



## **SUBMISSION**

**Ministry of Economic Development**

**Exposure Draft of the  
Commerce (Cartels and Other Matters)  
Amendment Bill**

**22 JULY 2011**

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### **1. About New Zealand Retailers Association:**

The New Zealand Retailers Association (“**NZRA**”) is the most significant body in the country representing the interests of retailers. We represent an industry that has annual sales of \$66 billion and which employs 325,000 people (approx 20% of the New Zealand workforce) in more than 49,000 outlets throughout New Zealand.

Across all store types and areas we have some 5,700 members and they in turn operate some 14,000 shop fronts. These stores range from the majority of large national retailers to thousands of owner operators.

Our membership accounts for 65% – 70% of total retail expenditure (excluding the motor vehicle sector).

Within the New Zealand Retailers Association structure we also have a number of specialty groups and in the main these include retailers, importers, and suppliers of a specific product type. The specialty groups we operate are:

- Bicycle Industry
- Sporting Goods
- Jewellery
- Plumbing Distributors
- Pets/Pet Products/Equestrian Suppliers

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### 3. Introduction:

The NZRA's members include a significant number of businesses operating under a franchise agreement and we made submissions on the review of franchising regulation in New Zealand in November 2008. Considered within the franchise model are Co-operatives.

In its submission on the Cartel Criminalisation Discussion Document ('**discussion document**') the NZRA stressed the importance of clarity in defining any cartel offence (including by way of clear exemptions), particularly surrounding the application to franchises, cooperative and joint venture models.

As noted in the NZRA's submissions on the discussion document, using a franchising model provides benefits to a franchisor by:

- a enabling it to expand quickly without having to provide excessive capital and
- b providing the franchisee with the opportunity to be self-employed, but with the support of the franchisors' established products and systems.

Franchising as a business system can facilitate economic growth and employment. In New Zealand many of our well known retail brands operate under a franchising or similar model. Such business systems need to be able to operate on a day to day basis without uncertainty as to the scope of both civil and any new criminal provisions.

### 4. NZRA Comments on Draft Exposure Bill:

#### Cartel provision

The NZRA welcomes the proposed form based approach to defining the cartel provision. This does provide greater clarity as to the nature of the prohibited cartel conduct; price fixing, output restrictions, market allocation and bid rigging.

However, under the proposed definition of a cartel provision the NZRA's concerns regarding the potential application in relation to the franchise model still remains. That is:

- c Could parties to franchise arrangements be prosecuted for price fixing:
  - i if the franchisees are in competition (e.g. if franchise areas overlap) or
  - ii if the franchisor has company owned stores?
- d Could parties to a franchise arrangement be prosecuted for market sharing?

If uncertainty remains in the cartel provision itself, as to whether it excludes genuine franchise arrangements, then certainty needs to be achieved through clear exemption provisions.

### **Collaborative activity' exemption**

The collaborative activity exemption still does raise some concerns for the NZRA in terms of the ability for the exemption to create certainty in relation to the franchise model. Because the exemption has been drafted essentially using a 'greenfields' approach, there is little certainty for businesses as to how this new exemption may be interpreted by the Courts. It would still be a matter of interpretation as to:

- e whether the franchise model itself is a 'collaborative activity' and
- f whether franchisors setting prices for franchisees and the inherent division of territory required for franchise operations is 'reasonably necessary' for the franchise activity.

Businesses need clarity that they will not be subject to criminal prosecution in relation to the practice of franchisors setting prices for franchisees and the division of territory necessitated by the franchise model.

The NZRA considers that these concerns could be alleviated by:

- g amending the definition of collaborative activity to include a specific reference to the franchise business model and
- h positively stating that price setting by franchisors and territory division in the franchise model are included in the practices considered reasonably necessary for the operation of a franchise business model.

### **Amendments to section 33 joint buying exemption**

Section 33 is an important exemption in relation to franchise arrangements and the NZRA welcomes the proposal to clarify the application of section 33 in relation to collective acquisitions.

However, as currently drafted section 33 still does not include sufficient certainty that franchisees can jointly price and advertise collectively acquired goods or goods collectively negotiated (including on franchisees' behalf), but purchased individually.

NZRA recommends that section 33 be further amended as follows:

- i section 33(b) is amended to provide for both the joint pricing and advertising for the resupply of goods acquired in accordance with paragraph (a)

- j a new section 33(d) is inserted which provides for the joint pricing and advertising for the resupply of goods acquired in accordance with paragraph (c) and
- k collective negotiation as referred to in section 33(c) is clarified to include both negotiation by and on behalf of the collective.

## **5. Conclusion:**

We trust these submissions are helpful and would be delighted to meet the Ministry to discuss them in greater detail if that would be useful

New Zealand Retailers Association  
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