



10 August 2007

Commerce Act Review  
Ministry of Economic Development  
PO Box 1473  
Wellington

**Response to the Ministry Of Economic Development's (MED) discussion document (the Discussion Document) of May 2007 entitled Review of the Clearance and Authorisation Provisions under the Commerce Act 1986 (the Act)**

1. Thank you for the opportunity to comment on the MED's Discussion Document seeking comments on the clearance and authorisation provisions under the Act.
2. We set out our responses to the questions raised in the Discussion Document in turn below. In doing so, we have focused on questions relating to mergers, restrictive trade practices and legal process issues which are of day to day application.
3. By way of very high level summary, our responses to the questions below are premised on the following themes:
  - (a) While business has had many positive experiences with dealing with the Commerce Commission (**the Commission**), there are areas of concern which need to be addressed. The main issues for business relate to certainty over the duration of clearance processes and transparency.
  - (b) We consider it would be extremely helpful for business to have greater certainty over the timing of clearances and the release of the reasons for approving or declining clearances. For this reason, we have submitted that there should be mandatory timeframes for clearance determinations to be made and the reasons for determinations to be released. Even such mandatory timeframes may be insufficient where there are pressing deadlines in a merger context or unnecessary where the applicant is confident that there are no material competition concerns. For that reason we also support the introduction of a letter of comfort system to offer a lower level of certainty to parties based on the facts provided by them to the Commission in situations where parties do not have time, or do not perceive the need, to go through a full clearance process.
  - (c) As part of certainty, we also support extending the clearance system to include restrictive trade practices. Currently, in the absence of such a system, parties are often in an invidious position if their conduct comes close to substantially lessening competition in choosing whether to proceed with the conduct or desist from it. Clearances for trade practices would bridge this gap. As part of this we see merit in permitting price fixing and resale price maintenance conduct to be cleared as well although, to gain maximum benefit from this, we see merit in these types of conduct ceasing to be per se offences (except perhaps in the most blatant cartel price fixing context) in order to allow their actual impact on competition to be considered (ie along the lines of section 29(1A)).

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- (d) Generally we support the thrust of the legal process reforms proposed in order to ensure that rights to appeal are wider than they are currently from clearance applications, and that High Court Judges can obtain the support of lay members where in their discretion they consider it would assist the Court. We do query however whether there is a sufficient volume of competition cases to justify a specialist competition tribunal, and have the concern that the creation of such a tribunal could have the effect of increasing delays in obtaining fixtures in the High Court if only a small body of judges are available to hear competition cases.

4. We now expand on these points below.

#### **Merger issues**

*Question 1: What should the default number of working days for Commission consideration of merger clearance applications be?*

5. By way of background, we believe there is an important preliminary factor that needs to be considered. One of the primary issues for business when dealing with the Commission is the lack of firm deadlines within which to expect a clearance decision to be obtained. While this is partly due to a generally unrealistic deadline of ten working days in section 66, it is more importantly a function of the lack of statutory incentives on the Commission.
6. In the current process, if the Commission does not reach a decision within the ten working day period (or otherwise agreed deadline), the Commission will be presumed to have declined the application for merger clearance or authorisation (sections 66(4) and 67(4) of the Act respectively). In this situation, it is in the Commission's interest often to ask for a further extension of time, and for parties to accept that request.
7. The Commission will often seek more time to consider a merger to avoid the risks of making a wrong decision and/or reduce appeal risk. It will do so more than is efficient as it does not bear the major costs of delay. These costs instead rest with business since business faces the risk of losing the deal through delay. The only constraints on the Commission currently are administrative targets whose effect appears to be minimal.
8. We favour moving to a system in which the acquisition is automatically cleared if the Commission does not reach a decision within the relevant time-period. This would lead the Commission to have strong incentives for managing its caseload efficiently and disposing of cases within the relevant time-periods. The scope for game-playing by the merging parties in seeking to minimise scrutiny by the Commission would be nullified by the very strong statutory information gathering powers of the Commission within short timeframes under section 98 of the Act.
9. Such a change would be consistent with the United Kingdom position. For example, if the period within which the Office of Fair Trading (OFT) has to consider a merger notice expires without it making a decision regarding the notice, the OFT cannot make a decision in relation to those arrangements (or arrangements which do not materially differ from those arrangements).<sup>1</sup>

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<sup>1</sup> Section 96(3) of the Enterprise Act 2002.

