

**OFFICE OF THE MINISTER  
OF COMMERCE AND CONSUMER AFFAIRS**

The Chair  
**Cabinet Economic Growth and Infrastructure Committee**

**Removal of the criminal offence for cartels from the Commerce  
(Cartels and Other Matters) Amendment Bill**

**Proposal**

- 1 This paper seeks approval to:
  - a. remove the criminal offence for cartel behaviour from the Commerce (Cartels and Other Matters) Amendment Bill ('the Cartels Bill'); and
  - b. table and circulate a Supplementary Order Paper (SOP) to this effect for consideration at the Committee of the Whole stage for the Cartels Bill.

**Background to the policy decision**

- 2 Cartels are formed when rival firms agree not to compete with each other. A cartel is an anticompetitive arrangement by competitors to:
  - a. fix prices;
  - b. establish output restrictions or quotas; or
  - c. share or divide markets by allocating customers, suppliers, territories or lines of commerce.
- 3 In October 2011, Cabinet agreed to introduce the Cartels Bill which would better define anticompetitive cartel conduct and introduce a new exemption and clearance regime for collaborative activities. The Cartels Bill also introduces criminal sanctions for cartel conduct including a sanction of imprisonment for up to seven years, along with a raft of minor amendments to enhance the operation of the Commerce Act 1986 [CBC Min (11) 10/2; CAB Min (11) 39/1 refers].
- 4 Subsequently in April 2013, Cabinet agreed to repeal the sector-specific regime for international liner shipping and bring this sector under the Commerce Act 1986 after a two year transitional period [CAB Min (13) 11/5 refers]. This decision is also reflected in the Cartels Bill which passed its second reading in November 2014.
- 5 This paper revisits the decision to introduce criminal sanctions for cartels and seeks policy decisions to remove the criminal sanction provision from the Cartels Bill.

## Comment

### *Cartels in New Zealand*

- 6 Cartels in New Zealand are often divided into three categories: domestic, trans-Tasman and international. Many of the large cartels affecting New Zealand are international cartels, detected in other jurisdictions. New Zealand courts have issued price fixing judgments in respect of 17 cartels, involving about 32 different bodies corporate, since the Commerce Act came into force. The highest pecuniary penalties imposed to date were \$7.5 million on a body corporate and \$100,000 on an individual.
- 7 The table below sets out some of the significant price fixing cases.

<b>Industry</b>	<b>Penalties</b>
Wood chemicals (2006 – 2008) Domestic	Koppers Arch: \$2.85 million for price fixing plus \$750,000 for exclusionary conduct jointly and severally  Osrose: \$1.075 million for price fixing plus \$725,000 for exclusionary conduct, jointly and severally  Fernz: \$1.9 million for price fixing
Air cargo (2011) International	In June 2013, the High Court approved a settlement requiring Air New Zealand to pay a \$7.5 million penalty for price-fixing in breach of the Commerce Act. The total penalties for the 11 defendants involved in the cartel case totalled \$42.5 million. The other defendants were British Airways, Cargolux, Cathay Pacific, Emirates, Korean Air, MASKargo, Qantas, Japan Airlines, Singapore Airlines Cargo and Thai Airways.
Freight forwarding (2010 – 2011) International	On 8 April 2014, the High Court ordered Swiss company Kuehne + Nagel International AG to pay a \$3.1 million pecuniary penalty, plus costs, for cartel conduct affecting New Zealand markets. The total penalties for the six defendants involved in the cartel in New Zealand amounted to almost \$12 million.

### *Previous decision to impose criminal sanctions*

- 8 The review of whether to impose criminal sanctions on cartel conduct arose from a concern that the current civil regime may not provide optimal disincentives for cartel conduct. It also reflected a concern that New Zealand's competition regime may be out of step with overseas jurisdictions that were increasingly imposing criminal sanctions for cartel conduct and this could reduce the Commerce Commission's ability to cooperate with those jurisdictions in investigating international cartels.
- 9 The imposition of criminal sanctions for cartels was judged against the following objectives:
- to promote detection and deterrence of cartels (while ensuring that efficiency enhancing collaborative activity is not deterred); and
  - to improve international cooperation and facilitate New Zealand's active contribution to enforcement efforts against global cartels.

