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Economic Development, Science and Innovation Committee
Parliament Buildings
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Submission on the criminalisation of cartels

The Institute of Directors (IoD) appreciates the opportunity to comment on the [Commerce \(Criminalisation of Cartels\) Amendment Bill](#) (the Bill) which will introduce a criminal offence for cartel conduct.

The Bill will amend the Commerce Act 1986, the purpose of which is to promote competition in markets for the long-term benefit of consumers within New Zealand. One of the key ways the Commerce Act promotes competition is by prohibiting cartels. Cartels exist where competitors agree to reduce or remove competition that exists or would otherwise exist between them.¹

Summary

Cartel reforms were introduced in the Commerce Act in August 2017, after being first tabled in Parliament in 2011. The proposed criminal offence for cartel conduct in the Bill will work in parallel with the existing civil cartel regime. The criminal offence is aimed at individuals who are the decision-makers for the cartel and also their organisations. The decision-makers will sometimes be directors. For individuals convicted of the offence, the Bill introduces a penalty of up to 7 years imprisonment or a fine of up to \$500,000, or both.

The IoD supports competition law that provides for effective and efficient markets. We also support the prohibition of cartels. However, we don't support criminalisation of cartel conduct for the following reasons:

- criminalisation may have a detrimental effect on pro-competitive activities
- increasing risks for directors can deter effective directors from serving on boards
- increasing risks and regulation means boards can spend a disproportionate amount of time on conformance rather than performance and may become more risk adverse
- there is likely to be significant compliance costs, especially for businesses
- the civil regime for cartels is robust and a sufficient deterrent
- there is no compelling cost/benefit analysis for criminalisation.

We comment in more detail below about our reasons for opposing the Bill.

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of over 8,500 members drawn from listed issuers, large private organisations, small and medium enterprises, State Sector organisations, not-for-profits and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

¹ Commerce Commission, *Competitor Collaboration Guidelines* (January 2018).

Background

2017 reform

Under the Commerce Act, entering into or giving effect to an agreement containing a cartel provision is unlawful (unless an exception applies). A *cartel provision* is essentially any provision in an agreement between competitors that has the purpose, effect, or likely effect of at least one of the following in relation to the supply or acquisition of goods or services in New Zealand:

- price fixing
- restricting output
- market allocating.

Each of these terms is further defined. The following exceptions to the prohibition of cartel provisions were introduced in 2017 to recognise that collaboration between firms can also increase productivity and growth:

- vertical supply contracts
- joint buying and promotion agreements
- collaborative activities.

A voluntary clearance regime was also introduced under which businesses can apply to the Commerce Commission to ensure that their collaborative activities do not contravene the Commerce Act.

Background to criminalisation

Criminalisation of cartel conduct has been raised in recent years:

- in January 2010 the Ministry of Economic Development consulted on whether New Zealand should criminalise cartel conduct
- criminalisation was included in an exposure draft of the Commerce (Cartels and Other matters) Amendment Bill released in June 2011 and then introduced into Parliament in October 2011
- in December 2015, the Government of the day decided not to proceed with criminalisation but continued with reforming the civil regime for cartels
- the Commerce (Cartels and Other matters) Amendment Bill was passed in 2017.

Criminalisation was opposed by a majority of submitters including corporates, law firms, and business groups.

The current Government is seeking to reintroduce criminalisation of cartel conduct in substantively the same form as previously proposed. The policy to be given effect in the Bill is informed by the initial 2010 review. The specific policy objectives of introducing criminalisation of cartels are to:

- promote detection and deterrence of cartels
- improve cartel enforcement by the Commerce Commission and facilitate New Zealand's contribution to enforcement efforts against global cartels.

Criminalisation of cartels summary

The criminal offence for cartel conduct is largely the same as the civil prohibition, except the criminal offence requires an *intention* to engage in cartel conduct (ie deliberate wrongdoing). The onus of proof will be on the prosecution to prove this beyond reasonable doubt (compared with the balance of probabilities, which is a lower standard of proof for the civil prohibition).

The Bill also introduces a defence in relation to collaborative activities. In essence, it will be a defence for a defendant involved in a collaborative activity if the defendant *believed* that the cartel provision was reasonably necessary for the collaborative activity (including in relation to restraint of trade). *Collaborative activity* is defined as an enterprise, venture, or other activity, in trade, that is:

- carried on in co-operation by 2 or more persons and
- not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.

The penalty for a criminal cartel offence is:

- for an individual, up to 7 years imprisonment or a fine not exceeding \$500,000, or both
- for an organisation, up to the greater of \$10 million, or three times the commercial gain, or if this cannot be easily established 10% of their turnover.

