Submission

by

Business|NZ

to the

Ministry of Economic Development

on the

Fees for Clearance and Authorisation Applications: Commerce Act 1986

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FEES FOR CLEARANCE AND AUTHORISATION APPLICATIONS: COMMERCE ACT 1986 DISCUSSION DOCUMENT

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1. Introduction

1.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 54-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand 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.

1.2 In addition to advocacy on behalf of enterprise, Business New Zealand 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.

1.3 Business New Zealand'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.

1.4 Business success and growth is fundamental in achieving the aims of higher economic growth for the country. Competition in markets is an important element in which economic growth can be maintained. Any practices that would be deemed as anti-competitive would distort the market, and not be to the long-term benefit of consumers. The Commerce Act is the defining piece of legislation that promotes competition in markets in New Zealand, and we agree that the voluntary notification regime associated with restrictive trade practices and business acquisitions are important instruments to assist the overall goals of the Commerce Act.

1.5 Business New Zealand welcomes the opportunity to provide comment on the Fees for Clearance and Authorisation Applications discussion document that the Ministry of Economic Development (MED) has released (referred to as the 'Ministry'). While it has been some time since the monetary value of the fees has been reviewed, we believe that the Ministry and the Commerce Commission (referred to as the 'Commission') need to consider more wide ranging choices in regards to future options.

2. Summary of Recommendations

2.1 If the Commission does proceed with the possibility of increasing the fees for clearance and authorisation in some way or form, Business New Zealand recommends that:

(a) No consideration is given to a full cost recovery approach to authorisation and clearance applications by the Commission;

(b) No consideration is given to a change in the structure or fees collected under the current cost sharing recovery approach to clearance and authorisation applications; and

(c) Consideration is given to a Commission investigation into the possibility of a two-tiered system whereby small-medium sized entities are exempt from clearance and authorisation fees charges, while entities not within the bounds of any threshold pay the current fee levels in place.

2.2 However, Business New Zealand's preferred recommendations are that:

(d) The Commission set a zero fee cost for clearance and authorisation applications for all entities; and

(e) The Commission undertake an internal investigation into procedures and policies that are currently in place for authorisation applications so as to achieve efficiency gains.

3. Comment on Fee Options Proposed by the Commission

3.1. The Commission currently charges fees for applications relating to authorisation of restrictive trade practices (section 58), clearance of business acquisitions (section 66(1)), authorisation of business acquisitions (section 67(1)) and authorisation of process, revenues and quality standards (section 70(1)).

3.2. The shift from a compulsory notification regime to a voluntary one in 1990 has meant that entities are now more likely to notify only if they perceive that there is a risk that their actions are deemed to be anti-competitive. This places the onus on entities to actively monitor and take pro-active steps to ascertain whether actions regarding mergers would have any anti-competitive traits.

3.3. The discussion document outlines two broad options, a full cost recovery approach and changes to the current regime of a cost sharing approach.

3.4. The full cost recovery approach involves the cost of the service being borne entirely by the users of the service. While the discussion document notes the potential advantage of the burden on the taxpayer being removed, there is a range of disadvantages including the inability of applicants to assess the cost before the application is determined, as well as increasing costs on applicants, undermining the system of voluntary notification by operating as a disincentive to notify. These disadvantages could lead to increased monitoring and investigatory work by the Commission.

3.5. We share the same view as the Commission that the disadvantages of a full cost recovery approach significantly outweigh the advantages. Therefore, Business New Zealand would be totally opposed to any consideration given to a full cost recovery approach by the Commission.

3.6. Recommendation: That no consideration be given to a full cost recovery approach to authorisation and clearance applications by the Commission.

3.7. A cost sharing approach simply involves a split of costs between the applicant and the Commission. The discussion document has outlined two options, a flat fee system that is the current regulatory regime or a tiered fee system.

3.8. A flat fee system for the cost sharing approach is currently in place for the four forms of application involving clearance and authorisation. This is a fee that is paid regardless of the particulars of the applicant and the complexity of the application. The discussion document provides some new fee amounts that could be introduced, which signal a significant step up from the current fee amounts. Although the Commission acknowledges that the proposed fee charges are a suggested range, if we were to take the mid-point for each range, the increase ranges from 44% to 233%, representing sizeable increases from the current fee levels.

3.9. A flat fee structure would provide entities with certainty of costs, rather than costs determined by complex discussion with the Commission. Small-medium sized entities in particular would be most likely to be discouraged from making clearance and authorisation applications.

3.10. The other cost sharing approach outlined is a tiered fees approach, where if the cost to the Commission of an application exceeds a monetary threshold, then the applicant would be liable for a greater fee. The standard fee would also accompany the application. Any crossing of the threshold would see the applicant be liable for the difference between the higher fee and the standard fee.

3.11. Despite the Commission indicating checks would be in place so that applicants are notified within a certain timeframe of the cost exceeding the threshold, and that the entity would have the option of withdrawing its application, the increase in cost to the entity is still extremely sizeable. The imposition of an additional threshold fee (again using mid-points of the range)

could increase the current cost from anywhere from 425% to 1,025% if the proposed new standard fee is also taken into account.

