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Via Email

Cartel Criminalisation
Ministry of Economic Development
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Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill (Exposure Bill)

Introductory Comments

The introduction of criminal sanctions for cartel conduct will undoubtedly heighten awareness not to engage in such conduct (and possibly lead to a few more leniency applications for existing arrangements being made). However, in my experience, I do not consider that there is a lack of incentive to comply with the existing civil based cartel provisions of the Commerce Act. The financial cost, risk to employment and reputational consequences from being made the subject of a Commerce Commission investigation and civil proceedings already provide substantial incentives to comply.

Adding a criminal sanction will complicate investigations by applying higher standards on fact gathering, and the trial process (which will also need to be faster and a burden on the courts). Adding criminal sanctions to newly drafted laws carries a heightened degree of risk of things going astray until experience and a body of precedent has been built up.

I see the only factor in favour of criminalisation is the need to maintain a reasonable alignment of our commercial laws with those of Australia (which only criminalised cartel conduct from July 2009 but the laws remains untested). This factor is weakened by not following the cartel provisions contained in Division 1 of Part 4 of the Competition & Consumer Act. The drafting of the Exposure Bill is, in my view, superior in many respects to the Australian provisions but there may be differences in application which may lead to different outcomes on each side of the Tasman, particularly as concerns the availability of the exemptions to cartel conduct.

Aside from the criminalisation aspect, I consider the widening of the per se cartel categories and upgrading the approach to exemptions to be good advances in area of competition policy and law. I think it is worth considering implementing the measures contained in the Exposure Bill except for the criminal sanctions. This would maintain a good degree of compatibility with Australia in the key commercial areas. The policy to extend sanctions from civil to include criminal can be reviewed once experience has been gained over how the new provisions have performed and developments in Australia.

Specific Comments

Overall, I think the Exposure Bill is well drafted and justified in the accompanying Explanatory materials. I consider the widening of per se cartel conduct is appropriately balanced against the broader and more relevantly defined exemptions, which are a considerable improvement over the current exceptions to s30. My few comments and queries on the drafting are set out below:

Section	Topic	Comment
30A(2)	Price Fixing Definition (price recommendations)	<p>It is proposed to repeal s32 which exempts price recommendations made to 50+ competing persons from s30. Section 32 provides a strong argument that such recommendations can amount to fixing and controlling prices. The new price fixing definition is limited to the purpose of the provision (not effects). Uncertainty may arise over whether the making of mere price recommendations constitute price fixing under the new provisions (as well as recommendations being normally unilateral). It is noted that s 2(8) provides that a recommendation by a body of persons to members is deemed to be an arrangement between those members (unless they individually prove disassociation).</p> <p>If recommending prices is to be future criminal conduct, it possibly should be made explicit by referring also to recommending prices in s30(a)(2) as being unlawful.</p> <p>(It is widely known that nowadays firms commonly operate at different functional levels. This give rise to possible conflicts arising from the widespread practice of setting RRP's that are sanctioned under s39 and the risk of breaching s30. This conflict should also be examined to see whether a clear direction to business can be given one way or the other.)</p>
30A(3)(c) & (d)	Restricting Output definition	<p>Is it necessary to retain "to any person or class of persons" in (c)? If the restriction was applied generally (i.e. all persons) and be not so targeted, the reduction of supply would have the same price rising effect, but not be caught. This would bring it into line with (d) which does not include a target person or class.</p> <p>As (c) deals only with supply situations, is there a need to include a reference to the extremely remote possibility that the parties are in competition on the acquiring side? Deletion of "or acquire" would make it easier to interpret. Similarly for (d), is "supply or" necessary as it only applies to acquisition situations?</p>
	Section 29	<p>The inclusion of (c) and (d) and the new s30(4) makes s29 exclusionary provisions even more redundant than it currently is and it can be repealed.</p>
30(5)	Bid Rigging Definition	<p>It is noted that additional words "for the supply and acquisition of the goods and services to which the bid relates" follow the "in competition with each other" wording formula used for all cartel definitions. This difference in approach might run the risk of the courts interpreting the "in competition with each other" elements used in the three other cartel categories more widely and capable</p>

