

**Submission to the Economic Development, Science and Innovation  
Select Committee**

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

**6 April 2018**

## Purpose

1. This submission sets out the Commerce Commission's (**the Commission**) views on the Commerce (Criminalisation of Cartels) Amendment Bill (**the Bill**).

## Overview

2. The Bill is a positive step towards modernising New Zealand's competition law and aligning it with the laws of our major overseas counterparts.
3. The Commission has liaised with the Ministry of Business, Innovation and Employment (**MBIE**), as the agency responsible for enforcing the Act, during the Bill's development. The Commission now welcomes the ability to comment on how the clauses of the Bill could be expected to work in practice.
4. Our submission comments on:
  - 4.1 the advantages of criminalising cartel conduct;
  - 4.2 the breadth and complexity of the proposed defences; and
  - 4.3 submits that the Bill would benefit from the inclusion of clauses
    - 4.3.1 enabling greater information sharing with other regulators; and
    - 4.3.2 creating a Cartel Prosecutors' Panel.
5. In summary, the Commission submits that:
  - 5.1 The parallel civil and criminal regimes will be workable. The introduction of a criminal cartel regime will better deter cartel conduct and improve enforcement of the law in New Zealand.
  - 5.2 The belief-based defences in proposed section 82C are unnecessary. If the section 82C defences are to be retained, we consider that the defences should only apply where a defendant's belief was reasonable.
  - 5.3 The cartel offence and any defences should be expressed in a way that is clearer to a lay-reader.
6. The Commission appreciates the opportunity to provide this submission.

## The Commission's role under the Commerce Act

7. The Commission is responsible for enforcing the Commerce Act 1986 including the prohibition against cartel activity.

8. Cartels are recognised internationally as the most serious form of anti-competitive conduct. Cartels mean that consumers pay more for their goods and services and businesses pay more for their inputs, and can be discouraged from innovating and entering new markets. Cartels undermine New Zealand's international competitiveness, and overall consumer welfare suffers.
9. The Commission considers that it has a successful track-record of actively enforcing the cartel provisions of the Commerce Act 1986.
10. The Commission's largest case has been the international air cargo price fixing cartel. In 2008 proceedings were filed against 13 airlines<sup>1</sup> and the total penalties ordered in the case amounted to \$42.5 million; additionally, the case delivered important judicial precedent and guidance to businesses on the jurisdictional reach of the (then) Commerce Act cartel provisions. Since December 2015, the Commission has obtained total penalties of more than \$22 million for price fixing in the real estate and livestock sectors of our economy.
11. The cartel prohibition was recently redefined by the Commerce (Cartels and Other Matters) Amendment Act 2017 to expressly include price fixing, output restriction and market sharing.<sup>2</sup> These amendments brought increased clarity to the cartel prohibition. The Commission also issued guidance to the business community on the new cartel prohibition and the exceptions that apply to some agreements.<sup>3</sup>

## Definitions

12. In the course of this submission we refer to:
  - 12.1 the **cartel prohibition**, which is the civil prohibition on entering or giving effect to agreements containing a cartel provision, contained in section 30 of the Commerce Act;
  - 12.2 the **exceptions**, which are the exceptions to the cartel prohibition that are contained in sections 31, 32, 33, 44A and 44B;
  - 12.3 the **cartel offence**, which is the proposed criminal offence contained in proposed section 82B of the Act (clause 4 of the Bill); and
  - 12.4 the **defences**, which are the defences to the criminal prohibition that are found in proposed section 82C of the Act (clause 4 of the Bill).

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<sup>1</sup> The breach related to airlines colluding to impose fuel and security surcharges for air cargo shipments to and from New Zealand.

<sup>2</sup> Many jurisdictions overseas specify bid rigging as a fourth offence. The Select Committee considering the previous legislation determined this was unnecessary in New Zealand legislation, as bid rigging would in any event be caught by the other three types of conduct.

<sup>3</sup> *Competitor Collaboration Guidelines*, January 2018, Commerce Commission.

## **Advantages of criminalising cartel conduct**

### **Improved deterrence of cartel conduct**

13. The primary reason to criminalise cartel conduct is to better deter cartel conduct that affects New Zealand consumers.
14. Overseas experience has shown that although financial penalties contribute to deterring corporations, individual criminal sanctions play an important role in deterring cartel conduct.<sup>4</sup> The threat of incarceration is a powerful deterrent against individuals engaging in cartel conduct. In one well known example, executives in the mid-1990's were caught on tape by the FBI expressing concern about hosting a cartel meeting in the United States because of the potential criminal sanctions in that jurisdiction.<sup>5</sup>
15. The introduction of a Commerce Act criminal cartel regime will also provide the Commission with important investigative advantages through enhancing domestic and international co-operation with other agencies.

