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Commerce Act Review
Ministry of Economic Development
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Submission on review of Clearance and Authorisation Provisions under the Commerce Act 1986

Vector welcomes this opportunity to submit on possible reforms of the Clearance and Authorisation provisions in the Commerce Act. Vector is supportive of the broad direction MED is taking in ensuring that regulatory and competition law frameworks enhance certainty and predictability, thereby promoting an environment that supports investment and activities that ultimately benefit the interests of New Zealanders.

In this submission we make comments on five key areas where reform is desirable:

1. Improvements to the merger clearance processes;

2. Support for a clearance of restrictive trade-practices;

3. Improvements in processes;

4. The importance of merits review processes to ensure just outcomes; and

5. Support for quantitative cost-benefit analysis in Commerce Commission decision-making in authorisation decisions.

Merger issues

Vector agrees with MED's analysis of the role of clearance and authorisation provisions in promoting certainty about immunity from legal challenge.

It is clear that in most instances, the Commission is unable to complete its analysis within the current statute-required 10 working days. This is understandable given that under the voluntary merger notification process most applications will involve competition issues. Nevertheless, there are some instances where global mergers are taking place, and the applicant may simply be taking an over-cautious approach in the domestic market.

To more efficiently use the Commission's scarce resources, we suggest that the Commission be given the capability to make a decision to not issue a full written

decision, but a materially affected party may request the Commission provide a written decision.

Timeliness is an important feature of the clearance system. From a commercial perspective, in a situation where there are multiple bidders, with varying degrees of resultant aggregation, undue delays in the clearance process can potentially place some bidders at a significant disadvantage and efficient acquisitions may be prevented. Vector recognises that the Commission must of course undertake the necessary analysis to assess competitive effects, but there are some procedural changes that could assist in speeding up the process. In particular, there should be opportunities for the applicant to receive regular updates from the Commission on what, if any, concerns are being considered by the Commission, so that additional information can be provided to the Commission at an early stage. Providing interested parties with an issues paper may be one means of speeding up the process.

Restrictive trade practices

Clearance system

Vector is supportive of a clearance system for conduct that may be at risk of challenge under the restrictive trade practice provisions. This would provide businesses entering into arrangements where the competition issues are complex, but believe there to be no breach of s27, the comfort that the arrangement will not be challenged later by the Commission or competitors. It would also provide longer term contractual certainty for parties entering into long-term arrangements, when at the time of entering into the arrangement there are no competitive concerns. It would also improve the use of the Commission's resources in not having to consider authorisation applications.

A good example of the potential benefits of a clearance system is the Electricity Governance Board application. At the behest of the Government, the electricity industry sought to enter into an arrangement to self-govern the industry which, by necessity, needed to include every market participant that uses the common electricity transmission network. The arrangement was caught by s27 because it included provisions that effectively made joining the arrangement compulsory.

Ultimately the Commission became involved not so much in evaluating whether it was reasonable for the arrangement to include all market participants, but whether the governance arrangements could be improved upon. The Commission ultimately made a number of conditions of authorisation that it believed would improve the proposed governance structure, but which seemed unrelated to any identified competitive harm.

In this case, a clearance would have been a more appropriate and considerably less time-consuming use of the Commission's resources. Recognising that any governance structure of the electricity industry must involve compulsory membership, a clearance could have been granted to allow for the arrangement to

effectively become compulsory. It would then have been up to the individual classes of members to decide whether the proposed governance arrangements would have served their interests better than a Crown-appointed Electricity Commission.

Revocation of authorisations

Vector agrees with MED's analysis that section 65(1)b is problematic and undermines the certainty that an authorisation is intended to provide. We agree also that it may be desirable for an authorisation to be capable of minor amendment if the terms subsequently become impractical.

MED's suggestion that the applicant may apply for revocation, however, may create similar risks if the applicant does not include all parties to the arrangement. We suggest that s65(1)b be replaced with a provision that allows *all parties* (not simply the applicant) to the arrangement to apply for variations, replacement or revocation.

Halting the conduct

Vector agrees that it should not be mandatory for the conduct to be halted while an authorisation is being applied for. For example, there may be circumstances where markets largely rely on the operation of long-term contracts to operate successfully, and it would undermine consumer outcomes to halt the operation of those arrangements with nothing clear in their absence.

We therefore support a modification of section 59A to provide discretion to the Commission to halt conduct where it meets a public interest test.

