <u>same</u> proceeding. To do so confuses the role of criminal and civil prosecutions. The current regime should remain that <u>separate</u> proceedings for damages can be brought by those that have suffered loss as a result of the cartel conduct.

34.2 In any event, we query the need for management exclusions or adverse publicity orders in the context of a criminal cartel proceeding where

individuals are likely to be practically excluded from management in any event (through being imprisoned), and there will be adverse publicity.

35. **Do you agree that the jurisdictional rules for the cartel offence should be the same as those for conspiracies?**

35.1 Contrary to para. 360 of the Discussion Document, the jurisdiction of the Commerce Act has been reviewed by the Courts under the provisions of the Commerce Act itself rather than the conspiracy provisions of the Crimes Act.

35.2 We consider the existing case law interpreting the jurisdiction of the Commerce Act to be adequate. This will be further clarified shortly by the Supreme Court.

OTHER ISSUES

Leniency Policy

36. One issue to consider is whether those given leniency under the current leniency programme of the Commerce Commission will also be provided with criminal immunity, or whether there will be a separate immunity programme with different outcomes for those seeking immunity from criminal prosecution and civil proceedings.

37. There are the competing interests of ensuring that all those who commit offences are treated equally in the prosecution process. On the other hand, there is a public interest in obtaining evidence, and informants are an important source of information, particularly in respect of the investigation and prosecution of cartel conduct.

38. However, the decision to give immunity to an informant, who has committed a serious criminal offence, is a concession that must be considered carefully. It is unlikely that blanket criminal immunity can, or should, be given to all informants who take advantage of the leniency programme. Only the Solicitor General can currently give immunity to an informant. The limited circumstances when immunity will be given are set out in Chapter 12 of the Prosecution Guidelines. The structures that will be required when dealing with applications for immunity from prosecution, and the interaction with the leniency programme of the Commission, have not been considered in the Discussion Document.

39. In the Australian context, the decision to grant immunity to an informant lies with the CDPP, in consultation with the ACCC. The circumstances in which the CDPP may grant immunity are set out in the Annexure to the Prosecution Policy of the Commonwealth.

40. Of importance is that a person who intends to apply for leniency is made aware of the extent of their immunity in criminal proceedings. Unlike statements made under coercion, any evidence they give voluntarily can be used in a criminal prosecution, in accordance with the rules of evidence.