



18 July 2011

Cartel Criminalisation
Ministry of Economic Development
PO Box 1473
Wellington 6140

cartels@med.govt.nz

Dear Sir/ Madam

Submission on Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill

Please find following the submission of the Meat Industry Association ("MIA") in response to the Ministry's call for submissions on the issues raised by the Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill ("Bill").

About the MIA

The MIA is a voluntary trade association representing New Zealand meat processors, marketers and exporters. It is an Incorporated Society that represents companies supplying virtually all of New Zealand sheepmeat exports and all beef exports, producing 13 per cent of our nation's exports by value (23 percent of New Zealand's primary sector export revenue). The New Zealand meat industry earned \$5.9 billion in export revenue in the year ended March 2011.

MIA member companies operate approximately 65 processing plants dispersed throughout the country. Our affiliate members include road and rail transport, shipping lines, ports, packaging firms, specialist product exporters, research and technology.

The Association advocates on behalf of its members and provides advice on economic, trade policy, market access, employment relations, business compliance costs and technical and regulatory issues facing the industry. The MIA is also the interface between the meat industry and government (i.e., it is the consultative body referred to in various New Zealand statutes, such as the Meat Board Act 2004, Meat Act 1981 and the Animal Products Act 1999).

Criminalisation of cartels

The industry wishes to add its support to pro-competitive business arrangements and efforts to protect such arrangements. The industry in principle supports the elimination of clear cases of 'hard core' cartel behaviour however there remains concern around the justification for criminalisation and aspects of the proposed offence.

The industry wishes to acknowledge the prudent course taken by Government in the release of the exposure draft Bill to promote consultation amongst the community, nationally and internationally, on this complex and often resource intensive area of law.

By this submission the MIA seeks to raise with Government two issues of importance for the industry, the first, necessity and proportionality, relating to the context in which the proposal is made and the second, a matter of legal principle for clarification, the nature of the knowledge necessary to satisfy the mental element of the criminal offence.

1. Necessity and Proportionality

The Association notes that the Bill proposes wide ranging changes to the structure and operation of the current law and holds concerns that the case for intervention of the magnitude proposed is not sufficiently strong. It is noted that the Bill aims to improve the deterrence effect of the regime, particularly amongst individuals and increase New Zealand's co-operation with international trading partners. It is also noted that due to New Zealand's size and the corresponding ease with which cartel behaviour can be detected it is unlikely New Zealand is seen as a haven for international cartelists.

The Bill appears to be a disproportionate response to the harm, both in terms of cost and prevalence. It is noted that the costs associated with intervention are substantial, including those associated with increased compliance and enforcement expenditure, obtaining conviction against the criminal evidentiary standard and the cost of incarceration.

The MIA is greatly concerned over the potential chilling of pro-competitive behaviour (such as collaboration and innovation) arising from criminalisation of cartels as business responds conservatively to the weight of the new liability. Further, there is concern that the chilling effects of the legislation would be magnified by the comparatively small size of the New Zealand economy and its markets relative to the other OECD nations that currently operate under laws similar to those proposed. In the absence of a demonstrable net benefit for New Zealand, the MIA does not consider the criminalisation proposal sufficiently justified by Single Economic Market objectives or the desire for greater harmonisation of laws amongst the OECD nations.

The MIA recommends that the Government delay in making a final decision on progressing the reform until both the necessity and proportionality of the proposal can be better evidenced.

2. Clarity around criminal knowledge

The MIA considers it to be important that the requirements of the criminal offence follow the criminal law and that the conduct and mental elements of the offence are clearly articulated in legislation. In regard to the mental element the Association notes that neither the knowledge or intention elements are sufficiently clear for comfort. Given provisions of the *Commerce Act* providing for constructive knowledge, should it proceed, the Bill should be precise on the issue of knowledge, requiring actual knowledge to satisfy the criminal knowledge element.

MIA Contact

Should you wish to discuss the Association's submission further, please contact Nadine King on DDI: 04 495 8371 or by e-mail: nadine.king@mia.co.nz.

Yours sincerely



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