Regulatory Impact Statement

CRIMINALISATION OF CARTELS

AGENCY DISCLOSURE STATEMENT

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Economic Development.

The RIS provides an analysis of options to:

- promote deterrence of hard-core cartels, while not deterring efficiency enhancing collaborative activity; and
- facilitate New Zealand's active contribution to enforcement efforts against global cartels.

The analysis includes some empirical data on detected cartels, rates of detection and options for increased deterrence. Although some data on detected cartels and price fixing arrangements is available, this data is for detected cartels only as the secret nature of cartels means the extent of the problem cannot be known. Additionally, data on detection rates is international data, rather than New Zealand-specific. These limitations mean it is difficult to precisely examine the incremental impact caused by criminalisation in deterring cartel conduct. It is impossible to fill information gaps with further research because of these factors and the essentially 'unknowable' nature of cartel conduct.

The recommended option of criminalisation might impose higher costs on businesses through increased costs of complying with the law. For example, businesses may face costs to assess their operations against the new regime. However, the recommended option also proposes changes to legislation to clarify the prohibition and exemptions, and to provide a clearance regime to help businesses manage any residual risk. Effective design of the regime would reduce costs for businesses wishing to engage in pro-competitive collaborative activity. Careful sequencing of the introduction of the new regime so that criminal sanctions commence once the new civil regime has bedded in should also minimise costs.

STATUS QUO AND PROBLEM DEFINITION

Background - What is a cartel?

1. Hard-core cartels are formed when rival firms agree not to compete with each other. The OECD defines a cartel[1] as an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to:

    a. fix prices;

    b. establish output restrictions or quotas;

    c. share or divide markets by allocating customers, suppliers, territories or lines of commerce; or

    d. make rigged bids (collusive tenders).

2. In general, hard-core cartels allow their participants to increase profits by limiting or removing competition in order to increase prices. Hard-core cartels are generally conducted in secret. They are difficult to identify and investigate due to their clandestine nature.

3. Cartel activity causes detriment to consumers[2] and impedes economic performance in three main ways:

    a. By raising the price above the level that it would be in a more competitive market, a cartel reduces demand for the good or service and hence production of the good or service. As a result, resources are not deployed where they will be of maximum benefit. In economic terms, this is a loss of allocative efficiency.

    This loss of efficiency caused by cartel losses (the deadweight loss) can be equal to as much as 50% of the overcharge. Empirical studies tend to find that deadweight losses are on average from 10% to 20% of the overcharge[3]. They are similar to the losses that result from oligopolies and monopolies.

    b. A successful cartel also protects its participants from the risk that they will lose market share in response to competition from another firm. This protects inefficient firms and creates a drag on productivity improvements. This is a loss of productive efficiency.

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[1] OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, 25 March 1998.

[2] The term 'consumer' is used generically and can refer to end consumers, government (including public sector procurement) or other businesses or industries (whose competitiveness can be impaired by the increased costs of a cartelised product).

[3] Peterson, E and Connor, J, *A Comparison of Welfare Loss Estimates for U.S. Food Manufacturing,* American Journal of Agricultural Economics, May 1995, p300-308.

c. A lack of competition creates less incentive for the cartel members to innovate by reducing costs or improving the quality of their product in order to retain their market share. Cartelised businesses may also attract greater levels of investment through being more profitable than they would be in a competitive environment. In economic terms this is a loss of dynamic efficiency.

4. In addition to economic harm, cartel conduct is an interference with market forces. The higher prices imposed by cartels result in a wealth transfer from consumers to the cartelists, on the basis of a secretive agreement that consumers are not aware of.

5. The OECD emphasises that "the hard-core cartel category does not include agreements, concerted practices, or arrangements that are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies." The OECD recommendation therefore aims to exclude pro-competitive collaboration between competitors from the cartel definition.

What do we know about the incidence and costs of cartels?

International evidence

6. Cartels, by their nature, are secretive. Overseas estimates point to a 10 – 20% chance that a cartel will be discovered. The highest detection rate estimated is 33% and the lowest is less than 10%[4]. The secret nature of cartels means that it is not possible to identify the total population of cartels so the overall level of cartel activity in the economy cannot be known. Therefore the following overview of global cartel activity relates to the minority of cartels that have been discovered, which is lower than the total number of cartels.

7. The following information draws on a data set for international cartels, not all of which operated in Australasia[5]:

   a. At least 6000 companies from 57 countries have been alleged or proven members of international cartels.

   b. The total known affected sales by international cartels is US$16 trillion.

   c. Most international cartels sell industrial goods, rather than consumer goods.

   d. The great majority of cartels have fewer than ten members, but bid-rigging cartels tend to support a larger number of firms.

[4] For a survey of available studies see: Connor, J, *Optimal Deterrence and Private International Cartels,* April 9 2007, available at SSRN: http://ssrn.com/abstract=787927.

[5] These were cartels subject to government or private legal actions between January 1990 and December 2008. Connor, J, *Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008*, AAI Working Paper #09-06, http://ssrn.com/abstract=1535131.

e. The median duration of an international cartel is 57 months (almost five years) and the mean 82 months (almost seven years). Global cartels which span at least three continents have a mean duration of 95 months (almost eight years)[6].

f. In recent years, a larger number of cartels have been detected. However, increased detection of cartels may be due to greater enforcement and deterrence through greater penalties and the introduction of leniency regimes. The total number of cartels (including hidden ones) could be rising or falling.

g. Data on price effects are available for 177 cartels. Median overcharges in different jurisdictions vary from 17% to 21% of sales. (This compares with median penalties imposed of between 2% to 12% of sales). Data from the United States suggests that international cartels impose higher overcharges than domestic cartels. The difference in the overcharge level is 6% on average[7].

8. United States and European Union data compiled by the UK Office of Fair Trading[8] provides some information on key sectors where cartels have been found over the last 21 years. These include:

   a. In the EU, the top sectors include chemical manufacture (11 cartels), Sea/coastal transport (10), pharmaceutical product manufacture (4) and tube manufacture (4).

   b. In the US, the top sectors are basic chemical manufacture (14 cartels), pharmaceuticals (8), non-metallic mineral manufacture (8) and electrical equipment manufacture (6).

9. All of these cartels are focused in upstream markets. The immediate impact of these cartels will be felt by intermediate businesses, but the impacts on downstream markets can be significant as the price premium will be marked up again in downstream markets.

10. The same report also notes that concentrated markets tend to contain more cartels, and that there is an inverse correlation between the number of firms and degree of concentration in a market and likelihood of collusion. Concentrated markets are common in New Zealand and there is no reason to assume that New Zealand is different to other parts of the world in terms of the incidence and effect of cartels.

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[6] Connor, J, *Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008*, AAI Working Paper #09-06, http://ssrn.com/abstract=1535131.

[7] Bolotova, Y, Connor, J, & Miller, D, *Factors influencing the magnitude of cartel overcharges: an empirical analysis of the United States Market,* Journal of Competition Law & Economics, 5(2), p 361–381.

[8] Grout, P, Sonderegger, S, *Predicting Cartels: Economic discussion paper,* United Kingdom Office of Fair Trading, March 2005.

New Zealand evidence

11. Cartels in New Zealand can be divided into three categories: domestic, trans-Tasman and international. Many of the large cartels affecting New Zealand are international cartels, detected in other jurisdictions.

12. The appendix to this RIS provides a list of all price fixing cases, proceedings and warnings in New Zealand since 1995. New Zealand-specific data is limited and the relatively small number of cases means that it cannot be statistically analysed. Many of the detected domestic price fixing incidents in New Zealand are local, minor in scope or degree of damage and resulted in a warning. The Commerce Commission (the Commission) makes a pragmatic judgement about the level of harm and the cost of enforcement proceedings in deciding how to proceed. Domestic price fixing arrangements that have been considered to be more serious have been proceeded against. New Zealand courts have issued price fixing judgments in respect of 16 cartels since the Commerce Act came into force, leading to civil pecuniary penalties, generally in the order of $100,000 to $500,000.

13. The following table shows some significant price fixing cases from the appendix together with an estimate of the size of the market and the total overcharge. Animal remedies and ophthalmologists were New Zealand based arrangements. Wood chemicals was a trans-Tasman cartel. Air cargo and freight forwarding are international cartels, and agreements were entered into overseas.

Table 1: Significant price fixing cases

Industry	Estimated Overcharge[9]	Penalties
Animal remedies	$250,000 on $2.5 million turnover	One penalty of $500,000 and one of $200,000
Ophthalmologists		Three penalties of $15,000 and one of $10,000
Wood chemicals	$9.75 million over 5 years	Penalties of $2.85 million and $1.075 million for price fixing and $750,000 and $725,000 for exclusionary conduct

[9] This estimate is based on an assumption of a 10% increase in price – less than the median overcharge in cartel cases, but the figure used in the United Kingdom Office of Fair Trading evaluations of the effectiveness of enforcements against cartels.

Air cargo	$280 million over 7 years	Penalties to date of $6.5 million, $6 million and $1.5 million. Proceeding still underway in relation to some airlines
Freight forwarding		Penalties to date ranging between $2.7 million down to $1.1 million

Status quo – how are cartels currently dealt with by the law?

14. Currently 'cartel' is not defined in the Commerce Act. However, hard-core cartel behaviour is prohibited and subject to civil sanctions. Part 2 of the Act sets out the legislative framework:

    a. Section 27 prohibits entering into, and giving effect to, contracts, arrangements or understandings that have the purpose, effect, or likely effect of substantially lessening competition.

    b. Section 30 of the Act deems arrangements that have the purpose, effect, or likely effect of fixing, controlling or maintaining prices to substantially lessen competition.

    c. Sections 31 to 33 of the Act provide exemptions from the application of section 30. These exemptions include:

        i. certain joint ventures that are carried on jointly by means of joint control, or by means of their ownership of shares in the capital of that body corporate;

        ii. recommended pricing by industry associations of not less than 50 persons; and

        iii. joint buying and promotion arrangements.

15. Businesses have indicated that this framework lacks clarity regarding the scope of the prohibition and exemptions, and as such may chill legitimate efficiency enhancing activities.

Enforcement

16. While private enforcement is not precluded under the Act, the Commission has the primary enforcement role given its statutory powers and its ability to seek a range of remedies for conduct, including pecuniary penalties.

17. The Act specifies a maximum pecuniary penalty of up to three times the illegal gain, or if this is not known, 10% of annual turnover of the body corporate in New Zealand. Based on optimal deterrence[10] this assumes a 33% chance of detection, which is at the high end of international estimates. Penalties imposed in New Zealand price fixing cases to date have generally been lower than this level (maximum penalties have never been imposed in New Zealand). It is very difficult to impose optimal penalties because:

    a. Where parties cooperate with the investigating agency, the penalties are generally reduced or discounted.

    b. Sufficient information on which to calculate the penalty (including the specific amount of the cartel gain and the multiple to be applied to account for the probability of detection and punishment) is usually lacking.

    c. Imposing the maximum fine level may be enough to make some firms bankrupt, which is undesirable from a competition perspective.

18. Sanctions against individuals can provide additional deterrence. In New Zealand, a pecuniary penalty of up to $500,000 can be imposed on individuals. This amount has not been revised since 1990. For some individuals this penalty may not offset the potential gain from engaging in cartel behaviour so may not be a strong deterrent. Additionally, although the Act specifically prohibits corporations from indemnifying individuals, it is likely this is not effective. It can be subverted in at least three ways:

    a. By paying an individual up front for participation in a cartel, in anticipation of future penalties.

    b. Through increasing remuneration or bonuses paid after the imposition of a penalty. These would not explicitly compensate for a penalty, but it would be difficult to assess whether parts of a remuneration package were a form of indemnity.

    c. By making payments to the individual outside New Zealand.

19. Currently section 80C of the Act provides for management banning orders, which exclude a person from being a director or from being involved in the management of a body corporate for up to five years. These provisions were introduced in 2001 but have yet to be used. The Commission indicates that they have not been sought mainly because relevant individuals have cooperated in investigations.

[10] In simple terms, optimal deterrence theory suggests that deterrence should aim to minimise the social losses from cartels by deterring cartel activity to the point where the marginal harm deterred equals the marginal cost of deterring the harm. For a company considering cartel activity, penalties should be set at the point where costs (probability of discovery times total fine imposed) are greater than the expected benefits of forming a cartel.

Authorisation

20. If businesses wish to undertake collaborative activity that would otherwise contravene section 30, they can apply to the Commerce Commission for an authorisation. The Commission will generally grant authorisation if it is satisfied that the public benefit outweighs the detriment that would result from loss of competition.

21. However, there are not a large number of businesses seeking authorisation. Businesses have indicated that this is because it is costly; quantifying the public benefits from authorisation can be difficult; outcomes are uncertain; they are unwilling to disclose confidential information in a public process; and seeking authorisation is a lengthy process. In November 2010, the Commission introduced a streamlined authorisation process for 'straightforward' applications to enable decisions to be made as quickly as possible to address some of the costs of the authorisation process. Three applications have been received since this process was put in place.

Leniency

22. The Commerce Commission introduced a leniency programme in 2004 that allows a participant in a cartel to notify the Commission in return for leniency. Leniency provides for automatic conditional immunity from prosecution and is conditional on on-going co-operation. The Commission receives around two leniency applications per year. The recent introduction of leniency programmes in many jurisdictions has caused the number of cartel cases detected to increase substantially. In the United States, notifications to the Department of Justice's Antitrust division went from one per year to 20 per year with leniency[11].

23. Leniency has particularly assisted in detecting international cartels operating in New Zealand. Once an international cartel is detected, participants will rush to apply for leniency in all jurisdictions in which it operated. Without a leniency programme international cartels would be less likely to notify the Commission of their participation.[12]

Problems identified with the current regime

24. It is not clear that current legislation provides optimal disincentives for cartel activity and allows New Zealand to participate in co-ordinated international criminal action against hard-core cartels.

[11] Harrington, J, *Optimal cartel pricing in the presence of an antitrust authority,* International Economic Review, 2005.
[12] Spratling and Arp, *Making the Decision: What To do when faced with international cartel exposure: developments impacting the decision in 2009,* Paper to Criminalisation of Cartel Conduct Workshop Adelaide, 3 April 2009.

Insufficient detection and deterrence

25. Optimal deterrence says the principal purpose of sanctions for cartels should be to minimise the social losses by deterring cartel activity to the point where the marginal harm deterred equals the marginal cost of deterring the harm. For a company considering cartel activity, penalties should be set at the point where costs (probability of discovery times total fine imposed) are greater than the expected benefits of forming a cartel. As noted above, it is very difficult to impose optimal fines. Maximum corporate fines for price fixing in New Zealand assume a detection rate for cartels of 33%, which is at the high end of international estimates[13]. They have not been imposed in New Zealand. Fines on individuals can provide an additional deterrent effect, but although the Act prohibits firms from indemnifying individuals, the issues identified in paragraph 18 above can arise.

26. Also, jurisdictions with greater penalties for cartel behaviour than New Zealand appear to be more successful at detecting cartels, particularly through attracting leniency applications[14].

27. The OECD argues that because of the problems with fines that are highlighted, there is a case to consider criminalisation to complement fines and provide an additional deterrent, where this is consistent with legal and social norms[15]. Anecdotal evidence suggests that criminalisation may assist in deterring cartels. For example, US Department of Justice interviews with cartel members not operating in the US who claimed the existence of jail sentence was the reason for their decision[16] and UK survey data suggests that cartel participants are most deterred by criminal penalties[17]. In some cases, cartel members in New Zealand have also indicated to the Commission that their cartel excluded the US because of the threat of jail time.

28. In terms of the moral aspects of cartels, some argue that cartel behaviour is morally wrong and unambiguously harmful. Cartels can cause a deadweight loss to society due to unsatisfied demand, estimated at around 10% to 20% of the overcharge. The wealth transfers and secretive nature of cartels mean that they can be seen as equivalent to a form of theft or fraud, and are therefore deserving of criminal sanctions.

29. Others consider that transactions still involve a willing buyer albeit at a cartelised price, so the harm results from the dead weight loss, in particular, the effect on allocative, productive and dynamic efficiency. Persons holding these views may be less likely to see cartel behaviour as worthy of criminal sanctions.