### **Dual civil and criminal prohibition is workable**

16. In our view, the parallel civil and criminal regimes created by the Bill will be workable.
17. We have lengthy experience in working with dual criminal and civil regimes under the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003, and we routinely make decisions in which we select the jurisdiction (civil or criminal) most suited to the matter at hand.
18. We exercise our enforcement discretion in each case following close scrutiny of the evidence.
19. We seek to generate public understanding and acceptance of our enforcement decisions through the quality of decisions that we make, through ensuring that they are made as transparently as possible, and through issuing public guidelines on the considerations that underpin our decision-making.<sup>6</sup> We have specifically published

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<sup>4</sup> 'Deterrence and Detection of Cartels: Using All the Tools and Sanction,' The 26<sup>th</sup> Annual National Institute on White Collar Crime, by Gregory J. Werden, Scott D. Hammond, Belinda A. Barnett, Antitrust Division, U.S. Department of Justice, 1 March 2012, p. 22.

<sup>5</sup> U.S Department of Justice, 'An Inside Look At A Cartel At Work: Common Characteristics of International Cartels, 6 April 2000, at IV(c). The paper and transcripts are available online at <https://www.justice.gov/atr/speech/inside-look-cartel-work-common-characteristics-international-cartels>. The investigation of the vitamins cartel was the basis for the 2009 film "The Informant!".

<sup>6</sup> See the Commission's published Enforcement Criteria available online at <http://www.comcom.govt.nz/enforcement-criteria/>.

*Enforcement Response Guidelines* that guide the public as to our approach to such decisions, and these include *Criminal Prosecution Guidelines*.<sup>7</sup>

### **Improved detection of cartel conduct**

20. We anticipate that criminalising cartel conduct will improve the ease and timeliness of detection and investigation of cartels that affect New Zealand.
21. Most cartels are covert and therefore difficult to uncover and prove. International studies and empirical data have shown that only a small percentage of cartels have been detected in advanced economies.<sup>8</sup> The Commission agrees with the Government's rationale for criminalisation, that it is likely to increase the detection and deterrence of cartels. The principal way in which detection can be expected to increase is through greater use of the leniency programme.
22. The Commission's leniency programme was introduced in 2004 and many cartel investigations are initiated in this way. Full immunity is available to businesses and individuals who come forward with sufficient information and evidence of cartel activity. Immunity is dependent on full cooperation being provided throughout the duration of an investigation and any enforcement action taken in respect of the cartel activity.
23. The Commission submits that the availability of a criminal sanction, particularly the potential for a sentence of imprisonment, heightens for cartelists the risks of detection, whether by investigation or through a fellow cartelist seeking immunity. By increasing the risks and the 'stakes', criminalisation of cartel conduct can be expected to increase a cartelist's own incentives to avoid cartel conduct or to seek immunity.<sup>9</sup> As the US Department of Justice Antitrust Department has said:<sup>10</sup>

Our investigators have found that nothing in our enforcement arsenal has as great an effect as the threat of substantial incarceration in a United States prison -- nothing is a greater deterrent and nothing is a greater incentive for a cartelist, once exposed, to cooperate in the investigation of his co-conspirators.
24. Leniency applicants from multi-national corporations can accordingly also be expected to focus more of the resources that they devote to securing and perfecting immunity on those jurisdictions that have criminal sanctions.

<sup>7</sup> See online at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/> .

<sup>8</sup> For example, estimates show that less than a fifth of cartels have been detected in the EU between 1985 and 2005. See 'A Tip of the Iceberg? The Probability of Catching Cartels,' Peter L Ormosi, Centre for Competition Policy Working Paper 11-6, December 2011 p. 40.

<sup>9</sup> Office of Fair Trading, 'The Impact of Competition Interventions on Compliance and Deterrence,' December 2011 the OFT's study showed that the threat of criminal penalties was significantly greater than fines.

<sup>10</sup> US Department of Justice "Seven Steps To Better Cartel Enforcement", 2 June 2006.

25. The Commission is also working on introducing an anonymous whistle-blower scheme for individuals who hold information about a cartel, but who are not directly involved, to provide that information to the Commission. We consider that individuals are more likely to come forward to make a disclosure of cartel conduct if they are aware it is a serious criminal offence. In this way criminalisation will also enhance the Commission's ability to detect cartel activity through greater whistleblowing.