10. We appreciate that making this change would necessitate the Commission needing more time to reach its decision. For this reason we would support the Commission having 40 working days to reach a decision.
11. We also appreciate that in some exceptional cases the Commission may need more time even than the 40 working day period to reach a decision. We suggest that the Commission should still be permitted to seek extensions of time from the parties to the clearance application. There will be less incentive for the parties to agree to such an extension request if the change we have proposed is made (ie on the basis that the application is cleared if a decision is not reached within the proposed timeframe). If the parties do not agree to the Commission's request for an extension, then the Commission should be permitted to apply to an independent third party for an extension in exceptional cases.

*Question 2: Is there a need to amend the Act in relation to the publication of written merger clearance decisions?*

12. We support the implementation of both options (a) and (b) in para. 31 of the Discussion Document, namely that the Commission should be required to give written reasons within a certain number of days of making decisions, and a notice of appeal should be filed within 20 working days of the time the written decision is made publicly available.
13. There are a number of reasons why the Commission should be required to give written reasons for its decision. It conforms with principles of natural justice by informing the parties to the clearance application how their interests have been considered. Importantly the publication of a written decision also informs the business community of the Commission's thinking on issues such as market definition and impacts on competition, which assists professional advisers in providing advice to their clients. In this way, it reduces the costs of compliance for business and, so far as it reduces approaches to the Commission, in turn reduces the Commission's costs. The Commission publishes its reasons for a decision anyway, so this requirement does not impose an additional burden on the Commission.
14. We do not consider the possible consequence in para. 32 of the Discussion Document (ie that the Commission will be encouraged to delay decisions until the written reasons have nearly been completed) is particularly compelling. Firstly, if the recommended change we have suggested in question 1 is accepted, then the Commission will be granted sufficient time to make a decision and will not have leverage to obtain a further extension of time. Secondly, in our experience the Commission almost always has at least a draft decision prepared before announcing its determination in order to allow internal discussion over whether the determination is correct.
15. To the extent that the Commission considers this issue is a real one, the Commission could be given 5 working days to release its decision to the parties for clearance following a determination, with any confidentiality issues to be resolved within a further 10 working day period so the decision becomes generally publicly available after that time.
16. In relation to the second issue, section 91(2) prescribes that the 20 working day appeal period runs from the date of the determination appealed against or such further time as the Court may allow. It is not satisfactory that parties have to rely on the Commission's

indulgence to file appeals outside this period in circumstances where the written reasons have not been released. Nor is this fair.

17. While, as noted in footnote 2 of the Discussion Document, the ability to appeal is not reliant on the publication of written reasons, practically it is not possible to formulate proper grounds for appeal without the written decision. The Discussion Document stresses that the Court has the discretion to extend the appeal time limit, but this places an added burden on the appellant to seek leave from the Court which should not be necessary in circumstances where it is delay on the part of the Commission in releasing its written reasons, rather than delay on the part of the appellant, which has necessitated the application for further time to appeal.

*Question 3: Should the Act provide for the enforcement of undertakings to dispose of assets or shares?*

18. Conceptually, we believe that this would be a logical addition to the Commission's powers.

*Question 4: Should the original applicant be able to ask the Commission to make minor variations to undertakings to divest assets or shares?*

19. We believe that the applicant should be able to ask the Commission to vary any undertaking to divest assets or shares. There must be some clear boundaries around what is "minor".

*Question 5: Should the Commission be able to accept behavioural undertakings?*

20. We believe that the Commission should be able to accept behavioural undertakings in line with international practice for mergers.
21. The Discussion Document has referred at para. 55 to the UK Competition Commission's use of behavioural undertakings. In practice, the UK Competition Commission has used behavioural undertakings extensively to address both horizontal and vertical competition concerns (for example, *Scotrail / FirstGroup* and *Centrica / Dynergy* respectively). Behavioural undertakings have also been used in Canada.<sup>2</sup>
22. Behavioural undertakings can be useful at least in the following ways:
- (a) to address any time-limited or otherwise more limited competition concerns (for example, *Scotrail/First Group* and *L3 Communications/Ocean Systems*);
  - (b) to support a divestment remedy (see the European Commission decision in *Kimberley Clark* and the UK Competition Commission decision in the *London Stock Exchange* mergers);
  - (c) when divestment or prohibition is not practical, for example because any prohibition may not be enforceable as the assets are located overseas (for example, see the UK Competition Commission's decision in *Dräger/Air-Shields*)<sup>3</sup> or a suitable purchaser for the assets to divested is not available (for

