

In Confidence

Office of the Minister of Commerce and Consumer Affairs
Chair, Cabinet Economic Development Committee

Supplementary changes to the Commerce (Criminalisation of Cartels) Amendment Bill

Proposal

- 1 This paper seeks approval for changes to the Commerce (Criminalisation of Cartels) Amendment Bill via a supplementary order paper.

Executive summary

- 2 The paper seeks approval to three second order changes to the Commerce (Criminalisation of Cartels) Amendment Bill (the Bill) through a supplementary order paper (SOP).
- 3 I consider that the original categorisation of the proposed criminal offences for the purposes of the Criminal Procedure Act 2011 was incorrect and should 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 I believe that it would be inappropriate to align the criminal offences to category 4 conduct.
- 4 This paper also seeks to 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). In the interests of providing certainty to businesses, I propose that a defence be extended to the four exceptions in the Commerce Act and that the necessary belief as to the facts that the exception applied be on reasonable grounds.
- 5 I also propose that the Solicitor-General should 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.

Background

- 6 The Bill criminalises intentional cartel conduct by creating two proposed offences.
- 7 Offence 1: A person commits an offence if they enter into a contract, arrangement or understanding that contains a cartel provision (that is not exempt or authorised under the Act) and they intend, at the time, to engage in price fixing, restricting output or market allocation.

- 8 Offence 2: A person commits an offence if they give effect to a cartel provision (that is not exempt or authorised under the Act) and intend, at the time, to engage in price fixing, restricting output or market allocating.
- 9 The policy intent of the Bill is to only criminalise intentional cartel conduct. It does not criminalise unintended or accidental cartel conduct as the persons involved would not have the required mental element to commit the offence.
- 10 When deciding on the proposal to criminalise cartel conduct, DEV made two further related decisions. First, that the offence be classified as a category 4 offence under the Criminal Procedure Act. Secondly, that the “honest belief” defence should apply to certain facts relating to the collaborative activity exception and the specified international liner shipping exceptions) [DEV 18-MIN-0006 refers]. It is these two decisions which I am now seeking Cabinet approval to change.
- 11 I am also seeking one other change to the Bill relating to the prosecution process for the offence.
- 12 The Bill was read a second time on 25 October and is currently awaiting Committee of Whole House consideration.

Proposed changes

Change to the category of the offence

- 13 The Criminal Procedure Act sets out four categories of offences for the purposes of determining criminal procedure. Each category of offence has a default trial type, being a Judge-alone trial or jury trial, and a default court (i.e. District or High Court).
- 14 DEV previously agreed to the offence being a category 4 offence [DEV 18-MIN-0006, recommendation 7.7 refers]. This reflected the contents of the previous Criminalisation Bill (Commerce (Cartels and Other Matters) Amendment Bill) which was introduced by the previous Government (although the criminalisation provisions were later removed before the previous Bill was passed). To reflect their seriousness, category 4 offences are automatically tried in the High Court by a jury. However, the High Court judge may order a judge-alone trial in complex trials and in other situations such as the risk of jury intimidation. This may be appropriate given the complex nature of prosecutions for cartel offences.
- 15 Some submitters during the select committee process commented on the lack of alignment between the proposed cartel offence and the current category 4 offences. Current category 4 offences include murder, treason, espionage, genocide and terrorism.
- 16 On reflection, I now consider that category 4 is not appropriate for the proposed offence. While I consider that the proposed cartel offence is serious, it does not align with the serious offences currently classified as category 4 such as genocide and terrorism.
- 17 Accordingly, I propose that the cartel offence be re-categorised to category 3. Category 3 offences are tried in the District Court by the judge or jury depending on whether the defendant elects to have a judge-alone trial. However, the court has a similar discretion to order a judge-alone trial in the District Court, such as for complex trials.