- 10 These objectives are to be read in light of the purpose of the Commerce Act which is to promote competition in markets for the long-term benefits of consumers within New Zealand.
- 11 The table below briefly summarises the advice received for and against criminalisation:

Arguments against criminalisation	Arguments for criminalisation
<p><b>Chilling effect on pro-competitive activity:</b> Any uncertainty regarding the scope of the criminal offence may deter legitimate and pro-competitive business activities.</p>	<p><b>Improved detection:</b> The threat of imprisonment provides additional incentives for individuals or firms to seek leniency and cooperate with the Commerce Commission in any resulting cartel proceedings.</p>
<p><b>Increased compliance costs:</b> Company directors and employees may seek to minimise the risk of criminal liability by engaging more legal and expert advice for contracts or adopting formal structures for cooperation, such as mergers as opposed to joint ventures. Increased company resources are spent on compliance.</p>	<p><b>Improved deterrence:</b> The threat of imprisonment acts as a disincentive for individuals and companies to engage in cartel conduct. Increased social condemnation of criminal conduct also acts as a disincentive.</p>
<p><b>Poorly distinguishes between the criminal offence and civil prohibition:</b> Criminalisation is usually reserved for conduct that causes significant detriments to the public. The Cartels Bill distinguishes criminal cartels from civil cartels based on the 'intent' of the cartelist and not the cartel's impact. This is due to evidential complexity of establishing cartel effects. However, intention alone may not convey sufficient blameworthiness, which creates some uncertainty as to what level of cartel harm would be required for a criminal proceeding and conviction.</p>	<p><b>Improved international co-operation:</b> It enhances cooperation and information sharing by the Commerce Commission with overseas competition agencies that also have criminal cartel regimes, thereby facilitating enforcement against international cartels.</p>
<p><b>Administration and enforcement costs:</b> The Commission would incur some additional costs in implementing the criminal regime. Investigation costs would likely increase, as all cases would need to be investigated to a criminal standard. Criminal prosecutions may also take longer than civil proceedings and this is likely to result in additional costs.</p>	<p><b>Single economic market:</b> Criminalisation advances a Single Economic Market with Australia by ensuring that firms are faced with the same consequences for the same anti-competitive conduct no matter where it occurs. This is one of outcomes agreed under the 2009 Trans-Tasman Outcomes Framework.</p>
<p><b>Costs of imprisonment:</b> Corrections would incur some additional costs for incarceration of any cartelists.</p>	

- 12 The decision to impose criminal sanctions placed weight on how criminalisation would improve the detection and deterrence of cartel behaviour and increase the ability for the Commerce Commission to cooperate with competition agencies in other jurisdictions such as Australia.

