

Submission by



to the

**Economic Development, Science and Innovation
Committee**

on the

Commerce (Criminalisation of Cartels) Amendment Bill

6 April 2018

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COMMERCE (CRIMINALISATION OF CARTELS) AMENDMENT BILL SUBMISSION - 6 APRIL 2018

1. INTRODUCTION

- 1.1 BusinessNZ welcomes the opportunity to comment on the Commerce (Criminalisation of Cartels) Amendment Bill (referred to as 'the Bill').
- 1.2 We have submitted on the criminalisation issue on a number of occasions, including in the 2012 Amendment Bill and the 2011 draft exposure Bill and we supported the additional level of consultation before the legislation was introduced into the House. As in our previous submissions, we remain unconvinced of the need to apply criminal sanctions.

2. SUMMARY OF RECOMMENDATIONS

- 2.1 BusinessNZ does **not support** the:
- a) Criminalisation of hard core cartels (p.9) and the Bill should not proceed.

Notwithstanding our primary recommendation above, on a without prejudice basis BusinessNZ **recommends** that should the Bill proceed:

- b) The 2-year delay in the commencement of criminal sanctions should extend to 3 years (p.10).

3. BUSINESSNZ'S OVERALL VIEW ON CARTEL BEHAVIOUR

- 3.1 BusinessNZ would point out that we fully support competition law if it provides for an effective and efficient market. We also support moves by the Government to eliminate clear cases of hard core cartel behaviour. However, in submissions since 2010 we have queried whether the introduction of stronger sanctions is required in the absence of clear evidence existing sanctions have proved unsuccessful. Plainly put, are the proposals a solution looking for a problem?

4 PREVIOUS POLICY PROCESS & SUBMISSIONS

- 4.1 As noted, since 2010, BusinessNZ has submitted on a number of documents relating to the issue of cartel criminalisation. Table 1 sets out the timeline followed by the key points raised.

Table 1: Policy Process for Cartel Criminalisation (2010 – present)

Year	Policy Process	BusinessNZ Response
2010	Cartel Criminalisation Discussion Document	Submission
2011	Draft Commerce (Cartels & Other Matters) Amendment Bill	Submission
2012	Commerce (Cartels & Other Matters) Amendment Bill	Submission
2013	Competitor Collaboration Guidelines: Consultation	Letter

Discussion Document (2010)

4.2 During the discussion document phase, our main concerns involved the following, namely that:

- Despite a 98-page discussion document, there was little attempt to establish the extent of the problem of hard-core cartel behaviour in New Zealand (not a single recent New Zealand case study was mentioned);
- Although aligning New Zealand with offshore practices was stated as a major factor in wanting to introduce changes, there was no attempt to show the result would be a net benefit to the New Zealand economy;
- Comments by the Minister of Commerce and others when the discussion document was released appeared to reflect a view that the proposed changes were a *fait accompli*. This would undermine the purpose of a discussion document which should be to gauge public opinion and make regulatory changes only if necessary.

4.3 Given these considerable concerns, we concluded government should not make changes to existing competition laws relating to cartels until such time as another investigation taking into account BusinessNZ's concerns was conducted.

Exposure Draft Bill (2011)

4.4 BusinessNZ strongly supported the release of an exposure draft Bill to allow submitters further input into the policy process. While there were parts of the Bill we supported, the core issue of criminalisation of hard-core cartel behaviour continued to be something we opposed.

Commerce (Cartels & Other Matters) Amendment Bill (2012)

4.5 BusinessNZ remained unconvinced of the need for criminal sanctions. However, the Bill also outlined three options to improve the regime at that time, with or without criminalisation:

- a) Clarifying the scope of the prohibition and exemptions;
- b) Introducing a clearance regime to allow businesses to manage any residual uncertainty before entering into arrangements with competitors; and
- c) Updating the penalty regime.

Of the new options outlined, we supported the proposed collaborative activity exemption, the establishment of a clearance regime for collaborative activities, and the formation of guidelines compiled by the Commerce Commission on collaborative activity exemptions. However, we saw no need to update the penalty regime.

Competitor Collaboration Guidelines: Consultation (2013)

- 4.6 We commended the Commerce Commission for producing a draft guideline document involving Competitor Collaboration Guidelines. We viewed this as a critical way to provide businesses with a clear understanding of how issues such as cartel prohibitions, vertical supply contracts and clearance for cartel provisions are treated to ensure certainty for the private sector.

