

Should Cartel Conduct Be Criminalised?

Cartels (of the kind that exploit consumers) have a bad name, and rightly so. Cartel conduct is subject to heavy penalties under competition law (the Commerce Act).

Cartels can take the form of price fixing, bid rigging, market sharing and agreements to restrict output.

But collective action can also take the form of joint ventures, franchises, networks and alliances that benefit consumers. Banks, telecommunications companies and many others need to share information and enter into cooperative agreements in order to operate efficiently and benefit consumers.

In fact the most common form of price fixing in the economy is collective wage bargaining by unions. Perversely, this is exempt from the Commerce Act and unions have a statutory monopoly on bargaining.

In a recent discussion paper the Ministry of Economic Development proposes the introduction of criminal penalties, including jail terms, on top of the civil penalties for cartel conduct.

One of the reasons cited is that it would bring our law into line with that in Australia (and some other jurisdictions).

But New Zealand should always be careful about regulating something just because other countries do. Many regulations are the result of populist political reactions (cartel criminalisation may be a case in point) or special interest rent seeking.

The fact that other countries shoot themselves in the foot (say with agricultural subsidies) doesn't mean New Zealand should do likewise.

In the case of Australia, the highly respected former chairman of Australia's Trade Practices Commission, Professor Bob Baxt, has described the

Australian criminalisation reforms as “one of the most unfortunate examples of the failure ... of successive governments to appreciate the importance of joint venture activity in the Australian economy.”

Many lawyers, academics, Business New Zealand and the Business Roundtable have criticised the MED discussion document.

For a start, no evidence is provided about the frequency of cartel conduct in New Zealand. Given its small size and open markets, the scope for durable cartel behaviour seems extremely limited.

More importantly, no attempt is made, even hypothetically, to demonstrate significant economic harm from cartels. We know that some of the cases investigated by the Commerce Commission, such as sellers of Bike Lights on Trade Me, Dunedin pubs, South Island tow truck operators and Manawatu funeral directors, are of trivial economic importance.

Do they really warrant significant use of taxpayer-funded enforcement resources and the potential for jail terms? Current enforcement expenditure on cartels by the Commerce Commission already runs to \$3 million annually, according to the discussion paper. Criminalisation would require expensive jury trials, which MED suggests could run to 30 days.

Perhaps the most significant economic cost of criminalisation would be its chilling effect on legitimate business activity. It carries a serious risk of making managers risk averse – more so than shareholders in a company would wish them to be – because of the possibly devastating personal effects of a prosecution.

The discussion paper is naive to assert that “Cartels are relatively easily recognised – we know them when we see them.”

Economic theory is not clear on whether particular conduct is harmful. Firms may get conflicting professional advice on proposed actions. Severe penalties are not appropriate when firms and their advisers cannot be clear whether they are complying with the law.

Moreover, recent analyses of successful cartel prosecutions have failed to find evidence of subsequent benefits in the form of lower prices.

As always, the costs and benefits of any proposed regulation need to be carefully weighed up. At a recent conference, former director of the New Zealand Institute of Economic Research Brent Layton made the point that it was incumbent on MED to produce a sound regulatory impact analysis to justify any criminalisation proposal. The absence of such an analysis in the discussion document was arguably a breach of Cabinet Manual requirements.

As the 2025 Taskforce noted in its report, “In economies with open markets, competition policy is likely to be, at most, a minor contributor to economic performance.” A leading British economist John Kay only slightly overstated the situation when he wrote recently that “Competition cases today are arcane exercises in which experts exchange conflicting and inconclusive theoretical assertion and counter-assertion, often for years.”

The claim in the discussion paper that cartels are the most harmful form of anti-competitive behaviour is spurious.

Far worse are statutory monopolies like ACC, as the recent financial crisis has again demonstrated, and Zespri, which the previous National government planned to open up to competition.

Such issues, as well as a general review of the Commerce Act as recommended by the 2025 Taskforce, are much higher priorities for the resources available for competition policy reform.

New Zealand cannot hope to become a dynamic and prosperous country and close the income gap with Australia if it keeps burdening the business sector with ever-increasing ill-justified regulation and keeps avoiding the issues that really matter.

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