

9 February 2018

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Commerce (Criminalisation of Cartels) Amendment Bill**

### **Purpose**

---

1. We have considered whether the Commerce (Criminalisation of Cartels) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 17 (freedom of association) and s 25 (minimum standards of criminal procedure). Our analysis is set out below.

### **The Bill**

---

3. The Bill amends the Commerce Act 1986 ('the principal Act'). The principal Act was previously amended in 2017 to better define anti-competitive cartel conduct and introduce a new exemption and clearance regime for collaborative activities. The 2017 amendments made it an offence to enter into a contract, arrangement, or understanding that contains a cartel provision, or gives effect to a cartel provision with civil pecuniary penalties as the available sanction. This Bill introduces a further sanction in the form of a criminal offence where the contravention involves an intention to price fix, restrict output, or market allocate.
4. An individual who commits a criminal offence under this Bill will be liable on conviction to imprisonment for a term not exceeding seven years and/or a fine not exceeding \$500,000. A company will be liable to a fine not exceeding the greater of \$10 million or three times the value of any commercial gain resulting from the contravention.

### **Consistency of the Bill with the Bill of Rights Act**

---

#### **Section 17 – Freedom of association**

5. Section 17 provides that everyone has the right to freedom of association. This provision recognises that persons should be free to enter into consensual arrangements with others and to promote the common interests and objectives of the associating group.
6. Criminalising and extending the possible penalties for anti-competitive cartel activity in cl 4 of the Bill, appears to limit the right to freedom of association.
7. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act.

8. We consider that the limitation is justified under s 5 of the Bill of Rights Act because:
  - a. preventing anti-competitive cartel activity, which can result in market monopolies, is a sufficiently important objective
  - b. the use of criminal penalties to deter this activity, and to incentivise individuals or firms to cooperate with the Commerce Commission, is rationally connected to that objective
  - c. there are a number of exemptions in the principal Act to allow legitimate collaborative activity (for example, for joint venture pricing) and the Bill provides a defence of belief that the cartel provision was reasonably necessary for the purposes of a collaborative activity, so the Bill impairs freedom of association no more than is reasonably necessary, and
  - d. given the importance of effective competition for both consumers and the overall economy, and the exemptions and defence provided, the limit is in due proportion to the importance of the objective.
9. For these reasons, we conclude that the limit on freedom of association imposed by the Bill is justified under s 5 of the Bill of Rights Act. This is consistent with our August 2017 advice regarding provisions with similar effect, originally contained in the Commerce (Cartels and Other Matters) Amendment Bill.

## **Section 25 – Minimum standards of criminal procedure**

10. Section 25 provides that everyone who is charged with a criminal offence is entitled to the observance of minimum standards of criminal procedure. This includes the right to a fair trial (s 25(a)), the right not to be compelled to be a witness or to confess guilt (s 25(d)), and the right to present a defence (s 25(e)).
11. Clause 4 of the Bill provides that a defendant that wishes to claim an exemption or rely on a defence of belief that the cartel provision was reasonably necessary, must notify the prosecution of that fact within 20 working days after they plead not guilty. At the same time, the defendant must provide sufficient details about the application of the relevant exemption or defence to fully and fairly inform the prosecution of the manner in which the exception or defence is claimed to apply. The provision contains a safeguard that the notification can happen at any later time with leave of the court.
12. This 20 day notification requirement limits the period of time that the defendant has to decide on their defence, and compels the defendant to provide information about their defence in advance of trial. While we note the ‘right to silence’ after charges have been filed is not specifically protected by the Bill of Rights Act,<sup>1</sup> these provisions may arguably engage the rights protected by s 25 including the right to a fair trial, the right to present a defence, the right not to be compelled to confess guilt, and the right to be presumed innocent.
13. We note that other related rights may also be engaged, including the right to adequate time and facilities to prepare a defence under s 24(d).

---

<sup>1</sup> We note s 23(4) specifically protects the right of those who are arrested or detained to refrain from making any statement.

14. To the extent that this provision is considered to limit s 24 or s 25, we consider this is justified under s 5 of the Bill of Rights Act.
15. The Bill has a sufficiently important overarching objective of preventing anti-competitive cartel activity. The specific objective of this provision is to enable the prosecution to be able to have time to adequately respond to the defence given the complex nature of the exemptions and defences. The 20 day notification requirement is rationally connected to this objective.
16. The provision explicitly allows notification at any later time with leave of the court. This safeguard ensures that if a defendant does not have adequate time to decide on its defence or needs to change defence at a later stage, the defendant can apply to the court for a later notification date. This ensures the provision limits any rights no more than reasonably necessary, and can be applied in a way that is consistent with the Bill of Rights Act.
17. For these reasons, we conclude that any limits on the rights protected by s 25 (and s 24) imposed by the Bill appear to be justified under s 5 of the Bill of Rights Act.

## **Conclusion**

---

18. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**