Submission

By

to

The Commerce Select Committee

on the

Commerce (Cartels & Other Matters) Amendment Bill

6 September 2012

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COMMERCE (CARTELS & OTHER MATTERS) AMENDMENT BILL
SUBMISSION BY BUSINESSNZ[1]
6 SEPTEMBER 2012

1. INTRODUCTION

1.1 BusinessNZ welcomes the opportunity to comment on the Commerce (Cartels & Other Matters) Amendment Bill (referred to as 'the Bill').

1.2 We submitted on the draft exposure Bill in 2011, and supported the additional level of consultation before the Bill was introduced into the House. Like our previous two submissions on this issue, we remain unconvinced of the need to apply criminal sanctions to conduct deemed to be in the nature of a cartel. Notwithstanding this point, we also wish to outline our views on aspects of the Bill that we do support.

2. SUMMARY OF RECOMMENDATIONS

2.1 BusinessNZ does **not support** the:

a) Criminalisation of hard core cartels (p.7).

BusinessNZ **supports** the:

b) Revised definition of hard-core cartel conduct (p.8);

c) Proposed collaborative activity exemption (p.8); and

d) Establishment of a clearance regime for collaborative activities (p.8).

BusinessNZ **recommends** that:

e) The formation of any guidelines compiled by the Commerce Commission on collaborative activity exemptions should involve significant assistance and feedback from the business community (p.8);

f) Whether or not criminal sanctions of hard-core cartel behaviour proceed, the scope of the prohibition and exemptions should be clarified and a clearance regime introduced (p.9);

g) Issues relating to pre-bid activity and preliminary contracting are addressed to avoid legitimate collaborative activity being considered as cartel behaviour (p.10);

h) There should be no change to the penalties regime (p.10);

i) The 2 year delay in the commencement of criminal sanctions should proceed (p.11); and

[1] Background information on BusinessNZ is attached in the appendix.

j) The clearance application fee and applications for collaborative activity clearance fees should be significantly reduced to encourage applications during the first two years the Act is in force (p.12).

3. BUSINESSNZ'S OVERALL VIEW ON CARTEL BEHAVIOUR

3.1 BusinessNZ would first like to point out that we fully support competition law that provides for an effective and efficient market. We also support moves by the Government to eliminate clear cases of hard core cartel behaviour. However, the point we have raised in previous submissions is whether the introduction of stronger sanctions is required in the absence of clear evidence that existing sanctions have been unsuccessful. Plainly put, are many of the proposals a solution looking for a problem?

3.2 Our submission comprises two main parts:

a) BusinessNZ's view on the criminalisation of hard-core cartel behaviour, and

b) Other changes/additions to the scheme.

PART A: CRIMINALISATION OF HARD-CORE CARTEL BEHAVIOUR

4 PREVIOUS SUBMISSIONS

4.1 BusinessNZ submitted on both the *Cartel Criminalisation* discussion document in 2010 and the *Exposure Draft Bill* in 2011. In both submissions, we took the opportunity to highlight what we believed to be some fundamental issues that should be examined before action (if any) is taken.

Discussion Document (2010)

4.2 During the discussion document phase, our main concerns involved the following:

- Despite a 98-page discussion document, there was little attempt to establish the extent of the problem of hard-core cartel behaviour in New Zealand (not a single recent New Zealand case study was mentioned).

- Aligning New Zealand with offshore practices was stated as a major factor in wanting to introduce changes but with no attempt to show there would be a net benefit to the New Zealand economy.

- Comments by the Minister of Commerce and others when the discussion document was released appeared to reflect a view that the proposed changes were a fait accompli. This would undermine the purpose of the discussion document which should be to gauge public opinion and make regulatory changes if necessary.

4.3 Given these considerable concerns, we concluded that the Government should not make changes to existing competition laws involving cartels until

such time as another investigation taking into account BusinessNZ's concerns was conducted.

Exposure Draft Bill (2011)

4.4 BusinessNZ strongly supported the release of an exposure draft Bill so that submitters could have further input into the policy process. While there were parts of the Bill we supported, the core issue of criminalisation of hard-core cartel behaviour remained one that we opposed.

