

**To**  
Cartel Criminalisation  
Ministry of Economic Development  
PO Box 1473  
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**From**  
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**By**  
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**Date**  
22 July 2011

## **Cartel Criminalisation - Submission on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill**

1. Thank you for the opportunity to provide comments on the Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill.
2. This submission is made by Buddle Findlay. We are making this submission on our own behalf, and are not representing the views of any of our clients.

### **Proposal to criminalise cartel conduct**

3. In relation to the general proposal to criminalise cartel conduct, we do not consider there is a sufficient case to criminalise such conduct in New Zealand.
4. We understand that the proposal to criminalise cartel conduct is driven by the perceived need to keep up with our neighbours, rather than a real concern about economic harm. However, we do not consider that keeping up with our neighbours is a sufficient reason to criminalise cartel conduct.
5. Our key concern regarding the proposal to criminalise such conduct is that it will have the effect of inhibiting pro-competitive behaviour. We already observe instances when firms decide to complete less vigorously than would otherwise be the case because the existing price fixing prohibition is difficult to apply to everyday business. Criminalising cartel conduct risks further dampening the types of competitive behaviour that the Commerce Act is intended to facilitate. We particularly observe this effect in multi-national companies that operate in countries that have criminalised cartel conduct.
6. Therefore, we are concerned that there is no real problem to address and that criminalising cartel conduct will have the opposite effect to what is intended.

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**Proposed new section 30 prohibition**

7. Despite our reservations about the proposed criminalisation of cartel conduct, we support the proposal to change the current price fixing prohibition in section 30 of the Commerce Act.
8. We consider that the current prohibition inhibits pro-competitive behaviour in some situations. For example, the per se nature of the prohibition and the limited applicability of the joint venture exemption means that some vertical arrangements are prohibited, such as situations in which an upstream firm (who also competes downstream) wishes to impose restraints on downstream firms for legitimate business reasons.

**Proposed exemptions**

9. We support having a broad exemption for collaborative activity, to ensure that legitimate pro-competitive behaviour is not caught by prohibitions in the Act.
10. We also support the proposed exemption relating to bid rigging (subject to a drafting change outlined in the attached appendix), and the proposed exemptions relating to joint buying and promotion agreements.

**Proposed clearance regime for collaborative activities**

11. We consider that the test for clearance should be whether the collaborative activity will not have, or would not be likely to have, the effect of substantially lessening competition in the market.
12. We do not consider that it is necessary for the purposes of the clearance test that the cartel provision is reasonably necessary for the purpose of the collaborative activity. If a collaborative activity does not have the effect or likely effect of substantially lessening competition, it should not matter whether the cartel provision is reasonably necessary for the purpose of the collaborative activity.
13. Therefore, we suggest that the clearance test in proposed new section 65A (clause 12 of the draft Bill) should be amended by removing the requirement that the cartel provision be reasonably necessary for the purpose of a collaborative activity.

**Proposed increase in penalties for section 103 offences**

14. Clause 25 of the Bill proposes to increase the penalties for offences under section 103 of the Commerce Act. In particular, the proposed penalty for individuals is a term of imprisonment not exceeding 18 months, and the proposed fine for a body corporate is a fine not exceeding \$1 million.
15. Increasing the penalties for offences relating to failing to comply with a notice issued by the Commerce Commission under section 98 of the Commerce Act may place individuals and businesses in a difficult position where the validity of a notice issued under section 98 is questionable (for example, because the notice is of a "fishing

expedition" nature, and the issue of the notice does not fall within the Commission's powers under the Act).

16. Businesses and individuals already face very difficult decisions as to whether or not to comply with a notice that is suspected to be invalid. In such cases, it is often feared that a refusal to comply with a notice will imply guilt, so notices are complied with in order to avoid such an implication and maintain a good working relationship with the Commission. Increased penalties for failing to comply with a notice may exacerbate the problem, and further deter people from challenging the validity of a notice.

#### **Repeal of section 29**

17. Section 3.4.5 of the explanatory material released with the draft Bill notes that currently the draft Bill retains section 29 of the Commerce Act to ensure that all exclusionary provisions continue to be prohibited under a hybrid per se/rule of reason provision. The explanatory material notes, however, that an alternative would be to repeal section 29 and, where the scope of section 30 is too narrow to prohibit exclusionary provisions, rely on the rule of reason prohibition in section 27.
18. We consider that section 29 should be repealed, as we do not consider that it is necessary. This is because any exclusionary activities that have the purpose, effect, or likely effect of substantially lessening competition will be prohibited under section 27 of the Act.

#### **Drafting comments**

19. We attach a table setting out our specific comments on the drafting of the draft Bill.
20. Please contact us if you have any questions about this submission.

Yours sincerely



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## APPENDIX – SPECIFIC DRAFTING COMMENTS

Clause/Section	Comment
Clause 6 – proposed section 32 (exemption relating to bid rigging)	We consider that the proposed new section 32 should make it clear that a person who comes within the exemption does not contravene section 30(1) in relation to any cartel provision, not just a cartel provision with a bid rigging purpose. The reason for this suggested change is to ensure that if a person is exempt under proposed new section 32 in relation to bid rigging, the person is also exempt from the price fixing prohibition (because a provision with a bid rigging purpose may also have a price fixing purpose).
Clause 12 – proposed section 65A (clearances relating to cartel provisions)	We consider that paragraph (a) of subclause (2) of proposed section 65A should be omitted. This is because, as set out in the body of our submission, we do not consider that the clearance test should require that the cartel provision is reasonably necessary for the purpose of a collaborative activity.
Clause 21 – proposed section 82B (offence relating to cartel provisions)	We consider that this clause should be amended to ensure that the offence does not require that the person knows that a provision is a cartel provision, as this would require knowledge of the law rather than knowledge of the arrangement giving rise to the breach of the law.