- 18 I note that the proposed cartel offence cannot be classified as category 1 or 2 as the maximum term of imprisonment for the offences proposed in the Bill exceeds that permitted for category 1 or 2.
- 19 The Commerce Commission considers that the cartel offences should be tried in the High Court if possible. This is due to the Commerce Act experience of High Court judges who currently determine civil cartel prohibitions. I note that there is provision in the Criminal Procedure Act for cases that are category 3 offences to be transferred to the High Court. Section 66 of the Criminal Procedure Act allows the Chief High Court and Chief District Court Judges to designate that certain offences are “protocol offences” which can be transferred to the High Court on a case-by-case basis. While this is a matter for the judiciary, the new cartel offences appear to be appropriate candidates for addition to the protocol offences list. I have asked my officials to engage with the Ministry of Justice to request that the proposed offences are considered during the next review of the list of protocol offences.
- 20 While the final decision of whether to transfer a criminal cartel trial to the High Court will rest with the individual judge considering the matter, parties will be able to make submissions to the judge on the matter. I am comfortable for this decision to be made on a case-by-case basis by a judge.

Extension of the defences

- 21 DEV previously agreed to the inclusion of defences to complement two of the exceptions to cartel conduct in the Commerce Act [DEV 18-MIN-0006, recommendation 7.4 refers]. These are the collaborative activity exception and the exception for specified international liner shipping activities. The defences applied only to the “reasonably necessary” limb of the exceptions, not the other aspects. The defences aimed to ensure that parties who intentionally engaged in cartel conduct, but who believed that their conduct was exempt, were not potentially caught by the criminal offence.
- 22 The justification for the defences was to provide for circumstances where it was possible for there to be legitimate mistakes as to whether the exemptions applied. Mistakes of law are not a defence in New Zealand criminal law. However, officials considered that it was possible to make an honest mistake of fact as to whether something was “reasonably necessary” in relation to the collaborative activity and international liner shipping exceptions. The test of ‘belief’ would be assessed subjectively, being a relatively low evidential burden. The other elements of the exemptions were considered to be more straight forward and a defence based on a subjective ‘belief’ test could risk being too wide.
- 23 During select committee consideration, a number of submitters made the point that all the exceptions and their parts require judgements as to their application and there is a chance that an honest mistake could be made with any of them. As an example, a person could commit an offence by:
- having intended to engage or give effect to a cartel provision to price fix, allocate markets or restrict output; and
 - they did so with the honest belief that an exception applied; but
 - the exception does not actually apply.
- 24 I accept this point and now believe that it is prudent to extend the defence to the four main exceptions to cartel conduct in the Commerce Act and to widen it to be a general defence of belief on reasonable grounds that the conduct was exempt. Given the severity of the

proposed offence and the risk of imprisonment, I consider that a general defence that covers all four exceptions is the most just and appropriate option. While this is a general defence, I consider it is required to ensure that only those with the requisite mental intent are caught by the criminalisation offences.

- 25 In addition, the requirement that the defendant's belief be objectively assessed (on reasonable grounds) as to whether their conduct was exempt clarifies that the defendant must have a reasonable basis for their belief. This mitigates the Commerce Commission's concerns about the possibility of the defence being used improperly to evade liability.

Prosecution of the offences

- 26 When the Bill was originally drafted it was envisaged that the prosecution of these offences would be undertaken either by the Crown Solicitor in the relevant region or by an informal 'ad hoc' panel of expert counsel maintained by the Solicitor-General.
- 27 The Commerce Commission and Crown Law Office consider that this informal arrangement may not be appropriate. A panel of prosecutors would need to be codified to ensure the availability of counsel in the long-term. I agree with this view.
- 28 Accordingly, I am seeking agreement to the establishment of a prosecutor's panel where all Crown prosecutions for the proposed offences will be undertaken by a prosecutor from this panel. The panel would be appointed by the Solicitor-General after consulting with the Chairperson of the Commerce Commission. This is the same structure as the prosecutor's panel that already exists for prosecutions undertaken by the Serious Fraud Office.
- 29 I consider that this proposal will enhance public and business confidence in the criminal cartel regime by ensuring expert independent prosecutors are available for these cases.
- 30 The funding of the prosecutions will continue to come out of the Commission's major litigation fund which has previously been agreed to increase from financial year 21/22 to fund these prosecutions.
- 31 The right to initiate private prosecutions will not be affected by this proposal.

