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Commerce Act Review
Ministry of Economic Development
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WELLINGTON

Via email: commerceactreview@med.govt.nz

Review of the Clearance and Authorisation Provisions under the Commerce Act 1986

The Society's Commercial and Business Law Committee (the Committee) appreciates the opportunity to comment on the Ministry of Economic Development Discussion Paper *Review of the Clearance and Authorisation Provisions under the Commerce Act 1986* (the Act) (the Paper).

Mergers

Issue A: The Statutory Timeframe for Clearance Determinations

Concern: The Ministry's consideration of the timeframe under section 66(3) is timely. There is concern about the recent increase in the time taken for clearance determinations to be made by the Commission. Prior to this increase, the process was considered quick and simple, and it enabled acquirers of a business to seek certainty in what can be a complex area of law.

Effect of delay: The time taken to consider clearance applications deters business acquirers from seeking clearance and encourages them to proceed without a clearance, notwithstanding the risk that an acquisition may be challenged. This increases the prospect of merger activity that may breach section 47 of the Act and potentially increases the need for the Commission to consider, if not take, enforcement action, therefore committing considerably more resources than if the clearance procedure were considered quick and simple.

Objective: The Committee welcomes any steps that can be taken which reduce the period of time for a clearance determination, including the provision of additional resources to the Commission in this area.

Suggestion: Removal of the ability for the applicant and the Commission to agree to extend the time available for a determination to be made under section 66(3) of the Act should be considered. The effect of section 66(4) is that in practice, the Commission has as much time as it wishes to consider an application. An applicant is most unlikely to refuse an extension of time where the consequence of doing so would be a declined application. A slightly longer period of time under section 66(3) and the removal of the ability to extend that period of time is a preferred option to retaining the ability to extend the timeframes. This approach gives applicants the certainty that a decision will be made within a set period of time. A timeframe of 40 working days from the date of the application is appropriate, given the analysis in paragraphs 20 to 22 of the Paper.

Alternative Suggestion: One right of extension might be available to the Commission (the requirement for agreement by the applicant is considered redundant) for a set period of time, e.g. 10 working days. Such right of extension should only be utilised by the Commission where it is strictly necessary, although such performance criteria are properly contained in the annual Output Agreement with the Minister of Commerce rather than the Act itself.

Q1. What should the default number of working days for Commission consideration of merger clearance applications be?

The default number of working days should be 40, with no ability to extend the period of time. If the Ministry considers that this is too onerous, there should be a single right of extension that can be exercised by the Commission for a further period of 10 working days provided reasonable notice is given to the applicant.

Issue B: The Publication of Written Decisions

Support: The Committee supports the Commission's policy of publishing reasons for every determination made on a clearance application. This provides an invaluable resource to practitioners in the area of competition law. It also reduces the necessity to seek such information by way of a request under the Official Information Act.

Timing of written decisions: When an application for clearance is declined, the need for timely written decisions is more critical than when an application is granted. Typically, the appellant will be the applicant whose clearance application has been declined.

Suggestion: For this reason and for the sake of certainty, the Commission should be required to give written reasons within 10 working days of making a decision **and** section 91(2) should be amended to provide that a notice of appeal must be made within 20 working days of the time the written decision is published. The Committee does not consider these options in the alternative but believes that both changes are required to provide a potential appellant sufficient certainty with respect to timing.

Concern: With reference to paragraph 32 of the paper, the Committee's comments in relation to the timing for a decision to be made in respect of a clearance application, would remove the possible consequence that the Commission would delay making a decision until written reasons have been completed or nearly completed. It is concerning that the time between a decision being made and the reasons being provided takes so long, when one would logically consider the reasons to be well understood and documented at the point when the decision is made. Again, this may be a resourcing issue that requires addressing.

Q2. Is there a need to amend the Act in relation to the publication of written merger clearance decisions?

The Act should be amended to provide that written decisions are required within a period of 10 working days from the date of a decision and notices of appeal must be lodged within 20 working days of the written decision being published.

Issue C: The Enforcement and Variation of Undertakings to Divest Shares or Assets

Q3. Should the Act provide for the enforcement of undertakings to dispose of assets or shares?

The ability to enforce undertakings to dispose of assets or shares is important for the integrity of the clearance procedure. This will provide greater comfort to the Commission that divestments will occur as intended, or otherwise agreed, and benefit applicants for clearance who chose to offer such

divestments. The Commission should be able to seek orders from the High Court to enforce the disposal of assets or shares.

Q4. Should the original applicant be able to ask the Commission to make minor variations to undertakings to divest assets or shares?

Yes. Additional flexibility in this regard is appropriate.

Issue D: Behavioural Undertakings

Behavioural Undertakings Desirable: Behavioural undertakings should be expressly allowed rather than expressly disallowed as is currently provided under the Act. While there are reasons against behavioural undertakings being used as outlined in the Paper, there are occasions where these can mean the difference between a successful clearance application and an unsuccessful one. In such circumstances it is considered appropriate and proper that the Commission and applicants have the ability to consider behavioural undertakings, particularly where these are used to support structural undertakings.

