



# Impact Summary: Changes to the Commerce (Criminalisation of Cartels) Amendment Bill

## Section 1: General information

### Purpose

The Ministry of Business, Innovation and Employment is solely responsible for the analysis and advice set out in this Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing decisions to be taken by Cabinet on potential changes to the Commerce (Criminalisation of Cartels) Amendment Bill (**the Bill**) following consideration by select committee.

### Key Limitations or Constraints on Analysis

This Impact Summary is to deal with second order issues that arose since the primary Regulatory Impact Statement entitled Criminalisation of Cartels, dated 26 August 2011. It deals with two issues:

- Targeting of defence
- Categorisation of offence.

There are limitations on the availability of data to assess the problem given the secretive nature of cartel conduct. The options have focused on how to improve the effectiveness of the policy intent of the Bill rather than to reassess that policy. Consultation and testing has also been limited due to any changes needing to be made at the Committee of the Whole House stage on the Bill.

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## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

The Commerce (Criminalisation of Cartels) Amendment Bill (**the Bill**) amends the Commerce Act 1986 (**the Act**) to introduce a new criminal offence for cartel conduct. The proposed new criminal sanctions reflect the covert nature of cartels and the harm they cause to consumers and the economy. The proposed criminal offence applies where the person ‘intentionally’ engages in or gives effect to a provision involving price fixing, restricting output or market allocation (the three aspects of cartel conduct prohibited), and where none of the exceptions for cartel conduct in the Act apply. In a prosecution for the proposed offence, the prosecutor would have to prove, beyond reasonable doubt that the person **intended** to engage in or give effect to a provision involving the aspects of cartel conduct. That is, the defendant would have to have the ‘mens rea’ or mental element of committing the crime.

The existing exceptions to cartels in the Act will also apply to the proposed cartel offence. These are:

- The collaborative activity exception (section 31 of the Act)
- The vertical supply contracts exception (section 32 of the Act)
- The joint buying and promotion exception (section 33 of the Act)
- The international liner shipping exceptions (section 44A and 44B of the Act, not in force until August 2019)

Given the seriousness of the proposed criminal offence, the Bill includes a defence to the proposed criminal offence where a defendant mistakenly believed that either of the collaborative activity or international liner shipping exceptions applied, and that the cartel conduct was reasonably necessary for the purpose of the collaborative activity of supply of international liner shipping services.

#### *Defendants may be criminally liable for honest mistakes’*

The general policy intent of the Bill is to criminalise ‘intentional’ cartel conduct where the defendant has entered into or given effect to a cartel arrangement in contravention of the Act. The Commerce Act 1986 (**the Act**) provides a number of statutory exceptions that would not constitute a cartel arrangement and may be pro-competitive. These exceptions relate to collaborative activities (e.g. joint ventures or franchise arrangements), joint buying, vertical supply contracts and specified liner shipping arrangements.

When the Bill was originally drafted, the intention was that a defendant would also have a defence to the criminal offence where they were factually mistaken that one or more of the exceptions applied. This defence was only provided for in relation to two of the exceptions, as it was considered that there was only a real chance that someone would make a factual mistake as to whether or not something was ‘reasonably necessary’, which is an element of the exceptions for collaborative activities and specified liner shipping arrangements.

During consideration of the Bill by select committee, it became clear based on submissions received that a person may be mistaken as to whether an exception applies in more cases than just that element of the two exemptions originally considered. Some submitters felt that the

burden of proof was too harsh on the prosecution and that the belief of the defendant should be on reasonable grounds.

On reflection we consider that providing a defence to the new criminal offence for some elements of two exceptions but not all of the exceptions in the Act was an error as it may create a gap in the law which risks criminalising unintentional conduct. Where some individuals may make be honestly mistaken that one of the other exceptions applied and were reasonably necessary for the purpose of the exception, there is a real risk that conduct may be caught by the proposed criminal offence which does not actually possess criminal intention to breach the law.

An example of this situation is a person can commit an offence by:

- Entering into or giving effect to a cartel arrangement as they believed that an exception applied and they were not contravening the Act
- Intentionally engaging in price fixing, market allocation or limiting output and
- The exception doesn't actually apply due to a mistake of fact (note that ignorance of the law would not be a defence).
- Note that this could occur with any of the exceptions if no defence applied
- An example of a mistake of fact could be that a marketing employee has engaged in price fixing with a competitor on the mistaken belief that a recently concluded collaborative activity or joint venture between his or her employer and that competitor was still underway.

