

# Cartel Criminalisation

Prepared for

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Ministry of Economic Development

**Authorship**

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# 1 Response to Submission Questions

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Covec broadly supports the introduction of criminalisation of ‘hardcore’ cartel activity as outlined by MED in its Discussion Document. Because of the harm that cartel activity can cause, we consider that it appropriate that criminal sanctions are available to provide a strong deterrent.

Below we provided brief responses to some of the questions raised.

## 1.1 Detecting and deterring cartels

Question 1. Do you consider cartels to be harmful?

- Yes. We broadly agree with the list of harms outlined in the discussion document.
- We would add that undermining trust in markets and undermining competition as the mechanism that sets price can increase transactions costs for consumers. To the extent that consumers in any industry are not able to rely on ‘rival’ firms being in competition with other, they cannot assume that suppliers will reduce prices down to the lowest efficient level in order to obtain business.
- In the absence of the effective, competitive pressure that would ensure efficient prices, consumers may need to undertake costly information gathering to attempt to determine for themselves what is an appropriate price. For example, the possible presence of cartels may mean that firms would not be able to reply on, say, running a tender to obtain specific goods or services at a competitive (efficient) price. Instead, rather than rely on a competitive process, buyers would have to gather large amounts of information about production process, distribution costs, etc. Buyers would then need to attempt to determine what an appropriate price should be themselves. This could substantially increase transactions costs throughout the economy.

Question 2. Are the current penalties for cartel activity sufficient to deter and detect cartels? Is there any evidence to support this judgement?

- We expect that the current penalties are likely to be sufficient to deter some cartels but probably not all. We are not aware that cartel activity has been totally eradicated in any given country that outlaws this behaviour. As pointed out in the Discussion Document, there is at least one example of a multi-national cartel that excluded the US because of the criminal sanctions that exist there.
- Some individuals may decide to undertake cartel activity if the expected benefits from this activity exceed the expected costs, where the expected costs are likely to be based on the likelihood of detection and the punishment if caught. To the extent that some individuals believe that the threat of detection is low, the existing penalties may not be a sufficient deterrent.

- We agree that the increased number of leniency applications in Australia, as described in paragraph 23 of the Discussion Document, may indicate benefits of criminalisation, although it is not indicated whether the prevalence of leniency activity prior to Australia's law change was similar to that currently observed in New Zealand, and over what time period Australia has seen an increase in leniency applications.

Question 3. What do you consider would be the most effective means of increasing the deterrence and detection of cartels?

- We expect that criminalisation and facilitating whistleblowers are two methods by which deterrence and detection of cartels could be increased. Given the multi-national nature of many business transactions and operations, we expect that strengthening links between other jurisdictions, especially regarding information flows, would assist in the detection of cartels. To the extent that the current lack of criminal sanctions is a barrier to such cooperation with some jurisdictions, criminalisation could increase detection.

Question 4. What are the costs and benefits of the options outlined for increasing deterrence and detection?

- We broadly agree with those benefits outlined in the discussion document.
- We question the relevance of the Canadian study referred to in the Discussion Document (paragraph 57) regarding the deterrence of imprisonment. Because this study related to all types of crime, it may not be relevant to compare the deterrent effect of imprisonment across different types of criminals. Factors that may be relevant to some criminal acts or criminals may not be relevant to engaging in anti-competitive actions such as cartels. For instance, factors like childhood trauma or abuse, low educational attainment or opportunity, poverty, unemployment or addiction to alcohol, drugs or gambling may be much more relevant to recidivism rates for a number of criminals but may be irrelevant for those operating cartels.
- As identified, one potential cost could be additional costs incurred in carrying out unsuccessful criminal prosecutions. There could be substantial difficulties involved with getting convictions in some cases, which could be costly. Additionally, unsuccessful prosecutions could reduce the deterrent effect.

## 1.2 Defining the offence

Question 8. Should the cartel offence be a per se prohibition or a rule of reason approach?

- We expect that there could be substantial practical difficulties if a rule of reason approach were adopted that required proving a substantial lessening of competition.

Question 14. Which of the OECD categories of hard-core cartel (price fixing, market allocation, output restriction and bid rigging) should be explicitly covered by a cartel offence? Should they be included directly or only indirectly by reference to effects on price?

- Regarding reference to price, any requirement to show effects on price raise considerable complexity. For instance, a cartel may have the effect of maintaining current prices above what they would be otherwise. In this case, the cartel has not caused any movement in price, but may have had a negative impact on consumers.
- Over any given time period, there may be a large number of variables that affect a price in a particular market. It can be difficult to determine the extent to which cartel behaviour is affecting any changes (or lack of changes) in prices. Consequently, we have reservations about references to effects on price.
- Additionally, any impact on price would be irrelevant if the cartel is not successful.

Question 16. How can we achieve greater ex-ante predictability in the application of the cartel offence?

- Allowing for authorisations and/or clearances for applicants could provide this.
- The binding rulings provided by Inland Revenue could provide a useful template. For more information see:  
<http://taxpolicy.ird.govt.nz/publications/files/html/coe/chapter17.htm>

Question 17. Should there be a notification scheme, which provides for immunity from criminal prosecution?

- We have concerns about attaching criminal sanctions to conduct that causes no substantial harm. Approaches to address this could include:
  - instituting an optional clearance regime for horizontal arrangements which are not likely to substantially lessen competition; and/or
  - extending the authorisation regime contained in sections 58 through 65 of the Act to cartel-type activities.

Questions 25. Which of the three approaches – adaptation of section 30, adopting Australian legislation, or greenfields – should be adopted?

- Although we do not have a firm preference at this point, we would point that a greenfields approach could provide more scope for unintended consequences.

### **1.3 Criminal procedures and penalties**

Question 31. Should the right of a cartelist to trial by jury be restricted?

- Given the complexity that can arise in competition law cases, we are not convinced that jury trials would be appropriate.