<sup>2</sup> For further details, please see

[http://www.globalcompetitionforum.org/regions/n\\_america/canada/The%20Use%20of%20Behavioural\\_Campbell\\_1002.pdf](http://www.globalcompetitionforum.org/regions/n_america/canada/The%20Use%20of%20Behavioural_Campbell_1002.pdf)

<sup>3</sup> Dräger Medical AG & Co KGaA / Air-Shields available at [http://www.competition-commission.org.uk/rep\\_pub/reports/2004/fulltext/489.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2004/fulltext/489.pdf)

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example, the European Commission's decision in *Boeing/McDonnell Douglas*);<sup>4</sup>

- (d) where the merger leads to significant efficiencies, which any structural remedy would reduce substantially;
  - (e) to mandate access if there are any vertical or conglomerate foreclosure concerns (for example, *Toll / Pacific Corporation*).
23. In respect of the options for behavioural undertakings that have been proposed in para. 56 of the Discussion Document, we recommend option (a) (ie that the Commission should have full discretion to accept any types of undertakings as it sees fit). We consider the Commission is well placed to exercise this discretion and assess the competition implications of such undertakings on this wider basis. That said, we accept that in practice behavioural undertakings are likely to be used in support of undertakings to divest shares or assets.

*Question 6: Should the Commission consider introducing an informal pre-merger letter of comfort system?*

24. We support the Commission introducing an informal pre-merger letter of comfort system.
25. The proposed change we have recommended in question 1 to ensure that clearance determinations be made in a 40 working day period would go a reasonable distance to meeting concerns of business about the timeliness of the clearance process. However, even 40 working days may be too long in respect of some acquisitions. In this situation an informal letter of comfort system would help to bridge the gap if such letters of comfort could be issued within 10-15 working days from the date of application, or an applicant could quickly be told that a formal clearance application was required.
26. The key difference between the letter of comfort approach and the clearance is that the Commission would issue the letter of comfort based solely on the facts provided to it by the parties, whereas under a clearance the Commission will carry out its own investigations. As the Discussion Document notes, there is therefore less legal certainty for the parties in respect of the letter of comfort approach since they must take the risk that the facts they have provided to the Commission are accurate. The parties may also still face the risk of third party challenge as they do not receive the immunity provided by a clearance. However, we consider that many parties would be prepared to trade off total legal certainty for the letter of comfort in acquisitions.
27. We appreciate that adding a letter of comfort procedure could be argued to place additional strain on the Commission's resources, particularly if it is having to ensure that clearances are issued within 40 working days as recommended in the response to question 1 (although conversely a letter of comfort application may mean one less clearance application to the Commission). We would therefore support there being a filing fee for making a letter of comfort request to help support resources being placed in this area at the Commission.

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<sup>4</sup> Case IV/M.877 Boeing/McDonnell Douglas, [1997] O.J. L336/16 at paragraph 123.

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## Restrictive trade practices issues

*Question 7: Should a clearance system be introduced for trade practices?*

28. We believe it would be helpful for there to be a clearance system for trade practices in New Zealand. Firstly, it would be consistent with the merger regime. Secondly, given the relative lack of case law on many points, it would be helpful for business to have a means to increase certainty, especially where they are contemplating entering into arrangements involving sunk costs.
29. We also consider it would be helpful for the Commission to have jurisdiction to provide a clearance for trade practices even if the Commission decides there is no substantial lessening of competition from the conduct. Again, this would lead to a higher level of certainty for the business about its conduct going forward, and avoid the cost and time of a clearance application being wasted in the event of a finding by the Commission there is no substantial lessening of competition.