Therefore they have breached the proposed cartel offence provisions. Some of this problem could be addressed through prosecutorial discretion by the Commerce Commission or through sentencing discretion by the Courts, but we consider it is better to make clear that the person does not face criminal liability in this circumstance.

### *The offence is miscategorised*

The Criminal Procedure Act 2011 (**CPA**) specifies categories of criminal offences ranging in seriousness from 1 to 4, and sets out the appropriate criminal procedure for each category. When the Bill was originally drafted, the offence was categorised as a 'category 4' offence (being the most serious), which are automatically heard in the High Court. Category 4 was chosen as it was considered more appropriate for any criminal prosecutions for cartel conduct to be held in the High Court as is the case for practically all current Commerce Act matters. The objective of this was to use existing expertise on the bench of the High Court.

During the select committee process, some submitters believed that the offence was miscategorised, as existing category 4 offences are more serious in nature than cartel conduct and other similar crimes of a corporate nature are category 3.

Current category offences 4 offences include murder, treason, espionage and genocide. These types of offences are not aligned to the nature or seriousness of the proposed criminal cartel offence.

## **2.2 Who is affected and how?**

Those affected by these particular issues and changes include:

- Those considering activities that may constitute a cartel but which an exception applies to.
- Those accused of cartel offences.
- The Commerce Commission.
- The courts.

We expect relatively few trials for these offences.

### **2.3 Are there any constraints on the scope for decision making?**

The main constraint is that Cabinet has already agreed the policy intention and general scheme of the criminal cartel regime [DEV-18-MIN-006]. These decisions are reflected in the current version of the Bill. The problems and policy changes needed in this case are outside of current Cabinet decisions and thus require new consideration. Having said that these matters are second order to the primary decision to criminalise cartel conduct, which the Government is not inclined to change.

We are also constrained somewhat by standing order 260 which as interpreted by the Speakers means amendments must be in scope of the Bill as introduced. This prevents wholesale changes outside the generic scheme of the Bill, without agreement of Parliament.

## Section 3: Options identification

### 3.1 What options have been considered?

Due to the constraints outlined above, the options available for both issues are limited.

#### *Defendants may be criminally liable for honest mistakes'*

##### Status Quo

The status quo is the Bill as it is currently drafted.

There are defences in relation to a belief that something was 'reasonably necessary' as an element of the following two exceptions:

- Collaborative activities and
- International liner shipping services

There are no defences for mistakes of fact relating to the other elements of the above exceptions or for the remaining two exceptions:

- Joint buying and promotion
- Vertical supply contracts

The general policy intent of the Bill is to capture and criminalise intentional cartel conduct. Given the complex nature of this area of the law, it is possible that a party may genuinely consider in good faith that an exception applies to their conduct but which in fact does not. This potentially creates a situation where a person may commit a criminal offence even though they did not have the necessary intention as a result of their mistaken belief that an exemption applied.

This does not align with the policy intent of the Bill and presents a problem as it risks capturing accidental or unintended conduct which should not attract criminal liability. Note that ignorance of the law would not be a defence.

##### Extend the defences to all the exceptions and provide that it be on reasonable grounds

This option would involve redrafting the Bill so that the defence is available for persons who mistakenly believed on reasonable grounds that any of the exemptions in the Act applied.

##### Repeal the defences and allow the exceptions to stand

This would involve repealing all the defences and allowing the exceptions to deal with the situation.

For the reasons noted above while we considered this option we do not consider it to be a viable for the reasons outlined above regarding false positives in relation to prosecutions of people who have made honest mistakes.

## The offence is miscategorised

Given the specificity of the categorisation of offences the available options are the four categories provided for in section 6 of the **CPA**.

Category 1 and 2 are not able to be used for the proposed criminal cartel offence as they are far below the sentence range for Criminalisation. They are not discussed further.

### Category 3 offence

- An offence that is punishable by imprisonment for life or by imprisonment for 2 years or more, except those offences listed in Schedule 1 to the CPA (category 4 offences).
- Judge-alone trial in a District Court
- The defendant may elect a jury trial, in which case the type of trial will be a jury trial in the District Court.
- The High Court may make a Protocol order that the proceeding be transferred to that court, in which case the type of trial will be either a Judge-alone trial or a jury trial in the High Court (depending on whether the defendant had elected a jury trial or not).
- In some instances, despite a defendant electing a jury trial, the court may order that the trial be conducted by a judge without a jury: see section 102 or 103 (long and complex cases or juror intimidation).

