

House of Representatives

# Supplementary Order Paper

**Tuesday, 5 March 2019**

**Commerce (Criminalisation of Cartels) Amendment Bill**

*Proposed amendments for the consideration of the Committee of the whole House*

**Key:**

- **this is inserted text**
- **~~this is deleted text~~**

**Note:** This Supplementary Order Paper shows amendments to the Bill that are being proposed by the Minister for the purposes of consideration in Committee of the whole House. This document does—

- **NOT have official status in terms of unamended text**
- **NOT have the status of an as-reported version of the Bill.**



## Explanatory note

This Supplementary Order Paper makes the following changes to the Commerce (Criminalisation of Cartels) Amendment Bill:

- it amends *clause 4, new section 82B* to clarify that a person does not contravene the prohibition on cartel provisions if the person’s conduct comes within an exception to that prohibition (for example, the exception in section 31 of the Commerce Act 1986 for a collaborative activity):
- it replaces the defences in *clause 4, new section 82C* with a single defence that relates to all exceptions to the prohibition on cartel provisions. The defence applies if the defendant believed on reasonable grounds that 1 or more exceptions applied to the relevant conduct. However, the defence only applies if the defendant’s belief is based on a mistake of fact. It does not apply if the belief is based on ignorance, or mistake, of any matter of law (for example, a misinterpretation of the provision that establishes the exception):
- it moves the disclosure requirement for a defendant that was previously set out in *new section 82B(2)* to *new section 82D(1)*. It also changes that requirement so that the details provided by the defendant need not “fully and fairly” inform the prosecution about the exception or defence they intend to raise (but must inform them). The SOP also adds a requirement for the court or Registrar to notify the defendant if the disclosure requirement applies (see *new section 82D(2)*):
- it amends *clause 4* to insert *new section 82E*, which sets out the consequences of a failure to comply with the disclosure requirement. *New section 82E* is similar to section 34 of the Criminal Disclosure Act 2008, which sets out the consequences of failing to disclose information as required by that Act:
- it inserts *new clause 12A, new section 107*, which requires the Solicitor-General to establish a prosecutors panel, the members of which can conduct prosecutions under *new section 82B*:
- it deletes *clause 14*, which would have amended the Criminal Procedure Act 2011 to provide that the offence in *new section 82B* is a category 4 offence under that Act. The effect of deleting *clause 14* is that the offence is a category 3 offence under that Act. It also deletes *clause 9*, which would have required proceedings for offences against *new section 82B* to be heard in the High Court. Instead the trial court for the offence will be determined in accordance with the procedures applying to category 3 offences under the Criminal Procedure Act 2011.

## Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Supplementary Order Paper. It provides access to information about any material policy changes to the Bill and identifies any new significant or unusual legislative features of the Bill as amended.

**Proposed amendments to**

SOP No 194

**Commerce (Criminalisation of Cartels) Amendment Bill**

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A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=sop&subtype=government&year=2019&no=194&>

**Regulatory impact assessment**

The Ministry of Business, Innovation, and Employment produced a regulatory impact assessment on 27 November 2018 to help inform the new policy decisions taken by the Government relating to the contents of this SOP.

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

- <https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/criminalisation-of-cartels-2018/>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

**The Honourable Kris Faafoi, in Committee, to propose the amendments shown in the following document.**

*Hon Kris Faafoi*

## **Commerce (Criminalisation of Cartels) Amendment Bill**

Government Bill

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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.

**3 Principal Act**

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

**Part 1**  
**Criminalisation of cartels**

**4 New sections 82B and 82C to 82E 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.
- (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:
- (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
    - (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.
- (5) See the exceptions set out in Part 2, which relate to conduct that would otherwise contravene **section 30(1)(a) or (b)**.

**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,—
- (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.
- (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

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- (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~~
  - (d) ~~the collaborative activity did not end because the lessening of competition between any 2 or more parties became its dominant purpose.~~
- Defences in relation to international liner shipping service*
- (4) In a prosecution under **section 82B(1)(a)**, it is a defence if—
- (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—
- (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~~
  - (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~~
  - (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.

**82C Defence relating to exceptions to cartel prohibition**

- (1) In a prosecution under **section 82B**, it is a defence if, at the time of the alleged contravention, the defendant believed on reasonable grounds that 1 or



more of the exceptions set out in Part 2 applied in relation to the conduct that constituted the alleged contravention.

- (2) However, the defence does not apply if the defendant's belief is based on ignorance, or mistake, of any matter of law.

**82D Disclosure by defendant in cartel prosecution**

- (1) A defendant that wishes to claim that an exception set out in Part 2 applied in relation to the conduct that constituted the alleged contravention, or to rely on the 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 inform the prosecution about how the exception is claimed to have applied or how the defence will be relied on.

- (2) The court or the Registrar of the court must give written notice of the requirements in **subsection (1)** to a defendant who pleads not guilty.

**82E Consequences of failure to disclose under section 82D**

- (1) This section applies if, at the hearing or trial of a defendant, the court is satisfied that—

- (a) evidence sought to be adduced by the defendant is, or is based on, information that should have been disclosed to the prosecution under **section 82D**; and  
(b) that information was not disclosed.

- (2) The court may—

- (a) exclude the evidence; or  
(b) with or without requiring the evidence to be disclosed, adjourn the hearing or trial; or  
(c) admit the evidence if it is in the interests of justice to do so; or  
(d) exercise its powers under any other enactment or rule of law that deals with the failure of a party to comply with the directions of the court.

- (3) However, if it appears to the court that the defendant was not given notice in accordance with **section 82D(2)**, the court—

- (a) must not order the exclusion of evidence under **subsection (2)(a)**; but  
(b) must adjourn the hearing or trial if the prosecution requests an adjournment.

Compare: 2008 No 38 s 34

## 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)

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)**”.
- (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)**”.

##### 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)~~

~~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”.
- (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)

- (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**.

**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**.

**12A New section 107 inserted (Cartel prosecutors panel)**

After section 106A, insert:

**107 Cartel prosecutors panel**

- (1) The Solicitor-General must appoint a cartel prosecutors panel for the purpose of enabling prosecutions under **section 82B** to be taken speedily.
- (2) The Solicitor-General must consult with the chairperson before appointing the panel.
- (3) The panel must consist of those lawyers that the Solicitor-General considers appropriate.
- (4) Only members of the panel may conduct prosecutions under **section 82B** on behalf of the Crown.
- (5) In this section, **lawyer** has the meaning given in section 6 of the Lawyers and Conveyancers Act 2006.

**13 Schedule 1AA amended**

- (1) In Schedule 1AA, clause 2(1), replace “Section 30(a)” with “**Section 30(1)(a)**”.
- (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)**”.

~~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
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**Section 82B** Offence relating to cartel prohibition

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