

The Commerce (Cartels and other Matters) Amendment Bill

Supplementary submission to the Commerce Select Committee

Date: 22 November 2012

Purpose

1. This submission sets out the Commerce Commission (Commission)'s response to the question posed by Hon David Cunliffe at the Select Committee hearing on 25 October 2012.
2. The honourable member's question was: does the Commerce (Cartels and Other Matters) Amendment Bill (the bill) have the unintended consequence of weakening the existing civil prohibition? The question was rephrased as: does it create such wide defences that it is impractical? And: does the repeal of sections 29-34 create a risk that the current civil offence is watered down?

The Commission's view

3. In our view, provided the amendments suggested in our previous submission (dated 4 September) on the collaborative activity exemption and jurisdiction are made to the bill, we think that the answer to the member's question is "no", the bill does not weaken the existing civil prohibition.
4. For the reasons set out below, in our view:
 - 4.1 The new sections 30 and 30A are likely to capture any conduct currently captured by the current section 30.
 - 4.2 However, the current wording of the collaborative activity exemption creates a risk that that the civil prohibition is weakened. This risk could be alleviated if the bill required the courts and the Commission to consider the pro-competitive purpose of a collaboration when assessing whether or not the collaborative activity exemption applies.
 - 4.3 No significant enforcement difficulties are likely to arise with the repeal/amendment of the current exemptions.
 - 4.4 We have no objection to the repeal of the prohibition against contracts, arrangements or understandings containing exclusionary provisions (section 29).
5. However, we remain concerned about the honest belief defence for criminal conduct. For the reasons explained in our earlier submission, our view is that if that defence remains as it is then it will create enforcement difficulties in respect of the criminal offence. This is particularly so given the criminal provision already incorporates a *mens rea* element. (More detailed submissions on this point can be found in our submission of 4 September 2012, at paragraphs 30-41.)

The new prohibition is likely to capture conduct captured by the current section 30

6. The wording of the prohibition in the new section 30 clarifies the existing civil prohibition in section 30. It does this by expressly referring to the four types of hard

core cartel conduct, and defining each type of conduct clearly. This wording makes the prohibition more consistent with international best practice.

7. As such, we doubt that any conduct currently captured by section 30 would cease to be captured by the new sections 30 and 30A.

The collaborative activity exemption requires amendment

8. The proposed exemption for collaborative activities will replace the repealed exemption for joint ventures in section 31.
9. As we have previously submitted, the Commission supports an exemption that will encourage and enable pro-competitive and efficiency-enhancing collaborations.
10. However, while the collaborative activity exemption is designed to limit false positives (excluding conduct from the exemption that is in fact pro-competitive), as currently drafted it risks creating false negatives (exempting conduct that is in fact anti-competitive).
11. We therefore support the proposed collaborative activity exemption, but with the amendment set out at paragraph 4.2 above. That is, the legislation should expressly require the courts and the Commission to consider the pro-competitive purpose of a collaboration when assessing whether or not the collaborative activity exemption applies. (More detailed submissions on this point and suggested wording for the bill can be found in our submission of 4 September 2012, at paragraphs 13-29.)
12. The Commission will put out guidelines on the exemption, possibly drawing on the United States' Federal Trade Commission and Department of Justice guidelines and the Canadian Competition Bureau guidelines as to what is regarded as pro-competitive and efficiency enhancing.
13. With our suggested amendment, we believe the exemption strikes the right balance between avoiding false positives, while mitigating the potential for false negatives.

No difficulties with the repeal/amendment of the existing exemptions

14. A new exemption for joint buying and promotion arrangements will replace the repealed section 33. We foresee no significant enforcement difficulties with the amended exemption.
15. We also foresee no significant enforcement difficulties with the repeal of the trade association exemption (section 32) and the deeming provision regarding covenants (section 34).
16. For completeness, we also see no significant enforcement difficulties with the new exemption for vertical supply agreements.

No objection to the repeal of section 29

17. We have no objection to the repeal of section 29.

18. Since section 29(1A) was enacted in 2001, there has not been a case taken under section 29. Section 29(1A) provides an affirmative defence where a contract that would otherwise fall within section 29(1), can be shown not to substantially lessen competition.
19. Post repeal, section 27 and the new section 30 will be sufficient to capture agreements containing exclusionary provisions that would have otherwise also fallen within section 29.