### Category 4 offence

- An offence listed in Schedule 1 to the CPA (for example, murder and manslaughter).
- Jury trial in the High Court.
- In some circumstances the court could order that the trial be conducted by a judge without a jury (long and complex or juror intimidation).

### Comparison

Criteria	Category 3	Category 4
<b>Appropriateness</b>	<p>Category 3 is an offence that is punishable by imprisonment for life or by imprisonment for 2 years or more, except those offences listed in Schedule 1 to the Act (category 4 offences).</p> <p>This appears appropriate as the term of 7 years in the Bill is between life imprisonment and 2 years. The true appropriateness appears to</p>	<p>A category 4 offence is an offence that is listed on schedule 1 of the Criminal Procedure Act. There are no other criteria apart from it being listed on a category 4 offence on schedule 1 of the Criminal Procedure Act. The sanctions range from life imprisonment to seven years imprisonment (use of landmines). Broadly it appears the 7 years imprisonment is the lower end of the scale in relation to category 4 offences.</p>

	turn on whether category 4 is more appropriate.	
<b>Proportionality</b>	This is by default a judge only trial in the District Court. The defendant may elect a jury trial. These offences may be transferred to the High Court if a protocol order is made by the High Court. In that case it is judge only trial or jury trial in the High court depending on if what the defendant elects. Section 102 or 103 of the CPA provides that a judge may order (in either court) a judge only trial in the case of complex or long trials or juror intimidation.	This is a jury trial in the High Court. This reflects the seriousness of the conduct in question. Section 102 or 103 of the CPA provides that a judge may order a judge only trial in the case of complex or long trials or juror intimidation.
<b>Consistency</b>	This would be consistent with other financial offences/corporate offences. For example the Financial Markets Conduct Act provides for offences in relation to financial reporting standards.	This would not be consistent with other financial offences/corporate offence. Nothing in schedule 1 of the CPA is comparable to the criminalisation offences.

### 3.2 Which of these options is the proposed approach?

### *The defences are not well targeted*

We consider that extending the defences to all the exceptions in the Commerce Act and modifying the evidential test to 'belief on reasonable grounds' is the best option as it maintains the policy rationale of the Bill.

For the reasons set out above, we do not consider the status quo to be a viable option. We also do not consider that just allowing the exceptions to deal with the situation as appropriate.

### *The offence is miscategorised*

A category 1 or 2 offence is not appropriate for the criminal offence. They are intended for relatively minor offences with short prison sentences. Further analysis is not needed on these categories.

The offences categorised as category 4 appear to be those considered most blameworthy and in need of the highest level of moral condemnation by society.

While cartel conduct is serious, it does not warrant condemnation by society on the same level as category 4 offences such as genocide or murder. We therefore consider that category 3 is the most appropriate categorisation for the proposed criminal cartel offence.

There is experience on the High Court bench that would be useful to criminalisation cases. However we consider that due to the election option by the defendant of jury being available in either court, the jury will play the role of decider of the facts, not the Judge. Therefore this positive is reduced.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

#### *Extending the defences to all exceptions*

Affected parties	Comment:	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties	There are no additional costs on those parties being regulated as the proposed changes reduce the scope of situations where someone may be criminally liable.	None
Regulators	As the proposed changes reduce the scope of what conduct may be captured under the proposed cartel offence, the Commerce Commission and prosecutors will not experience any material additional costs. It	None



	may however be more complex for the prosecution to disprove the defences when raised in trial.	
Wider government	There are no material cost changes on the Courts service.	None
Other parties	Some minor risk that deterrence of serious cartel conduct weakened.	Uncertain
<b>Total Monetised Cost</b>	N/A	N/A
<b>Non-monetised costs</b>	<i>Overall we consider there are no material changes in costs in relation to the proposed changes.</i>	None

#### Expected benefits of proposed approach, compared to taking no action

Regulated parties	There are some additional benefits of the proposed changes to regulated parties as there will be a wider range of circumstances where a defence to the criminal offence will be available, reducing the risk of capturing conduct not worthy of criminal sanctions	Low
Regulators	The Commerce Commission and prosecutors are not materially directly impacted by these changes.	None
Wider government		None
Other parties	Better targeting of offence/defence should also marginally reduce any potential chilling effect on business conduct.	Low
<b>Total Monetised Benefit</b>	N/A	N/A
<b>Non-monetised benefits</b>		Low