*Question 8: Assuming a clearance system is introduced, should it apply to price fixing and resale price maintenance?*

30. We believe that the clearance system should be extended to cover price-fixing and resale price maintenance. Both can have pro-competitive and efficiency effects which could be considered in the context of assessing whether these types of conduct have the purpose, effect or likely effect of substantially lessening competition in a market (if the *per se* rule for resale price maintenance and price fixing were removed as discussed below).
31. Resale price maintenance, similar to other vertical restraints, has many pro-competitive rationales. For example, it can avoid double marginalisation and/or free-riding by a retailer on the investment in services of another retailer by cutting prices and services. These rationales have recently led the US Supreme Court to overturn the previous presumption that minimum resale prices *per se* infringe antitrust laws.<sup>5</sup>
32. There is also a case that section 30 captures agreements with efficiency rationales, albeit to a less extent. Internationally, the *per se* approach to agreements between competitors which might have some effect on price is weakening. For example, the European Commission has considered that agreements to set multilateral interchange fees (MIF) should be dealt with as an "effect" infringement rather than an "object" infringement of Article 81(1) EC.<sup>6</sup> This is consistent with the US courts' practices in considering the MIF, which have not regarded the agreeing of MIF as being a *per se* infringement of the Sherman Act.<sup>7</sup>
33. We accept that under the current wording of sections 30 and 37 they are *per se* offences and there is no ability to consider pro-competition and efficiency effects. If the working of these sections remains the same, then that would restrict the scope of the clearance scheme in respect of them since it could only focus on whether there was in fact resale price maintenance and/or price fixing, and not go on to look at whether they in fact substantially lessened competition. For these reasons, we would

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<sup>5</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480, 551 U.S. (June 28, 2007).

<sup>6</sup> See paragraph 60 of the Commission decision of 24 July 2002 in Case No COMP/29.373 *Visa International – Multilateral Interchange Fee* OJ L 318, 22.11.2002, p. 17-36;

<sup>7</sup> See *National Bancard Corp (NaBanco) v Visa USA, Inc.*, 596 F sup 1231 (SD Fla 1984); 779 F 2d 592 (11th Cir 1986).

recommend that similar wording to section 29(1A) be incorporated in sections 30 and 37 so that there is a defence to those provisions if it can be shown there is no purpose, effect or likely effect of substantially lessening competition in a market. This could then be taken into account in the clearance process as well.

34. It might be appropriate to provide that naked cartels cannot seek to access the clearance regime. However, the Commission could quickly issue guidelines or rulings (focusing on market impact) which would make it clear that such cartels would not be cleared.

*Question 11: Should a collective bargaining notification system be introduced? Would your answer be different if a trade practices clearance system were to be introduced?*

35. We support the introduction of a collective bargaining notification system. There is anecdotal evidence of small suppliers facing difficulties in respect of bargaining with major market players (for instance suppliers to supermarkets).
36. For clarity, we would like to separate two forms of buyer-related competitive harms identified in paragraphs 101 and 105 of the Discussion Document. First, the paragraph discusses the case of a "textbook" monopsonist withholding demand, leading to lower prices for sellers and a deadweight loss. Such a monopsonist is generally agreed to harm competition but such a buyer is relatively rare, as the model is based on strong assumptions including no bilateral negotiations. Secondly, an inequality of bargaining power can result in lower prices for a "power" buyer. This has been alleged to cause harm in some cases for a variety of reasons, including harm to suppliers' incentives to innovate and invest and harm to smaller purchasers as fixed costs are recovered from them rather than the "power buyer" and therefore lower competition downstream (the "waterbed" effect). These allegations are not straightforward to analyse.
37. We would not consider a collective bargaining notification system to be necessary if a trade practices clearance system were introduced and applied to price fixing on the basis set out in our response to question 8 (in particular if section 30 were amended to permit consideration of whether there has been a substantial lessening of competition). In this situation, collective bargaining schemes could be cleared in advance.

*Question 13: 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?*

38. If there will continue to be no clearance system for trade practices, then we would support the retention of the "lessening of competition" jurisdiction test for authorisations if the alternative is going back to the former position of a "substantial lessening of competition" jurisdiction test. The former position was not satisfactory in that parties would go to the time and expense of submitting an authorisation application and then be faced with an outcome where they did not receive the certainty of an authorisation even if there were impacts on competition arising from their conduct falling just below a substantial lessening of competition.
39. That said, if it is proposed that the "lessening of competition" jurisdiction test would be removed and the Commission would be permitted to give an authorisation even if it formed the view there was no lessening or substantial lessening of competition, then