### **Improved co-operation with other agencies**

26. At both an international and domestic level, there is a generally recognised public interest in the sharing of information, and in the protection of information shared, between agencies tasked with detecting and preventing serious criminal offending.<sup>11</sup> Agencies are therefore generally more willing to share sensitive information or co-operate on joint investigations with agencies that investigate serious criminal offending. There is, however, an expectation that the co-operation and information sharing will be reciprocated.
27. The Select Committee will be well aware of the increasingly international nature of commerce, and the important role that international trade plays in the New Zealand economy. This makes it particularly important that the Commission is able to exchange information with its overseas counterparts.
28. The Commission notes that provisions to facilitate international information sharing by the Commerce Commission were inserted by the Commerce (International Co-operation and Fees) Amendment Act 2012, but that these envisage the Commission entering a series of bilateral co-operation agreements. Such bilateral agreements between competition agencies are likely to be overtaken in the near future by multilateral co-operation agreements, such as already exist in relation to securities regulation.<sup>12</sup> Bilateral agreements are increasingly unmanageable given the steady increase in the number of competition agencies, including a significant number with a criminal cartel prohibition.<sup>13</sup>
29. New Zealand has a number of agencies that are involved in the prevention and detection of serious 'white collar' or organised crime in New Zealand. These agencies regularly co-operate on investigations and share information. The Commerce Act currently contains no provisions that facilitate information sharing with domestic agencies.

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<sup>11</sup> In New Zealand, for example, this is recognised in the Privacy Act 1993, the Protected Disclosures Act 2000, and the common law in relation to breach of confidence. The Mutual Assistance in Criminal Matters Act 1992, and its counterparts in other jurisdictions such as Australia, reflect the desirability of co-operation at an international level.

<sup>12</sup> The International Organisation of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information has been signed by 129 countries including New Zealand.

<sup>13</sup> For example, the most recent OECD stocktake.

30. The Commission notes that sections 30 to 33 of the Financial Markets Authority Act 2011 provide a comprehensive and flexible information sharing regime. The Commission considers that the adoption of similar provisions in the Commerce Act would enhance the Commission's ability to assist other regulators, and thereby would be likely to assist in the long term enforcement of the cartel prohibition.

*Co-operation with overseas jurisdictions*

31. International cartels that affect markets in New Zealand are often also detected in other jurisdictions (usually New Zealand's main trading partners: Australia, Canada the United Kingdom, Japan and the United States). These jurisdictions have criminal sanctions for cartel activity. The proposed cartel offence and accompanying criminal regime will bring about significant benefits to the Commission's investigations and enforcement work against cartels. These benefits include:
- 31.1 enabling the Commission to use extradition procedures to return to New Zealand any cartel offenders located overseas;
  - 31.2 the Commission will be able to seek formal government-to-government 'mutual assistance' under the Mutual Assistance in Criminal Matters Act 1992;
  - 31.3 the Commission will be better able to obtain informal agency-to-agency assistance from overseas cartel enforcement agencies. Our experience is that where cartel conduct is criminal in both jurisdictions, agencies will be more willing to share information that is confidential, provide investigative assistance, or cooperate on investigations that affect both jurisdictions;<sup>14</sup>
  - 31.4 the Commission will be better able to share confidential information with overseas enforcement agencies and assist a criminal investigation in another jurisdiction;<sup>15</sup>
  - 31.5 criminalisation will set a level playing field for competition law sanctions with Australia, in line with the objectives of the Single Economic Market Outcomes Framework 2009.<sup>16</sup>

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<sup>14</sup> As noted above, the Commission has cooperation agreements with Canada and Australia.  
<http://www.comcom.govt.nz/the-commission/about-us/international-relations/>

<sup>15</sup> Sections 99B to 99P govern the sharing of information under co-operation agreements, and section 99J of the Act prevents the Commission from providing statements by a person to an overseas agency under a co-operation agreement unless the agency has agreed not to use them in criminal or civil pecuniary penalty proceedings against that person. The Commission may also be able to provide assistance under the Mutual Assistance in Criminal Matters Act 1992.