Regulatory Impact Statements (original and revised) & Cabinet Paper

4.5 Although a draft exposure Bill had been released for comment, much of the focus of our submission in 2011 was on the Regulatory Impact Statement (RIS). Taking into account the fundamental policy process issues we raised in our submission on the discussion document, the RIS at that time provided the best proxy in terms of a proper investigation that took into account our earlier concerns.

4.6 The RIS has since been revised and expanded upon (referred to as the revised RIS). Therefore, we would like to discuss the revised RIS in the context of the details of the Bill.

4.7 Last, in addition to the Bill and revised RIS, the associated Cabinet Paper also provides useful insights into the issue of the criminalisation of cartels. BusinessNZ wishes to pick up on a few of these matters below.

The Evidence in New Zealand of Hard Core Cartel Behaviour

4.8 We recognise the effort the Ministry of Business, Innovation & Employment (MBIE) has gone to in terms of providing a summary of both the section 30 (price fixing) cases in the revised RIS, and the warnings and acknowledgements of the Commerce Commission from 1995 through to 2010 provided via its various media releases. This information builds on the original RIS where MBIE had at least examined past data to give interested parties an updated picture of hard-core cartel behaviour in New Zealand (compared with the 2010 discussion document that failed to even look into this issue).

4.9 Ironically, despite MBIE continuing to provide more information on cartel cases in New Zealand as this process has evolved (which we argue should have taken place at the beginning of the process), it has become even more obvious that the attempt to scope the level of the problem as part of any justification for stronger sanctions falls at the first hurdle.

4.10 Paragraph 12 of the revised RIS states that *"New Zealand data is limited and the relatively small number of cases means that it cannot be statistically analysed"*. We agree. However, the fact that there has been a small number that cannot be analysed is in itself a clear indication of a problem, or in this case, lack of a problem, existing in New Zealand.

4.11 Of those that can be assessed, table 1 in the revised RIS outlines five cases since 1995 of what are considered to be significant instances of price fixing. Of the five, two were international cartels, one was Trans-Tasman, and two were New Zealand based arrangements. At face value, this could represent one case of price fixing leading to criminal sanctions around every 4 years. However, the obvious question is whether any of these cases would be considered hard-core cartel behaviour that would warrant criminal sanctions in the first place.

Problems Identified with the Current Regime

4.12 In terms of problems identified with the current regime, paragraph 19 of the revised RIS states that *"a lack of detection of cartels via leniency may be an indicator that New Zealand's penalty regime is not a sufficient deterrent to cartel behaviour"*. We find this statement puzzling. It could equally be stated that a lack of detection of cartels via leniency may be an indicator that there are minimal problems regarding cartels in New Zealand in the first place.

4.13 Paragraph 19 also mentions that reducing cartel behaviour through increased deterrence would encourage production inputs to be more competitively priced. While one could argue that this makes intuitive sense, it again does not come across as a solid justification for change. Therefore, the notion that the low number of cases of cartel behaviour in New Zealand is due to a perception of sub-standard penalties cannot be seriously considered as a 'problem' with New Zealand's current cartel penalty regime.

Cooperating with Other Jurisdictions

4.14 Paragraphs 32 to 37 of the revised RIS discuss the apparent reduced ability to cooperate with other jurisdictions if criminal sanctions are not introduced.

4.15 Paragraph 32 states that "*Many large cartels affecting New Zealand are international and are detected from work in other jurisdictions. It is important that New Zealand can effectively cooperate with other jurisdictions to sanction behaviour"*. Paragraph 33 then states that a *"lack of criminal sanctions in New Zealand may reduce the scope for cooperation. Without criminalisation, the Commission may be unable to share confidential information or undertake investigations to assist a criminal investigation in another jurisdiction. This could decrease reciprocity between investigating agencies…"* (emphasis added). Given the uncertain nature of the statements made above, we presume that this has not been the case, or at least there is again no evidence to suggest that something has already occurred due to New Zealand not having criminal sanctions.