Consultation

- 32 These proposals fall after select committee consideration of the Bill. This process included public consultation on the contents of the Bill as originally drafted.
- 33 My officials consulted the Commerce Commission, Crown Law Office and Ministry of Justice on the proposals contained in the departmental report to select committee. The Department of Prime Minister and Cabinet has also been informed.
- 34 The Commerce Commission considers that the defences are not necessary as the existing exceptions to section 30 and the mens rea element of the offence are sufficient to capture pro-competitive or unintentional conduct. Although the Commerce Commission supports the addition of the reasonableness ground to the defence, the Commission is concerned that extending the reasonable belief defence to the four exceptions as well as widening it to a general defence rather than only applying to the "reasonably necessary" limb of these exceptions could increase the cost and complexity of prosecutions. The Commission notes that the defence is not aligned with the position in Australia.

35 My officials at the Ministry of Business, Innovation and Employment consider that the defences are vital to ensure that procompetitive conduct and unintentional cartel conduct is not inadvertently caught by the proposed cartel offence.

Financial implications

36 I do not expect any additional financial implications as a result of these proposals.

Legislative implications

37 The proposals in this paper will be implemented through a SOP to the Commerce (Criminalisation of Cartels) Amendment Bill. I plan to seek approval for lodgement of this SOP when the Cabinet Legislation Committee (LEG) meets in early February 2019.

Impact analysis

38 The impact analysis requirements apply to the first two proposals in this paper relating to changing the category of the offence and changes to the defences. An impact summary for these proposals has been prepared and is attached.

39 The Regulatory Quality Team at Treasury has determined that the remaining proposal is exempt from the Regulatory Impact Analysis requirements as they have no or only minor impacts on business, individuals or not-for-profit entities.

Quality of the impact analysis

40 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement (RIS) prepared by MBIE. 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.

Human rights

41 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Publicity

42 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.

Proactive Release

43 This paper will be published on MBIE's website, subject to withholdings as appropriate under the Official Information Act 1982 once the SOP is lodged.

Recommendations

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

1 **note** that on 14 February, the Cabinet Economic Development Committee agreed to criminalise intentional cartel conduct [DEV-18-MIN-0006].

Category of the offence

2 **note** that the Cabinet Economic Development Committee agreed that the offence would be a category 4 offence under the Criminal Procedure Act 2011;

3 **note** that following select committee consultation, category 4 appears unsuited for these offences;

4 **note** that category 3 is the only other option for these offences;

5 **agree** to recommend that Cabinet rescind the previous decision referred to in paragraph 2 and instead;

6 **agree** that the offences be classified as category 3 offences;

The defence

7 **note** that the Cabinet Economic Development Committee previously agreed that the defence in the Bill will only apply if the defendant was of the belief that certain facts relating to the exceptions for collaborative activities (including the exception for restraint of trade) or specified shipping activities applied;

8 **agree** to recommend that Cabinet rescind the decision referred to in paragraph 7 above; and instead;

9 **agree** that a general defence be enacted that applies to the four exceptions available for the cartel offence (relating to collaborative activities, vertical supply contracts, joint buying and promotion arrangements, and specified international liner shipping activities) where a defendant believed on reasonable grounds that their conduct was exempt;

The mechanism for prosecution

10 **note** that it was originally intended that prosecutors would be selected on an ad hoc basis but that the Commerce Commission and Crown Law Office consider that this may not be viable in the long-term;

11 **agree** that all Crown prosecutions of the proposed cartel offences and any related offences to the substantive offence must be undertaken by prosecutors on a panel established under the Bill;

12 **agree** that this panel will contain as many prosecutors as the Solicitor-General believes necessary;

13 **agree** that this panel will be appointed by the Solicitor-General after consultation with the Chairperson of the Commerce Commission;

14 **note** that cartel prosecutions by this panel will be funded out of the Commerce Commission's existing major litigation fund;

Legislative implications

- 15 **agree** to give effect to the above proposals through a supplementary order paper to the Commerce (Criminalisation of Cartels) Amendment Bill;
- 16 **agree** that consequential amendments may be made to other enactments to give effect to these proposals;
- 17 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 18 **authorise** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes, consistent with the policy intent of this paper, on issues that arise in drafting of the supplementary order paper;

Proactive release

- 19 **note** that this paper will be published on the Ministry of Business, Innovation and Employment's website once the supplementary order paper has been tabled in the House, subject to withholdings as appropriate under the Official Information Act 1982.

Authorised for lodgement

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs