

Commerce (Criminalisation of Cartels) Amendment Bill

Government Bill

Explanatory note

General policy statement

Introduction

The Commerce (Criminalisation of Cartels) Amendment Bill (the **Bill**) amends the Commerce Act 1986 (the **principal Act**) to introduce a criminal offence for cartel conduct. Cartels are formed when rival firms agree not to compete with each other. A cartel is an anticompetitive arrangement by competitors to do any of the following:

- fix, control, or maintain prices:
- establish output restrictions or quotas:
- share or divide markets by allocating customers, suppliers, territories, or lines of commerce.

Cartels are harmful to consumers, other businesses, and the economy. They reduce consumer welfare through higher prices for, or lower quality of, goods or services, have the potential to impede new entrants or “mavericks” from participating in markets, and stifle innovation and productivity improvements in the economy. Cartels, by their nature, are secretive and difficult to detect. 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.

Policy to be given effect by the Bill

The policy to be given effect in this Bill was informed by a review initiated in January 2010, which looked at whether to introduce a criminal cartel offence. The review arose from a concern that the existing civil regime might not provide optimal disincentives for cartel conduct. It also reflected a concern that New Zealand’s competition regime might 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 co-operate with those jurisdictions in investigating international cartels.

The specific policy objectives for introducing criminalisation for cartels are as follows:

- to promote detection and deterrence of cartels (while ensuring that efficiency-enhancing collaborative activity is not deterred);
- to improve cartel enforcement by the Commerce Commission and facilitate New Zealand's contribution to enforcement efforts against global cartels.

These objectives are to be read in light of the purpose of the principal Act, which is to promote competition in markets for the long-term benefits of consumers within New Zealand.

Clause 4 of the Bill inserts *new section 82B* into the principal Act, which contains the new criminal cartel offence. This offence is targeted at the individuals who are the decision-makers for the cartel and their corporations. The key element of the offence is the requirement to show intention to engage in cartel conduct. The maximum fines are the same as the maximum pecuniary penalties that may be imposed under the civil cartels regime, with the additional sanction of up to 7 years' imprisonment in the case of individuals.

There are also elements in the Bill that are designed to mitigate business uncertainty and compliance costs arising from the new criminal regime. These include the following:

- existing exceptions and exemptions in the Act to the civil prohibition for cartel conduct will also apply to the new criminal offence, including the exception relating to collaborative activities (such as joint ventures) and the exception for specified international shipping activities (such as vessel-sharing agreements);
- new defences in *new section 82C* to provide for circumstances where a defendant believes that the impugned conduct was reasonably necessary as provided for in one of the exceptions;
- a 2-year transitional period before the criminal offence comes into force, which would allow for businesses to learn from experience under the existing civil regime for cartel conduct, which came into effect in August 2017.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2018&no=22>

Regulatory impact assessment

The Ministry of Business, Innovation, and Employment produced a regulatory impact assessment on 26 August 2011 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact assessment can be found at—

- <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform/ris-cartel-criminalisation>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 states the Bill's Title.

Clause 2 provides for the Bill to commence 2 years after Royal assent.

Clause 3 provides that the Bill amends the Commerce Act 1986 (the **principal Act**).

Clause 4 inserts *new sections 82B and 82C* to criminalise the following cartel behaviours, which are already prohibited by section 30 of the principal Act:

- price fixing:
- restricting output:
- market allocating.

Under the principal Act, the consequences for a breach of section 30 are limited to civil pecuniary penalties and actions for damages. *New section 82B* makes it an offence for a person to contravene section 30, but only if the person intends, at the time of the contravention, to engage in price fixing, restricting output, or market allocating. For an individual, the offence attracts a penalty of up to 7 years' imprisonment or a fine not exceeding \$500,000, or both. For another legal person such as a company, it attracts a fine of up to \$10 million or a higher penalty based on commercial gain from the breach or the person's turnover. *New section 82B(2)* requires a defendant in a prosecution for a breach of section 30 to give notice, within 20 working days of pleading not guilty or such later time as the court allows, if the defendant intends to rely on an exception or a defence under the Act.

New section 82C sets out the defences available in a prosecution under *new section 82B*. These relate to circumstances in which a defendant believed they were operating within a statutory exception to section 30 of the principal Act.