#### Changing the category of the offence

Affected parties	Comment:	Impact
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#### Additional costs of proposed approach, compared to taking no action

Regulated parties	There are no additional costs on those parties being regulated as the proposed changes change the forum of the trial but not the offences themselves.	None
Regulators	The Commerce Commission and prosecutors are not materially directly impacted by these changes	None
Wider government	Cost to the courts service etc. These will balance out as there is no material	None

	differences in the costs of trials in the high vs the district court.	
Other parties		None
<b>Total Monetised Cost</b>	N/A	N/A
<b>Non-monetised costs</b>	<i>Overall we consider there are no material changes in costs.</i>	None

#### Expected benefits of proposed approach, compared to taking no action

Regulated parties	Those accused of these offences will be tried in a more appropriate forum	Low
Regulators	We do not see any impact on the Commerce Commission or prosecutors.	None
Wider government	Cost to the courts service etc. These will balance out as there is no material differences in the costs of trials in the high vs the district court.	None
Other parties	None	None
<b>Total Monetised Benefit</b>	N/A	N/A
<b>Non-monetised benefits</b>	<i>Overall we consider there are low levels of benefits to changing our approach. This will come from a more appropriate forum for the defendant in these cases.</i>	Low

#### 4.2 What other impacts is this approach likely to have?

None anticipated.

## Section 5: Stakeholder views

#### 5.1 What do stakeholders think about the problem and the proposed solution?

During the development of the departmental report which contained these proposals consultation was carried out with the Ministry of Justice and the Commerce Commission.

The Commerce Commission does not support the proposal to change the category of the offence. They consider category 4 to be the most appropriate as it allows for automatic High Court trials.

The Commerce Commission does not support the inclusion of any defences in the Bill. They consider the exceptions would suffice. For the reasons noted above we do not consider this to be correct.

In oral submissions during select committee, a number of submitters including John Gordon and DLA Piper raised the need to extend the proposed defence to all the existing exceptions in order to provide certainty and clarity to businesses and individuals and to avoid criminalising conduct which was not intended to be captured.

MBIE considers that the Court in which prosecutions of the cartel offence are held is a second order question, with the question of category the first. On that basis and as noted above, we consider that category 3 is the most appropriate category for this offence.

The question of which court is most appropriate is not limited by the category of the offence being set at category 3. Section 70 of the CPA allows for the prosecutor in a particular case to request an order from a High Court Judge to transfer the case to the High Court. These applications are decided on their merits and provide an appropriate mechanism which balances the prosecutions wishes and the rights of the defendant to elect a jury or judge alone trial.

The Ministry of Justice supports our proposed changes as per departmental report consultation.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

This change will be implemented by way of a Supplementary Order Paper for the Commerce (Criminalisation of Cartels) Amendment Bill which is still being progressed through Parliament.

The criminalisation provisions (including the proposed changes here) come into force two years after the date of royal assent.

The Commerce Commission will investigate the criminalisation provisions with prosecutions conducted by crown prosecutors on behalf of the Solicitor General.

The proposed changes will be notified to interested parties and stakeholders once agreed to by Cabinet to ensure parties are informed.

We anticipate that the Commerce Commission will prepare guidance documents for the new criminal cartel regime before the offence comes into force.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

As per the original Impact Statement for Criminalisation from 2011:

**MONITORING, EVALUATION AND REVIEW**

*The Commission captures data on cartel investigations, leniency applications, cases filed and other relevant variables through quarterly reporting. On-going monitoring can be undertaken through the normal monitoring processes in place for monitoring the overall performance of the Commission.*

*Once all stages of the proposal are implemented, a qualitative assessment of the effectiveness of the regime would be undertaken as part of MBIE's monitoring function.*

**7.2 When and how will the new arrangements be reviewed?**

As per the original Impact Statement for Criminalisation from 2011:

**MONITORING, EVALUATION AND REVIEW**

*The Commission captures data on cartel investigations, leniency applications, cases filed and other relevant variables through quarterly reporting. On-going monitoring can be undertaken through the normal monitoring processes in place for monitoring the overall performance of the Commission.*

*Once all stages of the proposal are implemented, a qualitative assessment of the effectiveness of the regime would be undertaken as part of MBIE's monitoring function.*