A two year transitional period is proposed before the criminalisation comes into effect.

[IoD comments on criminalisation of cartel conduct](#)

The IoD supports competition law that provides for effective and efficient markets. We also support the prohibition of cartels. However, we don't support criminalising cartel conduct because the Government has not demonstrated that this will provide sufficient benefit to outweigh the potential harm to business and New Zealand as a whole. A regulatory impact assessment from 2011 has been used to help inform the main policy decisions taken by the Government relating to the contents of the Bill. Given the potential consequences of the Bill, we would have expected to see a current and adequate costs/benefits analysis justifying criminalisation.

We agree with the following comments from a Cabinet paper in 2015 when the criminal offence was removed from the Commerce (Cartels and Other matters) Amendment Bill:

“The Treasury has not seen enough analysis to balance the likely benefits of cartel criminalisation in terms of international cooperation and broader deterrence with the potential chilling effects on economic activity with unclear competition effects, the compliance costs imposed on businesses, and the administrative costs on the Crown.”

Before introducing a criminal offence, in our view, it would be better to understand how the new civil prohibition and exemption framework will operate in practice. We discuss our reasons for opposing criminalisation below.

Detrimental effect on pro-competitive activities

A key concern of the Bill is the potential detrimental effect it may have on pro-competitive business activities. Uncertainty around the scope of the offence and the defences, and how the Commerce Commission will approach civil and criminal prosecutions may make decision-makers more risk averse and discourage them from engaging in what would otherwise be lawful activities. We believe criminal sanctions will have a significant effect and organisations will be less likely to collaborate (eg in sharing resources and technology with other organisations) where this could be mistaken for cartel conduct.

Deterrence to people serving on boards

Trust in business and society is vital to New Zealand's prosperity and wellbeing. Directors have a key role in maintaining and growing trust and confidence in business and its role in society. Directors can face significant risks in their positions from a legal perspective and these are increasing over time. The reform under the Health and Safety at Work Act 2015 around directors' personal liability is a recent example.

We are concerned about these increasing risks, and especially criminalisation of commercial conduct, because this can discourage directors from serving on boards. New Zealand needs high performing, effective, and progressive directors to help raise the standard of governance in organisations and trust and confidence in business in New Zealand.

Conformance and risk adverse boards

Boards have a fundamental role in setting, driving and overseeing strategy. They must be continually engaged in strategic matters to ensure the long-term sustainability of their organisations. This is particularly important in today's complex and challenging operating environment for many organisations. The impact of increased director liability adds to boards' growing regulatory burden and means they can spend disproportionately more time on conformance rather than performance. Our 2017 Director Sentiment Survey found that 72% of directors were spending more time on compliance related activities in the last 12 months. We are also concerned that criminalisation will lead to boards becoming more risk adverse (ie not taking appropriate business risks) which will adversely impact New Zealand's economic performance.

Cost burden on business and directors

Criminalising cartel conduct will result in an increase in costs for organisations and directors. New Zealand (and some overseas) organisations and directors are likely to be unduly impacted by compliance costs as they seek to minimise risk (eg by seeking professional advice more frequently to ensure they are compliant with the Act).

Robust civil regime

New Zealand has a robust civil regime prohibiting cartels and there are significant penalties:

- individuals can be fined up to \$500,000
- organisations can be fined up to the greater of \$10 million, or three times the commercial gain, or if this cannot be easily established 10% of their turnover.

The Commerce Commission may also seek banning orders preventing any individual from being a director or involved in the management of any company for up to 5 years. We believe these penalties are a sufficient deterrent against cartels in New Zealand.

We question whether criminalisation will have a sufficient additional deterrent effect to outweigh the disadvantages to New Zealand, especially in light of the following:

- from the experience of other countries, we are aware it is very difficult and costly to successfully prosecute cartels (to the criminal standard)
- there is likely to be only a small number of cases given the size of New Zealand.

Guidance and transition

If the Bill proceeds, it is essential that the Government takes steps to raise awareness around criminalisation of cartel conduct including providing clear and comprehensive guidance for directors and other decision-makers (eg with examples of defences and exceptions). Guidance should also cover the approach of the Commerce Commission/Crown in relation to civil and criminal prosecutions. There also needs to be a sufficient transitional period (ie a minimum of two years).

In conclusion, we believe the current civil regime prohibiting cartels is robust and a sufficient deterrent, and introducing a criminal offence may be detrimental to business and New Zealand as a whole. We appreciate the opportunity to comment on behalf of our members.

Yours sincerely



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