### *Reconsideration of decision*

- 13 The introduction of a criminal regime for cartels has remained an issue of major contention following the introduction of the Cartels Bill. Supporters of criminal sanctions place weight on the benefits that would arise out of increased detection and deterrence. Others are of the view that criminal sanctions will impose substantial costs on businesses (in terms of compliance costs and chilling competitive activity) and that the international evidence that criminalisation reduces the incidence of cartel conduct is weak.
- 14 Following further engagement with stakeholders, I have reviewed the cost benefit analysis used to support the previous Cabinet decision and, on balance, I consider that there is not a clear case to support the introduction of criminalisation for cartels. On this basis I recommend the removal of the criminal sanctions for cartels from the Cartels Bill.
- 15 In reaching this view, I have considered whether the cartel regime promotes competition in the long term interests of consumers. I think there is a significant risk that cartel criminalisation will have a chilling effect on pro-competitive behaviour, particularly given the difficulties of targeting the criminal offence to 'blameworthy' cartel conduct that causes significant public detriments. For example, joint bids for contracts can be pro-competitive or anticompetitive depending on the facts and an in-depth investigation may be required to identify the difference in some cases. Criminal sanctions are most effective where the unlawful conduct is unambiguously harmful. Cartel criminalisation may unduly increase compliance costs on businesses and company directors as they seek to minimise risk.
- 16 I also consider that the existing civil sanctions outlined in the Cartels Bill, supported by the Commerce Commission's leniency policy, are able to provide sufficient deterrence to protect businesses and consumers from harmful cartel conduct. These civil sanctions include:
- a. pecuniary penalties for individuals of up to a maximum of \$500,000 and for bodies corporate of up to the greater of \$10 million, or three times the illegal gain, or if this is not known, 10 percent of the annual turnover of the body corporate in New Zealand;
  - b. prohibitions on companies against indemnifying their officers or employees from pecuniary penalties; and
  - c. banning orders which exclude a person from being a director or from being involved in the management of a body corporate for up to five years.
- 17 I am of the view that the other enhancements to the civil cartel regime as provided for in the Cartels Bill should proceed. The new collaborative activities exemption better provides for circumstances where cooperation between potential competitors can be efficiency-enhancing, such as emergency planning for public safety reasons. Further, the introduction of a clearance regime for collaborative activities will allow businesses to manage any residual uncertainty before entering into arrangements with competitors.

## **Legislative proposal**

- 18 I am seeking to give effect to this proposal by circulating and tabling the attached SOP.
- 19 The SOP will remove clause 18 of the Cartels Bill (which contains the proposed criminal offence for cartel conduct) and make a number of consequential changes.
- 20 There is presently an existing SOP (SOP 407) that proposes changes to clause 18 of the Cartels Bill as introduced, as well as changes to a number of other provisions. I am advised by Parliamentary Counsel that the option of amending SOP 407 (rather than withdrawing and replacing that SOP) in order to give effect to this proposal has the advantage of reducing complexity and making the proposed changes immediately transparent. Accordingly, the attached SOP takes the form of an SOP to amend SOP 407.

## **Financial implications**

- 21 There are no financial implications from the implementation of this SOP.
- 22 The introduction of the new criminal offence for cartels would have had some financial implications for the Commerce Commission through more costly investigations and criminal proceedings for cartels. It was expected that these costs would be met from reprioritisation within existing baselines. In addition, the Departments of Corrections and Courts may have incurred some additional costs of incarcerations which would also have been funded within baselines. The removal of the criminal offence will mean that these additional costs would not be incurred.

## **Regulatory impact analysis**

- 23 A Regulatory Impact Statement (RIS) recommending criminalisation on balance was prepared for the original cabinet decision [CBC Min (11) 10/2; CAB Min (11) 39/1 refers]. A new or amended RIS is not required for this SOP as the option outlined in this paper was considered in that RIS (as option 2) and officials' advice is unchanged.
- 24 The Regulatory Impact Analysis Team (RIAT) at Treasury previously considered that the RIS met the quality assurance criteria, but noted that balancing costs and benefits was challenging due to the hidden nature of cartels and their impacts on the economy. Effectiveness of criminalisation as a deterrent is highly dependent on how the tool would be enforced by the regulator.

## **Compliance**

- 25 The Bill as modified by the attached SOP continues to comply with:
- a. the principles of the Treaty of Waitangi;
  - b. the rights and freedoms contained in the New Zealand Bill of Rights 1990 and the Human Rights Act 1993;
  - c. the principles and guidelines set out in the Privacy Act 1993;
  - d. relevant international standards and obligations; and
  - e. Legislative Advisory Committee Guidelines on Process and Content of Legislation.
- 26 An agency disclosure statement was not prepared for the Cartels Bill as it was introduced prior to one being required. The attached SOP does not require one as it is not substantive.