<sup>16</sup> <http://www.mbie.govt.nz/info-services/business/business-law/sem>

### *Co-operation with other New Zealand agencies*

32. The cartel offence will, for reasons given at paragraph 25 above, enhance the Commission's ability to cooperate with agencies such as the New Zealand Police and the Serious Fraud Office to detect cartel activity, particularly where it occurs as part of broader corporate offending such as market manipulation, corrupt procurement practices, or fraud.
33. The Commission is also likely to receive greater technical assistance from other agencies, including with surveillance and interception under the Search and Surveillance Act 2012.<sup>17</sup> Technical assistance is increasingly valuable as a greater volume of evidence is captured on electronic devices or online.

### **Summary of Commission's position on criminalisation**

34. For these reasons, the Commission generally supports the Government's initiative to criminalise cartel conduct.<sup>18</sup> This support, and the Commission's achievement of these advantages, is, however, dependent upon:
  - 34.1 legislation that is readily intelligible by lay-people and their advisers, and which leaves the Commission well-placed to secure a criminal conviction in suitable cases; and
  - 34.2 the Commission being adequately resourced to invest in appropriate investigative tools and resources to carry out investigations to a criminal standard.
35. Further details on the first of these points is contained in the following section relating to the breadth and complexity of the proposed defences.

### **Breadth and complexity of the defences**

36. International experience suggests that precise and accessible definition of the cartel offence and defences is critical to a successful criminal regime (in terms of both deterrence and prosecution outcomes). The Commission has previously raised concerns about the breadth and complexity of the proposed cartel defences.<sup>19</sup>

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<sup>17</sup> As the cartel offence will be punishable by up to seven years imprisonment, the Commission will be able to access the surveillance and interception powers under the Search and Surveillance Act 2012.

<sup>18</sup> Many of the Commission's views contained in this submission can also be found in the submission to the 2012 Commerce Select Committee, when the previous government proposed criminalising cartel conduct.

<sup>19</sup> See Commerce Commission's previous submissions to the Select Committee on honest belief defence: 'The Commerce (Cartels & Other Matters) Amendment Bill,' Submission to the Select Committee, Commerce Commission, 04 September 2012.



## The proposed section 82C defences

*The proposed section 82C defences are unnecessary*

37. The Commission considers that the proposed section 82C defences are unnecessary for the following reasons:

37.1 The cartel offence already sets a high hurdle under section 82B. The prosecutor is required to establish to the criminal standard of proof (beyond reasonable doubt) that:

37.1.1 the defendant entered into (or gave effect to) a contract or arrangement, or arrived at an understanding that contained a cartel provision; and that

37.1.2 the defendant intended, at that time, to engage in price fixing, restricting output, or market allocating.<sup>20</sup>

That is, the Commission cannot succeed in establishing criminal liability unless it proves that the defendant engaged in prohibited cartel conduct intending to do so.

37.2 There are already a significant number of exceptions to the cartel prohibition, including sections 31, 32, 33 and 44 of the Act, together with a number of industry-specific exemptions. These mean that pro-competitive conduct is unlikely to be subject to the prohibition.

37.3 Pursuant to section 65A, a party who is uncertain about the legality or otherwise of their proposed collaborative activity can seek clearance in advance for the activity.

38. Consistent with our view that the defences are unnecessary, we note there are no equivalents of the proposed s82C defences in Australia. The Australian cartel prohibition is section 45AF(1) of the Competition and Consumer Act 2010. Section 45AO of that act provides a joint venture defence that is similar to the collaborative activity exception found in section 31 of the Commerce Act.

39. Like the New Zealand collaborative activity exception, the Australian joint venture defence only applies where the cartel provision is reasonably necessary for undertaking the joint venture. Unlike the proposed section 82C, the Australian legislation does not provide an additional defence where a person *believed* the cartel provision was reasonably necessary.

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<sup>20</sup> See section 82B(1). Under 82B(b) the person commits an offence if, in contravention of section 30(1)(b) gives effect to a cartel provision; and intends, at the time the cartel provision is given effect to, to engage in price fixing, restricting output, or market allocating.

40. We are not aware of any reason why defendants in New Zealand ought to have an additional defence not available to defendants to the equivalent offence in Australia. The Commission is concerned that 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 all parties.

