

## *Fixing the Price at Liberty: The Case for Imprisoning Price-Fixers in New Zealand*

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### I INTRODUCTION

On 27 January 2010, the Ministry of Economic Development (MED) released a discussion document on the potential criminalisation of cartels in New Zealand.<sup>1</sup> The document canvasses options to detect and deter cartels and concludes that there is a prima facie case for criminalisation, before delving into issues surrounding the definition and practical implementation of a cartel offence.

Publication of the document came as no surprise. In August 2009, Prime Minister John Key remarked that criminalisation of cartel behaviour was a legitimate issue for New Zealand to consider in light of Australia's enactment of a cartel offence.<sup>2</sup> The policies subsequently finalised in the Single Economic Market Outcomes Framework predictably included a medium-term goal of harmonising Australian and New Zealand penalties for restrictive trade practices — including hard-core cartels.<sup>3</sup> Only two months earlier, Commerce Minister the Hon Simon Power MP had responded to Australia's introduction of criminal sanctions<sup>4</sup> by indicating that criminalisation was on the “work programme”.<sup>5</sup> His comments, while cursory, echoed earlier Commerce Commission statements that the imposition of pecuniary penalties alone had limitations,<sup>6</sup> and that the Commission was watching Australian developments with interest.<sup>7</sup>

The Commerce Commission explicitly prioritises cartel enforcement,<sup>8</sup> and rightly so. The modern international consensus is that

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1 Ministry of Economic Development (MED) *Cartel Criminalisation: Discussion Document* (2010).

2 “Jail good idea for cartels, says Key” *The New Zealand Herald* (New Zealand, 18 August 2009).

3 MED *Single Economic Market Outcomes Framework As Identified In Prime Ministers Rudd and Keys Joint Statement of Intent* (2009).

4 Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth).

5 Ian Llewellyn “Jail Time For Business Cartels Mooted” *The New Zealand Herald* (New Zealand, 18 June 2009).

6 Paula Rebstock, Commerce Commission Chairwoman “Speech to Wellington District Law Society Law Practitioners Seminar Series” (Wellington District Law Society, Wellington, 18 November 2008).

7 Peter Taylor, General Counsel, Commerce Commission “The Application of the Leniency Policy” (LexisNexis Advanced Competition and Fair Trading Law 2007 Conference, 31 May 2007).

8 See the Strategic Framework 2009/2010 in Commerce Commission *Statement of Intent 2009–2012* (2009) at 12.

hard-core cartels are severely detrimental to economic welfare; labelled the most “egregious violations of competition law”<sup>9</sup> by the Organisation for Economic Co-operation and Development (OECD), as the “supreme evil of antitrust”<sup>10</sup> by the United States Supreme Court, and as a “major and largely invisible drain on the world’s economy”<sup>11</sup> by the United Kingdom Department of Trade and Industry in its 2001 White Paper. By inflating prices, cartels deceitfully transfer wealth from consumers to the producer, to the detriment of the consumer surplus and allocative efficiency. Annual global harm is estimated in billions of dollars.<sup>12</sup>

New Zealand competition law recognises the potentially devastating financial impact of cartel conduct by rendering horizontal arrangements that fix, control or maintain prices per se illegal.<sup>13</sup> Corporations and individuals that contravene the price-fixing prohibition in s 30 of the Commerce Act 1986, or the broader prohibition of anti-competitive arrangements in s 27, are subjected to harsh pecuniary penalties.<sup>14</sup> Yet New Zealand competition law stops short of imposing criminal punishment on cartelists. Notwithstanding international trends towards criminalisation, the MED discussion document is the first to examine the desirability of criminal penalties for cartel conduct in New Zealand in over a decade.<sup>15</sup>

Despite the disinclination to criminalise hard-core cartel conduct to date, the investigation of criminal sanctions was inevitable, triggered by Australia’s long-awaited introduction of criminal liability for cartels.<sup>16</sup> Consistent punishment of hard-core cartels would complement coordination between the competition agencies,<sup>17</sup> and send a signal to price-fixers that they risk imprisonment on both sides of the Tasman. Given New Zealand’s commitment to trans-Tasman economic integration<sup>18</sup> and the Prime Minister’s intentions to align trans-Tasman competition law, it seems inescapable that New Zealand will upgrade its arsenal of cartel penalties to achieve a more harmonised approach.

The need for proportionality in the punishment of cartels and other white collar offences also encourages a review of penalties. In February 2008, new criminal sanctions for insider trading, market manipulation

9 OECD *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL, 14 May 1998 [Recommendation].

10 *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* 540 US 398 (2004) at 408.