4.16 In addition, paragraph 37 mentions the importance of the Single Economic Market (SEM) with Australia as a reason for change. Namely, the SEM framework has a medium-term goal - that firms operating in both Australia and New Zealand markets should be faced with the same consequences for the same anti-competitive conduct. Given Australia has criminalised cartel conduct, the argument is that New Zealand should do likewise.

4.17 In our previous submissions, we outlined concerns regarding international harmonisation as a leading reason for introducing criminal sanctions. BusinessNZ has repeatedly commented on this argument when used in other regulatory areas, namely that any harmonisation needs to show a clear net economic benefit for New Zealand. Also, we remain particularly suspicious of the ongoing need to replicate business law on both sides of the Tasman.

4.18 Regarding the ongoing relationship between New Zealand and Australia, BusinessNZ commissioned a major report entitled *"Trans-Tasman Business Law Harmonisation"* in 2010, undertaken by Franks & Ogilvie[2]. The report summarised the responses from BusinessNZ members to the questionnaire on the Government's SEM outcomes framework, and had assistance from key professionals and MED. The report's intent was to provide a business view to government on the prioritisation of, and unexpected fishhooks in, SEM outcomes.

4.19 The majority of responses were from major companies from a cross-section of the economy, with some doing business on both sides of the Tasman and some having parent companies in Australia. Therefore, the respondents involved were well-versed on trans-Tasman issues.

4.20 Competition policy was one of the various issues examined, including cartel criminalisation. Paragraph 10 on page 37 of the report stated that:

a) The majority of members did not support the criminalisation of cartel behaviour. Many stated that it was not necessary, and lacks a strong policy basis. None considered harmonisation or being seen internationally as a 'good citizen' as a good reason for criminalising. Comments included:

> *"Financial penalty is enough. Ability for a competitor to obtain immunity by informing on others that could lead to their criminal conviction is distasteful."*
>
> *"In a small market like NZ there are often valid, pro-competitive reasons for businesses to cooperate with each other. The criminalisation of cartels could deter such legitimate cooperation."*

4.21 The comments in the report highlight the view by the majority in the business community that assimilation of New Zealand's laws is not always a step in the right direction as some regulatory competition is actually healthy. Also, the report outlined that proper cost/benefit appraisals of outcomes are necessary before criminalisation options proceed. As pointed out by ourselves and other submitters previously, it is far from obvious that criminalisation would have any clear long-term benefits for the New Zealand economy.

5. COSTS OF CRIMINALISATION

5.1 Pages 18-20 of the revised RIS outline four main costs identified by both MED and previous submitters regarding the introduction of criminal sanctions. BusinessNZ wishes to discuss three of these issues.

Costs of Imprisonment

[2] Trans-tasman Business Law Harmonisation – Initial Findings (Franks & Ogilvie) 2010.

5.2 Although listed last in terms of cost within the revised RIS, MED's defence of the cost of jail terms if criminal penalties proceed in reality does more to support such proceedings not going ahead. Paragraph 83 states that cartel offences would be unlikely to have a measurable effect on the overall prison population, with statistics showing the United States imprisoning fewer than 400 people over the last 10 years.

Administration and Enforcement Costs

5.3 Paragraph 81 indicates that given the low number of prosecutions expected in any given year (*"on average, one or fewer"*), on face value the costs associated with criminal sanctions would be fairly low. While we agree that the level of some costs will depend on additional measures introduced that we discuss below, invariably the total costs associated with the introduction of criminal investigations will increase because the Commerce Commission's starting point will be the possibility of a criminal prosecution.

5.4 Paragraphs 79 and 80 outline the main costs for the government, involving a combination of upskilling staff, developing processes/protocols, producing guidelines and additional investigation costs. However, neither the original nor the revised RIS discussed the costs incurred by those being investigated. While there would already be costs associated with the current civil regime, it is reasonable to assume that heightened sanctions would lead persons prosecuted to put additional resources into proving their innocence. In addition, there would also be opportunity costs, since individual business resources could instead be put into more productive activity.