Commission practice: The Paper does not refer to the risk analysis framework adopted by the Commission in Decision No. 545 regarding Gallagher Holdings Ltd/Tru-Test Corporation Ltd. In adopting the risk assessment framework the Commission recognised that the United Kingdom Commerce Commission has greater power to recommend actions including behavioural undertakings in order to remedy, mitigate or prevent a substantial lessening of competition. Given the Commission has adopted this framework, it is appropriate that it has the same flexibility to accept behavioural undertakings where it considers it appropriate to do so, taking into account the factors that may give rise to a reduction in the quality of outcomes outlined in paragraph 57 of the Paper.

Q5. Should the Commission be able to accept behavioural undertakings?

The Commission should be able to accept behavioural undertakings and should provide guidelines around when these will be acceptable, taking into account the possible negative consequences.

Issue E: Informal Pre-merger Processes

Critical factor: Any informal pre-merger letter of comfort system will only be necessary should the formal clearance application process continue to take more than 40 working days in some instances. The need for an informal approach depends on any change to the timing of the formal clearance process discussed above.

Q6. Should the Commission consider introducing an informal pre-merger letter of comfort system?

Provided sufficient timeliness can be assured under the formal clearance procedure, as suggested above, there is no need for an informal pre-merger letter of comfort system.

Issues F to K: Restrictive Trade Practices

Issue F: A Possible Clearance Process for Trade Practices

Q8. Assuming a clearance system is introduced, should it apply to price fixing and resale price maintenance?

There are good reasons for a clearance system to be introduced for trade practices. In a small

economy, with high market concentration, the uncertainty for businesses with high market shares and for any businesses engaged in joint venture operations, as to what they can and cannot do under the Act, can be problematic. If there is a concern under the current law, the Commission can invest significant resources in investigating. This creates legal risk for the organisation under investigation. There is no timeframe for the determination of an investigation, so parties can be, and often are, left in a state of uncertainty for years. If the Commission does not prosecute, then it records its views in a staff report. This is not available except on specific request under the Official Information Act (which can only be done, if one knows of its existence, for example, it is referred to in a subsequent clearance application). The report has little precedent value as it is not expressed to be the view of the Commission, only a recommendation of investigating staff, so the Commission is not bound by the reasoning. For these reasons, the Committee supports the introduction of such a clearance system primarily to avoid uncertainty, cost and delay. If a clearance system is introduced it should extend to price fixing and resale price maintenance.

Q9. Assuming a clearance system is introduced, what features should it have in relation to such matters as timeframes, undertakings, ability to vary, revoke or replace a clearance and appeal rights?

Consistency with the existing clearance procedure for mergers, where possible, is appropriate.

Issue G: A Possible Collective Bargaining Arrangement Notification Process

Q10. Are SMEs inhibited from engaging in efficient collective bargaining schemes? If so, please provide real examples.

The Committee is not aware of any real examples whereby SMEs are inhibited from engaging in efficient collective bargaining schemes.

Q11. Should a collective bargaining notification system be introduced? Would your answer be different if a trade practices clearance system were to be introduced?

While the Committee does not have any concern with the introduction of such a scheme it raises once more, the issue of resource allocation and what the priorities should be. The current operations of the Commission are under resourced and the introduction of a collective bargaining scheme may further stretch these resources.

Issue H: The "Lessening Competition" Jurisdiction Test

Q13. Assuming there will continue to be no clearance system for trade practices, should the "lessening of competition" jurisdiction test for restrictive trade practice authorisations be retained or removed?

Q14. If there is to be a clearance system for trade practices, what implications are there for the "lessening of competition" jurisdiction test for the restrictive trade practice authorisation system?

The "lessening of competition" jurisdiction test for restrictive trade practice authorisations should be removed. The cost and time taken for an authorisation is sufficient disincentive for authorisation applications that do not raise significant competition concerns in New Zealand. The Committee considers the argument that declining an application for failing to meet the "lessening of competition" test denies the applicant of certainty as a persuasive argument that should determine the issue.

Issue I: The Commission's Powers to Revoke, Amend or Replace Authorisations

Q15. Should the Commission's power to vary, replace or revoke an authorisation if there has been a material change of circumstances (i.e. section 65(1)(b)) be (i) retained, (ii) repealed or (iii) replaced by a provision that only allows the original applicant to ask the Commission to vary, replace or revoke an authorisation?

For reasons of certainty, an authorisation should not be subject to reconsideration by the Commission. However, the Committee recognises that there may be cases where the Commission's ability to revoke or vary authorisations (for example, if predicted benefits do not eventuate), can be the difference between authorisation being granted and it not being granted. The removal of its ability to investigate any change of circumstances is likely to act as a disincentive to it granting authorisations. On balance, the Committee is of the view that certainty is generally preferable for all parties and considers that the Commission should not be entitled to reconsider an authorisation other than at the request of the applicant.

