



SUBMISSION

Prepared by
New Zealand Retailers Association

For the
Ministry of Economic Development

On the
Cartel Criminalisation Discussion Document

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John Albertson
CEO
New Zealand Retailers Association
Level 8, Willbank House
57 Willis Street, P O Box 12 086
Wellington

Ph: 04 472 3733
Fax: 04 472 1071
Email: jalbertson@retail.org.nz

Submission prepared by the New Zealand Retailers Association

For the Ministry of Economic Development in respect of the cartel criminalisation discussion document

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1 Introduction

- 1.1 The New Zealand Retailers Association (NZRA) welcomes the opportunity to comment on the discussion document released by the Ministry of Economic Development in respect of cartel criminalisation in New Zealand.
- 1.2 The NZRA is the largest trade association involved in the retail industry in New Zealand.
- 1.3 We represent an industry that has annual sales of \$66 billion and which employs 325,000 people (approximately 20% of the New Zealand workforce) in more than 49,000 outlets throughout New Zealand.
- 1.4 Our national membership includes the major supermarket and general merchandise chains, specialised chains, traditional department stores and thousands of owner-operators spread throughout the country. The membership also includes a number of specialised trade groups representing manufacturers, distributors and retailers in the plumbing materials, metal fastener, pet, equestrian, jewellery, bicycle and sporting goods sectors.
- 1.5 The NZRA's members include a significant number of businesses operating under a franchise model.

2 Submission overview

- 2.1 The NZRA considers that it is useful to draw to MED's attention several key areas that need to be carefully thought through in considering any new cartel provisions.
- 2.2 Those issues are:
 - a Clarity in defining the offence, particularly to ensure there are clear exemptions in relation to joint ventures and franchises.
 - b The importance of ease of understanding the new provisions for the business community.
 - c The usefulness of a clearance regime.
 - d Concerns regarding trials of complex economic offences being conducted by jury.
- 2.3 These four key issues are significant to members of the NZRA. This is because it is crucial for their day to day operations and strategic decision making to have certainty surrounding the scope of conduct covered under the Commerce Act, particularly if a new criminal offence is introduced.
- 2.4 Any new provisions should be easy for businesses to understand and provide clear guidance as to the extent to which practices such as legitimate joint ventures and franchises are

exempt from any new criminal offence. This is important to ensure that unnecessary defence costs and any associated uncertainty are avoided.

- 2.5 The NZRA recognises that there will always be some grey areas, even when clarity and certainty is strived for. As a consequence, the NZRA considers that it is imperative that businesses have the ability to seek comfort from the Commerce Commission that their practices are lawful. The NZRA considers that a clearance regime is the best method of achieving this.

In the event that prosecutions are brought in relation to conduct under a new criminal offence, the NZRA considers it is important that such prosecutions are determined by a Court with sufficient expertise to decide the issues properly.

3 Clarity in defining the offence

Joint ventures

- 3.1 The NZRA considers that the joint venture exemption is currently an important exemption in the Commerce Act.
- 3.2 However, as currently drafted the joint venture defence in section 31 is quite narrow. Such a narrow exemption would not be sufficient if cartel conduct is to be criminalised and individuals involved could potentially be subject to terms of imprisonment of five to seven years.
- 3.3 The NZRA considers that the current joint venture defence in section 31 should apply to any new criminal provisions, but should be widened and clarified to ensure that all genuine joint ventures (that is, where the parties are in a genuine joint supply arrangement and are not in competition with each other) fall within the scope of the exemption.
- 3.4 Any clarification made in relation to a criminal offence should be extended to ensure there is also no uncertainty as to the scope of the exemption in the civil context.

Franchises and other owner operator models

- 3.5 Several of the NZRA's members operate successfully under a franchising or similar model which facilitates owner operated stores.
- 3.6 Using a franchising model provides benefits to a franchisor in enabling it to expand quickly without having to provide excessive capital. It also provides the franchisee with the opportunity to be self-employed, but with the support of the franchisors' established products and systems.
- 3.7 Franchising as a business system can therefore facilitate economic growth and employment. In New Zealand many of our well known retail brands operate under a franchising or similar model. Such business systems need to be able to operate on a day to day basis without uncertainty as to the scope of both civil and any new criminal provisions.
- 3.8 There are several examples of where the definition of any new offence could potentially appear to include genuine franchise (or other similar owner operator arrangements such as cooperatives and joint venture models). Any comments and suggested clarifications in relation to franchises are equally applicable to any model which facilitates a genuine owner operated chain store.