		of being satisfied by the parties competing in other markets and not necessarily that which involves the supply (or acquisition) of the goods or services the alleged conduct relates to. Removing the additional words from s30(5) should not alter who and what conduct is intended to be caught in this category.
31	Exemption for Collaborative Activity	This provision is designed to distinguish pro-competitive (or at least benign) collaborations from naked cartels so only the latter should ever be found to be unlawful. While there will be initial uncertainty over its application pending Commission and subsequently court guidance, I think it will achieve the outcomes intended as currently drafted. I had some concerns over the definition of collaborative activity referring to “the dominant purpose of lessening competition “in terms of what benchmark is intended to be employed? In the Act, “competition” is usually applied in a market context. Foreseeably, two purposes for the collaborative activity can be put forward; the first to be more competitive vis-à-vis third party competitors (e.g. by establishing a franchise operation). The other is for the parties to cease to compete against each other (e.g. allocate territories and standardise pricing) to achieve the first mentioned purpose. If “lessening of competition” is used in a market context benchmark, the first mentioned purpose would be the relevant enquiry. I would have concerns if the second “intra” party restrictions on competition was to be the relevant enquiry for the purposes of assessing whether the exemption was available.
32	Bid Rigging Exemption	The current exemption requires initiation by the bidding parties. It can possibly be extended to include the person running any bid to make it known in writing that joint bids can be accepted if certain conditions are complied with.
33(c) & (d)	Joint Buying Exemption	The new (c) significantly widens the joint buying exemption to the extent that it may exempt virtually all cartel conduct on the acquisition side as it will be easy to qualify under this definition. It also cuts across the bid rigging prohibition and exemption. To reduce possible abuse, perhaps a consent from the seller to joint buying procedure can be developed along the lines of s32 of the Exposure Bill.
47A	Acquisitions by Overseas Persons	The proposed regime should provide more incentive to apply for clearances for those “run of the mill” overseas acquisitions that are likely to be cleared. For those harder ones (particularly as part of a worldwide transaction) purchasers might be advised not to file because so much market information is volunteered up and a declined clearance provides good grounds to get a declaration. This is not helped by the draft remedies being limited and quite draconian. Appealing declined clearances would be expected. However, as the Commission would have no ability to injunct the overseas transaction taking place, a clearance would then not be available if the transaction could not wait for the appeals to be exhausted.
47A(3)	Definition of NZ	I query whether “does” business in NZ is the correct qualifying test.

	Company	This test would arguably include overseas firms sending out a sales rep occasionally to NZ to take orders or talk to distributors or end use customers, which does not amount to “carrying on business” in their own right. I think the test should be the same as the main remedy, which refers to ceasing to carry on business.
47B	Cease carrying on Business	An order to cease carrying on business seems to be the only order available on obtaining a declaration, but such may not cure the SLC effect unless the business can be sold to an independent owner. The court should be able to make other orders (or none at all) depending on the situation it is faced with.
65A(1)	Clearances for cartels	Clearances are intended to be only available to persons proposing to enter into a cartel. Whether or not a cartel provision is “reasonably necessary” for a collaborative activity may change over time. At the beginning, it may be necessary to get a project underway but if it proves successful, or parties are added or change, or market conditions alter, questions may be raised as to its continued reasonableness. It would be appropriate at that time to make a clearance application to continue to give effect to such. Thus s65A (1) could be extended to allow such applications (perhaps by not giving effect to in the meantime as per s59A(2) for authorisations)
28	Transitional Clearances	Even if the above suggestion to allow for clearances to be made in continuing to give effect situation is not agreed to, such applications should be made available at least during the transition to the new laws, to mitigate against unnecessary disruption & uncertainty to existing good collaborative arrangements.

I hope you find these comments useful.

Yours sincerely



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