End outcome – Removal of the criminal offence for cartels (2015)

- 4.7 The timeline of events shows government and the private sector following an exhaustive and thorough process on the criminalisation issue. Therefore in December 2015, BusinessNZ was pleased to see a sensible outcome by way of a Supplementary Order Paper (SOP) removing the criminalisation of cartels from the then Amendment Bill. The Cabinet Paper stated that after reviewing the cost benefit analysis used to support the previous Cabinet decision, there was no clear case for the introduction of criminalisation.
- 4.8 Rather than looking to introduce criminal sanctions for hard-core cartel behaviour, the Cabinet Paper rightly pointed out the focus was now directed to other options, ranging from a collaborative activity clearance process to a comprehensive guideline document providing a high degree of guidance on the way the new provisions were to be applied. The guidelines' document remains a living document, with the most recent version available as late as January this year.
- 4.9 From BusinessNZ's perspective, the end decision to abandon the introduction of criminal sanctions and instead focus on other options to assist the business community was the correct decision, for two reasons. First, the new options provide a way in which any perceived problems with cartel behaviour are dealt with by way of least regulatory impact (i.e. starting at the base of a regulatory pyramid). Second, the decision showed that by following a thorough process a pragmatic solution could be reached, with the private and public sectors able to agree on changes sufficient to address the problem identified.

5. EXPLANATORY NOTE TO THE BILL

- 5.1 Both the current Minister of Commerce and the Bill's explanatory state that *"The Commerce Commission has investigated numerous alleged domestic and international cartels and successfully taken enforcement actions, including proceedings for civil pecuniary penalties. These enforcement actions show that cartel conduct is active in New Zealand"*. A very similar statement was included in the associated Cabinet Paper (paragraph 10). BusinessNZ has concerns with this broad statement for a number of reasons. (A degree of confusion is apparent in that in addressing the regulatory impact statement, the explanatory note refers to the initial 2011 RIS while directing readers, in an accompanying reference, to the 2011 RIS as subsequently revised (see 6.1.))

- 5.2 First, as part of its overseeing role, we would expect the Commerce Commission to investigate alleged domestic and international cartels. As mentioned above, we support moves by government to eliminate clear cases of hard core cartel behaviour. For the Commerce Commission not to do so would simply be to turn a blind eye to this type of behaviour. However, linking the number of investigations carried out to their end outcome is a very different thing.
- 5.3 Second, while we agree that at a very low level some form of cartel conduct takes place in New Zealand from time to time, the statement also ignores the financial penalties that already exist. As we note below, even when instances of cartel behaviour are identified, this does not mean the full financial penalty will be imposed due to the low level of transgression.
- 5.4 Third, the statement simply discards the logical conclusion reached after a comprehensive policy process from 2010 to 2017.
- 5.5 Overall, we believe the statement shows there is a public policy disconnect between the level of transgression associated with cartel behaviour in New Zealand and the full-arm penalty proposed.

6. REGULATORY IMPACT STATEMENTS (ORIGINAL AND REVISED) & CABINET PAPER

- 6.1 The Bill reverts back to the regulatory impact statement (RIS) released in August 2011 but this statement was revised following the subsequent release of an Exposure Draft Bill (see comment 5.1). Paragraph 38 of the Cabinet Paper states that *"A new or amended RIS is not required for this Bill as options outlined in this paper were considered in that RIS (as option 3) and officials' advice is unchanged"*. BusinessNZ is surprised by the decision simply to revert back to an RIS that is now seven years old. Given we see no need for urgency for this Bill, we would have thought the Government would take the opportunity to update the RIS further to take into account arguments, counter arguments and more importantly, any investigations/sanctions beyond 2010.
- 6.2 As with BusinessNZ's 2012 submission, much of this current submission's remaining focus is on the revised 2011 RIS, since this is the only tangible means, from a public policy point of view, of ascertaining the need or otherwise for criminal sanctions for hard core cartel behaviour.
- 6.3 In addition to the Bill and the revised RIS, the associated Cabinet Paper also provides useful insights into the issue of the criminalisation of cartels. BusinessNZ wishes to pick up on a few of these insights below.