11 Department of Trade and Industry *A World Class Competition Regime* (2001) at [Box 7.1] <www.archive.official-documents.co.uk>.

12 OECD *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (OECD Publications Service, Paris, 2002) [OECD (2002)] at 71–72.

13 Commerce Act 1986, s 30.

14 *Ibid*, s 80(2B). Part 2 discusses the current and former penalty regimes in more detail.

15 Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (1998).

16 Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth).

17 The Commerce Commission (International Cooperation and Fees) Bill (2008 No 293-1) proposes to facilitate increased cooperation with respect to investigative assistance and information sharing.

18 MED “Memorandum Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law” (2010) <www.med.govt.nz>.

and misleading conduct in the context of takeovers came into force, with maximum penalties including up to five years' imprisonment.<sup>19</sup> As the law stands, imprisonment is a potential penalty for tax evaders and insider traders but not for price-fixers, whose covert agreements may potentially impact commerce on a far more devastating scale.<sup>20</sup>

Investigation of domestic and international cartels by the Commerce Commission continues to increase, with 19 active investigations in progress.<sup>21</sup> The growth in anti-cartel enforcement is attributed by the Commission to the Leniency Policy, revised recently in March 2010,<sup>22</sup> yet cartel detection is merely one aspect of the deterrence equation. Ongoing, effective deterrence also requires that cartel members other than the whistleblower feel the brunt of appropriate sanctions.

Finally, the economic slowdown experienced globally and in New Zealand<sup>23</sup> also favours consideration of imprisonment as an option to deter cartelists. International evidence demonstrates that cartel formation increases during financial crises, as stressed executives favour collusion to counter declining sales.<sup>24</sup> Most recently, Mark Berry, Commerce Commission Chairman, reiterated that a recessionary environment can cultivate price-fixing and bid-rigging arrangements as firms and suppliers seek to preserve profit margins.<sup>25</sup> Although the impact of the recession on cartel activity is unknown, it is an opportune time to re-evaluate the effectiveness of New Zealand's current penalties, with a view to curbing any executive temptation to participate in anti-competitive agreements.

Accordingly, a study of current penalties and the possibility of criminal liability for hard-core cartels is rightfully on the government's agenda. International developments aside, reviewing the legitimacy of criminal sanctions requires a detailed assessment of the present statutory framework and a cost-benefit analysis of a cartel offence in the New Zealand context.

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19 Securities Markets Act 1988, s 8F; Takeovers Act 1993, s 44C.

20 Ministry of Commerce, above n 15, at 30.

21 Mark Berry, Chairman, Commerce Commission "Commerce Commission Update for 2010" (Competition Law and Regulatory Review Conference, Wellington, 22 February 2010). By comparison, 14 were in progress in February 2009: see Paula Rebstock, Chairwoman, Commerce Commission, "Enforcing Competition Law During an Economic Crisis" (9th Annual Competition Law and Regulation Review Committee, Wellington, 25 February 2009).

22 Commerce Commission *Cartel Leniency Policy and Process Guidelines* (2010).

23 Gross Domestic Product declined 1.6 per cent in the year ended December 2009: Statistics New Zealand "Gross Domestic Product: December 2009 quarter" (press release, 25 March 2010).

24 See Don Klawiter "Cartel Enforcement Today: The Perils of the Economic Downturn" (2008) Global Competition Policy <[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)> cited by Rebstock, above n 20, at 3.

25 Berry, above n 21, at 2.

## II CIVIL LIABILITY FOR HARD-CORE CARTELS IN NEW ZEALAND

### The Statutory Framework

Section 30(1) of the Commerce Act 1986 creates a 'per se' prohibition of agreements between competitors with the purpose, or actual or likely effect, of fixing, controlling or maintaining prices, which are deemed to substantially lessen competition pursuant to s 27. Other hard-core cartels involving output restrictions, market allocation and bid-rigging must be analysed under the rule of reason in s 27 as to whether they in fact substantially lessen competition, or whether they are caught by s 30 where the cartel also has the purpose, or likely or actual effect, of price-fixing.<sup>26</sup>

Contraventions of ss 27 and 30 are punished by civil pecuniary penalties, which can be imposed against both corporations and individuals. Section 80(2B)(b) affords the courts considerable flexibility when sentencing corporations, with thresholds set at the greater of \$10,000,000 and either three times the value of the commercial gain, or, if not readily ascertainable, 10 per cent of turnover of the body corporate and any interconnected bodies corporate. By comparison, the maximum penalty for natural persons is a fixed threshold of \$500,000: s 80(2B)(a).