5.5 Therefore, the discussion of costs in the revised RIS tends to give the impression that because of an effective design with increased clarity, overall costs may be minimal. BusinessNZ remains unconvinced. Even though additional changes as discussed below may help reduce some of the additional costs, overall we believe there may still be sizeable extra administration and enforcement costs associated with the introduction of criminal sanctions.

Chilling Effect on Pro-Competitive Activity

5.6 Paragraph 74 of the revised RIS mentions that previous submissions on the discussion document highlighted the fact that criminal sanctions may deter legitimate and pro-competitive business activity if there is uncertainty regarding the conduct covered by the prohibition. While we agree that some concerns may be allayed through the delayed introduction of criminal sanctions following the changes outlined in option 2, exposure to the risk of criminal prosecution remains a large elephant in the room for businesses considering competitive conduct. Government needs to be mindful that criminal sanctions will still have a sizeable effect on activity by discouraging actions that may otherwise be perfectly legal.

Consultation of Officials

5.7 Last, paragraphs 63 and 64 of the Cabinet Paper summarise the various government agencies consulted on the proposals. Of particular note was that while Treasury supported other changes proposed in option 2 of the revised RIS, there were significant concerns around the introduction of criminal sanctions. This included the following statements:

"It is not clear that New Zealand has levels of cartel behaviour that warrant criminalisation"

"…. the main benefit from criminalisation appears to be greater alignment of pro-competitive regulation with other jurisdictions. However, increased international cooperation can be achieved through other means"

"Any marginal benefits from criminalisation are likely to be significantly outweighed by the costs faced by businesses who would have to ensure they are complying with the law"

"Treasury also notes that the majority of written submissions did not support cartel criminalisation".

In Summary

5.8 When examining the issues raised in both versions of the RIS, many of the reasons outlined for introducing criminal sanctions could equally be listed as reasons not to introduce criminal sanctions. Also, we believe the RIS underplays the reasons why criminal sanctions should not be introduced. Overall, while we are pleased to see the revised RIS elaborate on particular relevant issues, it still falls short of providing compelling reasons for the introduction of criminal sanctions.

Recommendation: That hard-core cartels should not be criminalised.

5.9 Notwithstanding our recommendation above that there is insufficient evidence that the current cartel regime in New Zealand is inadequate, we would, without prejudicing our overall view, like to comment on some of the other proposed features of the Bill.

PART B: OTHER CHANGES/ADDITIONS TO THE SCHEME

6.1 As paragraph 46 of the revised RIS states *"Submissions on the discussion document suggested that there was scope to improve the current regime, with or without criminalisation"*. Three options have been put up during the process, namely:

a) Clarifying the scope of the prohibition and exemptions;

b) Introducing a clearance regime to allow businesses to manage any residual uncertainty before entering into arrangements with competitors; and

c) Updating the penalty regime.

6.2 BusinessNZ would like to point out that like our submission on the exposure draft Bill, we do not believe the introduction of the additional options below should primarily represent a pathway for the introduction of criminal sanctions.

Clarifying the Scope and Introducing a Clearance Regime

6.3 Overall, in our previous submission BusinessNZ generally supported clarifying the scope of prohibition and exemptions, as well as the introduction of a clearance regime. We believed these changes to be helpful and pragmatic ways in which to address concerns from the business community where incorrect assumptions or processes can lead to costly outcomes.

6.4 Regarding the collaborative activity exemption, paragraph 41 of the Cabinet Paper points out that one area of concern raised involves uncertainty over how the Commission will interpret and approach the new exemption. As the Paper states *"there is concern that the 'reasonably necessary' limb of the exemption allows the Commission to second-guess commercial judgements made by the parties"*. Like the Minister for Commerce, BusinessNZ also acknowledges that there may be some uncertainty over how this will be applied. However, we would expect such concerns to be lessened by the resources that the Commission is expected to put into producing guidelines on the issue.