The Evidence in New Zealand of Hard Core Cartel Behaviour

- 6.4 When looking at actions taken between 2010/11 when the issue was first formally discussed between the public and private sectors, we recognised the effort the Ministry of Business, Innovation & Employment (MBIE) had gone to in providing, in the revised RIS, a summary of both the section 30 (price fixing) cases and the Commerce Commission's warnings and acknowledgements between 1995 and 2010, as provided via its various media releases. This information helped to build on the original RIS as MBIE had at least examined past data to give interested parties an updated picture of hard-core cartel behaviour in New Zealand (compared with the 2010 discussion document that failed even to consider the issue).
- 6.5 Ironically, despite MBIE continuing to provide more information on cartel cases in New Zealand as the process has evolved (which we argue should have taken place at the beginning of the process), it has become ever more obvious the attempt to scope the level of the problem as part of any justification for stronger sanctions failed at the first hurdle.
- 6.6 Paragraph 12 of the revised RIS stated that *"New Zealand data is limited and the relatively small number of cases means that it cannot be statistically analysed"*. We agree. However, that the number is so small it cannot be analysed is in itself a clear indication of a lack of any New Zealand problem.
- 6.7 Of cases that can be assessed, table 1 in the revised RIS outlines five since 1995 of those that can be considered significant instances of price fixing. Of the five, two were international cartels, one was Trans-Tasman, and two were New Zealand-based arrangements. At face value, this could represent one case of price fixing leading to criminal sanctions around every 4 years. However, the obvious question is whether any of these cases would be considered hard-core cartel behaviour warranting a criminal sanction.
- 6.8 As mentioned above, the fact that cases post-2010 have not been included in the revised RIS for the current Bill means any further attempt to scope the level of the problem is not possible.

Cooperating with Other Jurisdictions

- 6.9 Paragraphs 32 to 37 of the revised RIS discuss the apparent reduced ability to cooperate with other jurisdictions if criminal sanctions are not introduced.
- 6.10 Paragraph 32 states that *"Many large cartels affecting New Zealand are international and are detected from work in other jurisdictions. It is important that New Zealand can effectively cooperate with other jurisdictions to sanction behaviour"*. Paragraph 33 then states that a *"lack of criminal sanctions in New Zealand may reduce the scope for cooperation. Without criminalisation, the Commission may be unable to share confidential information or undertake investigations to assist a criminal investigation in another jurisdiction. This could decrease reciprocity between investigating agencies..."* (emphasis

added). Given the uncertain nature of the statements made above, we presume this has not been the case, or at least that again there is no evidence to suggest something has already occurred due to New Zealand not having criminal sanctions.

- 6.11 This viewpoint is also evident in the Cabinet Paper, where paragraph 19.2 states that *“by virtue of New Zealand also having a criminal regime, overseas cartel enforcement agencies would be liberated to share information more freely with the Commerce Commission and to cooperate more extensively”*. But little evidence is provided from which to ascertain the degree to which overseas cartel enforcement agencies are not currently sharing information.
- 6.12 In addition, paragraph 37 mentions the importance of the Single Economic Market (SEM) with Australia as a reason for change. Namely, the SEM framework has a medium-term goal - that firms operating in both Australia and New Zealand markets should face the same consequences for the same anti-competitive conduct. Given Australia has criminalised cartel conduct it is argued New Zealand should do likewise.
- 6.13 In our previous submissions, we outlined concerns about using international harmonisation as a leading reason for introducing criminal sanctions. BusinessNZ has repeatedly commented on this argument when used in other regulatory areas, namely that any harmonisation needs to show a clear net economic benefit for New Zealand. Also, we remain particularly suspicious of the ongoing need to replicate business law on the other side of the Tasman.
- 6.14 On the subject of the ongoing relationship between New Zealand and Australia, BusinessNZ commissioned a major report entitled *“Trans-Tasman Business Law Harmonisation”* in 2010, undertaken by Franks & Ogilvie¹. The report summarised the responses from BusinessNZ members to the questionnaire on the then Government’s SEM outcomes framework; its authors had assistance from key professionals and MED. The report’s intent was to provide a business view to government on the prioritisation of, and unexpected fishhooks in, SEM outcomes.
- 6.15 The majority of responses were from major companies from a cross-section of the economy, with some doing business on both sides of the Tasman and some having parent companies in Australia. Therefore, the respondents involved were well-versed in Trans-Tasman issues.
- 6.16 Competition policy was one of the various issues examined, including cartel criminalisation. Paragraph 10 on page 37 of the report stated that:
- a) The majority of members did not support the criminalisation of cartel behaviour. Many stated that it was not necessary, and lacks a strong policy basis. None considered harmonisation or being seen internationally as a ‘good citizen’ as a good reason for criminalisation. Comments included:

¹ Trans-Tasman Business Law Harmonisation – Initial Findings (Franks & Ogilvie) 2010.