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[13] Refer paragraph 6.
[14] OECD, *Fighting hard core cartels: Harm, Effective Sanctions and Leniency programmes,* 2002.
[15] OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation,* 2005.
[16] United States Department of Justice, *Ten strategies for winning the fight against hard core cartels,* Presentation to OECD Competition Committee WP3, 2004.
[17] Deloitte, *The deterrent effect of competition enforcement by the OFT: A report prepared for the OFT*, November 2007, http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf .

30. It should also be noted that separating out the empirical effects of tougher fines and leniency programmes from the additional deterrent effect of imprisonment is difficult and imprecise. The OECD notes that there is no systematic empirical data internationally on the deterrent effect of criminal sanctions. Given the nature of cartel activity, and the impossibility of identifying the total population of cartels, it would be virtually impossible to generate the relevant data[18].

31. However, cartel behaviour can cause significant costs to consumers and businesses. If cartel behaviour can be reduced through increased deterrence, this would encourage production inputs to be more competitively priced. This in turn would reduce efficiency losses caused by cartels with consequent implications for firm and economy-wide output and productivity.

Reduced ability to cooperate with other jurisdictions

32. Many large cartels affecting New Zealand are international and are detected from work in other jurisdictions. It is therefore important that New Zealand can effectively cooperate with other jurisdictions to sanction behaviour. The Commerce Commission has cooperation agreements with a number of other jurisdictions (Australia, United Kingdom, Taiwan and Canada). Furthermore, the Commerce (International Cooperation and Fees) Bill will provide a framework for other bilateral agreements to be negotiated. However, these mechanisms are likely to be used for civil proceedings only.

33. Countries that have criminal sanctions for cartel behaviour include many of New Zealand's major trading partners: Australia, Canada, the United Kingdom, Korea, Japan and the United States. Lack of criminal sanctions in New Zealand may reduce the scope for cooperation. Without criminalisation, the Commission may be unable to share confidential information or undertake investigations to assist a criminal investigation in another jurisdiction. This could decrease reciprocity between investigating agencies and reduce effectiveness of international efforts to detect and deter cartels.

34. Furthermore, leniency applicants and other businesses necessarily have to prioritise resourcing investigations by multiple agencies. Where there are criminal sanctions in the mix, they will prioritise cooperating with investigating agencies from those jurisdictions.

35. These issues are likely to become more significant as more jurisdictions move to criminalise hard-core cartel conduct.

[18] OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation,* 2005

36. In April the *OECD Economic Survey of New Zealand 2011* was released. It commented that New Zealand's regulatory framework combined with the smallness of the domestic market and geographic isolation may be hindering our economic performance. It suggested that New Zealand's approach to competition and regulation issues lacked consistency. Although these points were directed at the regulatory environment more generally, and not at New Zealand's general competition law as set out in the Commerce Act, the report stated that:

    a. consideration needs to be given to introducing criminal sanctions for hard-core cartel formation; and

    b. the changing nature of economic activity being increasingly integrated across countries suggests that international cooperation and information sharing is a pre-requisite for effective competition law enforcement[19].

37. The trans-Tasman Outcomes Framework under the Single Economic Market agenda jointly announced by Prime Ministers in 2009 has a medium-term goal that firms operating in both Australian and New Zealand markets are faced with the same consequences for the same anti-competitive conduct. Australia has criminalised cartel conduct.

Lack of clarity of current legislative framework

38. As noted above, submissions and comments on the discussion document and from workshops suggested that the current framework lacks clarity regarding the scope of the prohibition and exemptions. Some suggest that under the current regime, sales people, mid-level managers and senior managers may already be reluctant to engage in pro-competitive, efficiency enhancing conduct with competitors because of the risk that it might breach the Commerce Act. This indicates that rather than deterring cartel behaviour the current regime is chilling pro-competitive behaviour.

39. Clarification would help to ensure that legitimate pro-competitive activity is not chilled. More specifically:

    a. Section 30 prohibits conduct where there is an effect on price. Depending on the circumstances, it can be unclear whether the prohibition would always extend to output restrictions, market allocation and bid rigging.

    b. The current exemptions regime, particularly the joint venture exemption is considered inadequate. There is concern over its scope and that it stifles formation of efficiency enhancing joint ventures because it only applies to structural joint ventures. This raises uncertainty as to whether it would exempt activities such as the forming of bidding consortia for infrastructure projects or syndicated loans by banks, when both activities are welfare enhancing and allow the collaborating firms to better manage risk.

[19] OECD, *OECD Economic Surveys: New Zealand 2011*, 27 April 2011, p119-120.

OBJECTIVES

40. The objectives are:

    a. To promote detection and deterrence of hard-core cartels (while ensuring that efficiency enhancing collaborative activity is not deterred).

    b. To improve international cooperation and facilitate New Zealand's active contribution to enforcement efforts against global cartels.

REGULATORY IMPACT ANALYSIS

41. The attached table outlines the options proposed to address the objective and provides a brief high level summary of key costs and benefits and their magnitude. Further detail on the options is provided below.

Option 1: Status quo plus additional enforcement activity

42. Under this option, legislation remains the same, but additional activity is taken against hard-core cartel activity. Some activities are already underway including:

    a. ***Improving co-operation with enforcement agencies in other jurisdictions*** – The Commission already cooperates with enforcement agencies in other jurisdictions. The Commerce (International Cooperation and Fees) Bill provides a framework for negotiating further bilateral cooperation agreements.

    b. ***Increasing the probability of private enforcement*** – Private actions for damages can increase the cost of participating in a cartel. In New Zealand, private litigants can receive exemplary damages, over and above ordinary damages. One way to increase the probability of private enforcement is by providing for class actions, which could decrease the costs of Commerce Act proceedings for private litigants. The High Court Rules Committee has drafted a Class Actions Bill, which has been submitted to the Secretary of Justice for consideration.

43. Additional enforcement action could include:

    a. ***Increasing funding for the Commerce Commission's public awareness and enforcement activities*** – Increased resources would enable the Commission to follow up non-leniency based leads, adopt methods used by other agencies to proactively detect cartel behaviour and undertake increased awareness programmes.

b. ***Rewarding confidential informants*** – The Commission could be funded to provide rewards to confidential informants who are not directly involved in a cartel. This would have a direct fiscal cost. However, inducements would only be paid where information is of value, so the benefits should exceed the costs. Overall, rewards are unlikely to have a significant impact on deterrence because the secret nature of cartels means the pool of potential confidential informants is likely to be small.

44. The two activities outlined above would improve outcomes relative to the status quo. However, both require additional funding. The benefit is likely to be marginal - cartel enforcement is already prioritised by the Commission and detecting cartels is difficult due to their secretive nature. It is unlikely there would be many confidential informants who knew of the existence of a cartel without participating.

45. Additionally, these activities do not address the issues identified in the problem definition regarding the lack of clarity in the scope of the prohibition and exemptions, including the joint venture exemption, under the current regime.

Option 2: Improvements to existing civil regime

46. Submissions on the discussion document suggested that there was scope to improve the current regime, with or without criminalisation. Feedback on an exposure draft Bill also indicated support for some amendments. Potential amendments include:

a. clarifying the scope of the prohibition and exemptions;

b. introducing a clearance regime to allow businesses to manage any residual uncertainty before entering into arrangements with competitors; and

c. updating the penalty regime.

Clarifying the scope of prohibition and exemptions

47. As noted above, current uncertainty over the scope of prohibited activity can lead to businesses not undertaking legitimate pro-competitive activity for fear of breaching the Act. The presumptive nature of the price fixing prohibition means that it is important to clearly exempt pro-competitive conduct. Changes proposed include:

a. Clarifying the scope of section 30 to give effect to OECD recommendations that price fixing, output restrictions, market allocation and bid rigging should be per se illegal.

b. Clarifying the scope of exemptions from section 30 of the Act. The OECD recommendations cover a broad scope of activity, so an equally broad exemption is required if these are adopted. A broad exemption would focus on the substance of the arrangement, not the form, by replacing the current joint venture exemption with a strengthened exemption for pro-competitive collaborative activity. It would apply to genuinely pro-competitive collaborations, whether or not they take the form of joint ventures, strategic alliances, or bidding consortia.