## **Consultation**

- 27 The following government agencies have been consulted on this paper: the Commerce Commission, Ministry of Transport, Ministry of Justice, Ministry for Primary Industries, Ministry of Foreign Affairs and Trade and the Treasury. The Department of Prime Minister and Cabinet has been informed.
- 28 Treasury support moves to clarify the laws around cartel behaviour, such as the proposed cartel clearance regime, but considers that case for criminalisation is less clear.
- 29 Aside from the potential benefit from having an additional tool to deter domestic anticompetitive cartel conduct, the main benefit from criminalisation appears to be greater alignment of pro-competitive regulation with other jurisdictions, which could assist international cooperation.
- 30 The Treasury has not seen enough analysis to balance the likely benefits of cartel criminalisation in terms of international cooperation and broader deterrence with the potential chilling effects on economic activity with unclear competition effects, the compliance costs imposed on businesses, and the administrative costs on the Crown. Treasury also notes that the majority of submitters in 2011 did not support cartel criminalisation. Given the 'on balance' nature of this policy, Treasury recommends officials maintain a watching brief on domestic and international developments in cartel criminalisation and whether cooperation opportunities are being maximised.

## **Human rights**

- 31 The proposals contained in this Cabinet paper appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. There are no gender or disability perspective implications from the proposals in this paper.

## **Legislative implications**

- 32 I intend to progress this proposal by way of tabling the attached SOP for the Cartels Bill, which has a category 2 on the 2015 Legislation Programme.

## **Binding on the Crown**

- 33 The Commerce Act 1986, which is amended by the SOP, binds the Crown in so far as the Crown engages in trade.

## **Creating new agencies**

- 34 No new agencies will be created by the SOP.

## **Allocation of decisions making**

- 35 The SOP does not involve the allocation of decision-making powers between the executive, the courts or a tribunal.

## **Associated regulations**

- 36 No regulations are needed to bring the SOP into operation. Following the passage of the Cartels Bill, amendments to the Commerce Act (Fees) Regulations 1990 will be required to introduce a new fee for applications for collaborative activity clearances. Cabinet approved the new fee in April 2015 [EGI Min (15) 17/6 refers].

## **Other instruments**

- 37 The SOP does not include provisions empowering the making of other deemed legislative instruments or equivalent positions.

### **Definitions of Minister or department**

38 The SOP does not contain a definition of Minister, department or chief executive or any equivalent positions.

### **Commencement of legislation**

39 The changes included in the attached SOP will commence in accordance with the commencement of the Cartels Bill.

### **Parliamentary stages**

40 The Cartels Bill has received its second reading and is currently awaiting committee of the whole House.

### **Publicity**

41 I will release a media statement outlining the decision to remove the criminal offence for cartels when the SOP is tabled in the House. The Ministry of Business, Innovation & Employment propose to also post this paper on its website.

### **Recommendations**

It is recommended that the Committee:

- 1 **Note** that the Commerce (Cartels and Other Matters) Amendment Bill holds priority 2 on the 2015 legislation programme;
- 2 **Note** that the Commerce (Cartels and Other Matters) Amendment Bill currently includes criminal sanctions for cartel conduct;
- 3 **Agree** to remove the clause of the Commerce (Cartels and Other Matters) Amendment Bill, which provides for criminal sanctions for cartel behaviour by way of a Supplementary Order Paper to the Bill;
- 4 **Agree** that officials monitor domestic and international developments to better assess the potential effects of cartel criminalisation or whether criminal sanctions for cartel conduct are desirable, such as any detrimental effects on cooperation by the Commerce Commission with international regulatory agencies;
- 5 **Approve** the attached Supplementary Order Paper to amend Supplementary Order Paper 407 which has the effect of removing the criminal sanction provisions from the Commerce (Cartels and Other Matters) Amendment Bill for introduction at the Amendment Bill's Committee stage; and
- 6 **Agree** to the release of this Cabinet paper on the Ministry of Business, Innovation and Employment website following the tabling of the Supplementary Order in the House.

Hon Paul Goldsmith  
**Minister of Commerce and Consumer Affairs**

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