“Financial penalty is enough. Ability for a competitor to obtain immunity by informing on others that could lead to their criminal conviction is distasteful.”

“In a small market like NZ there are often valid, pro-competitive reasons for businesses to cooperate with each other. The criminalisation of cartels could deter such legitimate cooperation.”

- 6.17 Comments in the report highlight the view of the majority of the business community that assimilation of New Zealand’s laws is not always a step in the right direction as some regulatory competition is actually healthy. Also, as the report outlined, proper cost/benefit appraisals of outcomes are necessary before a criminalisation option is introduced. As BusinessNZ and other submitters have previously pointed out, it is far from obvious that criminalisation would have any clear long-term benefits for the New Zealand economy.

7. COSTS OF CRIMINALISATION

- 7.1 Pages 18-20 of the revised RIS outline four main costs identified by both MBIE and previous submitters associated with the introduction of criminal sanctions. BusinessNZ wishes to discuss three of these issues.

Costs of Imprisonment

- 7.2 Although listed last in terms of cost within the revised RIS, MBIE’s defence of the cost of jail terms if criminal penalties proceed does more to support such proceedings not going, than going, ahead. Paragraph 83 states cartel offences would be unlikely to have a measurable effect on the overall prison population, with statistics showing the United States imprisoning fewer than 400 people over the last 10 years.

Administration and Enforcement Costs

- 7.3 Paragraph 81 indicates that with the low number of prosecutions expected in any given year (*“on average, one or fewer”*), on face value the costs associated with criminal sanctions would be fairly low. While we agree the level of some costs will depend on additional measures introduced (discussed below), invariably the total cost of introducing criminal investigations will increase since the Commerce Commission will start from the possibility of a criminal prosecution.
- 7.4 Paragraphs 79 and 80 outline the main costs for government, a combination of upskilling staff, developing processes/protocols and producing guidelines, plus additional investigation costs. However, neither the original nor the revised RIS discussed the costs incurred by those being investigated. There will already be costs associated with the current civil regime but it is reasonable to assume that heightened sanctions will lead persons prosecuted to put additional resources into proving their innocence. In addition, there will also be opportunity costs, since, obviously, individual business resources can usefully be put into more productive activity.

- 7.5 The discussion of costs in the revised RIS tends to give the impression an effective design with increased clarity will mean overall costs will be minimal. BusinessNZ remains unconvinced. Even though the changes, discussed below, might help reduce some additional costs, overall there are still likely to be sizeable extra administration and enforcement costs associated with the introduction of criminal sanctions.

Chilling Effect on Pro-Competitive Activity

- 7.6 Paragraph 74 of the revised RIS mentions that previous submissions on the discussion document highlighted the fact criminal sanctions may deter legitimate and pro-competitive business activity if there is uncertainty about the kind of conduct the prohibition covers. While we agree some concerns may be allayed through the introduction of the collaborative activity exemption and the establishment of a clearance regime for collaborative activities, exposure to the risk of criminal prosecution remains a large elephant in the room for businesses considering pro-competitive conduct.
- 7.7 This is best exemplified with the point made in paragraph 18 of the Cabinet Paper which notes that criminal sanctions in the US have meant some cartels have not operated there because of the perceived risk of imprisonment. Yet such deterrent effects rarely affect one side only. There is nothing by way of acknowledgement that many legitimate business activities too have not happened because of the risk of imprisonment.
- 7.8 Overall, government needs to be mindful that criminal sanctions will have a sizeable effect on activity, discouraging actions that might in reality be perfectly legal.

Consultation of Officials

- 7.9 Paragraphs 31-33 of the Cabinet Paper summarise the various government agencies consulted on the proposals. Of particular note is the statement that *“Treasury is supportive of the policy direction to criminalise cartels in line with the suggestions in this paper. However, there will be fiscal implications from the policy change which are currently unknown”*. However, paragraph 38 also states that *“The Regulatory Impact Analysis Team at Treasury (RIAT) 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”*. During this lengthy process, Treasury's reservations have been much more evident as, for example:

“It is not clear that New Zealand has levels of cartel behaviour that warrant criminalisation”

".... the main benefit from criminalisation appears to be greater alignment of pro-competitive regulation with other jurisdictions. However, increased international cooperation can be achieved through other means"

"Any marginal benefits from criminalisation are likely to be significantly outweighed by the costs faced by businesses who would have to ensure they are complying with the law"

"Treasury also notes that the majority of written submissions did not support cartel criminalisation".