Clause 5 inserts a note into section 30 of the principal Act to alert readers to the civil and criminal consequences of a contravention of that section. *Clauses 6 to 8* and *clause 13* update references in the principal Act to reflect the amendment made to section 30.

Clause 9 amends section 75 to add *new section 82B* to the list of proceedings to be determined in the High Court.

Clause 10 amends section 79B of the principal Act to prevent a person who has contravened section 30 from being subject to both a civil pecuniary penalty and a criminal sanction for the same conduct.

Clause 11 amends section 80A of the principal Act to prohibit indemnities in respect of—

- penalties imposed following a conviction under *new section 82B*; and
- the costs of defending proceedings that result in conviction under *new section 82B*.

Clause 12 amends section 82A of the principal Act to prevent a person from being required to pay exemplary damages in relation to conduct for which the person has been convicted under *new section 82B*.

Clause 14 amends the Criminal Procedure Act 2011 to classify the offence in *new section 82B* as a category 4 offence for the purposes of that Act. A category 4 offence is tried by jury unless the court orders that it be tried by a Judge alone (which may be done in cases that are likely to be long or complex). A trial for a category 4 offence must take place in the High Court.

Hon Kris Faafoi

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Commerce (Criminalisation of Cartels) Amendment Act **2018**.

2 Commencement

This Act comes into force on the second anniversary of the date of Royal assent. 5

3 Principal Act

This Act amends the Commerce Act 1986 (the **principal Act**).

Part 1

Criminalisation of cartels

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4 New sections 82B and 82C inserted

After section 82A, insert:

82B Offence relating to cartel prohibition

(1) A person commits an offence if—

(a) the person,—

(i) in contravention of section 30(1)(a), enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision; and

(ii) intends, at that time, to engage in price fixing, restricting output, or market allocating; or

(b) the person,—

(i) in contravention of section 30(1)(b), gives effect to a cartel provision; and

(ii) intends, at the time the cartel provision is given effect to, to engage in price fixing, restricting output, or market allocating.

(2) A defendant that wishes to claim that an exception in section 31, 32, 33, 44A(4) or (5), or 44B applies, or to rely on a defence in **section 82C**, must—

- (a) notify the prosecution of that fact within 20 working days after the defendant pleads not guilty (or at any later time with the leave of the court); and
- (b) at the same time, provide sufficient details about the application of the relevant section to fully and fairly inform the prosecution of the manner in which the exception or defence is claimed to apply. 5
- (3) An individual who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000, or both.
- (4) A person other than an individual that commits an offence against this section is liable on conviction to a fine not exceeding the greater of the following: 10
- (a) \$10 million;
- (b) either,—
- (i) if it can be readily ascertained and if the court is satisfied that the offence occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or 15
- (ii) if the commercial gain cannot be readily ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred. 20

82C Defences in prosecution under section 82B

Defences in relation to collaborative activity

- (1) In a prosecution under **section 82B(1)(a)**, it is a defence if, at the time of entering into the contract or arrangement, or arriving at the understanding, containing a cartel provision,— 25
- (a) the defendant and 1 or more other parties to the contract, arrangement, or understanding were involved in a collaborative activity; and
- (b) the defendant believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity. 30
- (2) In a prosecution under **section 82B(1)(b)**, it is a defence if, at the time of giving effect to the cartel provision,—
- (a) the defendant and 1 or more other parties to the contract, arrangement, or understanding that contains the cartel provision were involved in a collaborative activity; and 35
- (b) the defendant believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity.
- (3) In a prosecution under **section 82B(1)(b)**, it is a defence if—
- (a) the relevant cartel provision constitutes a restraint of trade; and