Issue J: Halting Conduct while the Commission is considering an Authorisation Application

Q16. Should the mandatory requirement to halt the conduct while the Commission is considering an application for authorisation (i.e. section 59A(2)) be retained or removed?

The Committee agrees with the proposition that section 59A(2) be removed.

Q17. If the mandatory requirement to halt the conduct is to be removed, do you consider that it would be better to repeal section 59A(2) or replace it with a provision that provides the Commission with the discretion to require that the conduct be halted?

The Committee prefers the legal certainty provided by option (a) (namely, that 59A(2) is repealed so that applicants would not be required to stop giving effect to the relevant provisions while an application is being considered). The uncertainty created by the Commission having a discretion in this regard is considered undesirable.

Issue K: Conference Procedures

Q18. Should the applicant and/or any third parties have the power to require the Commission to hold a conference or should the decision be the Commission's alone?

An applicant should have the power to require the Commission to hold a conference. As is the case with the Takeovers Panel, an applicant will have the benefit of presenting their case directly to the decision makers. This will result in the applicant being "heard", rather than solely dealing through Commission executive as the intermediary. While the Committee understands that the main purpose of a conference is to provide the Commission with an effective means for obtaining information to assist it make a high quality decision, the view of what the critical information is and how that information is presented should be afforded to the applicant.

Q19. Assuming the applicants and/or third parties were no longer able to require the Commission to call a conference, should the Act specify that they may request the Commission to hold a conference or does it go without saying?

In the event that applicants and/or third parties were no longer able to require the Commission to call a conference, the Committee does not consider there to be any need for the Act to specify that a party may request a conference to be held.

Q20. Should the statutory time limits in section 62 relating to restrictive trade practice authorisation applications be retained or removed?

Statutory time limits in section 62 should be retained in some form. To allow such time frames to be at the discretion of the Commission creates considerable uncertainty for the relevant parties and, if anything, additional time limits should be introduced around the process as a whole (as the Committee has suggested in respect of merger clearance applications) rather than removing time limits such as those set out in section 62.

ISSUES L TO N: JOINT LEGAL PROCESS ISSUES

Issue L: The Right to Appeal Commission Determinations

Q21. Should appeal rights for persons who participate in Commission conferences be retained or replaced?

Appeal rights for persons who participate in a Commission conference should be replaced.

Q22. Assuming that the High Court will be given the discretion to decide whether a third party may appeal, what criterion or criteria should appear in the Act?

Certainty only favours the applicant in the circumstances and it is likely that any such applicant would prefer the additional flexibility of the general test outlined in paragraph 167(a).

Issue M: A Possible Specialist Competition Tribunal

Q23. Do you consider that a specialist competition tribunal should be established? Does your answer depend on whether there are to be appeals on the merit against regulatory control decisions by the Commerce Commission?

A specialist competition tribunal is not necessary other than in the event that appeals on merit against regulatory control decision by the Commerce Commission are allowed, in which case a specialist competition tribunal as contemplated in the Paper is considered appropriate.

Issue N: Wider Use of Lay Members

Q24. Should the High Court (or a replacement tribunal) have the discretion to appoint lay members in any proceeding where it is required to consider the merits of a report by the Commission?

The High Court should have greater discretion to appoint lay members where it is required to consider merits of a report by the Commission. The Committee is not aware of any other such appropriate circumstances.

ISSUES O TO S: THE FRAMEWORK FOR ASSESSING COSTS AND BENEFITS

Issue O: The Assessment of Efficiency Gains and Losses

The Committee has no comment in respect of questions 26, 28 or 29.

Public Benefit Test discussed: This was the subject of debate at the recent CLPINZ conference, where Justice Goldberg (the Federal Court Judge on the Australian Competition Tribunal (ACT)) was speaking. The view of the discussion session was that although "public benefit" was a broad concept, and the Commission did not ignore non-efficiency related benefits (or detriments), unlike a Court it was not accustomed to policy making and therefore relied heavily on efficiency benefits and detriments, and appeared to give greater weight to those results than to claimed, but less tangible, benefits such as international competitiveness. According to Justice Goldberg, the Dawson reforms, soon to be implemented in Australia, contemplate authorisation applications directly to the ACT, bypassing the ACCC, because more difficult policy considerations such as intangible public benefits are better weighed on the basis of evidence presented in a public forum and tested rigorously through processes such as cross-examination. While it would not be necessary for this to occur in NZ, a right of appeal to a specialist competition tribunal, on the merits, would allow a similar testing of benefits by a Court.

Q27. Is the public benefit test sufficiently broad to take international competitiveness claims into consideration and give them sufficient weighting?

The public benefit test is sufficiently broad, although the Committee is not in a position to determine whether or not the Commission is in fact taking international competitiveness claims into consideration and giving them sufficient weighting.

Q30. Is the approach used to define markets appropriate?

Yes.

The Committee trusts that its comments are of assistance. If you have any further queries please contact the committee secretary Sarah Barker, by email sarah.barker@lawyers.org.nz or phone (04) 463 2967.

Yours sincerely



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