*Section 82C defences are too broad*

41. In the event that the section 82C defences are retained, the Commission considers the belief element of the proposed defences should be qualified by a test of reasonableness. The section 82C defences should only be available, if at all, where a defendant *reasonably* believed the cartel provision was reasonably necessary for the purposes of a collaborative activity.<sup>21</sup>
42. In the absence of a 'reasonableness' requirement as to any belief, a defendant need only establish that he or she subjectively believed a cartel provision was reasonably necessary for the collaboration, even if that belief was based on a wholly inadequate or irrelevant thought process.
43. The burden of proof would then revert to the Commission to prove beyond reasonable doubt that they did not in fact hold that belief. As a result, the section 82C defences will be available to defendants no matter how idiosyncratic or erroneous their claimed subjective understanding of their business arrangements.
44. The section 82C defences would appear to provide a defence where an individual's belief arises from reliance on professional advice. Absent a reasonableness requirement, the section 82C defences would also extend to individuals who were careless or wilfully blind. For example, consider a defendant who chooses not to take professional advice or to make any enquiries about the cartel provision contained in their collaborative activity. They may nevertheless seek to rely on the defences on the basis that they formed a belief that the cartel provision was reasonably necessary to their collaborative activity.
45. The Commission is concerned that, absent a reasonableness requirement, the section 82C defences are so broad as to provide unmeritorious defendants with a defence that goes well beyond those available for analogous conduct in comparable jurisdictions.
46. We have spoken with the Crown Law Office, and understand that it supports the addition of a reasonableness requirement into any belief-based defence under the Commerce Act.

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<sup>21</sup> The Commission is alive to the textual and conceptual repetition involved in a '*reasonable* belief that X was *reasonably* necessary.' However, if the offence is enacted according to the current section 82C(1)(b), this would be difficult to avoid. The Commission would be open to submitting further on how these clauses might be redrafted so as to accommodate a reasonable belief that the collaborative activity exception applies.

### **Other comments on the defences and exceptions**

47. The Commerce Amendment (Cartels and Other Matters) Act 2017 included two specific exceptions to the cartel prohibition that were added after the Bill had been considered by the Select Committee. The exceptions were not, therefore, subject to scrutiny by Select Committee, nor publically consulted on. The exceptions are the international liner shipping exception<sup>22</sup> and the section 31(3) exception.
48. The Commission invites the Select Committee to look closely at the need for these provisions.
49. For the avoidance of doubt, if the Select Committee considers that these exceptions are necessary, the Commission repeats its submission above that the additional section 82C defences related to these exceptions are nevertheless unnecessary, and that if retained the belief element of these defences should be qualified by a test of reasonableness.

#### *Section 31(3) exception and corresponding defence in 82C(3)*

50. In principle, the Commission is comfortable with section 31(3) and the corresponding defence proposed in section 82C(3), relating to a 'restraint of trade' that continues after the end of the collaborative activity.
51. We, however, note that a 'restraint of trade' is not defined in the legislation. We consider that, further definition of this term is appropriate in order to provide greater drafting clarity, and to ensure that the exception and defence do not apply more broadly than intended.
52. In common competition law parlance, a wide range of commercial arrangements can constitute a 'restraint of trade', some lawful, many unlawful. Section 7 of the Commerce Act, for example, uses the term 'restraint of trade' and says that the law on restraints is unaffected by this Act, i.e. the common law prevails. The Commission regards it as confusing for lay-people and specialists alike that this terminology appears without definition or an apparent relationship within the Act.
53. Additionally, as we understand that section 82C(3) is intended to deal with commercial restraints that endure beyond the end of a franchise arrangement, we suggest that a definition or change of terminology to accommodate the well-understood franchise concept might provide clarity.

#### *Sections 44A and 44B exception and corresponding defence in 82C(4) to (7)*

54. Sections 44A and B, and proposed sections 82C(4) to (6) relate to international liner shipping. The Commerce Amendment (Cartels and Other Matters) Act 2017 will, from 17 August 2019, repeal a general Commerce Act exception for international liner shipping.

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<sup>22</sup> Section 44A of the Commerce Act 1986, not yet in force.

55. The Commission has consistently expressed the view that the general collaborative activity exception is sufficiently wide and flexible to deal with all industries including international liner shipping. The exceptions are, therefore, unnecessary. We hold this same view in respect of the proposed defences for international liner shipping services.
56. The Commission considers that new sections 44A and 44B are overly complex. We hold this same view with respect to proposed sections 82C (4) – (7).
57. The Commission foresees real difficulty in applying the exception and defence provisions in the event of cartel activity in the international liner shipping industry. We note that the ACCC's first criminal cartel prosecution related to the shipping industry.

