



6 April 2018

Committee Secretariat
Economic Development, Science and Innovation Committee
Parliament Buildings
WELLINGTON

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Lodged electronically

Dear Secretariat,

Commerce (Criminalisation of Cartels) Amendment Bill

We welcome the opportunity to make a submission to the Economic Development, Science and Innovation Committee's (the Committee) consultation on the *Commerce (Criminalisation of Cartels) Amendment Bill* (the Bill).

The ACCC supports the criminalisation of cartel conduct in New Zealand. This change would align New Zealand's cartel laws more closely with Australia's cartel laws and facilitate closer trans-Tasman cooperation. Hard-core cartel conduct is a form of theft which is comparable to fraud and other classes of corporate crime that attract criminal sentences. It is covert, difficult to detect and leads to significant consumer and small business detriment.

We have a number of observations about the Bill based on our experience of the criminalisation debate in Australia and investigating criminal cartel conduct.

If you would like to meet or discuss this matter further, please contact Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division at marcus.bezz@acc.gov.au or +61 2 9230 9130

Yours sincerely

Rod Sims
Chairman

1. Cartel criminalisation in Australia

Cartel conduct was criminalised in Australia in 2009. Since that time, the Australian Competition and Consumer Commission (ACCC) has invested significant resources in developing a criminal investigation capacity. This investment is now starting to bear fruit, with the successful prosecution of Nippon Yusen Kabushiki Kaisha in 2016, resulting in a \$25 million criminal fine. Criminal charges were also laid against Kawasaki Kisen Kaisha Ltd, another alleged participant in the same cartel. Kawasaki Kisen Kaisha Ltd has pleaded guilty to the charges and the proceedings are set down for a sentencing hearing in November 2018.

Earlier this year the first Australian company and individuals were charged with criminal cartel conduct. In February 2018, the Country Care Group, its managing director and a former employee were each charged with criminal cartel conduct.

The ACCC considers that an effective criminal enforcement regime is critical to preventing, deterring and detecting serious cartel conduct that affects Australian businesses and consumers. Moreover, it sends a clear message to those who would engage in cartel conduct that such conduct carries a high level of condemnation from the community generally, and is not merely a regulatory concern.

Our experience is that criminalisation has significant deterrence effects, particularly for individuals. In many cases, those that commit cartel conduct are well resourced and can readily meet monetary penalties. Businesses and their executives may consider monetary penalties, no matter how high, as a 'cost of doing business'. However, they are unlikely to think of criminal convictions or gaol time in the same way. More generally, criminalisation raises the importance of compliance with cartel provisions within businesses and encourages effective compliance systems.

Criminalisation also increases the incentives for cartel participants to self-report cartel conduct pursuant to a country's immunity or cooperation policy. Following criminalisation in Australia, we experienced an increase in the number of applications received under the *ACCC immunity and cooperation policy for cartel conduct*. We have also experienced a marked increase in immunity applications in the past 6 months that may be attributable to the increased visibility of criminal cartel prosecutions and outcomes above. This would align with research into the Australian business community that has found that when business people are aware of the criminal consequences of cartel behaviour, they are more likely to expect detection and prosecution of cartel behaviour.¹

Community education and outreach is a key element in emphasising the seriousness of cartel conduct and the value of early cooperation. The ACCC placed considerable resources into raising awareness of criminal cartel laws before securing the criminal prosecutions outlined above²

2. Closer trans-Tasman cooperation

As has been noted in discussion of the Bill, criminalisation would also bring New Zealand's law into line with other major economies that are its regular trade partners, like the US, Canada, the UK and Australia.

¹ *The Deterrent Impact Of Cartel Criminalisation: Supplementary Report On A Survey Of Australian Public Opinion Regarding Business People's Views On Anti-Cartel Laws And Enforcement*, Christine Parker and Chris Platania-Phung, The University of Melbourne Cartel Project, Melbourne Law School, 12 January 2012. Available at http://law.unimelb.edu.au/data/assets/pdf_file/0008/1676069/ParkerandPlataniaPhungImpactofDeterrencerevisedtitle2.pdf

² See, for example, the ACCC's *The Marker* video at <https://www.youtube.com/watch?v=louVP9VvFlg>.