48. Clarifying the scope of the prohibition and exemptions would provide firms with a greater level of clarity regarding the type of legitimate collaborative activity that is not prohibited and flexibility to determine appropriate arrangements for their activities. Because it focuses on substance, not form, this approach would enable businesses to better manage investment risk, which in turn should encourage greater innovation and efficiencies.

49. In the long run clarifying the scope of the prohibition and exemptions should reduce costs for the Commission to determine what is and is not prohibited under the Act. However, in the short-term costs may increase through increased advocacy and explaining the new regime to businesses. For example, the Commission estimates that it would cost around $50,000 to produce guidelines in respect of a collaborative activity exemption.

50. There may also be an initial cost for businesses to determine the application of the revised scope to their collaborative activities and address any uncertainty regarding whether those activities are within the scope. However, feedback on the exposure draft Bill did not raise this as an issue. It appears that the design of the prohibition and exemptions ensures that the same conduct - hard-core cartel conduct - is prohibited under the new regime. The uncertainty identified would be inherent in any change to a regulatory regime. In the long run, there should be greater certainty as the regime beds-in.

Clearances

51. Long-term arrangements can be economically similar to, and may be substitutable for, an acquisition or merger. In addition to clarifying the scope of the prohibitions and exemptions, a clearance regime for collaborative activities could be provided to mitigate uncertainty about whether such arrangements would breach the Act. Providing for a clearance regime would have the following costs and benefits:

52. *Positive effect on pro-competitive activity* – The ability to apply for clearance would allow firms to manage any residual risk that their collaborative activity may breach the Act, providing them with greater certainty.

53. *Administration and enforcement costs* – There would be additional administrative costs from firms seeking clearance. As a new regime is implemented, there may be an initial spike in the number of clearances sought, tapering off over time as people gain confidence in a new regime and certainty regarding their business arrangements. It is difficult to estimate the exact number of clearances that would be sought. Assessing clearance applications for the collaborative activity exemption is likely to be less straightforward than a simple merger clearance. The cost of assessing a clearance application is on average around $40,000.

54. Some of this cost can be offset through an application fee. The fee for clearance applications is currently $2,300 (including GST). This fee is proposed to be reviewed following the passage of the Commerce (International Co-operation and Fees) Bill and a new fee could be set at around $8,400 (including GST). Any fee for collaborative activity clearances would be set with reference to Treasury and Audit Office guidelines, and a separate RIS would be prepared and submitted with fee regulations.

Updating the penalty regime

55. As noted under the problem definition, the current regime may not impose optimal penalties. An option would be to increase financial penalties.

56. However, the current maximum financial penalties have not been imposed in New Zealand. As noted above, optimum penalties are difficult to calculate, there are generally discounts available for cooperation and imposing the maximum fine may be enough to bankrupt some firms, which is undesirable from a competition perspective. There is unlikely to be any significant benefit from increasing the penalties for firms above their current level.

57. There could be some scope to increase the level of penalty for individuals, given this has not been reviewed since 1990. However, it is not clear that this would be effective as changing the level of the penalty does not address the possibility that the indemnity provisions in the Act could be subverted using the means outlined in paragraph 18, even though the Act specifically prohibits firms from indemnifying individuals.

58. No change is proposed to the current management banning order penalty outlined in section 80C of the Act. Although these have not been used to date, this is mainly because they have not been sought as relevant individuals have cooperated in investigations.

Summary of proposed changes under Option 2

59. The first two changes under this option (amending the scope of prohibition and exemptions, and providing a clearance regime) are recommended. They would address the objectives by reducing the potential for chilling effects on pro-competitive behaviour.

60. On the other hand, amending the level of financial penalty is unlikely to have much benefit for the reasons outlined above.

61. Additionally, the changes proposed under this option will not affect international cooperation, nor will they address the objective of promoting detection and deterrence of hard-core cartels.

Option 3: Criminalisation of hard-core cartels

62. Under this option, legislation would be amended to provide for a criminal offence. This option is being considered together with changes under option 2 to clarify the prohibition and exemption and provide a clearance regime. This is because identified issues regarding the scope should be addressed before criminalisation is considered to ensure that hard-core cartel behaviour would be captured by a criminal offence.

63. It is proposed that the maximum penalty for a cartel offence would be a term of imprisonment of seven years, and for a body corporate, it would be the same as the current maximum pecuniary penalty. This compares with a penalty of up to seven years imprisonment for theft of property valued over $1,000 (section 223 of the Crimes Act 1961) and for "obtaining by deception or causing loss by deception" if the value exceeds over $1,000 (section 241 of the Crimes Act 1961).

64. The key costs and benefits of criminalisation are set out below.

Benefits

Improved detection

65. Criminalisation may increase the detection of cartels through greater use of the Commission's leniency programme. The threat of criminal sanctions provides an additional incentive for firms to seek leniency and cooperate in any resulting cartel proceedings. In the US, an increase in the detection of cartels and successful prosecutions has been attributed to a new and clear leniency policy backed up by the threat and use of criminal sanctions[20].

[20] United States Department of Justice Antitrust Division, *Corporate and individual leniency policies;* see OECD, *Fighting Hard-Core Cartels*, 2002.

Improved deterrence

66. As noted above, it is difficult for fines to optimally deter cartel conduct and there is some evidence that fines imposed in New Zealand are below the optimal level. Criminalisation would provide an additional deterrent in the following ways:

    a. Criminalisation provides incentives for individuals not to engage in cartel behaviour. People may be dissuaded from offending by knowing imprisonment could result. Unlike pecuniary penalties, the deterrent effect of imprisonment is not dependent on an individual's wealth. It is likely to be higher for white collar offenders because of social stigma, greater opportunity cost through lost income, reduced opportunities for future employment and possible travel restrictions. As noted above, anecdotal evidence shows some global cartels have excluded the US from their operations because of the risk of imprisonment. Cartel participants are also more likely to meet outside the US because of the perceived risk of imprisonment[21]. Survey data suggests that cartel participants are most deterred by criminal penalties.[22]

    b. Greater social condemnation of cartel behaviour could also increase deterrence. As noted above, cartels can be viewed as a form of theft or fraud, harmful to individuals and society more generally, and can be seen as morally wrong. Criminalisation would send a strong signal that the government considers cartel behaviour harmful and worthy of condemnation and strong sanction. Social condemnation of hard-core cartel behaviour may help to reduce its incidence or at least encourage detection.

67. Increased deterrence of cartels would encourage production inputs to be more competitively priced, reducing the deadweight and efficiency losses caused by cartels. This is estimated at 10 – 20% of the cartel overcharge. However, it is very difficult to measure the total incidence and therefore total cost of cartels, given that cartels, by their nature are secretive). The losses could be small for domestic cartels, but potentially quite large for trans-Tasman and international cartels. Reducing these losses in turn has implications for firm and economy-wide output and productivity.

Improved international co-operation

68. As noted above, increased internationalisation of commerce means that cartels are a global problem. Global deterrence and coordinated response efforts require cooperation between jurisdictions. Increased cooperation would likely lead to improved deterrence of international cartels.

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[21] The US still claims jurisdiction in cases where cartel participants organise a cartel in the US from outside its borders. Connor J, *Effectiveness of Antitrust Sanctions on Modern International Cartels,* Journal of Industry, Competition and Trade, 2006, p 195–223.

[22] Deloitte, *The deterrent effect of competition enforcement by the OFT: A report prepared for the OFT*, November 2007, http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf .

69. The passage of the Commerce (International Cooperation and Fees) Bill will provide a framework for negotiating further bilateral cooperation agreements to enable enhanced cooperation with overseas regulators. However, New Zealand's lack of criminal sanctions may mean that even where we have cooperation agreements, it becomes more difficult to share information, assist in investigations and detect and prosecute international cartels.

70. Criminalisation would improve the reciprocal sharing of information and enhance the scope for further cooperation between competition agencies. It would also allow the New Zealand government to cooperate with other countries through mutual assistance and extradition procedures such as:

    a. The Mutual Assistance in Criminal Matters Act 1992, which would enable New Zealand to locate witnesses and obtain oral and documentary evidence, including the execution of search warrants in other jurisdictions.

    b. The Extradition Act 1999, which permits applications to extradite defendants to and from New Zealand.

71. Furthermore, leniency applicants and other businesses have limited resources and have to prioritise resourcing investigations by multiple agencies. Leniency applicants prioritise cooperating with investigating agencies in jurisdictions with criminal sanctions.

72. It would also signal the government's view of the importance of effective competition law and assist in addressing issues identified by the OECD (see paragraph 36).

Single Economic Market

73. Criminalisation would advance the Single Economic Market outcomes framework by ensuring that firms are faced with the same consequences for the same anti-competitive conduct. As such, criminalisation would provide a major component of improved cooperation between the Commerce Commission and the Australian Competition and Consumer Commission (ACCC), complementing initiatives under the Commerce (International Cooperation and Fees) Bill.

Costs of criminalisation

Chilling effect on pro-competitive activity and costs of compliance

74. Submissions on the discussion document highlighted that criminal sanctions may deter legitimate and pro-competitive business activity and increase compliance costs if there is uncertainty regarding the conduct covered by the prohibition and exemptions. Any uncertainty may result in overly cautious behaviour by executives and reduce entrepreneurship and innovation.

75. Because of this uncertainty, option 3 proposes that criminalisation would only be introduced together with the changes outlined in option 2 to clarify the prohibitions and exemptions, and provide a clearance regime.

76. As noted under option 2, a new regime would need time to settle as businesses review and evaluate their collaborative arrangements to ensure they are within the scope of the revised exemptions and comply with the law. If a criminal offence is introduced, commencement should be sequenced so that the revised prohibition and exemptions are introduced earlier. This would allow businesses to develop confidence in the new regime before criminal sanctions are imposed.

Distinguishing between the criminal offence and the civil prohibition

77. The exposure draft Bill set out a parallel criminal offence and civil prohibition, consistent with the approach taken in Australia. The approach is also consistent with other business law statutes such as the Securities Market Act. The distinguishing feature of the criminal regime is that the criminal offence requires the additional element of intent. Additionally, where cartel conduct is prosecuted, a criminal investigation requires a higher standard of proof – beyond reasonable doubt.

78. As well as these distinctions, there are a number of steps that can be taken to provide greater certainty for businesses and individuals. These include:

    a. advocacy work to promote understanding of the offence, and the hard-core cartel prohibition and exemptions;

    b. encouraging those responsible for the decision to only prosecute cases of serious offending; and

    c. encouraging those responsible for the decision to prosecute to provide guidelines to give greater certainty about when they would take a criminal prosecution.

Administration and enforcement costs

79. The Commission has indicated that it would incur some costs in the following areas:

    a. up-skilling and developing processes and procedures for undertaking criminal investigations;

    b. developing prosecution guidelines and fact sheets on the criminal prosecution process – this cost is estimated at around $50,000 (in addition to the $50,000 cost of guidelines under option 2);

    c. developing processes and protocols around criminal prosecutions with other agencies; and

    d. increased time requirements for Commissioners to up-skill and get information and advice on criminal matters.

80. The Commission will also incur additional investigation costs, as with criminalisation, all cases will need to be investigated to a criminal standard initially until a decision is taken on whether or not to prosecute.

81. Criminal prosecutions may take longer than civil proceedings because there is greater use of oral evidence. This is likely to result in additional costs, particularly if cases proceed by way of jury trial. However, there are likely to be only a very small number of prosecutions (on average, one or fewer) in any given year.

82. Costs can be reduced through effective design to ensure the regime provides as much certainty as possible. This includes sequencing changes to clarify the prohibition and exemptions and introducing a clearance regime before introducing criminalisation.

Costs of imprisonment

83. Imposing criminal penalties such as jail terms would have a cost. However, cartel offences would be unlikely to have a measurable effect on the overall prison population. The United States has imprisoned fewer than 400 people over the last 10 years.

Should New Zealand criminalise?

84. In considering whether to create a criminal offence, the Legislative Advisory Committee Guidelines suggest that regard should be had to:

    a. Will the conduct in question, if permitted or allowed to continue unchecked, cause substantial harm to individual or public interests?

    b. Is the conduct that is to be categorised as a criminal offence able to be defined with precision?

    c. Would public opinion support the use of criminal law, or is the conduct in question likely to be regarded as trivial by the general public?

85. We consider that the first and second factors are clearly met. As set out in the problem definition, hard-core cartels cause harm to individuals and the economy. It is impossible to know the size of the harm because cartels are, by their nature, secretive. The changes to the prohibition and exemptions outlined under option 2 will clarify the law and the type of behaviour that will be captured by the criminal offence. In respect of the third factor, some argue that cartel behaviour is morally wrong and unambiguously harmful, and can be seen as akin to a form of theft or fraud. However, some consider that the use of criminal sanctions may not be appropriate. To some extent this is likely to be the product of the lack of clarity in the regime to date and may change over time given that the new regime better targets hard-core cartel conduct.

86. There could be benefits from criminalising provided that it is done together with changes to clarify the prohibition and exemptions and provide a clearance regime, and that the introduction of criminal sanctions is carefully sequenced, to mitigate the downsides.

87. The benefits of criminalisation include improved detection and deterrence. Criminalisation may increase detection of cartels through greater use of leniency. Criminalisation and the associated threat of imprisonment would provide additional deterrence where fines are not optimal (and there is some evidence that the fines in New Zealand are less than those suggested by optimal deterrence theory). Deterrence could also be increased through greater social condemnation. Condemnation of hard-core cartel behaviour may help to reduce its incidence and encourage detection. Increased deterrence of cartels would encourage production inputs to be more competitively priced, reducing the deadweight and efficiency losses caused by cartels.

88. Enhancing the ability of the Commission to cooperate with other jurisdictions would improve the sharing of reciprocal information with jurisdictions that have criminalised cartels, which includes a number of New Zealand's key trading partners, and would lead to improved deterrence of international cartels. It would also send a signal on the government's view of the importance of effective competition law.

89. However, there would be a number of costs associated with criminalising cartel behaviour. These include the potential to chill pro-competitive activity, costs to businesses from implementation, costs of imprisonment and administration and enforcement costs incurred by the Commission.

90. To mitigate these costs, implementation of criminalisation would be accompanied by other improvements, including clarification of the prohibition and exemptions, and introduction of a clearance regime as outlined under option 2. Sequencing the introduction of the regime so that there is greater certainty over how the Commission will interpret key terms prior to the introduction of criminal sanctions will help mitigate costs. Additionally, activities such as advocacy and developing prosecution guidelines can also help to improve certainty and minimise costs.

91. There will be some incremental administration costs associated with criminalising and adopting the changes outlined under option 2. The total additional cost is estimated at $500,000 for the first year that the regime is in place (mainly to develop guidelines and deal with any clearance applications), but will likely reduce over time as businesses become more certain of the regime. To some extent costs may be able to be met by reviewing the Commission's priorities within existing funding.

92. Given that feedback on the exposure draft Bill was supportive of the design, we consider that on balance, together with changes under option 2, there are benefits from having a criminal offence in additional to the improved civil prohibition.

CONCLUSIONS AND RECOMMENDATIONS

93. All three options would provide for improvements over the status quo. It is likely that all three would lead to some increased detection and deterrence of cartels.

94. However, the effectiveness of the activities outlined under option 1 is difficult to ascertain and may be marginal relative to the size of additional funding, given the work that the Commission is already undertaking. The option also does not address issues identified regarding the lack of clarity of the scope of the prohibition and exemptions.

95. Some of the changes outlined under option 2 – specifically, amending the scope of the prohibition and exemptions and providing a clearance regime – would help to address issues relating to the current regime's lack of clarity and potential to chill pro-competitive behaviour.

96. However, these changes by themselves do not effectively address all the objectives. While clarifying the scope of the law and providing clearance could encourage pro-competitive behaviour, it is unlikely to have a significant deterrent effect on hard-core cartels. Additionally, the changes proposed under option 2 do not address the objective of enhancing international cooperation.

97. To increase deterrence and enhance international cooperation, the most effective option would be to criminalise hard-core cartels together with making changes to the prohibition and exemptions and introducing a clearance regime (option 3).Criminalisation should bring deterrence closer to optimal levels, assist in moral condemnation of cartels, increase detection through greater use of the Commission's leniency programme and will enhance the Commission's ability to cooperate with other jurisdictions on criminal investigations. Amending the prohibition and exemptions, introducing a clearance regime and sequencing the implementation of changes will help to manage the downsides of criminalisation.

CONSULTATION

Consultation with government agencies

98. The Commerce Commission, Treasury, Ministry of Justice, Police, Ministry of Foreign Affairs and Trade, Crown Law and Ministry of Transport were consulted on this Regulatory Impact Analysis and the accompanying policy paper.

Consultation with external stakeholders

Discussion paper January 2010

99. A discussion paper was released in January 2010. In March 2010 two workshops were held in Auckland and one in Wellington. These were predominantly attended by competition law experts from major law firms. The main focus of those workshops was on how to design a cartel offence, rather than whether cartels should be criminalised.

100. Two forums were held with the Corporate Counsel of several businesses, one in Wellington and one in Auckland. These forums focused more on the merits of criminalisation rather than design issues.

101. Twenty-five written submissions were received on the discussion paper. Submitters included law firms, individual businesses, business organisations, overseas law associations and overseas academics. Most submissions focused on whether or not to criminalise – there was little comment on the other proposals mentioned in the discussion document.

102. The views on the merits of criminalisation range from those who support it, to those who do not think there is a case for it in New Zealand, through to a more narrowly held view that there should not be a *per se* prohibition for price fixing. The submissions received were slightly more against criminalisation than in support of it – seven are in favour,[23] and nine oppose it.[24] Seven submissions did not offer a view either way but highlighted issues that would need to be considered in the design of a criminal cartel offence.[25]

Arguments in favour

103. Amongst those who support criminalisation, increased deterrence was cited as a primary reason. Submissions noted that the risk of going to prison would be more of a deterrent than a fine, as it elevates the risk beyond a merely financial one.

104. Some submissions suggested that criminalisation would lead to increased detection of cartels as it is the greatest inducement to apply for leniency.

105. Others supported criminalisation for international alignment reasons. Other jurisdictions have gone down this path and some submitters think it would be sensible for New Zealand to follow suit. Strengthening links between the Commission and overseas regulators would assist in the detection of cartels.

106. Some also see criminalisation as a suitable punishment given the level of harm cartels can cause to the economy. Another view is that cartel conduct is similar to other white collar crimes and the penalties and sanctions for it should be brought into line with other offences such as fraud and insider trading.

107. Finally, some support criminalisation in conjunction with improvements to section 30. Submitters gave strong messages that the current section 30 is overly broad, capturing and chilling pro-competitive activity.

[23] American Bar Association – Sections of Antitrust and International Law, Prof Christopher Harding, Council of Trade Unions, Covec, 2 Degrees, Meredith Connell and Mastercard International.
[24] Business NZ, Business Roundtable, Russell McVeagh, Veda Advantage, Board of Airline Representatives NZ, David Matthews, Air New Zealand, Bell Gully and Simpson Grierson.
[25] Ian Wylie, Roger Featherston, Caron Beaton-Wells and Brent Fisse, NZ Retailers' Association, Law Council of Australia, International Container Lines Committee and the Commerce Commission.

Arguments against

108. Among those that oppose criminalisation, nearly all point to a lack of evidence of the incidence of domestic cartels in New Zealand and their impact. They believe that there is a culture of low corruption and in such a small economy where everyone knows each other it would be difficult to keep any cartel conduct secret for long.[26] Furthermore, they consider that domestic cases of price fixing do not cause much harm as they are usually very local in their geographic and market scope. A lack of knowledge that price fixing is wrong is the problem, not insufficient penalties.

109. Following from this, opponents see the current penalties as sufficient to deter most would-be cartelists. Moreover, the Commission is seen as a very active regulator, already providing a credible threat. The Commission's leniency policy is seen as a highly effective way to detect cartels.

110. Another concern expressed by some submitters is the risk that criminalisation will chill pro-competitive activity if legislation is unclear on the scope of the prohibition and exemptions. There was a view that people could also be deterred from becoming company directors due to the seriousness of the criminal punishment and increasing levels of directorial liability.

111. Some submitters considered the costs of criminalisation would be too high. They highlighted increased compliance costs for business and increased costs for the Commission for more resource-intensive investigations and a higher standard of proof. If Commission funding was increased, some suggested greater economic benefit would be obtained by investing in other areas.

112. Furthermore, some believe that criminalisation has been an ineffective deterrent overseas. The number of prosecutions in jurisdictions that have criminalised cartel conduct has been small (apart from the United States) and all these jurisdictions continue to experience cartel conduct. The fact the United States is imprisoning more people is also taken as a sign that criminalisation is ineffective.

Exposure draft Bill June 2011

113. An exposure draft Bill and draft RIS were released in June 2011. Sixteen submissions were received on the draft Bill and RIS.

114. In July 2011, workshops were held in both Auckland and Wellington. These workshops were attended by corporate counsel, competition law specialist and other business advisors. The main focus of those workshops was on whether the provisions in the exposure draft Bill were workable and effective, rather than on whether cartels should be criminalised.

[26] We note that the opposite can also be said – because everyone knows each other, few would be willing to go to the authorities to "dob in" their friends.

115. Responses differed from those received on the discussion document. There were a range of views, including:

    a. Those that previously supported the introduction of criminal sanctions maintained their support.

    b. Some submitters, who had previously opposed criminalisation, had reconsidered their position based on the legislative framework set out in the exposure draft Bill and conceded that there could be benefits in criminalising.

    c. Others remained reluctant to endorse criminalisation but provided suggestions such that if it were adopted then the proposed regime would be workable. These submitters expressed general support for the design of the prohibition, exemptions, and clearance regime. However they continued to raise the same concerns outlined above: that the case for criminalisation has not been made and introducing criminal sanctions could chill legitimate pro-competitive activity.

116. Arguments for and against criminalisation were largely similar to those raised in the previous consultation.

Arguments in favour

117. As previously indicated among those that support criminalisation, the likely increased detection and deterrence effects were cited as the main reason to introduce criminal sanctions. Supporters see criminal sanctions as a suitable punishment given the level of harm caused by cartels. Some also believe there would be value in aligning with other jurisdictions in this area.

Arguments against

118. Those who oppose criminalisation argue that there is lack of evidence of a problem to justify criminal penalties for cartels. They also argue that there is a lack of evidence to suggest that criminalisation would improve either the detection or deterrence of cartels. They suggest that the current penalties are effective. They consider that criminalisation would offer little benefit, while imposing substantial costs on businesses (in terms of compliance costs and chilling pro-competitive activity) and the Commission.

119. One concern raised by submitters was that even within large, seemingly well-resourced businesses, sales people, mid-level managers and senior managers may already be reluctant to engage in pro-competitive, efficiency enhancing conduct with competitors because of the risk that it might be in breach of the Commerce Act.

Design of the regime – exposure draft Bill

120. Where submissions addressed the design of the regime, most were of the opinion that it would be a significant improvement on the current price fixing prohibition and joint venture exemption set out in the Commerce Act. One submitter saw the exposure draft Bill as a substantial improvement on the Australian regime and noted that it avoided the overreach and undue complexity of the Australian provisions.

121. The collaborative activity exemption proposed in the exposure draft Bill was well-received by businesses and their advisors. At the workshops, competition law experts indicated that the exemption set out relatively straightforward questions for businesses to consider and apply to their arrangements. To the extent that concerns were raised, these focused on the fact that the exemption was new and there would be uncertainty around how the Commission applied it. Specifically, the 'reasonably necessary' limb of the exemption may allow the Commission to second-guess the commercial judgement of parties.

122. The clearance regime was also well-received, and submitters considered it provided a positive option for businesses to manage uncertainty. There was some concern over whether the Commission would be able to make an assessment within a reasonable timeframe to allow for effective commercial decision-making.

IMPLEMENTATION

123. It is proposed that the proposals in this paper are implemented in stages. Changes to the prohibition and exemptions, and provision for a clearance regime would apply at the time the Bill was enacted. After allowing time for changes to bed in to allow businesses and individuals to develop familiarity and certainty with a new regime, criminal sanctions would be introduced.

124. The Commission would be responsible for enforcing the new regime. After enactment but prior to the new prohibition and exemptions coming into force, there will be a period of time during which it is envisaged the Commission will develop guidelines on its approach and firms can adjust their behaviour accordingly. The Commission may also undertake publicity efforts to ensure firms are aware of the new regime. The Commission and the Solicitor-General would also be invited to develop prosecution guidelines to outline when they would take a criminal prosecution. The Commission would be subject to the usual monitoring and accountability regime. The design of the offence is intended to minimise compliance costs. There is no scope to reduce or remove any existing regulations.

MONITORING, EVALUATION AND REVIEW

125. The Commission captures data on cartel investigations, leniency applications, cases filed and other relevant variables through quarterly reporting. On-going monitoring can be undertaken through the normal monitoring processes in place for monitoring the overall performance of the Commission.

126. Once all stages of the proposal are implemented, a qualitative assessment of the effectiveness of the regime would be undertaken as part of MED's monitoring function.

LIST OF COMMERCE COMMISSION SECTION 30 (PRICE FIXING) CASES

Judgments

• Case	• Industry	• Penalty
CC v Otago and Southland Vegetable and Produce Growers Assn (1990) 4 TCLR 14 (HC)	Fruit and vegetable growers, retailers and auctioneers	$5 nominal penalty for each defendant (a mix of individuals and corporations)
CC v BP Oil NZ Ltd [1992] 1 NZLR 377 (HC)	Oil company service stations	$8,000 (employee) $40,000 (BP Oil)
CC v Queen Street Backpackers (HC Auckland, 1996, CP 1160/92, 28/03/96, Baragwanath J)	Auckland backpacker hostels	Permanent injunctions No penalty
CC v Country Fare Bakeries (HC Christchurch, 1996, M446/94, 17/10/1996 Hansen J)	South Island bakery market	$150,000 against each defendant
CC v North Albany Motors Ltd (HC Auckland, CP88/94, 4/12/96, Morris J) *Also recorded in CC v North Albany* (1997) 7 TCLR 575) *Giltrap City Ltd v CC* [2004] 1 NZLR 608 (CA)	Auckland Toyota motor vehicle dealers	$50,000 against each of the seven defendants $100,000 (Giltrap City)
CC v Roadmarkers Waikato (1981) Ltd (HC Auckland, 1998, CL1/97, 25/6/98 Elias J)	Road marking	$15,000

CC v Taylor Preston Ltd & Ors (No 2) (1998) 6 NZBLC 102,598 (HC)	Meat processing – livestock prices	Penalties of $70,000, $90,000, $225,000, $250,000, $375,000 and three of $1.5 million against the various defendants
CC v Christchurch Transport Limited (HC Christchurch, 1998, CP79/98, 21/8/98 Pankhurst J)	Tendering for bus routes	$10,000 (CEO) and $380,000 (corporate)
CC v Eli Lilly & Co (NZ) Ltd (HC Auckland, 1999, CL19/98, 30/4/99 Fisher J)	Animal remedies	$500,000 (Elanco) and $200,000 (Chemstock)
CC v Caltex NZ Ltd (2000) 9 TCLR 366 (HC)	Oil company car wash promotion	$450,000 (Caltex – initiated action, no cooperation, turnover $704m) $350,000 (Mobil – more cooperative than Shell, turnover $1,205m) $375,000 (Shell – turnover $1,332m)
CC v Ellingham (HC Wellington, CIV-2002-485-720, 27/10/2005, Gendall J)	Ophthalmologists	Three penalties of $15,000 and one of $10,000 against the various defendants

CC v Koppers Arch Wood Protection (NZ) Ltd (2006) 11 TCLR 581 (HC) *CC v Koppers Arch Wood Protection (NZ) Ltd* (HC Auckland, 4 October 2006,CIV 2005-404-2080,Williams J; Osmose Defendants) *CC v Koppers Arch Wood Protection (NZ) Ltd* (HC Auckland, 8 February 2008 ,CIV 2005-404-2080, Williams J; Fernz Defendants)	Wood treatment chemicals	Koppers: $2.85 million for price fixing plus $750,000 for exclusionary conduct jointly and severally Osmose: $1.075 million for price fixing plus $725,000 for exclusionary conduct, jointly and severally Fernz: $1.9 million for price fixing
CC v Schneider Electric SA, in CC v Alstom Holdings SA And Others (HC Auckland,22 December 2008 ,CIV 2007-404-2165,Rodney Hansen J) *CC v Siemens AG* (2010) 13 TCLR 40	Gas-insulated switchgear	$1.05 million
CC v New Zealand Diagnostic Group and others, Auckland, 19 July 2010, CIV 2008-404-4321, Allan J	Hamilton pathology services	Two penalties of $65,000 and one of $35,000 against the various defendants

CC v Geologistics International (Bermuda), Auckland, 26 November 2010, CIV 2010-404-5490, Allan J *CC v EGL INC, Auckland,* 16 December 2010, CIV-2010-404-5474, Rodney Hansen J *CC v Deutsche Bahn AG and others,* Auckland, 13 June 2011, CIV-2010-404-5479, Allan J	Freight forwarding	Geoglogistics International (Bermuda): $2.5 million EGL: $1.15 million BAX:$1.4 million Schenker $1.1 million Panalpina: $2.7 million
CC v British Airways PLC, Auckland, 5 April 2011, CIV-2008-404-8347, Potter J *CC v Cargolux Airlines International S.A.,* Auckland, 5 April 2011, CIV-2008-404-8355, Potter J *CC v Qantas Airways Limited,* Auckland, 11 May 2011, CIV 2008-404-8366	Air cargo	British Airways: $1.6 million Cargolux: $6 million Qantas: $6.5 million

Proceedings[27]

Date	Case
22 Nov 2007	The Commission filed civil proceedings against Visy Board (NZ) Limited and Visy Board Pty Limited and four executives for alleged cartel behaviour in the New Zealand corrugated fibre packaging industry. The Commission's allegations centred on customer sharing, price fixing and bid rigging in relation to the supply of corrugated fibre packaging in New Zealand during the period 2000-2004. On 20 April 2011 the High Court at Auckland (*CC v Visy Board (NZ) Ltd and others, Auckland,* 20 April 2011, CIV 2007-404-7237, Heath J.) decided to reduce the number of claims the Commission can pursue. The Commission is appealing this decision.
15 Dec 2008	The Commission initiated proceedings against 13 airlines and seven airline staff, including senior executives, for extensive and long-term cartel activity in the air cargo market. The Commission alleges that airlines throughout the world colluded to raise the price of freighting cargo by imposing fuel surcharges for more than seven years. The allegations also involve a series of regional price fixing agreements. In addition, the Commission alleges that a number of airlines conspired to price fix through the imposition of a security surcharge immediately following the 9/11 terrorist attacks. Proceedings continuing in relation to the following airlines continuing to defend the charges: Air New Zealand Ltd, Cathay Pacific Airways Ltd, Emirates, Japan Airlines International Co. Limited, Korean Airlines Co. Limited, Malaysian Airlines System Berhad Limited, Singapore Airlines Cargo Pte Limited and Singapore Airlines Limited, and Thai Airways International Public Company Limited.
2010	Alleged agreements between banks and card schemes to set the amount of the interchange fee, provide the rules of operation of card schemes, limiting entry into the card services market and other related provisions, thereby controlling the level of the merchant service fee paid by retailers. Proceedings were withdrawn upon settlement terms satisfactory to the Commission

[27] Sourced from Commerce Commission media releases.