3.12. Business New Zealand agrees that it is difficult to identify a particular entity's price sensitivity, given the wide range of sizes and resources that would make applications. However, given the 'grey area' that exists regarding whether an entity should make an application to the Commission, the fee charged would be a strong determining factor in whether to make an application. Therefore, we believe that the substantial increase in fees for both cost-sharing approaches would discourage entities, particularly small-medium sized ones, from making applications, although they would have done so under the current fee structure. Therefore, we would not consider either cost sharing proposal as viable.

3.13. Recommendation: That no consideration is given to a change in the structure or fees collected under the current cost sharing recovery approach to clearance and authorisation applications.

3.14. The discussion document also raises the possibility of non-notification due to a possible increase in fees. Another alternative that the Commission could investigate is an extension of the scheme that the United Kingdom currently has in regards to a specific exemption for small-medium sized entities for certain newspaper mergers. The Commission may look at adapting the regime in place in the UK to the clearance and authorisation applications fees in New Zealand.

3.15. The adjusted regime could involve a complete exemption of fee payments for those deemed to be within a particular threshold in terms of being identified as a small-medium sized entity. Entities that would be outside the threshold would pay the fee amounts that are currently in place.

3.16. Recommendation: That consideration is given to a Commission investigation into the possibility of a two-tiered system whereby small-medium sized entities are exempt from clearance and authorisation fees charges, while entities not within the bounds of any threshold set pay the current fee levels in place.

4. Business New Zealand's Preferred Options

4.1. Notwithstanding our recommendations based on the discussion document by the Commission, Business New Zealand would also like to express our view on what preferred steps should be taken.

4.2. Business New Zealand would point out that while fee levels set in 1990 were intended to be temporary, these have remained unchanged ever since. It would therefore question why a review should suddenly take place 14 years later; especially given the healthy revenue position the Government currently finds itself in.

4.3. A period of economic downturn which translates into a sustained period of meagre tax revenue for the Government that does not cover core Government expenses often leads to reviews of fees structures and cost sharing issues between the Government and the private sector. However, the Government's current tax take is such that there are significantly large surpluses in existence. A recent OECD report has found that the Government's personal and corporate income tax take, as a percentage of gross domestic product, grew faster in the 2001 to 2002 year than in any other OECD country[1]. Since the policy objective of the review is to identify the appropriate cost distribution between applicants and the Government for costs incurred by the Commission, Business New Zealand believes there is already enough revenue to conclude that the Government is able to sustain the present distribution of cost for the notification regime without any fees increases imposed on businesses.

4.4. In examining the costs for both the applicant and the Government, it is important to consider that the applicant who voluntarily notifies the Commission has already put time and resources at their own cost into compiling information to be sent to the Commission as part of the investigation. The cost of gathering legal, economic, accounting and other specific information can often outweigh the fee that the Commission charges. While these costs would vary greatly among applicants, for most if not all applicants the cost is not just the fee that is charged by the Commission.

4.5. The Commission believes there is some uncertainty as to what exact category the regime would fall under; with the closest being some form of merit good given it has elements of both public and private good provisions. The merit good case does provide a strong argument for charging at less than full cost, and we would take the view that any thought towards charging at full cost would lead to a significant loss of public benefits.

4.6. The discussion document has outlined a series of options for future fee settings, ranging from full cost recovery to changes in the current cost sharing approach. However, the discussion document does not examine the option of a zero fee cost for applications. Given the change in 1990 from a compulsory notification regime to a voluntary one, any entity that applies if they perceive that there is a risk would at least have some good reason to apply, given the cost to the entity is never zero as the compilation of material would consume internal time and resources before the application is made. Also, given the fact that the Commission views the current fees structure as not covering even 10% of the Commission's costs in terms of processing in some instances, the option of a zero fee approach would provide an ideal opportunity for money that would otherwise have gone to the Commission to be kept by the applicant and invested back into the business. It would also provide the Government with a positive signal towards business friendly and growth promoting policies.

[1] OECD, "Comparing OECD Countries' Tax Burdens: Revenue Statistics".

4.7. Recommendation: That consideration is given to a zero fee cost for clearance and authorisation applications for all entities.

4.8. Lastly, rather than an assumption that increased costs to the Commission should call into question the current cost distribution between the two parties, there is a level of responsibility that needs to be examined of the Commission itself in regards to whether a complete efficient and effective service is currently being provided. Namely, are the cost increases totally due to the increased complexity of the notifications, or due in part to inefficient systems and practices handling these applications within the Commission?

4.9. Therefore, Business New Zealand recommends an internal examination of the Commission relating to the procedures and policies that are currently undertaken for authorisation and clearance applications. This examination would ascertain whether there is scope for more effective and efficient ways in which future applications could be handled, which would reduce the cost burden of the regime for the Commission.

4.10. Recommendation: That the Commission undertake an internal examination into procedures and policies that are currently in place for authorisation applications so as to achieve efficiency gains.