Conferences

Vector supports the use of conferences as a means of providing additional background and information directly to Commissioners. We agree that the primary means of such conferences is for the Commission to gather additional information, in the context of a draft decision. Vector supports the right of the applicant and materially affected third parties to call for a conference, given that this is the only formal means of communicating directly with Commission members.

Vector has participated in numerous conferences and finds that they are an important means of resolving and understanding positions. Vector submits that these conferences could be improved by allowing for more debate between experts assisting the Commission and the parties' experts. In Vector's experience it is sometimes very difficult to fully understand the analysis in some experts' reports, and this could be addressed through "hot-tubbing" – the process whereby experts prepare summaries of their commonly agreed positions and have the opportunities to debate the disagreed positions before the Commission members. We do not question that it would be inappropriate for conference participants to question the

Commission itself, given it is a quasi-judicial body, but we do not believe that this should apply to the ability to undertake limited questioning of Commission staff and experts to clarify ambiguities or state implicit assumptions in draft decisions. Improvements in this area would potentially reduce the need for stakeholders to undertake subsequent appeals.

Merits review

As Vector has submitted in its submission on the review of the regulatory control provisions in Parts 4, 4A and 5, we view merits review as being a fundamental element in ensuring that quality outcomes are achieved: in the first instance by creating good governance disciplines on the Commission, and secondly, as an avenue for correcting substantive errors in the Commission's approaches that could not be addressed through judicial review. In Vector's view, the administrative costs of providing for additional oversight are likely to be far exceeded by improvements in investor confidence, and therefore a lower overall cost of capital and willingness to invest.

Vector is supportive of a specialist tribunal comprised of a select group of high court judges assisted by lay members as appropriate. Given the complexity of some of the matters, building a pool of judges with experience and expertise would improve the quality of judicial outcomes. We consider this would be cost effective in drawing from existing high court judges.

Vector also supports the use of lay members wherever the issues warrant the specific non-legal expertise.

Use of cost benefit analysis in public benefit assessments

Quantification provides valuable insights

Vector supports the use of quantification in making public benefit assessments under the authorisation provisions in the Commerce Act. We agree with MED's statement:

> 198…The main advantage of quantification is that it places greater discipline on the Commission to think carefully about its assumptions, which in turn means that there is greater transparency about those assumptions. In addition, quantification enables the Commission to value and explicitly compare disparate factors.

MED queries, however, whether there is adequate ability to quantify with any degree of accuracy dynamic efficiency effects, which by definition involve projecting the outcomes of innovation and investment into the future. Vector submits that this concern is over-stated. For example, (setting aside differences in view between the Commission and the pipeline businesses) in the gas inquiry[1] the

[1] Although the gas inquiry was conducted under Part 4 of the Commerce Act, similar concepts were involved to authorisations of mergers or restrictive trade practices (e.g., specification of counterfactual, economic efficiency assessments).

Commission and the pipeline businesses both were able to quantify dynamic efficiency costs of price control and this analysis was relatively straight-forward. CRA International for example stated that their development of a Monte Carlo simulation analysis of possible future investment and demand scenarios for NGC Distribution took around six working days.

From Vector's perspective the key benefit of quantification is in providing insights into order-of magnitude effects of different impacts of market arrangements on efficiency. In conducting such analysis, it is important that the analysis is undertaken according to good professional practice by economists and other experts. Vector submits that consideration should be given to providing legislative direction that the Commission undertake its analysis along similar principles to the *Daubert*[2] principles for acceptable testimony of expert witnesses in the US. These principles establish acceptable standards for the nature and quality of expert analysis. This would provide an important discipline in what is a quasi-judicial process.

Concluding comment

Vector appreciates the opportunity to submit on MED's proposed revisions to the Clearance and Authorisation procedures in the Commerce Act. These issues are of vital importance to the commercial community and ultimately to New Zealanders in promoting efficient markets. We would be happy to provide additional explanations or clarifications of the issues we raise in this submission.

Yours sincerely

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[2] *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). The Court in Daubert offered "general observations" of whether proffered evidence was based on the scientific method, although the list was not intended to be used as an exacting checklist:

- Empirical testing: the theory or technique must be falsifiable, refutable, and testable.
- Subjected to peer review and publication.
- Known or potential error rate and the existence and maintenance of standards concerning its operation.
- Whether the theory and technique is generally accepted by a relevant scientific community.