Warnings and acknowledgements[28]

Date	Facts
12 Jul 1995	Two South Auckland lawyers entered into a settlement with the Commission after admitting they attempted to fix prices for conveyancing fees.
28 Aug 1995	A group of tourist industry companies settled with the Commission, signing an undertaking to stop price fixing by setting standard commission rates. PA Tours was formed by the companies which signed the settlement. One of its purposes was to collect the commissions excursion operators (e.g. boat rides and bungy jumping) pay to tour operators who bring tourists to their excursions. It set the commission rates at a standard level.
07 Apr 1997	Six Picton rental car companies had a price fixing arrangement to prevent discounting and to keep rental car rates in the local area higher.
22 Jul 1997	Tauranga midwives attempted collective agreement to pay general practitioners specified rates was considered a form of price fixing and risked breaching the Commerce Act. Tauranga midwives had agreed that, when a midwife was responsible for a woman's maternity care and the woman visited a general practitioner, then standard fees set collectively by the midwives would be paid to the general practitioner.
22 Sept 1997	Lower Hutt doctors attempted a collective agreement to pay midwives specified rates. The doctors had agreed that when a doctor was responsible for a woman's maternity care and the woman also used a midwife, then standard fees set collectively by the doctors would be paid to the midwife.
12 Dec 1997	The two biggest taxi companies in Christchurch, Blue Star (Christchurch) Society Limited and Gold Band Taxis (Christchurch) Society Limited, set mutually agreed standard fares. This happened four times between May 1994 and October 1996.
24 Apr 1998	The Trans-Tasman Shipping Alliance agreed how the companies would recover the costs of Ministry of Agriculture and Forestry checks and other government charges related to unloading ships in New Zealand. The arrangement was to pass on the full cost of the charges to customers.
4 Sept 1998	The Queenstown Lakes District Council tried to introduce a standard pricing structure for the hiring of all sports facilities in its area, irrespective of who owns them.
23 Apr 2000	Cordless phone distributor, Vtech Distributors Limited and another distributor acknowledged that they were price fixing.
5 Jul 2000	The New Zealand Honey Packers Association acknowledged that its discussions and reporting on honey prices were likely to have the effect of price fixing and breach the Commerce Act.

[28] Sourced from Commerce Commission media releases and annual reports. In some of these cases, the companies acknowledged wrongdoing. Warnings are given when, in the Commission's opinion, there was a breach of the Commerce Act.

25 Jan 2001	The Commission warned the New Zealand subsidiaries of three multi-national vitamin companies (BASF, Roche and Aventis) for entering into market sharing and price fixing agreements. They would have faced charges of price fixing in New Zealand if it were not for the three-year limitation period in the Commerce Act.
2003/04	Three Canterbury saddlery retailers allegedly engaged in price fixing behaviour to agree the price of certain stock.
2003/04	Alleged price fixing between a group of cardiac anaesthetists for a contract between Mercy Hospital and Auckland Healthcare's Green Lane Hospital during negotiations in 2000.
2003/04	Alleged price fixing between the Hawke's Bay District Health Board and a group of obstetricians in relation to a 1998 agreement that sets pricing for obstetric services.
23 Sept 2004	The Pharmacy Guild of New Zealand's Premiums Guide placed the Guild and its members at risk of contravening the Commerce Act. The Premiums Guide was a monthly publication stipulating 'premiums' for pharmacists to charge patients on partially subsidised medicine.
08 Nov 2004	Tommy's Real Estate discussed commission rates with a competitor.
2005/2006	Alleged price fixing by a number of Christchurch tow truck operators, under the guise of an industry association, in respect of their joint tender for the provision of towing services to the Christchurch police.
4 May 2005	Six Manawatu-based funeral directors submitted a joint tender to the police for a contract. The six funeral directors agreed prices for the supply of services as part of a joint tender put forward to the New Zealand Police in 2003.
18 May 2005	Individual GPs in Dunedin met and collectively decided to set a maximum fee level for a specific group of patients. The GPs were proposing then to join the Dunedin Primary Health Organisation (PHO). An agreement as to maximum fees results in a base price being created, thereby harming patients through higher average prices.
2006/07	Allegation that North Dunedin bars had engaged in price fixing by agreeing not to offer discounts.
2008/09	Alleged agreement for prices of land tours sold via two i-site offices to cruise ship passengers at Tauranga.
31 Mar 2009	Real Estate Network Limited (REN) is a cooperative company representing approximately 95 per cent of licensed residential real estate agents in and around Christchurch. It adopted a by-law setting a minimum for commissions payable between its members.
01 Apr 2009	Schindler Lifts New Zealand Limited (Schindler) and one current and one former employee participated in a longstanding cartel arrangement which shared elevator installation contracts in the South Island.

24 Nov 2009	Contact Energy Limited (Contact) and TrustPower Limited (TrustPower) alleged to have attempted to engage in anti-competitive conduct during the purchase by tender of a power station near Nelson in 2002.
03 Feb 2010	Ernie Travers of Massey, Auckland, a Trade Me seller who, in the Commission's view, attempted to fix prices for LED bicycle lights with another online seller.
28 Apr 2010	Gisborne Farmers Market Committee admitted it was attempting to fix the prices for produce sold at the market, by passing a rule which required members to sell their produce above the level of wholesale prices.
27 Sept 2010	Tyre Guys Limited and Adens Trading Limited admitted that they had contacted each other via comments on Trade Me pages, text message and emails to set prices.
5 Nov 2010	Alleged that representatives of ERS New Zealand Ltd (ERS NZ), one of the largest providers of waste oil services in New Zealand, approached another major provider and attempted to fix prices for the provision of certain waste oil collection services.
24 Nov 2010	South Pacific Air Ambulance and Careflight (QLD) Limited acknowledged they had breached the Commerce Act by agreeing the price Careflight (QLD) would quote for an air ambulance evacuation in 2009.

Summary of Main Options and Analysis

Options	Benefits			Costs			Overall impact
	Detection	Deterrence	International co-operation	Chilling of pro-competitive behaviour	Administration costs	Business Compliance costs	
Option 1: Status quo plus additional enforcement							
Increased funding for Commerce Commission - additional resources for detection and advocacy	↑ Allows Commission to follow-up on non-leniency based leads	↑ Increased advocacy and detection should increase deterrence	–	–	↑	–	Any benefit from additional funding is likely to be directly related to costs
Rewarding confidential informants – financial rewards to people not directly involved who advise Commission of a cartel	↑ The potential pool of confidential informants likely to be small due to secret nature of cartels	↑ See impacts on detection	–	–	↑	–	Small benefit but only if it encourages confidential informants to come forward
Option 2: Amend legislation							
Clarifying the scope of prohibitions and exemptions	–	–	–	↓ Should decrease the risk of chilling pro-competitive activity by providing more clarity on what conduct is and is not prohibited	↑ May be a small increase in costs due to increased advocacy needed to explain the new regime	May be an initial cost to business to determine whether arrangements comply, however, over time they should have greater certainty therefore reduced cost –	Net benefit as clarifying law should provide certainty to businesses that are contemplating engaging in legitimate collaborative activity
Providing a clearance regime to allow businesses to manage any residual risk prior to entering into collaborative arrangements	–	–	–	↓ Allows businesses to manage residual risk that collaborative activity may breach the Act	↑ May be an increase in costs due to an initial increase in clearance applications, however, costs likely to fall as businesses become familiar with the new regime	Businesses can assess whether there is value in seeking clearance from the Commission –	Net benefit as it allows firms to manage any residual risk. Although there are likely to be some administration costs resulting from assessment of clearance applications
Update civil penalties	–	Unlikely to result in increased deterrence –	–	–	–	–	Unlikely to affect behaviour/ achieve objectives.
Option 3: Introduce criminal sanctions for hard-core cartel conduct Note that this option assumes that the legislation is clarified in accordance with option 2 As a result, option 3 considers the incremental costs and benefits associated with introducing criminal sanctions	↑ Increased detection - some evidence that use of leniency increases where criminal sanctions are introduced and leniency applicants prioritise co-operating with jurisdictions where there is a threat of criminal penalties	↑ Increased deterrence - fines in NZ do not provide for optimal deterrence, criminal sanctions provides additional deterrent Anecdotal evidence suggests cartels less likely to operate in countries where cartels are criminalised	↑ Increased co-operation – allows for processes such as extradition Criminal sanctions are consistent with OECD recs and SEM objectives	Risk of chilling pro-competitive behaviour but this can be managed by implementing changes under option 2 and sequencing implementation of criminalisation to reduce chilling effect –	↑ Incremental increase in costs outlined in option 2, but increase is not anticipated to be significant	↑ Small increase in business compliance costs but these can be managed by clarifying the scope of the prohibition and exemptions and introducing the clearance regime	Net benefits from the introduction of criminal sanctions through increased detection, deterrence and international cooperation. Costs are not likely to be significant due to careful design of regime in option 2 and the prudent sequencing of the introduction of the regime