- 3.9 There could be uncertainty as to whether parties to franchise arrangements could be prosecuted for price fixing if the franchisees are in competition (e.g if franchise areas overlap) or if the franchisor has company owned stores.
- 3.10 It is in the very nature of a franchise operation that each franchise will follow a standard method of operation so that a customer will know that it will receive the same experience regardless of which franchise office they are visiting e.g a franchise customer in Wellington will expect to receive the same quality product at the same or similar price as they would receive in Lower Hutt. This allows the franchise operation to compete better with other competitors in the same industry. There should be no uncertainty as to whether this is potentially seen as criminal activity (or indeed as in breach of any civil provisions).
- 3.11 Similarly, there should also be no uncertainty as to the application of criminal (or civil) provisions where a franchisor operates company owned stores. There are numerous instances where corporate owned stores technically compete with the franchise, whilst still facilitating the benefits obtained in utilising this owner operator model.
- 3.12 There could also be uncertainty as to whether parties to a franchise arrangement could be prosecuted for 'market sharing'. It is inherent in the nature of many franchises that the different franchises have allocated territories. Again, this allows the franchise network to compete better with other competitors and is not inherently anticompetitive.
- 3.13 For those reasons the NZRA considers that the definition of any cartel offence would need to clearly exclude genuine franchise or similar arrangements in addition to retaining the current joint buying exemption. This would ensure that genuine owner operated chain stores can operate without doubt as to the scope of any new criminal provisions.
- 3.14 It would be extremely concerning, and contrary to New Zealand's economic and social interests, if the franchise method of business operation was discouraged due to any uncertainty regarding the proposed new criminal offence provisions. Obviously actual anti-competitive conduct could and should still be captured under the provisions.

Section 32

- 3.15 The NZRA considers that the current exemption in section 32 that provides an exemption for price recommendations made by trade associations is unnecessary provided the exemption in section 33 is clarified and extended to ensure that price recommendations made by franchisors to franchisees and joint advertising are exempt from application under the Commerce Act.

Section 33

- 3.16 Section 33 is an important exemption in relation to franchise arrangements, allowing joint acquisition and advertising of goods collectively acquired. There is however, some doubt as to the meaning of goods 'collectively acquired' and to what extent a franchisor can recommend prices to its franchisees and advertise collectively.
- 3.17 At least for criminal purposes a franchisor and franchisees should not be at risk of prosecution just because a franchisor has recommended prices to franchisees which they have decided to follow (regardless of whether the goods are held to be 'collectively acquired').

- 3.18 Similarly, a franchise chain needs to be able to jointly advertise prices and discounts on products without uncertainty as to whether the particular method of acquisition of the goods provides an exemption.
- 3.19 The NZRA considers that section 33 should be extended to apply to any new cartel offence but modified to ensure that there is no uncertainty as to the scope of the exemption's application in relation to franchise type arrangements.
- 3.20 A clear exemption is necessary as of right (rather than a defence) in relation to these types of arrangements, as there is a reputation risk and a high cost and inconvenience to businesses in defending proceedings.

4 Ease of understanding

- 4.1 The existing section 30 of the Commerce Act (dealing with price fixing) is reasonably well known to members of the NZRA and the New Zealand business community.
- 4.2 Subject to some appropriate exemptions (as discussed, in respect of joint ventures and franchises) the NZRA considers that the current section 30 could form the basis for any new criminal provision.
- 4.3 A prosecutor would also need to establish intent. However, an offence provision that builds on the existing section 30 and incorporates clear exemptions, might be simpler and easier for New Zealand businesses to understand than an approach which creates an entirely new criminal offence provision (the suggested 'greenfields' approach recommended in the discussion paper).
- 4.4 The NZRA considers that adaptation of the current section 30 is the preferred approach.

5 Clearance regime

- 5.1 Whilst reinforcing that certainty and clarity in any new criminal provisions is extremely important for businesses in New Zealand, the NZRA acknowledges that there will sometimes be unique scenarios that arise which may fall into a grey area.
- 5.2 In those circumstances the NZRA considers that the introduction of a 'clearance' regime would be extremely desirable as businesses could obtain clarity that their conduct will not be illegal and that criminal proceedings will not be brought against them. Any clearance regime should apply to both criminal and civil provisions.
- 5.3 A clearance regime would be particularly useful in respect of joint ventures, franchises and long term contracts, in the event that there was any residual uncertainty in respect of a particular unique scenario.
- 5.4 Although the cost of applying for a clearance can be significant, a business can weigh this cost against any risk of uncertainty as to whether any new criminal offence applies to particular conduct.
- 5.5 New Zealand businesses and the public are already somewhat familiar with the clearance process (as it is used for mergers/business acquisitions), and a quick clearance process would put customers and suppliers minds at ease.

6 Procedural issues

- 6.1 The NZRA does not consider that there should be jury trials for cartel conduct prosecutions.
- 6.2 In competition law cases some quite difficult legal and factual issues arise and economic analysis is normally required. These issues are normally not even dealt with by a single judge but by a judge sitting with an expert economist. It is unrealistic to expect such issues to be assessed by a jury.
- 6.3 To the extent that prosecutions are brought under any new criminal provisions, there should be comfort for businesses that those prosecutions will be undertaken by a Court with sufficient expertise to determine the issues.

7 Conclusion

- 7.1 The NZRA highlights several issues in this submission which it considers need to be addressed if any new criminal cartel offence is introduced.
- 7.2 Those issues relate to the need to ensure that there is sufficient certainty for New Zealand businesses as to what conduct is and is not included in any new provisions.
- 7.3 The NZRA considers that:
 - a There needs to be clarity in defining any offence, in particular surrounding application to joint ventures and franchises. Clear exemptions in relation to those areas would assist in ensuring such clarity.
 - b It is important that there is an ease of understanding for the business community. Building any new offence from the existing and relatively well known section 30 provision would assist with this.
 - c A clearance regime would be useful in providing businesses with an opportunity to seek comfort in cases of doubt.
 - d Due to the complicated factual and economic aspects of cartel cases, any prosecutions should not be determined by a jury but by a judge alone (or a panel of 3 judges).

New Zealand Retailers Association
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