Cartels often involve companies that operate across multiple jurisdictions, which makes international cooperation and information sharing crucial for successfully detecting and prosecuting cartel cases. Accordingly, international cooperation and intelligence sharing in criminal matters is a long established and accepted practice.

Criminalising cartel conduct would allow the New Zealand Commerce Commission (NZCC) to leverage existing law enforcement arrangements in addition to its usual international liaison with competition agencies. Criminalising cartel conduct would open up the possibility of mutual assistance requests (including police-to-police), which are an important tool in obtaining evidence for the investigation and prosecution of transnational crime.

In our experience, criminalisation has increased the ability and willingness of colleagues in other jurisdictions which have criminal cartel regimes to share confidential information and collaborate in relation to international cartel investigations. This is because of the legal complexities and prohibitions regarding the sharing and use of information gathered by overseas jurisdictions where cartel conduct is not being pursued criminally.

For example, both the NZCC and the ACCC have the power to request information and documents from parties by way of a legislative notice. The use of these notices is complicated in the context of a criminal cartel investigation due the privilege against self-incrimination and there is complex case law as to multi-jurisdictional investigations and the use of information obtained by international regulators and provided to the ACCC. By aligning the evidence gathering procedures and objectives of international regulators, it is easier to coordinate the use of information gathering tools and investigative strategies.

In addition, the criminalisation of cartels would enable the NZCC to use extradition processes to return alleged cartelists to New Zealand for prosecution. The Australian and New Zealand economies are closely interlinked and a potential cartelist could foreseeably engage in conduct in Australia or New Zealand that affects the markets of the other country. Extradition would enable New Zealand to pursue alleged cartelists that may otherwise escape its jurisdiction.

3. Cooperation with domestic law enforcement agencies

Criminalisation of cartel conduct has also enabled the ACCC to participate in joint investigations with other law enforcement agencies, and thereby utilise a variety of covert investigative techniques available only when investigating criminal offences. As cartels are conspiracies and are usually carried out in secret, covert investigative tools are crucial to enable a regulator to obtain evidence of conduct as it takes place.

In Australia, the ACCC can use materials obtained through telephone interception pursuant to the *Telecommunications (Interceptions and Access) Act 1979* (Cth) in investigations of criminal cartel offences if conducted jointly with interception agencies such as the Australian Federal Police. From our experience, using a combination of covert and overt investigative tools (for example, search warrants, surveillance devices and notices compelling the production of documents—similar to section 98(1)(b) of the New Zealand's *Commerce Act*) can assist in obtaining evidence, generating intelligence and securing the cooperation of key informants and witnesses.

We note that the proposed penalty for cartel offences under the Bill is a term of imprisonment not exceeding 7 years, which would appear to meet the requirements for the use of surveillance devices under the Part 3 of the *Search and Surveillance Act 2012* (SSA). Based on our experiences in Australia, we suggest that the New Zealand cartel offences in their final form continue to meet the requirements for surveillance devices, as a close relationship between the NZCC and relevant law enforcement agencies will be crucial in developing the capability to utilise these powers.

4. Bid-rigging

The OECD has described hard core cartels, including bid rigging, as the “the most egregious violations of competition law”.³ In 1998 the OECD Council recommended to governments of the OECD member countries that their competition laws effectively halt and deter hard-core cartels – defined as including bid rigging.⁴

We note that, as currently drafted in the Bill, section 82B and 82C follow the existing prohibitions in section 30 of the *Commerce Act*. We are very concerned that, like section 30, sections 82B and 82C do not expressly prohibit bid rigging as a form of cartel conduct.

In smaller economies such as Australia and New Zealand, government tenders generally have a small number of prospective tenderers, meaning cartel conduct in the tender process can be both easier and more profitable. This is recognised by the OECD Guidelines for Fighting Bid Rigging in Public Procurement.⁵

Bid rigging may be able to be captured under other prohibitions such as market allocation. However, without an express prohibition on bid rigging, the NZCC or prosecutor will have to make technical legal arguments as to whether the conduct falls within a prohibition. This creates legal uncertainty that, particularly in criminal matters, could be a barrier to prosecuting harmful cartel conduct. The absence of an express criminal prohibition of bid rigging in New Zealand is also likely to undermine ability of the ACCC and NZCC to cooperate to address trans-Tasman bid rigging conduct.

5. Defences

Australia’s joint venture defence

Joint ventures, or collaborative activities using the language of the *Commerce Act*, can have pro-competitive and socially beneficial outcomes.

Australian competition law has long recognised the importance of joint ventures to our economy and our cartel offence and civil prohibition contain a defence for relevant joint ventures.⁶

We consider that the key consideration in the development of a joint venture defence is to ensure it protects legitimate joint ventures but avoids an ex post justification of cartel behaviour as a ‘joint venture’. Our joint venture defence requires a defendant to prove that the cartel provision is for the purpose of a joint venture and is ‘reasonably necessary’ for undertaking the joint venture. The defendant must also prove that the joint venture is not carried on for the purpose of substantially lessening competition.⁷

Significantly, the question of whether a cartel provision is ‘reasonably necessary’ for undertaking the joint venture needs to be established to an objective standard.

Proposed collaborative activities defence

We are deeply concerned that as currently drafted, section 82C provides a defence if a party ‘believes’ that a cartel provision was reasonably necessary for the purposes of the

³ See OECD Council, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, published 1998. Available at <http://www.oecd.org/daf/competition/2350130.pdf>.

⁴ *Ibid.*

⁵ See OECD, *Guidelines for fighting bid rigging in public procurement – Helping governments to obtain best value for money*, developed by the OECD Competition Committee in 2009 and available at <https://www.oecd.org/competition/cartels/42851044.pdf>.

⁶ Section 45AO (formerly s 44ZZRO) of the *Competition and Consumer Act 2010* (Cth).

⁷ Section 45AO(c).

collaborative activity. This may mean that at trial, a defendant would need to do no more than demonstrate that they 'believed' a cartel provision was reasonably necessary, on the balance of probabilities. The prosecution would then be required to prove, beyond reasonable doubt, that the defendant did not, as a matter of fact, hold that belief, which is a significantly heavy burden to overcome. This may prevent legitimate prosecutions and undermine the value of the provision as a tool to achieve deterrence.

A similar disparity in burdens of proof was considered prior to the criminalisation of cartel conduct in Australia by a 2008-9 Senate Standing Committee on Economics inquiry into Australia's proposed legislation. The majority of parties making submissions to the Committee advocated for the maintenance of the existing civil exemption for joint ventures, which required establishing that the alleged cartel provision was for the purposes of the joint venture and did not have the purpose, effect or likely effect of substantially lessening competition.⁸ The ACCC submitted that it would be very difficult, if not impossible, to establish the complex economic concept of an effect of substantially lessening competition before a jury, beyond a reasonable doubt.⁹ The ACCC considers it would be similarly difficult to negate the highly subjective concept of 'belief' beyond a reasonable doubt.

This problem could be overcome by either making section 82C an objective test (like Australia's joint venture defence) or reduced by requiring a defendant's belief that the cartel provision was reasonably necessary to be a 'reasonable belief'.

A 'reasonable belief' requirement would allow a prosecution to respond to ex post justifications by demonstrating that no reasonable person in the defendant's position could have believed the cartel provision was reasonably necessary. This is a much lower threshold than proving the subjective belief of the defendant at the time.

Our view is that consistency between the Australian and New Zealand positions on this issue would have significant merit, as it would provide certainty, and may reduce compliance costs and complexity for businesses with trans-Tasman operations.

Shipping defence

The Bill's defence in relation to international liner shipping services raises similar issues to the collaborative activities defence. Section 82C(6)(d) also refers to a defendant's subjective 'belief' that an ancillary activity was reasonably necessary for the purposes of cooperating for the supply of an international liner shipping service.

While Australian law also provides an exemption from the operation of cartel laws for international liner shipping services, there are limits on which services are covered by the exemptions and in order for the exemption to apply, the parties must register a conference agreement.

As with section 82C(1)-(3), this problem could be solved by either requiring the defendant's belief to be 'reasonable' and by introducing a safeguard such as registration of any international shipping agreement with the NZCC.

⁸ Section 76C and 76D of the *Trade Practices Act 1974*

⁹ ACCC submission to the Senate Standing Committee on Economics Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, https://www.aph.gov.au/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/tpa_cartels_09/submissions/sub12_pdf.ashx