Submission

to the

Ministry of Economic Development

on the

Review of the Clearance and Authorisation Provisions under the Commerce Act 1986: Discussion Document

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Introduction

This submission is presented by the New Zealand Retailers Association Incorporated.

This Association is the largest trade association in New Zealand representing the retail sector. Our membership includes the majority of the national chains including the major supermarket and general merchandise chains, traditional department stores, specialist sector chains and thousands of owner operators spread throughout the country. Our 6200 members represent some 13,000 individual shop fronts from North Cape to Bluff.

We also manage a number of specialist trade groups, including plumbing materials suppliers, metal fasteners distributors, jewellers, bicycle dealers, sports goods suppliers and retailers, pet shops and equestrian suppliers.

Viewed statistically the total retail sector (including hospitality) is one of the most significant parts of the economy – we have annual sales of in excess of $60b and employ over 300,000 New Zealanders.

The Association's View

In respect of the Discussion Document, the Association wishes in the main to comment on the issues relating to Restrictive Trade Practices as the most likely to affect Retailers.

Clearance Process for Trade Practices

1. The Commerce Act currently contains provisions for the authorisation of restrictive trade practices. This allows for certain conduct to be permitted where it is considered to be good for New Zealand society even though it may contravene the substantive prohibitions of the Commerce Act. This is a complex, time consuming and expensive process, which must be argued on public benefit grounds and poses a significant hurdle for small and medium sized firms (SMEs).

2. At present, the Act does not provide a *clearance* process for trade practices as it does for mergers, whereby firms that are unsure whether their conduct is anticompetitive apply to the Commerce Commission ("the Commission") to consummate the conduct involved.

3. The Ministry of Economic Development ("the Ministry") is concerned that this omission impedes SMEs from engaging in some activities that are not anticompetitive because of concerns that they may attract a Commission investigation. The Ministry recommends that a clearance system be introduced to ensure a greater level of certainty in relation to trade practices that are on the margins of legality.

4. A clearance system would be beneficial for retailers as it would provide a cheaper and more cost-effective way to ensure greater certainty in relation to conduct that is and is not acceptance in relation to market competitiveness. Practices that amount to technical breaches of the prohibitions contained within the Act but do not have any effect on competitiveness may be cleared as acceptable by the Commission at

relatively low cost to the retailer which is likely to enable retailers to adopt a wider range of commercial practices. Finally, decisions by the Commission to decline a clearance application would also provide greater business certainty about the risks of giving effect to certain conduct.

Collective Bargaining Arrangement Notification Process

5. Collective bargaining is currently constrained by the Commerce Act. Section 27 of the Act prohibits all forms of collusive conduct which have the effect, or likely effect of substantially lessening competition. Under the Act, collective bargaining may be authorised by the Commission if the public benefit in authorisation outweighs any loss in competition that is bought about by the collective bargaining behaviour. However, due to those problems mentioned above in relation to the authorisation process, collective bargaining is not a viable option for SMEs in New Zealand.

6. The Ministry has identified that a collective bargaining scheme is likely to be an effective way of reversing the adverse impacts of market power where the buyer is a monopsonist and has the ability to lower prices and restrict the volume of the good and service purchased. The Ministry suggests that the Act adopt a collective bargaining notification system for small businesses similar to that recently introduced in Australia on 1 January 2007. The Australian system provides immunity from court action in certain circumstances, provided that the expected total value of the transactions for each party to the agreement does not exceed $3 million over a 12 month period. However, it should be noted that the case for a notification systems is likely to be weakened if a trade practices clearance system is introduced.

7. A notification system would be beneficial for retailers as it is likely to provide a more practical means of allowing a weak seller to collectively negotiate with monosponies without the risk of contravening the Act. By bargaining collectively, retailers may be able to realise more favourable and appropriate terms and conditions through the opportunity to have greater input into agreements. A notification process would allow for a speedier and less costly process and may encourage small and medium-sized retailers to engage in more efficient business practices. Transaction costs are likely to be lower for those buyers and sellers who are able to avoid duplication of fees by conducting negotiations with a group rather than a number of separate businesses and smaller firms may be able to share the cost of negotiation instead of bearing it in its entirety. Collective bargaining will also provide retailers with greater certainty in relation to the continued viability of their business and may enable them to explore a range of increased marketing opportunities available to them.

8. There are also a number of potential detriments to the operation of collective bargaining. If buyers and sellers are allowed to collude on the terms and conditions of acquisition and supply, competition may be distorted and resources employed inefficiently. This can lead to an increase in consumer prices, less choice and lower quality of product than would occur with open competition. Resource allocation efficiencies may occur as suppliers, faced with artificially lower returns (as a result of the market distortion created by collectively bargained agreements) choose to direct their resources elsewhere.

9. Collective bargaining is also likely to impact upon retailers outside the "collective" These retailers are likely to be at a competitive disadvantage in relation to the group as the market power of those retailers who engage in collective bargaining increases both in relation to the party with whom they are negotiating and their competitors. The long term viability of retailers who choose to remain outside the bargaining group may be adversely affected as a result. In some cases, competitors may be "frozen-out" of collective bargaining arrangements in an attempt to undermine market competitiveness. In some circumstances, collective bargaining mechanisms may also restrict the entry of new retailers into the market which can have the flow-on effect of discouraging innovation in existing enterprises.

We appreciate your consideration of our views, and would be happy to discuss these further with you.

New Zealand Retailers Association
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