This signals to us that there is nowhere near enough certainty as to the adverse effects of such regulations.

In Summary

- 7.10 When examining the issues raised in both the RIS and Cabinet paper, many of the reasons outlined for introducing criminal sanctions could equally be listed as reasons not to introduce criminal sanctions. Also, we believe the RIS underplays the reasons why criminal sanctions should not be introduced. Overall, while we appreciate the work the Government has put into examining this issue, it still falls short of providing compelling reasons for the introduction of criminal sanctions.

Recommendation: That hard-core cartels should not be criminalised.

- 7.11 Notwithstanding our recommendation above that there is insufficient evidence the current cartel regime in New Zealand is inadequate, we would, without prejudicing our overall view, like to comment on one other proposed feature of the Bill.

2-year Transitional Period

- 7.12 The Bill allows a 2-year transitional period before the criminalisation of offences comes into force, which will happen once it has received the Royal Assent.
- 7.13 The explanatory note states that this *"would allow for businesses to learn from experience under the existing civil regime for cartel conduct, which came into effect in August 2017"*. While we agree with this to a certain extent, we would also argue that the way in which cartel conduct is looked at by the private sector when there is the possibility of criminal as opposed to a civil penalty will inevitably be different. In short, businesses will take an even more risk averse and cautious approach to any cartel conduct, undoubtedly extending timeframes for such conduct.
- 7.14 Therefore, we believe the transitional period should be extended to 3 years to ensure the business community is provided with adequate time to cover off

both the changes to the Act in 2017 and the introduction of criminal sanctions.

Recommendation: That should the Bill proceed, the 2-year transitional period be extended to 3 years.

8. ABOUT BUSINESSNZ

Promoting New Zealand's success through sustainable market-led growth

[BusinessNZ](#) is New Zealand's largest business advocacy body, representing the majority of New Zealand private sector companies as members, affiliates or through membership of BusinessNZ divisions such as the Major Companies Group, ExportNZ, ManufacturingNZ, Sustainable Business Council and Buy NZ Made.

BusinessNZ represents around 14,000 businesses that are members of four regional business organisations:

[Employers & Manufacturers Association](#) (EMA) - northern half of North Island

[Business Central](#) - central region

[Canterbury Employers' Chamber of Commerce](#) (CECC)

[Otago-Southland Employers' Association](#) (OSEA)

BusinessNZ's [Major Companies Group](#) (MCG) works with and represents around 80 of New Zealand's largest companies.

[ExportNZ](#) and [ManufacturingNZ](#) work with and advocate for New Zealand exporters and manufacturers.

The [Sustainable Business Council](#) (SBC) provides mainstream leadership on sustainable business matters.

The [BusinessNZ Energy Council](#) (BEC) is a group of New Zealand organisations taking on a leading role in creating a sustainable energy future for New Zealand.

The [Buy NZ Made](#) Campaign encourages consumers and organisations to help create local jobs and growth by buying New Zealand goods and services.

BusinessNZ's [Affiliated Industries Group](#) (AIG) is a grouping of 75 industry associations affiliated to BusinessNZ that work together on pan-industry issues.

BusinessNZ undertakes research, analysis and advocacy on behalf of all business in New Zealand.

Research activities include producing monthly surveys of the manufacturing and services sector – the *BNZ-BusinessNZ Performance of Manufacturing Index* (PMI) and *BNZ-BusinessNZ Performance of Services* (PSI) as well as other surveys on business issues.

BusinessNZ analysts work in economic, environmental, employment and skills disciplines and provide submissions on current and proposed legislation affecting the environment for business and New Zealand's growth.

Public advocacy, public speaking, work programmes with other organisations and advocacy with decision makers make up a large part of BusinessNZ's work.

BusinessNZ champions policies leading to:

- international competitiveness
- balanced employment, economic and environmental legislation
- compliance and tax levels that foster growth and investment
- innovation and skill development
- an environment fostering the production of high value goods and services

Websites

BusinessNZ

www.businessnz.org.nz

ExportNZ

www.exportnz.org.nz

ManufacturingNZ

www.manufacturingnz.org.nz

BusinessNZ Energy Council

www.bec.org.nz

Buy NZ Made

www.buynz.org.nz

Sustainable Business Council

www.sbc.org.nz

Regional Business Organisations

www.ema.co.nz
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