6.5 We would also expect the business community to play a large part in the formation of these guidelines so that the final draft provides a high degree of certainty. For instance, we believe it would be worthwhile for the guidelines to include specific exemptions by example. These could include companies in a trade association collaborating on standards, promotional events or codes of practice/ethics. In short, we would expect the Commission to consider and outline various exemptions so that the business community is provided with a clear idea of what would typically be considered an exemption.

Recommendation: That the formation of any guidelines compiled by the Commerce Commission on collaborative activity exemptions should involve significant assistance and feedback from the business community.

6.6 For the clearance regime, we note how the collaborative activity exemption discussed above is an important element, essentially seen as the first of 'two limbs' to the proposed clearance test. The second limb is expected to mirror the test used in merger clearances and tests whether the collaborative activity raises competition concerns.

6.7 BusinessNZ supports the ongoing practice by the Commission of publishing detailed written reasons for its decisions on such matters. As paragraph 46 of the Cabinet Paper states *"over time this analysis would form a non-binding body of precedent"*.

6.8 Collectively the introduction of these two options generally provides a positive way in which to minimise business uncertainty. The options have also been

discussed as ways in which to mitigate the possibility of criminal sanctions causing a chill effect on competitive behaviour. BusinessNZ agrees. While we oppose the introduction of criminal sanctions, the two options discussed above are key elements in softening the blow of criminal sanctions.

Recommendation: Whether or not criminal sanctions of hard-core cartel behaviour proceed, the scope of the prohibition and exemptions should be clarified and a clearance regime introduced.

Pre-Bid Activity, Preliminary Contracting and Legitimate Joint Ventures

6.9 While we support the thrust of the new regime as indicated above, BusinessNZ has concerns around the application of the cartel provisions to legitimate behaviours in a number of industries. As paragraph 5.6 above mentions, Government needs to be mindful that criminal sanctions will still have a sizeable effect on activity by discouraging actions that may otherwise be perfectly legal. In this context, it has come to BusinessNZ's attention that instances where there is pre-bid activity and preliminary contracting by joint venture (JV) parties some of it may not become exempted under either the consortia bid exemption or the collaborative behaviour exemption.

6.10 Re the consortia Bid exemption, BusinessNZ is unsure whether a subsequent submission of a bid validates these actions. There are often instances where a JV or consortia do not end up submitting a bid, which can be due to reasons such as not making it through the prequalification process, or simply that a decision is made to withdraw. Where this occurs, the parties' behaviour should not attract a criminal sanction.

6.11 The relationship of the JVs will also be different depending on the work and parties involved. For some, the skills of the partners will be complementary. However, for other JV there is legitimate behaviour where parties who would otherwise compete decide to work together to overcome scale, capacity constraints, or even to share risks. Although technically such arrangements reduce competition between the two players involved in the JV, this does not mean competition is reduced in the wider market It can often mean there are actually more competitors.

6.12 It is also important to note that such behaviour is in reality transparent and up front, and therefore by its very nature is not intended to fall foul of proposed legislation. However, the uncertainty that currently exists could mean parties in various industries may not take the risk of working in this way, which could have a detrimental effect on market efficiency and economic growth.

6.13 We also have similar concerns for various industries that are involved in joint ventures formed for investment in major infrastructure, where one player by itself would not be able to commercially justify becoming involved in the venture. This is often the case for the New Zealand market, where economies of scale means parties have to join forces to join forces to justify the investment in the underlying asset in question

6.14 We have been informed that various members of BusinessNZ (either as individuals or via their industry associations) will be submitting on this particular issue. They will likely provide greater detail and specific examples on how this issue could negatively affect their industry. Given its importance, we would expect the Committee to place significant weight on this issue being addressed.

Recommendation: That issues relating to pre-bid activity and preliminary contracting are addressed to avoid legitimate collaborative activity being considered as cartel behaviour.

Updating the Penalty Regime

6.15 The remaining option that BusinessNZ did not support was the possibility of revising the penalty regime given the Government's view that the current regime may not impose optimal penalties. While we agree with the Government's conclusion that raising penalties is probably not the most desirable thing to do, the reasoning for this view again shows why criminal sanctions are not required. The maximum financial penalty has never been imposed in New Zealand - not a great surprise given the almost non-existent occurrence of hard-core cartel behaviour in this country.

6.16 We have previously agreed with the Government's view that imposing maximum penalties may be enough to bankrupt some firms and that is undesirable from a competition perspective. Interestingly, one could also apply the same logic to criminal sentences given the loss of a business and/or the associated damage to brand once the criminal prosecution became public.

6.17 Overall, we support the Government's view that changes to the penalties regime should not be introduced.

Recommendation: That there should be no change to the penalties' regime.

7. IMPLEMENTATION

7.1 As discussed above, both the revised RIS and the Cabinet Paper outline an increased role for the Commerce Commission in terms of providing guidelines to promote a better understanding of the relevant cartel prohibitions and exemptions, which involve:

- *Inviting the Commerce Commission to develop prosecution guidelines that outline when they would take a criminal prosecution, and*

- *Inviting the Commerce Commission to undertake further advocacy work to promote better understanding of the prohibitions in the Commerce Act, particularly the cartel prohibition and exemptions.*

7.2 To further ensure a smooth transition involving the new legislation, paragraph 12 of the Cabinet paper states that:

In response to concerns about the transition to a new regime and the potential for the introduction of criminal sanctions to exacerbate the risk of any chilling effect, I am proposing to sequence the introduction of the new regime so that the prohibition, exemptions and the clearance regime come into force on the day that the Act receives Royal assent but delay the commencement of criminal sanctions to give the new regime time to bed-in.

Part 2 (2) of the Bill confirms that criminal sanctions will come into force on the day that is 2 years after the date on which the Act receives the Royal assent.

7.3 BusinessNZ strongly supports this delay of 2 years, as it will assist businesses to become accustomed to the new regime, as well as help minimise instances where they may inadvertently be accused of taking part in cartel behaviour.

Recommendation: That the 2 year delay in the commencement of criminal sanctions should proceed.

8. FISCAL IMPLICATIONS

8.1 Paragraphs 65-67 of the Cabinet Paper outline the main costs associated with the new regime, primarily that of the new collaborative activity exemption and clearance regime.

8.2 Specifically, paragraph 66 mentions that clearance application will incur a fee, but the fee would not represent the average cost of a clearance. It is estimated in the Cabinet Paper that the average cost of a clearance would be approximately $40,000, while a review of the application fee, is currently $2,000 (excl GST), will increase to $7,000 (excl GST). This fee would also apply to applications for collaborative activity clearances.

8.3 When the broad context of what is being proposed is considered, BusinessNZ believes decreasing, not increasing, the application fees would provide a more optimal result.

8.4 As stated above, there is a two-year window from when the Act first comes into force, and the commencement of section 18 relating to criminal sanctions for hard-core cartel behaviour. During that time, those who initially apply will assist others in developing an understanding of, and familiarity with the new regime, especially since the Commission is instructed to be transparent about its decisions. Paragraph 66 of the Cabinet Paper states that *"It is not possible to estimate the number of clearance applications, however, I expect that any initial surge would ease as businesses become familiar and develop confidence in the new regime"*.

8.5 Given the window of time, BusinessNZ believes it would be better to decrease the cost of the application fee to encourage as many applications as possible in those first two years so that familiarity and confidence in the new regime is enhanced before criminal sanctions come into force. It may be the case that after the two year period, the application fee increases, but during that period, we believe all measures should be taken to provide as much clarity as

possible to business. That said, BusinessNZ would reiterate its view that criminal sanctions are unnecessary and should not be introduced.

Recommendation: That the clearance application fee and applications for collaborative activity clearance fees should be significantly reduced to encourage applications during the first two years the Act is in force.

9. APPENDIX

Background Information on BusinessNZ

9.1 Encompassing four regional business organisations Employers' & Manufacturers' Association, Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), its 71 member Major Companies Group comprising New Zealand's largest businesses, and its 76-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is New Zealand's largest business advocacy body. BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

9.2 In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

9.3 BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.