



Commerce (Criminalisation of Cartels) Amendment Bill

22—1

Report of the Economic Development, Science
and Innovation Committee

August 2018

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Jonathan Young
Chairperson

Commerce (Criminalisation of Cartels) Amendment Bill

Recommendation

The Economic Development, Science and Innovation Committee has examined the Commerce (Criminalisation Of Cartels) Amendment Bill and recommends that the House take note of its report.

About the bill as introduced

This is a Government bill that seeks to amend the Commerce Act 1986 by introducing a criminal offence for cartel conduct.

The bill aims to promote the detection and deterrence of cartels and improve the Commerce Commission's ability to enforce the prohibition of cartel conduct. This would facilitate New Zealand's contribution to enforcement efforts against global cartels.

The bill is in two parts. The first contains the substantive amendments and the second has consequential and related amendments. It would do the following:

- introduce a new criminal offence for cartel conduct
- introduce new defences for the criminal offence
- set the maximum sanctions for the cartel offence
- provide for matters relating to the criminal cartel proceedings
- provide for a two year transitional period before commencement of the criminal offence.

How cartels are currently regulated

In August 2017 the statutory definition of a cartel was revised by the Commerce (Cartels and Other Matters) Amendment Act 2017. A cartel is now defined as a situation where two or more businesses agree not to compete by engaging in any one of the following:

- price fixing
- restricting output
- allocating markets.

Currently, cartel conduct is a civil offence. This means that pecuniary penalties can be imposed on people and companies who have engaged in it.

There are three types of exception to the civil offence: collaborative activities, vertical supply contracts, and joint buying and promotion agreements. Further exceptions for international liner shipping services will come into force on 14 August 2019.

Submissions on this bill

We received submissions both supporting and in opposition to the bill.

Submitters who supported the bill stated that current civil monetary penalties are insufficient. They believe criminalisation will improve detection and deterrence of cartels, and will make it easier for the Commerce Commission to investigate cartel conduct.

These submitters want the criminalisation of cartel conduct to be reserved for the most serious behaviour. They suggested:

- narrowing criminal conduct, to make it only apply to bid-rigging or purposeful price-fixing
- incorporating into the offence a stronger definition of intention, such as that the person acted dishonestly with knowledge of wrongdoing or that they were deliberately deceptive
- widening the exceptions and defences to the offence, by excluding small businesses from liability, defining franchises as collaborative activities, exempting cartel conduct that is notified to the public or customers, and extending the belief defence¹ to all elements of the exceptions
- incorporating criteria in the bill to guide prosecutorial discretion, such as considering whether the conduct was deliberately dishonest or covert and the extent of the detriment to competition.

Submitters who opposed the bill stated that there is no evidence of a problem with the current regime. They were concerned that criminalisation would have a chilling effect on competition and business, and that the costs of criminalisation for business and regulators would outweigh any perceived benefits.

Some submitters raised concerns that the definition of cartel conduct, amended in August 2017, is untested in its application. They were concerned that this would mean a lack of clarity in the new criminal offence, which parallels the civil defence.

National Party members support the concerns of those opposed to the bill and believe the criminalisation provisions have not been shown to be warranted, and therefore hold the view that the bill should not proceed.

¹ As introduced, the bill contains a defence based on a defendant's belief that the cartel was reasonably necessary for the collaborative activity the defendant was engaged in.

Appendix

Committee procedure

The Commerce (Criminalisation of Cartels) Amendment Bill was referred to us on 20 February 2018. The closing date for submissions was 6 April 2018. We received and considered 20 submissions from interested groups and individuals. We heard oral evidence from 11 submitters.

We received advice from the Ministry of Business, Innovation and Employment.

Committee members

Jonathan Young (Chairperson)
Tamati Coffey
Paul Eagle (until 15 August 2018)
Andrew Falloon
Hon Paul Goldsmith
Gareth Hughes
Melissa Lee
Jo Luxton (from 15 August 2018)
Clayton Mitchell
Hon Aupito William Sio
Lawrence Yule

Advice and evidence received

The documents that we received as advice and evidence are available on the Parliament website, www.parliament.nz.