### **Complexity of the drafting**

58. It is critical to generating a compliance culture with the cartel provisions that they are clearly drafted and readily intelligible to the lay-person and their advisor. The cartel offence and defences should especially be clear and capable of being readily understood by the average member of the business community. In the event of alleged breach, it also becomes critical to effective enforcement proceedings that legal debate is focussed on culpability rather than on the meaning and scope of the Act.
59. The drafting of section 82C, setting out defences in relation to the cartel offence, is in our view unnecessarily complex.
60. For example, we have noted above the need to define the 'restraint of trade' provisions referred to in section 82C(3) and to use consistent terminology throughout the Act.
61. We also consider that, if the defences at section 82(C) are retained, they would greatly benefit from headings or cross-references linking the available defences to the other exceptions. For example, it is presently unclear that:
  - 61.1 Section 82C(1) setting out the defence in relation to a collaborative activity relates to section 31(1), the exception for entering into a cartel activity;
  - 61.2 Section 82C(3) setting out the 'restraint of trade' defence also relates to the section 31(3) exception;
  - 61.3 Sections 82C(4) to (6) setting out the defence in relation to international liner shipping relate to section 44A on the liner shipping exception; and
  - 61.4 The exceptions in section 32, 33 and 44 will also be available in respect of any prosecution.

62. For the same reasons, we consider there might also be benefit in ensuring that the exception provisions expressly refer to the defences later prescribed in section 82C. We note that the Bill will amend section 30 to include a cross-reference to the criminal offence provision. It would be desirable if this provision also cross references the exceptions and any defences.
63. Other drafting simplifications would seem to be available. For example, could sections 82C(1) and (2) be consolidated, and reflect that “it is a defence to the offences under s82B(1)(a) and (b) if [belief defence.]” Similarly, sections 82C(4) and (5), and perhaps also (6) would seem to present the opportunity for greater drafting economy.

## Other matters

### Establishment of a Cartel Prosecutors Panel

64. The Commission has discussed with the Crown Law Office the necessary arrangements to give effect to the Bill. Given the complex and specialised nature of cartel prosecutions, the Commission and the Crown Law Office agree that a panel of suitably skilled prosecutors should be created, from which counsel can be selected to lead any cartel prosecution.
65. The Serious Fraud Office (**SFO**) has at its disposal a Serious Fraud Prosecutors Panel for the purpose of enabling proceedings relating to serious or complex fraud to be brought expeditiously and expertly, including by giving early advice on the merits of any prosecution. Panel members are appointed by the Solicitor General after consultation with the Director of the SFO. Provision for the panel is made in the Serious Fraud Office Act 1990.<sup>23</sup>
66. The provisions of the Criminal Procedure Act 2011 confer on the Solicitor-General ultimate control over the conduct of all public criminal prosecutions, and we understand this responsibility can extend to informally putting in place a panel arrangement. However, we are of the view that a similar statutory recognition of a prosecutors panel, to that featuring in section 48 of the Serious Fraud Office Act 1990, would be beneficial in the cartels context and make its role clear.
67. The Commission therefore requests that provision is made in the Bill for the establishment of a Cartel Prosecutors Panel. We understand that the Crown Law Office supports this recommendation.

### Transitional provisions

68. The Commission considers that the proposed two year transitional period will be sufficient time for the Commission to embed the necessary procedural refinements. The transition time will allow the Commission to develop its ability to carry out

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<sup>23</sup> Section 48 of the Serious Fraud Office Act 1990.

criminal cartel investigations and to run an initial advocacy campaign to guide and prepare the business community.

## Conclusion

69. In conclusion, the Commission generally supports the Government's initiative to criminalise cartel conduct. It considers that:
- 69.1 The parallel civil and criminal regimes will be workable.
  - 69.2 The introduction of a criminal cartel regime will better deter cartel conduct and improve enforcement of the law in New Zealand, including through increased co-operation with other agencies.
70. The Commission's support is, however, dependent upon:
- 70.1 legislation that is readily intelligible by lay-people and their advisers, and which leaves the Commission well-placed to secure a criminal conviction in suitable cases; and
  - 70.2 the Commission being adequately resourced to invest in appropriate investigative tools and resources to carry out investigations to a criminal standard.
71. To this end, the Commission has suggested that:
- 71.1 The belief-based defences in proposed section 82C are unnecessary. If the section 82C defences are to be retained, we consider that the defences should only apply where a defendant's belief was reasonable.
  - 71.2 The cartel offence and any defences should be expressed in a way that is clearer to a lay-reader. We have provided some suggestions that may assist in achieving this.
  - 71.3 the Bill would benefit from the inclusion of clauses:
    - 71.3.1 enabling greater information sharing with other regulators; and
    - 71.3.2 creating a Cartel Prosecutors' Panel.
72. The Commission appreciates the opportunity to provide this submission.