(b)	the defendant and 1 or more other parties to the contract, arrangement, or understanding were involved in a collaborative activity that ended before the defendant gave effect to the provision; and	
(c)	at the time of giving effect to the provision, the defendant believed that the cartel provision was reasonably necessary for the purpose of the collaborative activity; and	5
(d)	the collaborative activity did not end because the lessening of competition between any 2 or more parties became its dominant purpose.	
	<i>Defences in relation to international liner shipping service</i>	
(4)	In a prosecution under section 82B(1)(a) , it is a defence if—	10
(a)	the cartel provision relates to restricting output or market allocating; and	
(b)	at the time the defendant entered into the contract or arrangement, or arrived at the understanding, containing the provision, the circumstances in subsection (6) applied.	
(5)	In a prosecution under section 82B(1)(b) , it is a defence if—	15
(a)	the cartel provision relates to restricting output or market allocating; and	
(b)	at the time the defendant gave effect to the cartel provision, the circumstances in subsection (6) applied.	
(6)	The circumstances are that—	
(a)	the defendant and all other parties to the contract, arrangement, or understanding that contains the cartel provision were supplying an international liner shipping service in co-operation with each other; and	20
(b)	the co-operation improved the service supplied to owners or consignors of goods carried at sea; and	
(c)	the cartel provision related to an activity ancillary to a specified activity (as defined in section 44A(8)); and	25
(d)	the defendant believed that the ancillary activity was reasonably necessary for the purposes of the co-operation.	
(7)	For the purposes of subsection (6)(a) , parties to the contract, arrangement, or understanding excludes persons who are parties only because section 30B(a) applies.	30

Part 2

Consequential and related amendments

Subpart 1—Amendments to principal Act

5	Section 30 amended (Prohibition on entering into or giving effect to cartel provision)	35
	In section 30, insert as subsection (2):	

- (2) *See* section 80 for liability to a pecuniary penalty, and **section 82B** for criminal liability, for contravention of this section.
- 6 Section 31 amended (Exception for collaborative activity)**
- (1) In section 31(1), replace “section 30(a)” with “**section 30(1)(a)**”.
- (2) In section 31(2), replace “section 30(b)” with “**section 30(1)(b)**”. 5
- (3) In section 31(3), replace “section 30(b)” with “**section 30(1)(b)**”.
- 7 Section 44A amended (Exceptions in relation to international liner shipping services)**
- (1) In section 44A(4), replace “section 30(a)” with “**section 30(1)(a)**”.
- (2) In section 44A(5), replace “section 30(b)” with “**section 30(1)(b)**”. 10
- 8 Section 44B amended (Further exception in relation to international liner shipping services (price fixing in relation to space on ship))**
- (1) In section 44B(1), replace “section 30(a)” with “**section 30(1)(a)**”.
- (2) In section 44B(2), replace “section 30(b)” with “**section 30(1)(b)**”.
- 9 Section 75 amended (Jurisdiction of High Court)** 15
- After section 75(1)(a)(iii), insert:
- (iv) proceedings for offences against **section 82B**:
- 10 Section 79B amended (Relationship between pecuniary penalties and criminal liability)**
- (1) In section 79B(1), replace “section 86B or 87B” with “**section 82B**, 86B, or 87B”. 20
- (2) In section 79B(2), replace “section 86B or 87B” with “**section 82B**, 86B, or 87B”.
- 11 Section 80A amended (Restriction on indemnities relating to contraventions of section 30)** 25
- (1) In section 80A(1)(b), after “imposed”, insert “; or”.
- (2) After section 80A(1)(b), insert:
- (c) any penalty imposed on person A by the court following the conviction of person A under **section 82B**; or
- (d) any costs incurred by person A in defending any criminal proceedings in which person A is convicted under **section 82B**. 30
- 12 Section 82A amended (Exemplary damages for contravention of Part 2)**
- After section 82A(2), insert:

- (3) The court may not order a person to pay exemplary damages in relation to conduct for which the person has been convicted of an offence under **section 82B**.

13 Schedule 1AA amended

- (1) In Schedule 1AA, clause 2(1), replace “Section 30(a)” with “**Section 30(1)(a)**”. 5
- (2) In Schedule 1AA, clause 2(2), replace “Section 30(b)” with “**Section 30(1)(b)**”.
- (3) In Schedule 1AA, clause 2(4), replace “section 30(b)” with “**section 30(1)(b)**”. 10

Subpart 2—Amendment to Criminal Procedure Act 2011

14 Criminal Procedure Act 2011 amended

- (1) This section amends the Criminal Procedure Act 2011.
- (2) In Schedule 1, Part 2, insert in its appropriate alphabetical order:

Commerce Act 1986

Section	Offence
Section 82B	Offence relating to cartel prohibition

15