



COVERSHEET

Minister	Hon Kris Faafoi	Portfolio	Commerce and Consumer Affairs
Name of package	Criminalisation of Cartels SOP	Date of issue	5 April 2019

List of documents that have been proactively released

Date	Title	Author
February 2019	<i>Amendments to the Commerce (Criminalisation of Cartels) Amendment Bill: Approval for tabling of a supplementary order paper</i>	<i>Office of Commerce and Consumer Affairs Minister</i>
19 February 2019	<i>LEG-19-MIN-0013 Commerce (Criminalisation of Cartels) Amendment Bill: Supplementary Order Paper</i>	<i>Cabinet Office</i>

List of supporting documents not released as publicly available

12 February 2019	<i>Disclosure statement: Commerce (Criminalisation of Cartels) Amendment Bill</i>	<i>MBIE</i>
5 March 2019	<i>SOP No 194 Commerce (Criminalisation of Cartels) Amendment Bill</i>	<i>PCO</i>

Information withheld

Some parts of this information release are not appropriate to be released and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified and are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Section of the Act	Reason for withholding
9(2)(f)(iv)	<i>To maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials.</i>

In Confidence

Office of the Minister for Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

Amendments to the Commerce (Criminalisation of Cartels) Amendment Bill: Approval for tabling of a supplementary order paper

Proposal

1. This paper seeks agreement to the tabling of a supplementary order paper containing amendments to the Commerce (Criminalisation of Cartels) Amendment Bill.

Policy

2. The supplementary order paper (SOP) makes a number of second order changes to the Commerce (Criminalisation of Cartels) Amendment Bill (the Bill). These changes were agreed to by Cabinet on 10 December 2018 [CAB-18-MIN-0802.02 refers].
3. The Bill criminalises intentional cartel conduct and provides for a criminal regime in parallel to the long-standing civil regime. The Bill was considered by the Economic Development, Science and Innovation (EDSI) Committee with a number of amendments considered. However, the Committee was split and the Bill was reported back without amendment. This SOP is required to make the necessary amendments.
4. The first of the amendments changes the category of the proposed cartel offence. The original categorisation of the proposed criminal offences for the purposes of the Criminal Procedure Act 2011 was incorrect and Cabinet agreed that it be changed to category 3 instead of category 4. Category 4 is reserved for the most morally blameworthy offences such as terrorism, murder and genocide and it would be inappropriate to align the criminal cartel offences to category 4 conduct.
5. The amendments also address concerns raised by submitters during select committee consultation in relation to aspects of the defences to the cartel offence. The defences were originally confined to two of the four exceptions to the Commerce Act's cartel prohibitions, and applied where a defendant had an honest but erroneous belief that the cartel provision (or ancillary activity) was reasonably necessary for the purpose of the collaborative activity (or co-operative international liner shipping service, as relevant).
6. The SOP will amend the Bill to extend the defences to the four cartel related exceptions in the Commerce Act and that the necessary belief as to the facts applied be on reasonable grounds.
7. The SOP will also provide that the Solicitor-General be required to set up an expert panel to conduct Crown prosecutions of breaches of the new criminal cartel offence,

similar to the prosecutors' panel relating to serious fraud offences. The Commerce Commission and the Crown Law Office both recommend this as the most appropriate approach. This will enhance confidence in the criminal regime by ensuring sufficient availability of experienced prosecutors.

8. The SOP also makes two minor and technical amendments that are consistent with previous Cabinet policy decisions. These are:
 - 8.1. clarifying that the offence does not apply if one of the Commerce Act exception applies to the conduct; and
 - 8.2. amending the disclosure requirements for the defences to ensure it does not reverse the burden of proof on a defendant.

Impact analysis

9. The impact analysis requirements apply to the first two proposals referred to above relating to changing the category of the offence and changes to the defences. An impact summary for these proposals was prepared and attached to the substantive Cabinet paper submitted in December 2018 [CAB-18-MIN-0802.02 refers].
10. MBIE's Regulatory Impact Analysis Review Panel has reviewed the Regulatory Impact Statement (RIS) prepared by MBIE for the DEV paper noted above. The Panel considers that the information and analysis summarised in the RIS meets the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.
11. The Treasury's Regulatory Quality Team has determined that the remaining substantive proposal is exempt from the Regulatory Impact Analysis requirements as it has no or only minor impacts on businesses, individuals or not-for-profit entities.

Compliance

12. The proposed amendments are in compliance with:
 - 12.1. the principles of the Treaty of Waitangi;
 - 12.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 12.3. the disclosure statement requirements (a short-form disclosure statement is attached. This complements the original disclosure statement prepared for the Bill);
 - 12.4. the principles and guidelines set out in the Privacy Act 1993;
 - 12.5. the relevant international standards and obligations;
 - 12.6. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

13. During drafting of the SOP, officials consulted Crown Law, the Commerce Commission, Treasury and Ministry of Justice. The Department of Prime Minister and Cabinet was informed.

Binding on the Crown

14. The Commerce Act, which the Amendment Bill amends, is binding on the Crown when the Crown is in trade. Section 5(3) of the Commerce Act provides that the Crown may not be prosecuted for a criminal offence in breach of the Commerce Act. This will automatically extend to the criminal cartel offences.

Allocation of decision making powers

15. This SOP does not contain any proposals related to this.

Associated regulations

16. No regulations are needed to bring the SOP or the Bill into operation.

Other instruments

17. This SOP does not contain any proposals related to this.

Definition of Minister/department

18. The SOP does not contain any proposals related to this.

Commencement of legislation

19. The Commerce (Criminalisation of Cartels) Amendment Bill comes into force two years after the Royal assent. This will allow businesses to prepare for the new criminal regime. It will also allow the Commerce Commission and Crown Law to make preparations for criminal prosecutions including issuing updated guidance.

Parliamentary stages

20. [Redacted]

21. [Redacted]

Proactive Release

22. This paper will be published on the Ministry of Business, Innovation and Employment’s website once the SOP is tabled in the House of Representatives.

Publicity

23. Given the technical nature of these proposals I am not proposing any publicity for the tabling of the SOP. My officials will inform interested parties when the SOP is tabled in the House.

Recommendations

The Minister for Commerce and Consumer Affairs recommends that the Committee:

1. **note** that the Commerce (Criminalisation of Cartels) Amendment Bill completed its second reading on 25 October 2018 [REDACTED]
2. **note** that the supplementary order paper implements the decision of Cabinet of 10 December 2018 [CAB-18-MIN-0802.02 refers];
3. **note** that the supplementary order paper also makes two minor and technical changes that are consistent with existing Cabinet approvals to improve legislative clarity and fix errors;
4. **note** that referral back to select committee is not required as these issues arose at the original select committee consideration, and
5. **approve** the supplementary order paper for introduction [REDACTED]

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs