Commerce (Criminalisation of Cartels) Amendment Bill

Departmental Report to the Economic Development, Science and Innovation Committee

July 2018
Introduction

This is the officials’ report on the Commerce (Criminalisation of Cartels) Amendment Bill (the Bill). The Bill was introduced to the House on 15 February 2018 and referred to the Economic Development, Science and Innovation Committee (the Committee) after first reading on 20 February.

The Bill’s objectives are:

- To promote the 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.

Submissions on the Bill

The Committee received 20 written submissions and heard 11 oral submissions. Hearings on the Bill were completed on 28 June.

Structure of this report

This report is in several parts:

- Section 1 provides an overview of the report and submissions.
- Section 2 sets out the case for criminalising cartel conduct.
- Section 3 responds to issues the Committee has sought advice on.
- Annex 1 is a clause by clause analysis of submissions made to the Committee.

PCO advice to come

The recommended amendments to the Bill are subject to Parliamentary Counsel Office (PCO) advice concerning how best to express each recommendation in the legislation. In addition, PCO may include in the revised track version of the Bill additional minor amendments to the Bill that are a consequence of implementing a recommendation in this report, that are necessary for the overall coherence of the legislation, or that are required editorial changes (for example, punctuation, spelling and typographical corrections).

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<tr>
<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<tr>
<td>FANZ</td>
<td>Franchise Association of New Zealand</td>
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<tr>
<td>MBIE</td>
<td>Ministry of Business, Innovation and Employment</td>
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<td>NZCBA</td>
<td>New Zealand Certified Builders Association</td>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>PCO</td>
<td>Parliamentary Counsel Office</td>
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<td>The Act</td>
<td>The Commerce Act 1986</td>
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<tr>
<td>The Bill</td>
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1 Overview of the report

The Bill

1. The Commerce (Criminalisation of Cartels) Amendment Bill (the Bill) amends the Commerce Act 1986 (the Act) by introducing a new criminal offence for cartel conduct.

2. The proposed new criminal sanctions reflect the covert nature of cartels, the harm to consumers and the adverse effects on the economy. The specific policy objectives of criminalising cartels are:
   • to promote the detection and deterrence of cartels (while ensuring that pro-competitive activity is not deterred)
   • to improve cartel enforcement by the Commerce Commission and facilitate New Zealand’s contribution to enforcements efforts against global cartels.

3. The Bill:
   • introduces a new criminal offence for cartel conduct, if the person ‘intentionally’ engages in price fixing, restricting output or allocating markets, and one of the exceptions or exemptions from the cartel prohibition does not apply
   • introduces a new defence to the criminal offence relating to ‘belief’ that the cartel provision was reasonably necessary, where ‘reasonable necessity’ is a requirement for one of the exceptions from the cartel prohibition to apply
   • sets the maximum sanctions for the cartel offence for individuals and companies, including up to seven years imprisonment for individuals
   • provides for matters relating to criminal cartel proceedings. This includes that the offence is classified as a Category 4 offence under the Criminal Procedure Act 2011 (i.e. heard in the High Court)
   • provides for a 2-year transitional period before commencement of the criminal offence.

4. The Bill has two Parts. Part 1 contains the substantive amendments to the principal Act which criminalises cartels. Part 2 makes consequential and related amendments.

Submissions received

5. The Committee received 20 written submissions on the Bill, although one submission did not have any content.
Six submitters (ACCC, Commerce Commission, Dr Edward Willis, John Land & Stewart Germann, NZ Shippers’ Council and Professor Peter Whelan) support the general intention of the Bill to criminalise cartels. Some of these submitters only support criminalisation in some circumstances.

Two submitters (DLA Piper and New Zealand Law Society) are neutral in their position and focus on amendments to improve the workability of the provisions.

Eleven submitters (Buddle Findlay, Business NZ, Franchise Association of New Zealand (FANZ), Horticulture New Zealand, Institute of Directors, John Gordon, Matthews Law, New Zealand Certified Builders Association (NZCBA), Russell McVeagh, Simpson Grierson and the New Zealand Initiative) oppose the Bill. However, if criminalisation of cartels is to proceed, many of these submitters recommend changes to the Bill to mitigate what they view as its adverse effects.

General comment on submissions

The case for criminalisation of cartels

The reasons for and against cartel criminalisation are well-canvassed in submissions. They include:

a) in support:

i. Existing civil monetary penalties are insufficient to deter serious cartel conduct and may be avoided or passed on to innocent shareholders or customers through lower dividends or higher prices.

ii. Criminalisation will improve detection and deterrence of cartel conduct through things such as enhancing the effectiveness of the Commerce Commission’s leniency regime.

iii. Criminalisation will make it easier for the Commerce Commission to investigate cartel conduct through enhancing its ability to cooperate with overseas and domestic agencies that also have criminal jurisdiction and through the availability of additional enforcement tools, such as extradition and interception devices.

b) in opposition:

i. There is no evidence of a problem warranting introduction of criminal sanctions.

ii. Criminalisation will have a chilling effect on competition and business.

iii. The costs of criminalisation for business and regulators will be significant and outweigh any perceived benefits.

We discuss the case for criminalisation of cartels in more detail in section 2 of this report.
If criminalised, most agree it should be reserved for serious cartel conduct

11. In general, if cartel conduct is to be criminalised, the submitters seek to ensure that it is well-targeted at serious cartel conduct. However, the way that they have approached this differs.

12. In addition, cartel conduct is regarded internationally as the most egregious form of contravening competition law. It has been characterised as ‘an unjustified interference in market forces’ and likened to insider trading, market manipulation and, in some cases, theft. This reflects the seriousness of the conduct in terms of its harmfulness to markets.

The Bill distinguishes criminal liability by reference to the actual ‘intention’ of the defendant

13. The Bill currently targets the offence at persons:

a) who enter into or give effect to arrangements that contain a cartel provision and who ‘intentionally’ engage in price fixing, restricting output or allocating markets and where none of the exceptions apply (such as the collaborative activities exception)

b) who did not have a ‘belief’ that the cartel conduct was reasonably necessary for the purposes of the collaborative activity (or in the case of international shipping, that the activity was reasonably necessary for the purpose of a cooperative shipping activity).

14. The element of ‘intention’ to engage in cartel conduct ensures the necessary level of culpability by the defendant. It is usually reserved in criminal law for the gravest cases of wrongdoing. The defendant must mean to price fix, restrict output or allocate markets. It cannot be accidental or as a consequence of recklessness.

15. There is also a defence if the person was ‘mistaken as to the facts’ about whether their conduct was reasonably necessary. The availability of this defence further supports that a person must have the necessary culpability in order to be criminally liable.

Many submitters are looking for something more to distinguish criminal liability

16. Many submitters are concerned that the proposed criminal offence simply parallels the civil prohibition in terms of what cartel conduct is. In August 2017, the definition of cartel conduct was amended from ‘price fixing’ to also include ‘restricting output and allocating markets’. These submitters consider that these amendments are untested and uncertain in their application. We consider that restricting output and market allocating was already captured by the previous prohibition to the extent that it maintained or influenced prices.

17. Others, such as the New Zealand Initiative, are concerned that mere ‘intention’ to engage in cartel conduct is insufficient to target criminal liability and something more is required to reflect ‘moral wrongfulness’ or ‘knowledge of wrongdoing’. A few submitters, such as the New Zealand Law Society, state that the meaning of ‘intention’ is unclear. They are concerned that merely entering into an arrangement that contains a cartel provision could be evidence of this intention.
18. Those submitters that wish to re-target the offence have recommended one or more of the following:

   a) narrowing the criminal conduct, such as making it only apply to bid-rigging or purposeful price-fixing

   b) incorporating further mental elements into the offence, such as that the person acted dishonestly, with knowledge of wrongdoing, or that they were deliberately deceptive

   c) widening the exceptions and defences to the offence, such as by excluding small businesses from liability, deeming franchises to be collaborative activities under the exception, exempting cartel conduct that is notified to the public or customers, or extending the belief defence to all elements of the exceptions

   d) 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.

But these submitters overlook the exceptions from cartel conduct in the Act and other protections that already exist

19. In our view, many of the submitters advocating further targeting of the offence may have understated the exceptions from the cartel prohibition in the Act which protect pro-competitive conduct.

The required element of ‘intention’

20. As mentioned, a key element of the offence is that the person ‘intentionally’ engages in price fixing, restricting output or allocating markets. Cartel law is a complex area, but we consider that the offence is well designed.

21. In particular:

   a) Contrary to the view of some submitters, an offence does not need to incorporate an element of ‘moral wrongfulness’ in order to distinguish the conduct as being criminal in nature. It is sufficient that the offence relates to conduct that can cause serious harm to others. For example, the inclusion of ‘dishonesty’ or ‘deliberate deception’ would incorrectly characterise cartel conduct and add unnecessary complexity in a trial. We consider that intentional cartel conduct can cause significant harm to others. It is ‘wrongful’ conduct to the extent that it is an unjustified interference in market forces with no redeeming benefits.

   b) The intention element in the offence does not relate to whether the person intends to merely enter into the agreement containing the cartel provision. Something more would be required. The person must intend to price fix, restrict output or allocate markets. It is the subjective intention of that person which matters and this would not simply be inferred by the person entering into the agreement.
c) Knowledge of wrongdoing is not required for conduct to be criminally liable in New Zealand and there is no reason for it to be required for contravention of this offence.

22. We consider that there is no need to further define the offence to better target culpability. Attempts to do so could create considerable complexity for criminal cartel prosecutions. We discuss the specific option of defining the offence by including ‘dishonesty’ in section 3 of this report.

The availability of the exceptions

23. In August 2017, the cartel prohibition in the Act was amended to include the three main forms of cartel conduct of price fixing, restricting output and allocating markets. This amendment is generally consistent with international practice. We consider that there is no reason to change this definition for the purposes of the criminal offence, as all three forms of cartel conduct can cause serious detriment.

24. Equally important, the 2017 amendments also widened the exceptions to the cartel conduct to carve out pro-competitive or efficiency-enhancing arrangements. This included widening the ‘joint venture’ exception to also include other forms of ‘collaborative activities’ and introducing a new ‘vertical supply contracts’ exception. In our view, many of the submissions have understated the availability of these exceptions when raising concerns.

25. For example, John Land and Stewart Germann raise examples in their submissions relating to franchising or distribution arrangements that contain restrictions on distribution or territories (e.g. pricing fixing or allocating markets). They state that it is unclear if these ‘common’ commercial arrangements would be exposed to criminal liability. We discuss these examples in more detail in section 3 of this report.

26. While a factual analysis is required, the franchise example appears to us to be covered by the exception for collaborative activities. In the t-shirt example, more information would be required as to the rationale for the constraint on internet sales. However, suggested amendments to clarify the application of the exceptions to franchises would unduly favour this business model over similar models and be technically difficult to do well. We also think that the exceptions better provide for franchises and distribution arrangements than the equivalent Australian provisions.

27. We consider that the fact that some of these exceptions are untested does not justify further narrowing the offence. Rather, it emphasises the importance of the Commerce Commission engaging in education and advocacy relating to the new cartel offence before it comes into effect. The Bill includes a two-year transitional period to allow the Commerce Commission to undertake this advocacy and to upskill for the new regime.

28. We also note that the Commerce Commission has prepared extensive guidance on the cartel regime following the 2017 amendments. This guidance will assist businesses to self-assess and could be added to as further precedent develops. Those businesses that remain uncertain on whether the collaborative activities exception applies will also be able to apply to the Commerce Commission for clearance.
Independent oversight of criminal proceedings

29. Some submitters, such as Matthews Law, raise concerns about the Commerce Commission’s approach to criminal enforcement.

30. We note that the Commerce Commission already has experience with enforcing parallel civil and criminal regimes. All criminal prosecutions are subject to the oversight and responsibility of the Solicitor-General under the Criminal Procedure Act 2011. In addition, the Commerce Commission has prepared guidelines on how it will exercise its prosecutorial discretion that are consistent with the Solicitor-General’s prosecution guidelines. These guidelines outline the key considerations in taking a criminal proceeding, which include considering the seriousness of the offending and the extent of any detriment to competition.

31. Some further protections in relation to criminal proceedings include:

   a) Commerce Commission settlements are voluntarily entered into by parties. Settlements (and the newly proposed enforceable undertakings in the Commerce Amendment Bill currently being considered by the Transport and Infrastructure Committee) may not include pecuniary penalties for contraventions, as only the court may determine if conduct contravenes the Act.

   b) Criminal cartel prosecutions will be undertaken by a Crown prosecutor who must act independently of the Commerce Commission (as required under the Criminal Procedure Act 2011).

   c) The proceedings will be overseen by the court and its sentencing discretion is subject to the purposes and principles of the Sentencing Act 2002, which includes having regard to the gravity of the offending.

32. We consider that criteria related to the exercise of prosecutorial discretion should not be further prescribed in the Bill. Instead, the Commerce Commission and Crown Law should prepare new guidelines that outline how they will work together in prosecutions. This would include how the leniency regime would operate in a criminal context. Leaving these matters to administrative guidelines provides more flexibility as to the matters that could be considered.
### Summary of recommendations

33. The following is a summary of recommendations for amendments to the Bill taken from the narrative of the report and the clause by clause analysis in Annex 1:

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<tr>
<th>Recommendations contained in the narrative of report</th>
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<tr>
<td><strong>The Offence:</strong> The element of dishonesty should not be included in the offence.</td>
<td>56</td>
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<tr>
<td><strong>Franchises:</strong> No change to the treatment of franchises in the Bill should be made.</td>
<td>81</td>
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<tr>
<td><strong>Franchises:</strong> The Commerce Commission should be invited to include franchises as a target group for its education and advocacy activities following the passage of the Bill. This may include the Commerce Commission preparing a fact sheet setting out their approach to applying the Act and the new provisions to franchise agreements.</td>
<td>81</td>
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<tr>
<th>Recommendations contained in the clause by clause analysis</th>
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<td><strong>Collaborative activities:</strong> The defence of ‘belief’ should be clarified to be ‘on reasonable grounds’.</td>
<td>304 cl 4- s82C(1)-(3)</td>
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<td><strong>Collaborative activities:</strong> Provide that directors, employees and agents of a body corporate that is involved in a collaborative activity are deemed to be involved in that collaborative activity.</td>
<td>308 cl 4 - s82C(1)-(3)</td>
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<td><strong>Notification of defences:</strong> Remove the “fully and fairly” qualifiers from the requirement to notify the prosecution of the intention to rely on a defence or exception.</td>
<td>402 cl 4- s82B(2)(b)</td>
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<td><strong>Prosecutions:</strong> Provide for the Solicitor-General to appoint a specialist panel of Crown prosecutors to carry out criminal cartel prosecutions.</td>
<td>508; New Section</td>
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2 The case for criminalisation of cartels

34. The Legislative Advisory Committee guidelines suggest the following principle applies when determining if conduct should be criminalised:

> Compelling reasons must exist to justify applying the criminal law to any conduct. The criminal law should be reserved only for conduct that society considers is sufficiently blameworthy to attract the consequences of a criminal conviction.

35. We believe this bar has been met; cartels cause harm, both to individuals and to the economy. While it is impossible to know the exact number of cartels or the amount of harm caused (as cartels by their very nature are secret), there is no reason to think that cartels do not operate in New Zealand given that our markets are concentrated.

36. We consider that there are three main advantages to New Zealand introducing criminal sanctions for serious cartel conduct.

   a) increased deterrence due to severe sanctions and associated stigma

   b) increased detection from benefits received as a result of leniency

   c) an improved ability for the Commerce Commission to cooperate and detect global cartel conduct.

Increased deterrence due to severe sanctions and associated stigma

37. The threat of criminal sanctions would likely lead to increased deterrence where those intending to engage in cartel conduct are more likely to hesitate to do so when faced with the associated social stigma and possible restriction of an individual’s freedom. We consider that the harm that cartels cause or have the potential to cause to the economy are worthy of such a stigma.

38. The OECD has noted that cartel activity is increasing worldwide with the number of international cartels discovered between 2010-2016 averaging 75 a year.¹ In light of this this international trend New Zealand law needs to contain a strong detriment against cartel conduct. The proposed criminal sanctions for cartel conduct effectively provide that detriment.

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Increased detection from benefits received as a result of leniency

39. Increased sanctions would improve the effectiveness of the leniency regime by increasing the value to the individual of applying for leniency.

40. The ACCC notes in its submission that it received an increase in leniency applications directly following criminalisation in Australia as businesses reflected on their conduct in light of the new sanctions. They further note that recent criminal cartel charges have resulted in a greater uptake of leniency applications.

41. We consider that a similar outcome will occur in New Zealand as businesses take the cartel prohibition seriously in light of criminal sanctions.

An improved ability to cooperate and detect global cartel conduct

42. Cooperation and detection are particularly important for global cartels where information is more likely to be shared with countries that have criminal regimes. Cartels often transcend jurisdictional boundaries. The Commission’s experience is that where cartel conduct is criminal in both jurisdictions, relevant agencies will be more willing to share information that is confidential, provide investigative assistance, or cooperate with investigations that affect both jurisdictions.

43. As the Commerce Commission notes in its written and oral submissions, there are numerous practical benefits to the Commission of criminalising including:

   a) enabling the Commission to seek extradition of cartel offenders located overseas to New Zealand

   b) the Commission will be able to seek formal government-to-government ‘mutual assistance’ under the Mutual Assistance in Criminal Matters Act 1992

   c) the Commission will be better able to share confidential information with overseas enforcement agencies and assist criminal investigations in other jurisdictions.

Potential chilling effect

44. We consider that the Bill is unlikely to lead to any chilling effect for business. We base this on three grounds:

   a) The sanctions for cartel conduct are changing, not the prohibited conduct. The Bill changes the sanctions for intentional cartel conduct. It does not extend the scope of what is already unlawful under the Act. The recent amendments were clarification amendments that made explicit what was already unlawful.
b) **The offence is well targeted.** The criminal offence does not target all unlawful cartel conduct. It only targets those with the necessary intention to engage price fixing, restricting output or allocating markets.

c) **Pro-competitive conduct is protected.** The regime contains a number of exceptions which protect pro-competitive conduct from being caught by the prohibition. These are complimented by the new criminal defence for the more complex of these exceptions where someone makes a mistake on whether one of the defences applied.
3 Questions raised by the Committee

Introduction

45. The Committee has asked for further advice on the following matters:
   a) Should the offence be re-defined to include the concept of ‘dishonesty’?
   b) How does the cartel regime apply to franchises?
   c) How the Act and the Bill applies to specific examples, such as setting maximum prices for doctors’ consultations for children
   d) Any protections for parties under investigation from undue pressures to settle.

46. We respond to these questions and matters in this section.

Should the offence include dishonesty?

47. The Committee has sought advice on the possible inclusion of dishonesty in the criminal cartel offence as a way to better target the offence. We do not believe including dishonesty as a feature of the criminal offence will achieve the underlying policy intent of the Bill. We also believe that doing so would be likely to lead to significant and unintended consequences for the successful enforcement of a criminal cartel regime. We outline the main justifications for why dishonesty should not be included below.

48. We consider (based on the UK example) that a dishonesty test has two limbs:
   a) The conduct is dishonest according to the standards of ordinary people, and
   b) The defendant knew it was dishonest according to those standards.

Dishonesty is a more complex concept that the name suggests

49. When considered in isolation from the complexities of a criminal cartel prosecution case, dishonesty appears simple and self-explanatory. However, in practice, dishonesty has been described as a ‘deceptively simple name for a complex concept’ and a confusing combination of the objective and subjective. For instance, knowledge that the conduct is morally wrong is not the same concept as dishonesty and serious offences in the criminal law do not necessarily require knowledge that the conduct is wrong in law or morally.

50. The subjective nature of dishonesty opens up the possibility for a defendant to potentially rely on an unmeritorious defence of ignorance or mistake of law. For example, a

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requirement for a defendant’s conduct to be dishonest according to the standards of ordinary people potentially allows large and sophisticated corporations to deny liability on the basis of mere beliefs about the legality of their conduct. Such complexity in what is captured within the bounds of ‘dishonesty’ and what is not, would likely lead to significant difficulty in the successful enforcement of criminal cartel offences.

The element of dishonesty is incapable of constraining a cartel offence only to serious cartel conduct

51. Limiting a criminal cartel offence to behaviour that is dishonest is not innately linked to serious harm or serious culpability. On culpability, dishonesty constitutes both mere transgressions of the law as well as determined, planned and unrepentant acts of cheating and deceit.

52. An intention to derive or obtain benefit is not indicative of seriousness – indeed such an intention is typical of legitimate commercial activity. As a result, dishonesty will not necessarily calibrate the criminal offence in a more targeted manner so that it captures only serious cartel conduct. There is also a risk that including dishonesty will open up the criminal offence to a wider conception of cartel conduct than just the most egregious of cartel conduct.

Dishonesty does not differentiate sufficiently between civil and criminal liability

53. The main justification for the inclusion of dishonesty in the criminal offence is that it signifies the ‘moral wrongfulness’ of the conduct and that this thus justifies or explains criminalising it. However, moral wrongfulness is not a sufficient condition for determining whether certain conduct warrants criminalisation. For example, cartel conduct which only amounts to a civil contravention is not morally neutral or even commendable.

54. Requiring dishonesty as an element of a criminal offence is thus not an accurate differentiator between civil cartel offences and those that attract criminal liability. This is because many civil cartel breaches, and to a certain extent all cases of cartel conduct, are likely to involve some form of dishonesty.

A dishonesty element does not accurately label or signal the distinct subject matter of cartel offences

55. Serious cartel conduct is fundamentally concerned with unjustified interferences with competitive market forces. In setting penalties in cartel cases, judges often encapsulate the harm caused by the conduct in terms of the distortion or interference with the competitive process and not to the dishonesty of the cartelists.

56. Critically, dishonesty relates not to interference with market forces, but to a breach of an obligation to act honestly in relation to one’s conduct. In this way, overlaying dishonesty in


a criminal cartel offence does not go to the heart of what is fundamentally wrong with cartel conduct that is, unjustified interferences with competitive markets.

Overseas experience with dishonesty indicates it is likely to be unworkable

57. The trouble and complexities of including dishonesty in a cartel offence has borne out in the UK’s adoption of dishonesty in their criminal cartel regime which was extensively criticised and then ultimately abandoned after few and overly difficult experiences with the concept in prosecutions. To this end, for the reasons above, neither the OECD nor the International Competition Network has advocated for the inclusion of dishonesty as an element to a cartel offence. Likewise, no other jurisdiction has followed the UK in making dishonesty a key determinant in criminalisation (though Australia briefly considered the possibility and then dropped the idea after significant criticism).

58. We believe that the element of dishonesty should not be included in the criminal offence.

How the Commerce Act and the Bill apply to franchises

What is franchising?

59. Franchising is a form of a licensing distribution arrangement. There are generally three types of franchises:

a) Product franchising is where a distributor supplies the product of a manufacturer, often with exclusive rights to sell within a specific market (e.g. motor vehicle dealerships or petrol retailers).

b) Manufacturing franchising is where an essential ingredient or technical information is all that is supplied, like in the manufacturing of soft drinks (e.g. a Coca-Cola franchise).

c) Business-format franchising is a mode of doing business based on a contract and licence, where a business (the franchisor) grants a person or company (the franchisee) the right to operate a copy of its business system for a specified period. A franchisor usually then concentrates on brand building, systems development and support, purchasing and strategic issues, while the franchisee focuses on its own business operations, customer service, staffing and day-to-day matters.

60. Another aspect to franchising is master, or sub-franchising. This can take several forms, but usually a franchisor grants a master franchisee the right to grant its franchises, rather than dealing directly with the franchisees. This allows the franchisor to concentrate on system development and strategic issues while the master franchisee focuses on regional expansion, recruitment of franchisees and support. These multi-tiered systems can exist not only within New Zealand, but across international boundaries as well.

61. A written franchise agreement is a central feature of franchising. It will set out the obligations of each party, the fees to be paid by the franchisee and should ensure that all likely issues related to the business efforts of the franchisor and the franchisee are addressed. Franchise agreements may include provisions relating to things such as
exclusive territories where the franchisee may operate, approved suppliers of goods or services as inputs, requirements on supply and recommended prices for resale of the goods or services.

How the cartel provisions apply to franchising

62. The cartel provisions in the Act apply to arrangements between competitors. There is a question as to whether franchisees are parties to an arrangement and whether they are competitors. The answer will depend on the particular circumstances. However, most business-format franchises will require franchisees to operate on the basis of a common form franchise agreement which is coordinated and enforced by the franchisor or master franchisee. This would likely form the basis of being an understanding between the franchisees and they may in turn be in competition to supply the franchised goods or services to customers.

63. We accept that many franchise agreements will include cartel provisions, being provisions relating to fixing prices, restricting output or allocating markets. These provisions are the means by which the franchisor protects their intellectual property and investment in the franchise. For example, in the case which touches most closely on franchises, the High Court has stated:

   In a real sense, a franchise agreement is a joint venture between the franchisor and franchisee, and sometimes between the franchisees as well. In those circumstances, I wonder whether a normal incident of the organization of such a business venture is easily subject to review under the Commerce Act. A franchisor in the position of Washworld will not license what are in fact copy-cat businesses unless able to protect itself later from the possibility of a franchisee using the franchise agreement as a springboard for competitive activity. So, such franchise agreements with their associated restraints may in fact promote the competitive process.\(^5\)

64. The Act recognises the benefits of franchise agreements by setting out three exceptions from the cartel prohibition. These exceptions focus on the substance of the arrangements rather than being specific to any particular business model or form.

The collaborative activity exception

65. A collaborative activity is defined in the Act as being an activity in trade that is:

   a) carried out in cooperation by two or more persons, and
   b) not carried out for the dominant purpose of lessening competition between them.

66. If any of the parties to the collaborative activity are in competition with each other and enter into an agreement that includes a cartel provision, then that cartel provision will not contravene the cartel prohibition if it is reasonably necessary for the purpose of that collaborative activity.

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\(^5\) Washworld Corporation (Leases) Ltd v Reid (1998) 8 TCLR 372 (HC), at 387-388 per Young J.
We consider that a genuine franchise is likely to be a collaborative activity. For example, business-format franchises require the franchisor (or master franchisee) and franchisees to carry out the franchise in cooperation with each other. These are by nature relational contracts and there is a high level of interdependence between the parties. Other product or manufacturing franchises may also involve cooperation by the parties. Furthermore, genuine franchises are generally unlikely to have a dominant purpose of lessening competition between the parties.

This would mean that the main requirement to determine whether franchising could contravene the cartel prohibition is whether each of the cartel provisions in a franchise agreement is 'reasonably necessary' for the purpose of the franchise. The term 'reasonably necessary' is used in a range of contexts in New Zealand law. It is not intended to be an overly onerous test. Businesses may consider whether the cartel provision is proportionate to the legitimate interests they are seeking protect and whether the provision is likely to benefit their customers.

For example, provisions specifying exclusive territories that a franchisee may operate in may be reasonably necessary to encourage that franchisee to invest, undertake the required training and provide the desired service quality to operate the franchise.

There is also a further provision in the collaborative activity exception to provide for cartel provisions that are restraints of trade after a franchise agreement has ended. This recognises that such restraints are likely to be reasonably necessary to enable the franchisor to protect their intellectual property and investment in the franchise.

**Vertical supply contract exception**

The vertical supply contract exception is also relevant to franchising. It requires that the cartel provisions are in a contract between the supplier of goods or services and a customer of that supplier. In addition, the cartel provisions must relate to the supply of goods or services to the customer and must not have the dominant purpose of lessening competition between the parties to the contract.

Any licensing distribution arrangements which do not relate to collaborative activities are likely to rely on this exception. An agreement to licence intellectual property is a supply of goods for the purpose of the Act. The franchisor or master franchisee may specify cartel provisions in the franchise agreement if those provisions relate to the licence of the intellectual property and/or any other goods or services supplied in relation to the franchise. The key constraints in this case is that the cartel provisions:

a) relate to the licence, goods and/or services supplied, and

b) do not have the dominant purpose of lessening competition between the parties.

For example, provisions specifying the maximum price at which the products may be resupplied by the licensee would likely be covered by this exception.

**Joint buying exception**

The third exception relates to joint buying. This exception applies if the cartel provision relates to the price of the goods or services to be collectively acquired by some or all of
the parties or provides for joint advertising of the price for resupply of goods or services acquired.

75. In some cases, franchisees may collectively acquire goods or services through the franchise agreement in order to achieve economies of scale of price and maintain quality. While we anticipate that most of these franchisees would be parties to a collaborative activity, this provision makes clear that the parties may also agree the price of the goods or services to be collectively acquired and jointly advertise the price for resupply. In such cases, it is not required to show that this cartel provision is 'reasonably necessary' for the purposes of the collaborative activity.

New offence and defence in the Bill

76. The new offence and defence in the Bill would only be relevant to the franchisor or franchisees that are already acting in contravention of the Act. In addition, the offence is further targeted to ensure that the contravening party has the necessary level of culpability in order to be criminally liable. That is, to be criminally liable the person must:

a) be a party to an agreement that contravenes the Act and intend to engage in price fixing, restricting output or allocating markets, and

b) not have a defence of a belief that the cartel provision was 'reasonably necessary' for the purpose of the franchise.

77. We anticipate that genuine franchises would not contravene the cartel prohibition if these exceptions are taken into account. If the exceptions do not apply, the agreement would likely contravene the Act.

Options raised by submitters

78. Submissions from Simpson Grierson, John Land and Stewart Germann, and FANZ in particular, raise concerns about the uncertainty of the application of the Bill to franchise agreements. The options include:

a) narrowing the cartel offence so that it only applies to purposeful price fixing

b) providing that the cartel offence only applies to large companies (noting that most franchises are small businesses)

c) deeming that franchises are collaborative activities

d) providing that parties to a franchise may apply for clearance.

79. The first two options are not supported as they are not a principled basis for designing the offence. The options of deeming franchises to be collaborative activities or enabling franchises preference in applying for clearance are also not supported. While we consider that most franchises will be collaborative activities, deeming franchises to be a collaborative activity would:
a) give undue preference to a particular business model, when franchising is only one form of distribution arrangement. The collaborative activity exception is designed to focus on the substance of the arrangements and not its form.

b) raise complex issues in terms of how to define a franchise for the purpose of this provision.

Recommendation

80. We recommend no change to the treatment of franchises in the Bill. The Commerce Commission should be invited to include franchises as a target group for its education and advocacy activities following the passage of the Bill. This may include the Commerce Commission preparing a fact sheet setting out their approach to applying the Act and the new provisions to franchise agreements.

Examples of how the Act and the new regime will apply

81. The Committee asked for advice on how the Act and the Bill would apply to some of the examples given by submitters.

82. Before doing so, we believe it is important to note that the submitters often cite these examples as evidence of uncertainty resulting from the August 2017 amendments to the cartel regime in the Act. There is a general view in submissions that the change to the definition of ‘cartel provision’ for the purposes of the cartel prohibition in section 30 of the Act has significantly widened its application to capture common commercial arrangements.

83. The Commerce Commission has commented on these concerns in its Competitor Collaboration Guidelines:

   We see the new section 30 as describing cartel conduct in more detail than the former section 30. For the most part, we consider that conduct that was price fixing before the relevant provisions of the Amendment Act came into force will remain cartel conduct under the new section 30.

   Furthermore, as a general rule we regard agreements between competitors to restrict output or capacity or to allocate markets or customers, as price fixing conduct under the former section 30, and therefore as unlawful. Under the new section 30 those types of conduct are specifically mentioned as cartel conduct that will remain unlawful.6

84. Consequently, we consider that many of those examples that indicate there is a risk of contravening the Act were likely to also have contravened the Act prior to 2017. In addition, while previously being at risk of contravening the Act, some of these examples may benefit from the expanded exceptions to the cartel prohibition introduced in 2017. We also note that the Bill will not change this position as it is only focused on truly culpable cartel conduct which is deserving of criminal liability.

Fixing maximum prices for doctors’ visits for children (referred to in oral submission by New Zealand Initiative)

The example – Doctors agree to fix prices for children’s visits

85. In this example, doctors in a low decile community get together and agree a maximum child consultation price for the benefit of the community (price fixing).

86. Other similar examples are given by Matthews Law in their submission. For example:

   a) pubs in a university town agreeing to impose an earlier closing time to curb drunken behaviour (an output restriction)
   
   b) competing supermarkets agreeing not to offer free plastic bags to customers to reduce waste (price fixing, output restriction)
   
   c) doctors agreeing to cap fees for the elderly (price fixing)
   
   d) car dealers agreeing not to sell cars with perceived safety issues, such as potentially faulty airbags (output restriction).

Comment

87. The above are all examples of competitors getting together to agree to lessen competition between them. While their intentions may be in the public interest, this relies upon the agreed restrictions somehow being better for consumers than the competitive outcome. For example:

   a) The doctors could easily agree to fix higher prices for adult patients to offset the lower prices for children’s visits, or they could agree not to accept new patients that have health risks requiring a higher number of visits as a result.
   
   b) The supermarkets could have agreed to impose a fixed charge for the plastic bags that would then be passed on to customers at the point of sale, with that charge exceeding the actual cost of the plastic bag.

88. These outcomes would not necessarily make the public better off. A more detailed assessment of the arrangement as a whole may be required.

89. It is not unlawful in any of these examples for the parties to unilaterally decide to supply the goods or services at the lower price or at a restricted output. For example, Progressive Enterprises and Foodstuffs (as New Zealand’s two competing supermarket chains) have each independently decided to restrict their supply of free single-use plastic bags. They are continuing to compete in relation to how they phase in this restriction and in the range of alternative services that they offer.

90. If the parties consider that an agreement between them is necessary to give effect to the arrangement, they have the option of applying to the Commerce Commission for authorisation. The Commission may grant authorisation for an agreement if it considers the public interest in the arrangement outweighs the competition detriment. As part of this analysis, the Commission would consider whether the cartel provisions are necessary
to achieve the public benefits or whether those same public benefits could be achieved by less restrictive means.

91. The Commission has issued guidelines on its authorisation procedure (July 2013). These guidelines also include a streamlined procedure for straightforward applications that are clearly in the public interest and have limited impacts on competition.

Collaborative activity and joint buying exceptions – price fixing to acquire goods from an approved supplier (referred to in submission by John Land and Stewart Germann)

The example – Happier Homes Franchise

92. Happier Homes Ltd is the franchisor of a network of home building companies using the Happier Homes brand. Happier Homes Ltd, through its subsidiary company, also builds houses sold through offices located in Central Auckland and Manakau. The company has appointed 20 other independent franchisees around the country, including three in the Auckland region at Takapuna, Albany and Henderson.

93. The standard franchise agreement in use provides that all franchisees are required to separately purchase all building supplies and other materials only from a list of approved suppliers provided by Happier Homes Ltd, and at prices negotiated by Happier Homes Ltd with the suppliers on behalf of the franchisees.

Comment

94. Happier Homes Ltd, acting through its subsidiary company, and the franchisees are likely to be considered competitors for the purpose of the Act. In addition, two of the requirements outlined above would likely be cartel provisions:

a) the requirement on franchisees to buy product at the prices negotiated by the franchisor (price fixing)

b) the requirement to only deal with approved suppliers (market allocating).

95. For the purposes of the exceptions, the Happier Homes franchise is likely to be viewed as a collaborative activity. The franchise involves the Happier Homes Ltd and the franchisees cooperating with each other to expand sales and provide quality services to customers. This arrangement does not appear to have a dominant purpose of lessening competition between them.

96. For the collaborative activity exception to apply, the two cartel provisions must be 'reasonably necessary' for the purpose of the franchise. In this example information has also been provided as to Happier Homes Ltd’s rationale for the provisions. That is, the provisions are to enable the Happier Homes franchise network to compete better with other building companies by:

a) ensuring that a consistent quality of building materials is used by all franchisees. thus enabling the Happier Homes brand to be positioned in the market as representing a certain quality and standard
b) reducing building supply costs for the franchise network due to the ability for the
franchisor to negotiate bulk supply deals with the relevant suppliers using the
purchasing volume of all franchisees. If franchisees entered into their own individual
negotiations with suppliers this would undermine the ability for the franchisor to get
the best deal for the franchise group as a whole.

97. These appear to be objectively reasonable rationales such that the exception would likely
apply. That is, that there would be no contravention of the cartel prohibition in the Act.

Vertical supply contract – restriction on internet sales (referred to in submission
by John Land and Stewart Germann).

The example – Got the T-shirt Ltd

98. Got the T-shirt Ltd is the manufacturer of designed t-shirts based in New Zealand. It sells
those t-shirts via its website intended primarily for overseas customers but New Zealand
consumers can also purchase this way. It also supplies t-shirts to various shop retailers
throughout New Zealand. Up until now, it has supplied the retailers pursuant to casual
supply arrangements. It now decides to formalise the supply arrangements by new formal
supply agreements with each retailer and seeks legal advice. It wants to include a provision
to require retailers to only sell the t-shirts from their own retail stores and not via the
internet (e.g. on its own website or through TradeMe).

Comment

99. The proposed restriction on the shop retailers preventing them from selling via the
internet is likely to be cartel provision. In this example, the manufacturer, Got the T-shirt
Ltd, and the retailers are competitors for the sale of t-shirts to customers.

100. It is unclear from the information given why Got the T-shirt Ltd is seeking to restrict
internet sales when previously this has been permitted. It would be useful to know from
Got the T-shirt Ltd how it sees this restriction would benefit New Zealand consumers. For
example, will it increase the volume of sales, lower prices, or promote better quality
services? The potential detriment is that Got the T-shirt Ltd is seeking to restrict
competition for its t-shirts and maintain its prices.

101. For the purposes of the exceptions, the relationship between Got the T-shirt Ltd and the
shop retailers is not a collaborative activity, as the parties are not acting in cooperation
with each other. However, as the restriction is to be a provision in a formal agreement, the
vertical supply contracts exception may apply. The elements of this exception would
assess the restriction by asking:

a) Does it 'relate to' the supply by Got the T-shirt Ltd of t-shirts to the retailers? The
restriction appears to relate to the t-shirts supplied but it is not clear that there is a
close connection between the restriction and the supply of the t-shirts. The fact that
Got the T-shirt Ltd was supplying the t-shirts to the retailers previously without the
restriction is a relevant factor.

b) Is the dominant purpose of the restriction to lessen competition between the
parties? As mentioned, it is not clear why the restriction is being imposed. If the
purpose of the restriction is to stop the retailers from undercutting Got the T-shirt Ltd on price, the exception would not apply.

102. If the exception applies, the arrangement would be further assessed to determine if it has the purpose, effect or likely effect of substantially lessening competition in the market. If the exception does not apply, the arrangement would contravene the Act. Without further explanation, this restriction on internet sales could be at risk of contravening the Act.

What happens if the conduct contravenes the Act

103. If the Commerce Commission conducts an investigation and concludes that the conduct is likely to contravene the Act, it has a range of enforcement responses. These are set out in it Enforcement Response Guidelines (October 2013).

104. The figure below sets out the Commerce Commission’s Enforcement Response Model.

![Commerce Commission Enforcement Response Model](image)

105. The Commerce Commission chooses the appropriate enforcement response after applying its enforcement criteria:

   a) the extent of harm
   
   b) the seriousness of the conduct
   
   c) the public interest.

106. The enforcement responses range from education to court proceedings. Low-level enforcement responses (such as no further action, compliance advice letter and warning letter) are intended to educate businesses and persuade them to modify their behaviour. Circumstances where this response is taken include if the harm is low or easily remedied, the offender is cooperative and willing to comply, it was a first-time breach, or where the public interest does not favour litigation.

107. Higher level responses are more likely to be taken if the harm is great, the conduct is serious or there is a compelling public interest. In such cases, the Commerce Commission
may consider that the most appropriate way to achieve its compliance and enforcement objectives is to issue court proceedings. Such cases may include those where:

a) the conduct is of significant public interest or concern
b) the conduct is deliberate, sophisticated, serious or repeated
c) there has been a disregard for the law
d) the harm is or was widespread or serious, or likely to spread without intervention
e) the victims include disadvantaged or vulnerable members of the community
f) the breach is hard to detect
g) the defendant’s attitude is uncooperative or the defendant is a repeat offender
h) the Commission wants to deter other businesses or people from the same type of conduct
i) the Commission wants to recover compensation or obtain orders that only a court can make (for example, banning a person from operating a company);
j) the Commission wants a court to determine an important or uncertain question of law, for example, taking ‘grey area’ cases in order to provide important public precedent.

Civil or criminal

108. The Commerce Commission is also experienced in enforcing legislation where there is a choice between commencing civil and criminal proceedings (e.g. under the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003). It will make this choice taking into account factors such as:

a) the seriousness of the conduct and its consequences
b) whether the conduct was deliberate or blameworthy
c) whether the law being enforced is long-standing and well understood
d) whether and what time limitations apply (these can differ between criminal and civil cases)
e) the sufficiency of the evidence, and the standard of proof required (civil cases must be proved on the ‘balance of probabilities’, while criminal cases require proof ‘beyond reasonable doubt’) and
f) the remedies that are available.

109. Decisions to initiate a criminal prosecution would also take into account the test for criminal prosecutions in the Solicitor-General’s Prosecution Guidelines, being that:
a) the evidence which can be adduced in court is sufficient to provide a “reasonable prospect of conviction” (i.e. the Evidential Test), and

b) criminal prosecution is required in the public interest (i.e. the Public Interest Test).

110. The Solicitor-General’s Prosecution Guidelines contain detailed guidance on the application of the two limbs of the test. Both limbs must be satisfied before making a decision to commence a criminal prosecution. Every decision to prosecute must be taken by the majority of Commerce Commission members sitting as the relevant Division.

The likely enforcement response in these examples

111. For the purposes of this report, we assume that the doctors have entered into price fixing agreements for the benefit of the community and Got the T-shirt has imposed a restriction on internet sales by its shop retailers.

112. If the Commerce Commission detected this conduct and had reason to believe that it contravened the Act, the Commerce Commission would consider its enforcement and prosecutorial guidelines looking at the evidence and the public interest in the particular case.

113. Based on the information provided, we think that a warning to the doctors would be a proportionate enforcement response. In the case of Got the T-shirt Ltd, more information would be required. We expect that there would need to be some evidence of culpability and harm to the market before the option of initiating court proceedings would be considered.

114. We note that in practice, enforcement decisions are at the Commission’s discretion and the discussion here is merely illustrative and is provided solely to assist the Committee.

Pressures on parties under investigation to settle

115. The Committee asked for advice on what protections are available for persons subject to investigations to avoid undue pressures to settle their case with the Commerce Commission, particularly once a criminal offence is introduced.

116. Currently, settlements (for civil matters) could result in any of the following outcomes:

a) ceasing conduct that is harmful

b) admission of liability

c) recommendations as to the penalty for consideration by the court

d) orders for paying actual costs to the Commission

e) compensation to the affected parties

f) remedies to address the competition detriments.

117. As noted by the Commission, negotiated settlements have the following benefits:
a) lower cost to all parties
b) faster outcomes
c) greater flexibility of terms and outcome, and
d) greater control of the process, including timing.

118. The Commission currently settles numerous cases each year. The Commission approaches settlements in a principled and transparent manner as spelled out in the Commission’s Enforcement Response Guidelines.

119. The settlement process in itself is voluntary. In particular, the Commission accepts approaches regarding settlement but it does not make such approaches itself. It is difficult to see how the Commission could exert undue pressure on a party as it does not commence settlement discussions but rather waits for approaches by other parties.

120. Any settlement involving a penalty needs to be approved by a Judge. This adds an additional safeguard ensuring the propriety of the process. At all times the actions of the Commission are judicially reviewable by the courts.

121. Ordinarily, parties interacting with the Commission have the benefit of counsel which will ensure their clients are well advised as to their options.
### Annex 1: Clause by clause analysis of submissions

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<th>Table number</th>
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<th>Clause numbers</th>
<th>Bill page numbers</th>
<th>Key and Table number</th>
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<td>1</td>
<td>General comments on the merits of criminalisation</td>
<td>n/a</td>
<td>n/a</td>
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<td>2</td>
<td>The offence relating to cartel conduct</td>
<td>4 [ss82B(1)]</td>
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<td>3</td>
<td>The defences and exceptions</td>
<td>4 [s82C]</td>
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<td>4</td>
<td>Other matters relating to the offence and criminal proceedings</td>
<td>4 [s82B(3)] and 14</td>
<td>3 &amp; 6</td>
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<td>5</td>
<td>Matters not covered in the Bill</td>
<td>n/a</td>
<td>n/a</td>
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<tr>
<td>6</td>
<td>Commencement/transitional period</td>
<td>2</td>
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<td>7</td>
<td>Governance and resourcing of the Commerce Commission</td>
<td>n/a</td>
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## Table 1: General comments on the merits of criminalisation

<table>
<thead>
<tr>
<th>Item</th>
<th>Submitter</th>
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<th>Comments</th>
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<tr>
<td><strong>101</strong></td>
<td>Commerce Commission, ACCC</td>
<td><em>Improves effectiveness of leniency regime</em>&lt;br&gt;Increased use of leniency programme improves detection and deterrence of cartel conduct. The potential for imprisonment increases the ‘stakes’. It may increase a cartelist’s incentives to not engage in cartel conduct or to seek leniency, including driving a wedge between the company and its officers who could face imprisonment from being involved in cartel conduct. Multinational leniency applicants may devote more resources to securing and retaining leniency in those jurisdictions with criminal sanctions.</td>
<td>Noted&lt;br&gt;Australian experience indicates that criminalisation increases the number of leniency applications and did have an increased deterrence effect.</td>
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<tr>
<td><strong>102</strong></td>
<td>ACCC</td>
<td><em>Has educative value</em>&lt;br&gt;Sends a clear message to potential cartelists that such conduct carries a high level of condemnation from the community generally and is not merely a regulatory concern; hence it has an educative function.</td>
<td>Noted</td>
</tr>
<tr>
<td><strong>103</strong></td>
<td>Commerce Commission, ACCC, Professor Peter Whelan</td>
<td><em>Monetary penalties set too low or can be avoided</em>&lt;br&gt;Some businesses and their executives may consider ‘monetary civil penalties’ as a cost of doing business.&lt;br&gt;Monetary penalties are unlikely to be set at the ‘optimal’ level to ensure deterrence if set to take into account ability to pay. There is also the potential for businesses to pass on the cost of fines to consumers or shareholders or be indemnified for the costs (bypassing the prohibition in the Act against indemnification).</td>
<td>Noted</td>
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<td>Item</td>
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| 104  | Commerce Commission, ACCC | *Improves ease of investigations and cooperation with other agencies*  
Improved investigation cooperation with other international agencies having criminal regimes (e.g. Australia, Japan, Canada, USA and UK), including being able to use the formal Mutual Assistance in Criminal Matters Act 1992 and extradition procedures. Improved investigation cooperation and technical assistance from domestic agencies having criminal regimes (e.g. Police and Serious Fraud Office). | Noted  
ACCC experience is that criminalisation has increased the ability and willingness of overseas regulators with criminal regimes to provide investigative assistance. |
| 105  | NZ Shippers Council | *General support for criminalisation of cartels for international shipping* | Noted  
Australia has had two successful criminal cartel prosecutions against international shipping companies. |

**Submissions opposed to criminalisation of cartels (or opposed to offence as currently drafted)**

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<tr>
<th>Item</th>
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</table>
| 106  | Buddle Findlay, Institute of Directors, Business NZ, New Zealand Initiative, FANZ, Horticulture NZ | *No evidence of a problem with cartels*  
No evidence of problem with cartel conduct in New Zealand (e.g. the Commerce Commission’s Annual Reports for 2016 and 2017 outline the effectiveness of the civil regime, including low recidivism and steady increase in the number of leniency requests). Alignment with criminal law in overseas jurisdictions is not a sufficient justification for change. | Noted  
The secretive nature of cartels means that it is difficult to quantify their existence in New Zealand. Internationally, there is evidence of increasing cartel activity. |
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<th>Item</th>
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<tr>
<td>107</td>
<td>Buddle Findlay, Institute of Directors, Business NZ, New Zealand Initiative, FANZ, Matthews Law, Dr Edward Willis, John Gordon, Horticulture NZ, Institute of Directors, John Land &amp; Stewart Germann, NZCBA, Russell McVeagh, Simpson Grierson</td>
<td><em>Criminalisation will have a chilling effect on competition</em>&lt;br&gt;Potential increased chilling effect on business conduct and competition due to uncertainty about the scope of the offence and defences and the Commerce Commission’s approach to enforcement. This could be particularly costly in a small economy that relies on collaboration to produce benefits, such as economies of scale.</td>
<td>Noted&lt;br&gt;The exceptions allow for a wide range of collaboration activities (broader than the joint venture exception in Australia). Businesses should be able to self-assess their activities. It will be important for the Commerce Commission to provide guidance and education for businesses.</td>
</tr>
<tr>
<td>108</td>
<td>Buddle Findlay, Matthews Law, FANZ, Russell McVeagh, Horticulture NZ, Institute of Directors, Simpson Grierson</td>
<td><em>Existing civil sanctions and enforcement tools are sufficient</em>&lt;br&gt;Civil sanctions are sufficient and the maximums have not been imposed to date. The Commerce Commission already has powerful investigative tools, including the ability to conduct dawn raids and compulsorily gather information.</td>
<td>Noted&lt;br&gt;Overseas experience with other comparable commercial conduct suggests that civil sanctions alone are insufficient to deter cartel conduct.</td>
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<td>Item</td>
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| 109  | Institute of Directors, Business NZ, New Zealand Initiative, FANZ, Matthews Law, Russell McVeagh, Horticulture NZ, Simpson Grierson, Dr Edward Willis | *Criminalisation imposes significant costs on businesses and regulators*  
Imposes significant costs on business, such as boards needing to spend disproportionate amounts of time on conformance rather than performance. Increasing risks for directors can deter effective persons from serving on boards. It also imposes significant costs on regulators, such as from the higher burden of proof and evidential standards. | *Noted*  
The conduct elements of the offence do not significantly differ from the civil prohibition, so businesses should already be turning their mind to compliance. The Commerce Commission will only take a criminal prosecution if the public interest and evidence supports it. |
| 110  | Dr Edward Willis, Institute of Directors, New Zealand Initiative, Russell McVeagh, Horticulture NZ, Simpson Grierson | *Claimed benefits of criminalisation overstated*  
Criminalisation may have negligible impact on strengthening deterrence in the majority of situations where New Zealand businesses are not aware that their conduct is unlawful, let alone criminal. It may also reduce deterrence if the Commerce Commission’s leniency policy is undermined or the institutional challenges of criminal proceedings reduce the likelihood of successful criminal prosecutions other than in the most egregious cases. It could also negatively impact on international cooperation with jurisdictions that do not have a criminal cartel offence. | *Noted*  
The Commerce Commission should undertake education and advocacy activities with businesses. It will also be expected to work with Crown Law in relation to criminal prosecutions to ensure an effective process. |
Table 2: The offence relating to cartel conduct (Clause 4 [s82B(1)], p. 2)

<table>
<thead>
<tr>
<th>Item</th>
<th>Clause - section</th>
<th>Submitter(s)</th>
<th>Submission</th>
<th>Comments</th>
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</table>
| **Item 201** | General | Professor Peter Whelan | The cartel offence should capture ‘wrongfulness’  
The cartel offence should be defined in such a way that captures the wrongfulness of cartel activity. If not, it may be perceived as unjust, juries may be unwilling to convict if the punishment is perceived as unfair and the criminal law may lose its legitimacy. If the offence is seen as legitimate, then compliance with the law will be more pronounced. | Disagree in part  
A more detailed discussion is included above in section 1. Intentional cartel conduct may be characterised as ‘an unjustified interference in market forces’. It has similarities to insider trading and market manipulation which are also criminalised. |
| **Item 202** | General | Commerce Commission  
Dr Edward Willis | The elements of the cartel offence and defence should be clear  
The criminal offence and defences should be expressed in a way that is clear and readily intelligible to a lay-reader, and which leaves the Commerce Commission well-placed to secure a conviction in suitable cases.  
The key policy question is whether the distinction between efficiency-enhancing conduct and harmful cartel conduct is sufficiently clear and appropriately defined so that criminalisation does not inadvertently or unnecessarily inhibit desirable collaboration. | Agree in part  
Clarity in the design of the offence and defences is desirable, as is finding the right balance between deterring harmful collusion and beneficial collaboration. The challenge is achieving clarity and the necessary specificity for targeting the offence in a way that is workable. |
| **Item 203** | General | New Zealand Initiative | Reliance should not be placed on prosecutorial discretion to define criminal conduct  
It is highly unsatisfactory – and offends the rule of law – for criminal offences to be cast more widely than necessary, as this leaves potential defendants at the mercy of the prosecuting agency. | Noted  
See discussion in section 1 on prosecutorial discretion. The exceptions and proposed defences are critical to targeting the criminal liability just to egregious cartel conduct. |
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<tr>
<th>Item</th>
<th>Clause - section</th>
<th>Submitter(s)</th>
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<td>204</td>
<td>cl4 - ss82B(1)</td>
<td>John Land &amp; Stewart Germann, John Gordon, Dr Edward Willis</td>
<td><em>The offence should not simply parallel the physical elements of the civil cartel prohibition</em>&lt;br&gt;The meaning of ‘cartel provision’ was amended in August 2017 to include restricting output and allocating markets, and the exceptions were correspondingly widened. However, the expanded prohibited conduct now captures quite common commercial arrangements (e.g. distribution arrangements, joint ventures and franchises) and the exceptions to a breach are untested and uncertain in their application. The Commerce Commission guidelines released in January 2018 are 50 pages long and there remains room for considerable debate. These submitters advocate for narrowing the physical elements of the offence.</td>
<td>Disagree&lt;br&gt;The three forms of cartel conduct, i.e. price fixing, restricting output and allocating markets, can all cause serious harm to markets. Some uncertainty is inevitable when laws are amended, but this can be addressed with education and guidance by the Commerce Commission. The Bill includes a two-year transitional period for businesses to familiarise themselves with the new provisions.</td>
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<td>205</td>
<td>cl4 - ss82B(1)</td>
<td>Commerce Commission</td>
<td><em>The parallel civil and criminal cartel regimes will be workable</em>&lt;br&gt;The Commerce Commission has lengthy experience working with dual criminal and civil regimes under the Fair Trading Act 1986 and Credit Contracts and Consumer Finance Act 2003. It routinely makes a decision on which jurisdiction (civil or criminal) is most suited to the matter at hand. It has published Criminal Prosecution Guidelines on its approach.</td>
<td>Agree</td>
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| 206  | cl4 - ss82B(1) and s30A of Act | ACCC | *The parallel civil and criminal cartel regimes should be extended to include bid-rigging as a specific class of cartel conduct*  
The OECD definition of hard core cartels includes bid-rigging as a specific from of cartel conduct. In a small country like New Zealand, government tenders are at risk of collusion due to the small number of prospective tenderers making it easier. The civil prohibition in section 30 and the parallel proposed criminal offence do not expressly prohibit bid rigging. Bid rigging may be able to be covered by the prohibition against market allocating, but it would require technical legal arguments which creates legal uncertainty and makes prosecutions more difficult. The lack of a specific bid rigging prohibition and offence may also undermine the ability of the ACCC to cooperate with the Commerce Commission to address trans-Tasman bid rigging. | Disagree  
Bid-rigging will often involve price fixing (e.g. cover pricing) or overlap with restricting output or allocating markets. Proof of these elements is no more technical or complex than would be involved in a separate bid-rigging offence. We see no reason why relying on the general cartel provisions rather than an explicit bid-rigging prohibition/offence would undermine the ability of the ACCC to cooperate with the Commerce Commission. |
| 207  | cl4 - ss82B(1) | John Land & Stewart Germann, John Gordon | *The offence should only be targeted at clear cases of price fixing*  
The offence in section 82B should be targeted at arrangements between competitors that have the purpose of fixing, controlling or maintaining prices in a market, and where none of the exceptions apply. Price fixing is better understood by the business community. The current expanded cartel provisions are complex and untested. Seeking clearance from the Commerce Commission is costly and in some cases impractical. | Disagree  
Serious cartel conduct is not limited to price fixing. Other jurisdictions with cartel offences (e.g. USA, Canada and Australia) do not limit their offences to price fixing. The transitional period will allow businesses to become familiar with the new offence. |
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| 208  | cl4 - ss82B(1)   | John Land & Stewart Germann, John Gordon | The offence should exclude arrangements that have a likely or incidental effect of controlling or maintaining price  
The offence in section 82B should be targeted at arrangements between competitors that contain provisions that have the ‘purpose’ of fixing, controlling or maintaining price. It should exclude circumstances where the provisions may only have a ‘likely’ or ‘incidental’ effect of controlling or maintaining price (i.e. where that effect is not the result of a deliberate or reckless action). | Disagree  
The offence will only apply if the person ‘intentionally’ engages in price fixing, restricting output or market allocating. It will not apply if this outcome was accidental. These submissions misunderstand the offence, as ‘purpose, effect or likely effect’ are not elements of ‘price fixing, restricting output or market allocating’. |
| 209  | cl4 - ss82B(1)   | Dr Edward Willis | The offence should be targeted at unambiguously egregious conduct (i.e. bid rigging and deliberately deceptive coordination by competitors)  
The offence in section 82B should be replaced with two new stand-alone offences relating to (a) bid-rigging and (b) cartel conduct that involves coordination in a deliberately deceptive manner. The element of ‘deliberate deception’ incorporates a mens rea element that is essential for a criminal offence and it delineates conduct for which there is no economic justification. The New Zealand economy does not benefit from deception. All other horizontal conduct could be treated as a regulatory offence only, and not be subject to criminal sanctions. If this more limited model proves successful over time, criminalisation could be extended to other horizontal conduct on a case by case basis on the merits of that success. | Disagree  
Deliberate deception does not appropriately characterise cartel conduct. Overt cartel conduct may be just as harmful (e.g. OPEC oil cartel). Rather, cartel conduct is ‘an unjustified interference with, or subversion of, the competitive process’, and can be likened to insider trading or market manipulation. |
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<td>210</td>
<td>cl4 - ss82B(1)</td>
<td>FANZ</td>
<td>The element of ‘intention’ is insufficient to target the offence</td>
<td>Disagree</td>
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Many franchise agreements include cartel provisions (e.g. territorial restrictions), which the franchisees ‘intentionally’ engage in. This places heavy reliance on franchises being covered by one of the exceptions, such as for collaborative activities. These exceptions are complex and untested. Many small business people (often ‘one-person bands’ such as cleaning and home service franchisees) do not have access to legal advice nor the resources to apply to the Commerce Commission for clearance. The impact of their conduct on the market may be minimal due to their small market share.

For example, a junior staff member of a small business agreeing to a sales promotion with what turns out to be a competing business would be captured by the Bill. The staff member may have had the intention of increasing sales for both businesses. This would be pro-competitive in practice but in doing so the member may end up carrying out market allocation or price fixing without being aware there is a criminal law against it.

Intention alone may not convey sufficient blameworthiness. Some knowledge of the wrongdoing should be required. The proposed offence is not supported.
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<td>211</td>
<td>cl4 - ss82B(1)</td>
<td>Matthews Law, NZCBA</td>
<td><em>The meaning of ‘intention’ should be made clearer</em>&lt;br&gt;A key element of the offence is the requirement to prove the person intended to engage in price fixing, restricting output or market allocating. A concern is that a prosecutor may argue that the simple act of entering into an arrangement that contains a cartel provision is sufficient to show the requisite intention to have that outcome. The Bill should be clearer that something more is required (e.g. moral wrongfulness) and not simply rely on Commerce Commission guidelines.</td>
<td><em>Disagree</em>&lt;br&gt;‘Intention’ in this context is subjective. It will be insufficient for the prosecutor to say that the defendant intended to engage in conduct that objectively amounted to price fixing. It must be the defendants’ actual aim.&lt;br&gt;‘Moral wrongfulness’ is a vague concept and should not be required as an element of the offence.</td>
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<td>212</td>
<td>cl4 - ss82B(1)</td>
<td>New Zealand Law Society</td>
<td><em>The ‘intention’ element should include ‘knowledge’ and be defined</em>&lt;br&gt;A person who engages in price fixing, etc. may do so intentionally, but without knowledge or reckless intent as to whether their activities amount to cartel conduct. There is also uncertainty in the case law about the meaning of ‘intention’. It could be limited to ‘actual knowledge’ of the consequences of the arrangement (i.e. to fix prices, etc.) or also include ‘recklessness’ as to those consequences. For the avoidance of doubt, a new subsection should be added clarifying that a person intends to engage in price fixing, etc. if that person: &lt;ul&gt;&lt;li&gt;knows that the contract, arrangement or understanding has the purpose, effect or likely effect of price fixing, restricting output or market allocating; or&lt;/li&gt;&lt;li&gt;is reckless as to whether the contract, arrangement or understanding has the purpose, effect or likely effect of price fixing, restricting output or market allocating.&lt;/li&gt;&lt;/ul&gt;</td>
<td><em>Disagree</em>&lt;br&gt;Knowledge of wrongdoing is not required to establish an offence. Intention requires that the person must mean to bring about that consequence and is a narrower concept than recklessness.&lt;br&gt;The proposed definition also incorrectly requires ‘knowledge’ of the arrangement or ‘recklessness’ as to the consequence. Intention to price fix, restrict output or allocate markets is more targeted.</td>
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| 213  | cl4 - ss82B(1) and ss2(8) of Act | NZCBA | **Unclear on status of recommendations made by association**  
Section 2(8) of the Commerce Act deems that:  
• arrangements entered into by an association shall be arrangements entered into by its members  
• any recommendation by an association to its members is an arrangement made between its members and the association.  
A concern is that a competitively benign statement by the association to its members could later be classed as a recommendation in relation to fixing prices, restricting output or allocating markets in contravention of the cartel prohibition. It is unclear if the fact the association intentionally made the recommendation is evidence that it had the requisite intention to engage in this conduct. It is also unclear if this intention element is also imputed to its members. | **Disagree**  
Section 2(8) of the Act is a deeming provision relating to when a recommendation of an association is an agreement between its members. It does not relate to the mental element of the cartel offence.  
Under the cartel offence, the requisite element of ‘intention’ must be proven against each particular accused.  
A competitively benign statement will not be a cartel provision. |
| 214  | cl4 - ss82B(1) and s90 of Act | NZCBA | **Unclear on attribution of conduct or state of mind (e.g. ‘intention’) of members to association**  
Section 90 of the Commerce Act deals with attribution of conduct (or state of mind) of a director, employee, or agent of a body corporate to that body corporate. Further clarity is required as to whether the intention of an employee, agent or other associated party will be regarded as establishing the intention of the association. Directors of the association could be exposed to criminal liability by way of indirect, constructive or imputed intention. This uncertainty has the potential to stifle pro-competitive behaviour and make it difficult for the association to attract and retain top recruits. | **Disagree**  
Section 90 is sufficiently clear and does not require amendment. The intention of a director, employee or agent of the association will be attributed to the association if that individual is acting within their authority. However, the intention of an employee or agent is not attributable to an individual who is a director of the association. |
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| 215  | cl4 - ss82B(1)   | New Zealand Initiative | The offence should include concept of ‘dishonesty’  
The proposed mental element of the offence requires only that a person “intends... to engage in price fixing, restricting output or market allocation”. A person might commit the offence by the simple act of entering into a contract, neither knowing that the contract had one of the prohibited effects or intending the contract to have this effect. The offence does not require the person to have the necessary ‘culpable mind’ or be ‘blameworthy’ in the sense of knowing of a significant risk of causing harm. If retained, the offence should be amended to include the element of dishonesty – in the sense that a person will only commit the cartel offence if they know that their allegedly infringing activity will have one of the prohibited effects. | Disagree  
There is no liability under the offence unless the person intends to price fix, etc. The test is intention, not knowledge, but the element of intention is subjective and requires personal blameworthiness.  
See discussion in section 3 regarding dishonesty. A dishonesty test would be too vague and uncertain for the Commission and businesses. Also, knowledge that the conduct is wrong is not the same concept as dishonesty. |
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<td>216</td>
<td>cl4 - s82C</td>
<td>Professor Peter Whelan</td>
<td><strong>The offence should not apply if cartel arrangements are notified</strong>&lt;br&gt;The approach in the criminal cartel offence in the United Kingdom Enterprise Act 2002 should be adopted by New Zealand. The principle underlying the UK offence is that the cartel conduct is a form of ‘deception’, as it is an agreement in secret to interfere with market forces. Consequently the offence does not apply if relevant information about the cartel arrangements are:&lt;br&gt;&lt;ul&gt;&lt;li&gt;given to customers before they purchase&lt;/li&gt;&lt;li&gt;given to vendors at or before bids are made in a tender, or&lt;/li&gt;&lt;li&gt;published before the arrangements are implemented, in a manner specified in regulations.&lt;/li&gt;&lt;/ul&gt;This approach both captures the criminality of the conduct (i.e. its deceptive nature) but also provides a means for legitimate cartel conduct to have certainty of exclusion from criminal liability. If arrangements are notified, they could still be liable under the civil cartel prohibition.</td>
<td><strong>Disagree</strong>&lt;br&gt;Publishing or notifying the existence of a cartel agreement does not detract from the harm they cause. The cartel still remains an unjustified interference in market forces.&lt;br&gt;Making notification of the cartel a defence could benefit those businesses that receive legal advice, whereas smaller businesses may not know that this defence is available.</td>
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| 217  | cl4 - ss82B(1) or s82C | Matthews Law | *The offence should not capture conduct that is in the ‘public good’*  
The physical element of the cartel offence is the same as the civil cartel prohibition and suffers from the same problem of ‘overreach’. Reliance is placed on the exceptions to exclude legitimate conduct that may fix prices, restrict output or allocate markets. However, the Commerce Commission’s guidelines on the ‘collaborative activity’ exception would exclude some arrangements between competitors that are undertaken for the ‘public good’ (e.g. doctors agreeing to cap fees for the elderly or pubs in a university town agreeing to impose an earlier closing time to manage binge drinking). The proposal should be reviewed. | Disagree  
If parties ‘intentionally’ engage in cartel conduct for a legitimate ‘public good’ purpose and one of the exceptions does not apply, this can be taken into account in the exercise of prosecutorial discretion and/or sentencing. The parties could also apply for authorisation from the Commerce Commission for the arrangement. Discretion is required as some claims of ‘public good’ can mask harmful conduct. |
| 218  | cl4 - ss82B(1) or s82C | FANZ | *The offence should be limited to large companies and their officers*  
If the offence is retained, it should only apply to large companies and their officers, such as businesses that employ over 200 people and/or who have gross revenue above a certain amount. This would target the offence at persons who are sophisticated, able to understand the cartel provisions and able to meet the cost of compliance. Cartel conduct by large companies is also more likely to harm competition. | Disagree  
This approach is not taken in relation to serious corporate offences in New Zealand or elsewhere. As a matter of enforcement discretion, account can be taken of the seriousness of the conduct and the harm to competition. |
| 219  | General McVeagh (supported by Horticulture NZ) | General McVeagh (supported by Horticulture NZ) | *The size of the business should not be a factor in applying criminal jurisdiction*  
The size of the impact on the market or public should not be a primary factor in determining criminal jurisdiction. This would risk certain businesses or individuals facing criminal sanctions when a smaller business would only face civil sanctions for the same conduct. It would be unfair and prejudicial to distinguish solely based on size. | Agree in part  
The Solicitor-General’s prosecution guidelines outline that the predominant consideration in assessing the public interest in taking a prosecution is “the seriousness of the offence” and the likely penalty. The harm to competition would likely also be taken into account. |
Table 3: The defences and exceptions (Clause 4 [s82C], p. 3-4)

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<td>301</td>
<td>cl4 - s82C</td>
<td>Commerce Commission, ACCC</td>
<td>The new defences are unnecessary and should be repealed</td>
<td>Disagree</td>
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The defences in the proposed section 82C are unnecessary as:

- the cartel offence already sets a high hurdle under section 82B where the defendant must have engaged in prohibited cartel conduct while intending to do so
- there are already a significant number of exceptions to the cartel prohibition under sections 31, 32, 33 and 44A and 44B which protect pro-competitive conduct
- pursuant to section 65A, a party can seek clearance in advance if they are uncertain about the legality or otherwise of the collaborative activity.

The Australian legislation does not provide an additional defence where a person believed the cartel provision was reasonably necessary. Layering additional complex defences on top of a cartel offence is likely to increase the complexity and cost of proceedings, making a successful prosecution more difficult and time-consuming for the parties.

The offence provision may capture those who make a reasonable mistake as to whether one of the exceptions apply. We do not consider that reasonably mistaken conduct should be captured. To ensure it isn’t, we consider a rebuttable defence is needed.
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| 302  | cl4 - s82C       | Dr Edward Willis | Better targeting of the offence to unambiguously egregious conduct would remove the need for defences  
The exceptions to cartel conduct and the proposed defence in section 82C are unclear in their application. This is contrary to the basic principles of justice and fairness. If the offence is targeted at unambiguously egregious conduct, the need for specific defences is eliminated. | Disagree  
The defence is required. The underlying principle is that the mental element of an offence and the mental element of a defence to an offence should both be subjective. Exposure to the risk of jail where the defendant genuinely believed that the cartel provision was reasonably necessary to achieve the purposes of a collaborative activity would be overly harsh. |
| 303  | cl4 - s82C       | DLA Piper New Zealand  
John Land and Stewart Germann,  
John Gordon,  
NZCBA,  
Russell McVeagh (supported by Horticulture NZ) | The new defence of ‘belief’ should apply to all of the exceptions  
The defence of ‘belief’ in clause 82C of the Bill should be widened. It should also apply to whether the defendant believes they are involved in a joint buying/promotion agreement or vertical supply contract (and/or an international liner shipping agreement), being the other exceptions in the Act. Excluding the other exceptions from the defence would:  
• risk deterring these arrangements  
• result in the same conduct facing inconsistent outcomes depending on whether it occurs in the context of a collaborative activity or not. | Noted  
The change recommended is outside current cabinet approvals. |
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<tr>
<td><strong>Defence for collaborative activities</strong></td>
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| 304 | cl4 - ss82C(1)-(3) | Commerce Commission, ACCC | *If retained, the defence should require belief on ‘reasonable grounds’*<br>Under the Bill, a defendant need only establish that he or she subjectively believed a cartel provision was reasonably necessary, even if that belief was based on a wholly inadequate or irrelevant through process. It would extend to defendants who were ‘careless or wilfully blind’, such as a person who relies upon their own assessment despite knowing it sensible to get professional advice. It provides unmeritorious defendants with a defence that goes well beyond those available for analogous conduct in comparable jurisdictions (e.g. Australia).<br>If the proposed section 82C defences are retained, there should be a ‘reasonable’ requirement for any belief defence. Crown Law is understood to support this change. | Agree<br>The defence of ‘belief’ as drafted could be overly lax. It should remain subjective, but should be amended so that the belief is reasonable.<br><br>**Recommendation**<br>The defence of ‘belief’ should be clarified to be ‘on reasonable grounds’.

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<p>| 305 | cl4 - ss82C(1)-(3) | Russell McVeagh, DLA Piper New Zealand, Horticulture New Zealand | <em>Extend defence to include reasonable belief where involved in collaborative activity</em>&lt;br&gt;The subjective defence should also apply to whether a defendant reasonably believed they were involved in a collaborative activity. It is logically inconsistent to require defendants to satisfy objectively that they are in a collaborative activity, but then to subjectively believe that the cartel provision was reasonably necessary for the purpose of the collaborative activity. Whether or not a person is engaged in a collaborative activity is not obvious. There is no reason to exclude a defence if a defendant subjectively believes they are involved in one. | Noted&lt;br&gt;This change is outside current cabinet approvals. |</p>
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<td>306</td>
<td>cl4 - s82C</td>
<td>Horticulture NZ</td>
<td><strong>An example of the ‘grey area’ for commercial conduct</strong>&lt;br&gt;The horticulture industry has many examples of where competitors work collaboratively to ensure consistent supply of produce to market which could fall in a ‘grey area’ under the law. Such situations include where supply may be far lower than forecast when disrupted by adverse weather, affected by biosecurity events, and other such production and supply vagaries. These examples do not involve a grower explicitly agreeing with a competitor to fix prices, limit output or allocate markets but there is a risk that could be a consequence.</td>
<td><strong>Disagree</strong>&lt;br&gt;The cartel offence will not be committed where the defendant does not intend to engage in price fixing, restricting output or allocating markets. The defendant does not have such an intention in the scenario raised. In the event of uncertainty, the parties concerned could take steps to bring them within the collaborative activity exception. Additionally, they can seek clearance from the Commerce Commission under section 65A of the Act.</td>
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<td>307</td>
<td>cl4 - ss82C(1)-(3)</td>
<td>Matthews Law, John Land and Stewart Germann</td>
<td><strong>The defence is overly narrow and requires some knowledge of the law to be available</strong>&lt;br&gt;The defendant must have a relatively strong understanding of the Act in terms of what constitutes a cartel provision and the respective elements of the available exceptions. For example, if a defendant is to show a ‘belief’ that the cartel provision was reasonably necessary for the purposes of the collaborative activity, arguably it will be necessary to show that this analysis has taken place. Otherwise the defence will be unavailable.</td>
<td><strong>Disagree</strong>&lt;br&gt;The defendant will need to have knowledge of the facts giving rise to the application of the exemption. That is, they will have to turn their mind to the question and have formed a view. The collaborative activity exception is similar to that used in the USA for cartels which works well. It is wider than the joint venture exception in Australia. Ignorance of the law is also not a defence.</td>
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<td>308</td>
<td>cl4 - ss82C(1)-(3)</td>
<td>DLA Piper New Zealand</td>
<td>Make clear the defence is available to officers and employees of company involved in collaborative activity. As currently drafted, the collaborative activity exception/defence requires the defendant to be involved in the collaborative activity. Even if a company is involved in a collaborative activity, if individual officers or employees of that company are charged, they may not be able to rely on this defence. It should be made clear that the defence is available to directors and officers where the company is the party involved in the collaborative activity.</td>
<td>Agree</td>
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## Franchises and restraint of trade defence/exception

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| 309  | cl6 - s31 of Act | Simpson Grierson | *Make explicit that collaborative activities include franchise agreements*  
Franchise agreements have a high risk of including a cartel provision, but the exceptions do not provide for all forms of franchises. That is:  
- the exceptions for ‘joint buying’ or ‘vertical supply contracts’ would not exempt market allocation restrictions unless the franchisor is also the wholesale supplier to its franchisees.  
- The collaborative activity exception requires that the franchisor and franchisee are ‘carrying on a common activity in co-operation’, but the franchisee may be relatively autonomous and the relationship may only be one of payment for services provided.  
The collaborative activity exception should be amended to provide that it ‘includes a franchise agreement’. This would also have the effect of making clearance available for these agreements. | **Disagree**  
Franchises are likely to be covered by the exceptions if they are carried on for legitimate purposes.  
Refer to the discussion above in section 3 on the treatment of franchises. |
| 310  | cl6 - ss31(3) of Act | Commerce Commission | *In principle support the new ‘restraint of trade’ provision*  
The recently added exception in section 31(3) of the Act relating to ‘restraint of trade’ is intended to deal with commercial restraints that endure beyond the end of a franchise agreement. This is supported in principle. | **Noted** |
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| 311  | cl4 - ss82C(3) and cl6 - ss31(3) of Act | Commerce Commission | ‘Restraint of trade’ should be defined  
The term ‘restraint of trade’ is used in a number of places in the Act, but with different meaning. A definition of ‘restraint of trade’ for the purposes of the collaborative activity exception and proposed defence, or a change of terminology, is needed to clarify the well-understood franchise concept and ensure that this defence/exception does not apply more broadly than intended. | Disagree  
Explicitly defining restraint of trade may restrict the situations in which the defence would apply. |
| 312  | cl4 - ss82C(4)-(7) and cl7 & cl8 - s44A and s44B of Act | Commerce Commission | The international liner shipping defence is unnecessary  
The general collaborative activity exception is sufficiently wide and flexible to deal with all industries including international liner shipping. This exception and the corresponding defence are unnecessary and should be repealed. | Disagree  
While the activities covered by the international liner shipping exception are a form of collaborative activity, there is benefit in being clear on how the provisions apply in this case. |
| 313  | cl4 - ss82C(4)-(7) | Commerce Commission | The international liner shipping defence is overly complex  
There will be real difficulty for the Commerce Commission to apply the exception and defence provisions in the event of cartel activity in the international liner shipping industry as a result of their complexity. If the proposed defence is retained, there should be a ‘reasonable requirement’ for any belief defence and the drafting could be made clearer. | Agree in part  
The international liner shipping exception was designed to deal with the particular collaborative activities in this sector. However, we agree that the ‘belief’ defence should be based on reasonable grounds. See discussion at item 304 above. |
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| 314  | cl7 & cl8 - s44A and s44B of Act | New Zealand Shippers’ Council (oral submission) | Support international liner shipping exception  
New Zealand’s export and import industry have fought to have international shipping lines made subject to the Commerce Act. To facilitate the transition, the Act includes an exception to allow some forms of collaboration in the intentional shipping area, and this is supported as a compromise. | Noted |
| 315  | cl4 - ss82C(4)-(7) and cl7 & cl8 - s44A and s44B of Act | ACCC | Require registration of shipping agreements to benefit from defence or ‘reasonable belief’  
The international liner shipping defence also provides for ‘subjective belief’ as to whether an ancillary activity was reasonably necessary. This defence should be amended by either requiring the defendant’s belief to be ‘reasonable’ or introducing a safeguard such as registration of any international shipping agreement with the Commerce Commission. Australian law requires the parties to register their shipping agreements in order to be exempt. The ACCC has successfully prosecuted two foreign shipping companies for criminal cartel conduct. | Agree in part  
Agree that the international shipping defence should be based on a reasonable belief that the conduct was reasonably necessary for the purposes of the cooperation (see item 304 above). However a registration requirement is not supported given the additional administration and costs entailed. |
| 316  | cl4 - s82C | Simpson Grierson | The new defence should also apply to vertical supply contracts exception  
An ‘honest belief’ defence should also exist for vertical supply contracts where the defendant believed that the cartel provision did not have the dominant purpose of lessening competition. | Noted  
See the discussion at item 303. |
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<tr>
<td>Joint buying and promotion agreements exception</td>
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| 317  | s33 of Act      | Simpson Grierson | Clarify that the joint promotion exception includes agreement on price to be jointly advertised | Disagree  
Exemption agreements on a resale price would allow for anti-competitive behaviour. |
|      |                 |              | The absence of a clear statement that agreement on the jointly advertised price falls within the section 33(b) exception leaves parties to assume the risk. This risk can be mitigated by clarifying that the exemption for a jointly advertised price extends to, and includes, agreement on the price that is jointly advertised. | | |
|      |                 |              | A new section 33(c) in the Act be inserted: “c) Relates to the price to be advertised jointly for the resupply of goods or services acquired in accordance with paragraph (b); or” | | |
| Drafting issues to improve clarity | | | | |
| 318  | cl4 - s82C and cl 5 – 8, and s32, 33, 34 of Act | Commerce Commission | Insert cross-references and consolidate provisions to improve clarity | Noted  
The drafting is a matter for PCO. |
|      |                 |              | If the defences are retained, it would benefit from headings or cross-references linking the available defences to the corresponding exceptions, and vice versa. Also some consolidation of the provisions may be desirable for ease of reading. | |
## Table 4: Other matters relating to the offence and criminal proceedings (Clauses 4 [ss82B(2)-(4)] and 14, p. 3 & 6)

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<td><strong>Defendant’s requirement to notify the prosecution of defence</strong></td>
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| **401** | cl4 - ss82B(2)(b) | DLA Piper New Zealand | *No case for special notification requirements for defendant*  
The new proposed section 82B(2) requires that a defendant wishing to rely on an exemption or a defence must notify the prosecution of that fact and provide sufficient details about the applications of the exemption or defence. This is contrary to standard procedure in criminal prosecutions as set out in the Criminal Procedure Act 2011, whereby the defendant has no obligation to disclose his/her defence to the prosecution. There is no valid reason for a different notification process to apply to criminal cartel cases. | **Disagree**  
In the case of cartels the defendant is likely to be in a position to possess significantly better information than prosecutors. The collaborative activity exception in particular is prone to artificial defences and the prosecution should not bear an undue burden. |
| **402** | cl4 - ss82B(2)(b) | New Zealand Law Society | *Omit requirement for ‘full and fair’ notification of defence*  
It is unusual to require the defendant seeking to rely on an exception or defence to have to provide sufficient details to “fully and fairly inform” the prosecution of the manner in which the defence or exception is claimed. Normally it is sufficient to state the facts relied on. The words “fully and fairly” would create additional room for disagreement about whether the notice is adequate. These should be omitted. | **Agree**  
The notification requirements should not be unduly burdensome or imply a reverse burden. They should be similar to those applying to an alibi.  
**Recommendation**  
Remove the fully and fairly qualifiers from the requirement to notify the prosecution of the intention to rely on a defence or exception. |
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<td>403</td>
<td>cl4 - ss82B(2)(b)</td>
<td>New Zealand Law Society</td>
<td><strong>Make clear there is no reverse burden for defences</strong>&lt;br&gt;It would be helpful to make clear, for the avoidance of doubt, that the notification requirement does not create a reverse onus of proof on the defendant. A new subsection after proposed section 82B(2) could provide, for the avoidance of doubt, that the requirement to give notice does not –&lt;br&gt;• impose any onus of proof on a defendant; and&lt;br&gt;• relieve the prosecution of the burden to prove each element of an offence and to negate any exception or defence, beyond reasonable doubt.</td>
<td><strong>Disagree</strong>&lt;br&gt;This is unnecessary. The concerns are largely addressed by the change recommended in item 402 above.</td>
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**Category of the offence**

| 404  | cl14 | DLA Piper New Zealand | **Cartel offence should be made category 3 under the Criminal Procedure Act 2011**<br>It is unclear why the offence has been categorised as category 4. It is more appropriately categorised as a category 3 offence because:<br>• it allows the defendant to elect whether they want a jury or a judge-alone trial<br>• the case can still be heard in the High Court, similar to other offences such as those set out under the Financial Markets Conduct Act 2011. | **Noted**<br>The change recommended is outside current cabinet approvals. |

**Double Jeopardy**
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| 405  | cl4 - 82B       | New Zealand Law Society      | **Section 82B of Act should also be amended to avoid double jeopardy**  
The amendments in clauses 10 and 12 of the Bill are supported to guard against double jeopardy. A further amendment is required to the cartel offence in the proposed section 82B, to preclude a person being liable for both exemplary damages and criminal penalties for the same conduct. That is: “A prosecution may not be brought under section 82B against any person who has been ordered to pay exemplary damages under section 82A for the same conduct.” | Disagree  
There is a public interest in a criminal prosecution. This should not be barred by a private action which includes exemplary damages. |
| 406  | cl4 - ss82B(3)  | Simpson Grierson             | **Maximum term of imprisonment should be five years**  
The appropriate maximum term of imprisonment is five years not seven. Five years is consistent with analogous offences such as insider trading and market manipulation or deception. | Disagree  
Seven years is in line with fraud, theft and other comparable offences. Also, seven years is the maximum. A trial judge will make a sentencing decision based on the facts of the case and the sentencing principles in the Sentencing Act 2002. |
| 407  | cl4 - ss82B(3)  | NZ Shippers’ Council         | **Support the criminal penalties**  
Support the criminal penalties outlined in clause 82B of the Bill.                                                                                                                                     | Noted                      |
Table 5: Matters not covered in the Bill

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| 501  | s65A of Act | FANZ | The Commerce Commission is not resourced for a high number of clearance applications
Even if there was any material adoption of the clearance regime process by businesses in New Zealand, the Commission would not (without a radical funding increase) seem to have the capacity to resource the increase in applications. | Noted |
|      |         |          | See discussion in item 502. | |
| 502  | s65A of Act | FANZ, John Gordon | Applying for clearance is not practical to address uncertainty
The clearance regime is too costly for most small and medium sized businesses, as it would require the engagement of specialist lawyers and advisors to inform the Commerce Commission’s full market analysis. The clearance process is also structured in a rigid way that does not always fit with commercial arrangements. | Noted |
|      |         |          | The clearance mechanism is not intended to be a routine process for use in all or most cases. It is a safety valve in cases where self-assessment may not be enough to resolve uncertainty. There is no comparable clearance mechanism in the USA, Canada or Australia. | |
| 503  | s65A of Act | Simpson Grierson | Clearance should be available for all franchise agreements
There is a wide variety of franchise structures and it is unclear how the exceptions will apply. Potential franchisees will hesitate to take on franchises if this carries uncertainties of risk of criminal sanctions. Clearance should be available for all franchise agreements. | Disagree |
<p>|      |         |          | The exception is designed so that businesses can self-assess and guidance is provided for this purpose. If the franchise is a collaborative activity, clearance will be available to the parties if they remain uncertain as to the provisions. | |</p>
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<td>504</td>
<td>s65A of Act</td>
<td>Simpson Grierson</td>
<td><em>Introduce a short-form collaborative activity clearance for immunity from the cartel prohibition only</em></td>
<td><strong>Disagree</strong> having a short-track clearance regime which does not require market/public notification or participation significantly impacts on transparency and may further protect the anticompetitive arrangements. It would place the Commerce Commission in an undesirable position if it were to grant a short-form clearance and later learn that the arrangement could breach the civil prohibition of substantially lessening competition. As far as the short-track mitigating harm of over-deterring legitimate behaviour – cartels can also significantly harm consumers.</td>
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<td><strong>Commerce Commission powers</strong></td>
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<td>505</td>
<td>s99C to s99P of Act</td>
<td>Commerce Commission</td>
<td><em>New powers for co-operation with overseas and domestic agencies are desirable</em>&lt;br&gt;The Commerce Act includes provisions enabling the Commerce Commission to share information obtained through its mandatory powers and co-operate with overseas regulators that it has a formal agreement with. However, this regime is relatively inflexible, does not contemplate multi-lateral co-operation arrangements with overseas regulators, and does not allow for information sharing with domestic agencies. Sections 30 to 33 of the Financial Markets Authority Act 2011 provide a comprehensive and flexible information sharing regime. Similar provisions should be adopted in the Commerce Act using this Bill as it would enhance the Commission’s ability to assist other regulators and assist the long-term enforcement of the cartel prohibition.</td>
<td>Disagree&lt;br&gt;We do not see a compelling reason to amend the Commerce Commission’s current powers to share information and provide investigative assistance to overseas agencies. In addition, the common law situation in relation to domestic agencies is sufficient.</td>
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<td>506</td>
<td>s99C to s99P of Act</td>
<td>New Zealand Shippers’ Council</td>
<td><em>Cooperation between regulators necessary to address international cartels</em>&lt;br&gt;Regulators around the world are giving greater attention to tackling hard core cartel conduct and the Commerce Commission should be able cooperate and share information with those overseas regulators.</td>
<td>Noted&lt;br&gt;The Act includes provisions to enable the Commerce Commission to enter into arrangements with equivalent overseas regulators to share information and provide investigative assistance. These are considered to be sufficient.</td>
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### Item 507

**Submitter**: ACCC  
**Submission**: *Use of surveillance devices and cooperation with domestic law enforcement agencies are crucial for cartel enforcement*

The cartel offence should continue to meet the requirements under the Search and Surveillance Act 2012 for the Commerce Commission to be able to use surveillance devices in investigations (i.e. the offence is punishable by a term of imprisonment up to 7 years). A close relationship between the Commerce Commission and domestic law enforcement agencies will be crucial in developing the capability to utilise these powers.

**Comments**: *Agree*

The use of surveillance devices will be important to enable the Commerce Commission to detect and investigate covert cartels.

### Criminal Cartel Prosecution

**Item 508**  
**New Section**: Yes  
**Submitter**: Commerce Commission  
**Submission**: *A Cartel Prosecutors Panel should be established*

The Criminal Procedure Act 2011 confers responsibility on the Solicitor-General for the conduct of public criminal prosecutions and the appointment of Crown prosecutors to cases. A provision similar to section 48 of the Serious Fraud Office Act 1990 providing for the Solicitor-General to appoint a specialist panel of Crown prosecutors for serious fraud cases should be included in the Bill for criminal cartel cases. This reflects the specialised nature of cartel prosecutions.

**Comments**: *Agree*

The establishment of a specialist Cartel Prosecutors Panel will ensure standing capacity of persons with expertise in cartel criminal prosecutions.

**Recommendation**

Provide for the Solicitor-General to appoint a specialist panel of Crown prosecutors to carry out criminal cartel prosecutions.
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<td>509</td>
<td>new</td>
<td>New Zealand Initiative</td>
<td>Clear separation of investigation and prosecution roles required&lt;br&gt;The Bill contains no safe guards to ensure that the decision to prosecute is made independently of those tasked with investigating an alleged cartel. The need for prosecutorial independence is likely to be more acute in relation to cartel inquiries because of the increased risk of a lack of objectivity following the type of lengthy investigations that are a characteristic of cartel inquiries. The Bill should specify a mechanism for independent prosecutorial decision-making by the Solicitor-General.</td>
<td>Disagree.&lt;br&gt;The Bill is in line with New Zealand criminal procedure for similar offences and prosecutions. The Criminal Procedure Act 2011 already requires that the Crown prosecutor must act independently of the Commerce Commission.</td>
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<tr>
<td>510</td>
<td>new</td>
<td>Russell McVeagh (supported by Horticulture NZ)</td>
<td><strong>Criteria to guide exercise of prosecutorial discretion should be added to Bill</strong>&lt;br&gt;The policy intention is that only ‘serious’ cartel conduct will be prosecuted criminally, but there is nothing in the Bill that legislates this intention. Leaving these matters solely to prosecutorial discretion will result in undue chilling of pro-competitive conduct. There should be a ‘grey list’ of indicative criteria in the Bill for the Commerce Commission to consider when deciding to prosecute criminally. This could include:&lt;br&gt;- the conduct was deliberately dishonest and deliberately covert&lt;br&gt;- the conduct was longstanding&lt;br&gt;- the conduct had, or could have, a significant impact on the market in which the conduct occurred&lt;br&gt;- the conduct caused, or could cause, significant detriment to the public&lt;br&gt;- the alleged participants have previously been found to have participated in cartel conduct.&lt;br&gt;In particular, emphasis should be placed on deliberate dishonest or covert conduct.</td>
<td><strong>Disagree</strong>&lt;br&gt;The Solicitor-General’s prosecution guidelines already set out criteria in the test of whether to criminally prosecute. The Commerce Commission has criminal prosecution guidelines to ensure certainty for businesses in prosecutions. These may be further amended, in association with Crown Law, to specifically address the new criminal cartel offence. Including criminal prosecution criteria in statute is likely to be overly restrictive. In particular, ‘deliberate dishonesty’ should not be a relevant criterion (see the discussion on dishonesty in section 3).</td>
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<td>511</td>
<td>new</td>
<td>Matthews Law</td>
<td><strong>There should be independent oversight of prosecution decisions</strong>&lt;br&gt;The costs and risks of criminal litigation will provide incentives for firms to settle through agreed facts and penalty, even when they may have an arguable case. This leads to an increased risk of ‘false positives’. It may be prudent to have independent oversight of decisions about laying charges and the prosecution proceedings. This oversight should be provided for legislatively.</td>
<td><strong>Agree in part</strong>&lt;br&gt;The Criminal Procedure Act 2011 already provides that the Solicitor-General is responsible for criminal prosecutions and issues prosecutorial guidelines. A Crown prosecutor independent of the Commerce Commission will have oversight of laying charges and the prosecution proceedings.</td>
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<tr>
<td><strong>Transitional period of 2 years</strong></td>
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<td>601</td>
<td>cl2</td>
<td>Commerce Commission</td>
<td><strong>Supports the 2-year transitional period</strong>&lt;br&gt;In the Commerce Commission’s case, this will allow sufficient time to develop capability in criminal cartel investigations and to run an initial advocacy campaign to guide and prepare the business community.</td>
<td>Agree</td>
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<td>602</td>
<td>cl2</td>
<td>Institute of Directors</td>
<td><strong>A sufficient transitional period is necessary</strong>&lt;br&gt;There needs to be a sufficient transitional period before the criminal offence comes into force. Two years is the minimum period.</td>
<td>Noted</td>
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<td>603</td>
<td>cl2</td>
<td>BusinessNZ, Russell McVeagh (supported by Horticulture NZ)</td>
<td><strong>Extend the transitional period to 3 years</strong>&lt;br&gt;Given the significant changes that occurred in 2017, if the Bill is to proceed the transitional period should be extended to at least three years to ensure sufficient time for the business community to familiarise and adjust to the relatively new definitions, exceptions and defences.</td>
<td>Disagree</td>
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Table 7: Governance and resourcing of Commerce Commission

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<td><strong>701</strong></td>
<td>Russell McVeagh (supported by Horticulture NZ)</td>
<td><strong>Significant additional resources and expertise required</strong>&lt;br&gt;The investigation, enforcement and prosecution of the criminal cartel offence will be a significant departure from the Commerce Commission’s existing expertise and experience. For example:&lt;br&gt;• It brings aspects of the Search and Surveillance Act 2012, Extradition Act 1999, Mutual Assistance in Criminal Matters Act 1992, New Zealand Bill of Rights Act 1990, Criminal Disclosure Act 2008 and Criminal Procedure Act 2011 into play&lt;br&gt;• It is significantly more complex to enforce due to the higher standard of proof and belief-based defences (which are seen as necessary for this offence)&lt;br&gt;• It brings additional procedural requirements relating to evidence.&lt;br&gt;To avoid causing adverse impacts on the Commerce Commission’s other work, and to reflect the seriousness of the additional powers granted, if the Bill is to be enacted the Commerce Commission should be allocated significant additional resources and expertise.</td>
<td><strong>Noted</strong>&lt;br&gt;The Commerce Commission already investigates and enforces criminal breaches under both the CCCFA and the FTA. However, additional funding has been allocated to enable the Commerce Commission to upskill and carry out educative and advocacy activities.</td>
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<td><strong>702</strong></td>
<td>Commerce Commission</td>
<td><strong>Support for criminal offence also conditional on adequate resourcing</strong>&lt;br&gt;The ability of the Commerce Commission to achieve the benefits of increased detection and deterrence through the introduction of a criminal offence will depend on it being adequately resourced to invest in appropriate investigative tools and resources to carry out investigations to a criminal standard.</td>
<td><strong>Noted</strong>&lt;br&gt;See above discussion in item 701.</td>
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<td>703</td>
<td>Institute of Directors</td>
<td><strong>Guidance for business on criminal offence critical</strong>&lt;br&gt;If the offence is retained, it is essential that Government takes steps to raise awareness around criminalisation including providing clear and comprehensive guidance for directors and other decision-makers. Guidance should also cover the approach of the Commission/Crown in relation to civil and criminal prosecutions.</td>
<td>Agree</td>
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<td>We expect the Commerce Commission and Crown Law will publish guidelines on how they will work together. The Commerce Commission will also undertake advocacy.</td>
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<td>704</td>
<td>New Zealand Initiative</td>
<td><strong>Commerce Commission governance and accountability should be strengthened</strong>&lt;br&gt;Research by the New Zealand Initiative disclosed serious concerns with the performance, behaviour and governance of, in particular, the Commerce Commission. These concerns relate to consistency and predictability of decision-making, accountability and commercial expertise. The ‘commissioner’ model of the Commission (and the former securities commission) stands in stark contrast to the board governance model of the Securities Commission’s successor, the Financial Markets Authority. Issues relating to the governance and accountabilities of the Commission should be resolved before the Commission is equipped with any further enforcement power.</td>
<td>Disagree</td>
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<td>The Commerce Commission already investigates and enforces criminal breaches under both the CCCFA and the FTA. The existing accountability and governance regime is sufficient.</td>
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