The current maxima for corporations were increased from an absolute maximum of \$5,000,000 in 2001, notwithstanding that High Court orders hitherto had not threatened penalty thresholds.<sup>27</sup> The Ministry of Commerce in 1998 had advised that fixed maximum penalties were unsupportable in light of economics literature on optimal penalties and unduly limited penalty awards.<sup>28</sup> Political sentiment favoured severe sanctions as a means of ensuring that the deterrence objective of penalties under the Commerce Act was achieved. The revised statutory maxima were accordingly championed as sending "an unequivocal signal to the courts" of the need to penalise rigorously anti-competitive behaviour.<sup>29</sup>

The 2001 amendments thus effected a significant shift from fixed corporate penalties to a flexible framework allowing the calculation of maximum penalties by reference to illegal gain or turnover (as a proxy for that gain). Although maximum penalties on natural persons of \$500,000 were unaltered, the creation of a presumption of personal liability<sup>30</sup> facilitated greater individual accountability. Indemnification by firms of

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26 Section 30 was restricted to price-fixing as the Commerce Committee believed that a wider clause could potentially capture pro-competitive agreements: Commerce Amendment Bill 1999 (296-2) (Commerce Committee report) at 8.

27 The highest penalties imposed prior to 2001 were three awards of \$1.5 million in *Commerce Commission v Taylor Preston Ltd (No 2)* (1998) 6 NZBLC 102,598 (HC).

28 Ministry of Commerce, above n 15, at 7–13.

29 Commerce Committee report, above n 26, at 25.

30 Commerce Act 1986, s 80(2).

employee liability for s 30 offences was prohibited,<sup>31</sup> so individuals could not evade punishment by transferring their price-fixing penalty or costs to the firm's expense account. Finally, in addition to monetary penalties, individual offenders risked being banned from the direction, promotion or management of a company for up to five years.<sup>32</sup>

### The Leniency Policy

Nonetheless, the deterrent effect of large pecuniary penalties, and even the presumption of individual sanctions, inevitably lacks impact for cartelists where the risk of regulatory detection is low. To combat the notorious secrecy of cartels, the Commerce Commission provides strong incentives for individuals to admit cartel participation through the Leniency Policy. To the first individual or corporate applicant,<sup>33</sup> this Policy grants "conditional immunity" from Commission-initiated proceedings,<sup>34</sup> provided that the Commission had no knowledge of the cartel or had insufficient evidence to initiate proceedings.<sup>35</sup> The 'marker' system allows applicants to preserve their status as first whistleblower while the prescribed documentation is assembled, further hastening the race to the Commission door.<sup>36</sup>

For cartel members too late to blow the whistle, the Leniency Policy affords the Commission discretion in its prosecution of individuals and companies who have fully cooperated and provided information that added "significant value to the investigation".<sup>37</sup> A defendant that provides early, full and ongoing assistance can expect significant penalty discounts of up to 50 per cent<sup>38</sup> in the penalties jointly recommended with the Commission to the court. Moreover, if the cooperating party informs the Commission about their participation in a second, unknown cartel, conditional immunity for that second cartel may be obtained in addition to a recommended penalty concession for the first cartel.<sup>39</sup>

The Leniency Policy is crucial to uncovering the existence and scale of hard-core cartel activity in New Zealand. The offer of complete immunity to the whistleblower represents a significant incentive to defect, particularly in light of the harsh pecuniary penalties available, and logically must increase the likelihood of cartel detection. Admittedly, only one proceeding brought by the Commerce Commission to date has

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31 Ibid, s 80A.

32 Ibid, s 80C.

33 *Cartel Leniency Policy*, above n 22, at [3.01]. If a company has qualified for conditional immunity, present or former directors, officers or employees may be covered by 'derivative immunity': see [3.18].

34 The Leniency Policy does not, however, provide amnesty against third party claims: *ibid*, at [3.04] and [4.13].

35 *Ibid*, at [3.07]. Further conditions must also be met in relation to admission of liability, lack of coercion of other cartel participants, cessation of cartel involvement and full, continuing cooperation: see [3.11]–[3.23].

36 *Ibid*, at [3.29].

37 *Ibid*, at [4.03]–[4.04].

38 *Ibid*, at [4.08].

39 *Ibid*, at [3.59]–[3.62].

initiated with a leniency application.<sup>40</sup> Yet this statistic will likely change, considering that 10 of the Commission's 19 active investigations have been initiated through leniency applications.<sup>41</sup> The recent amendments to the Policy confirm its standing as a pillar of anti-cartel enforcement, and should further incentivise leniency applications by enhancing accessibility to, and transparency surrounding, the application process.

### New Zealand Case Law

When turning to consider the fines levelled on detected cartels, one is confronted with the outstanding characteristic of New Zealand's price-fixing jurisprudence — its scarcity. Prosecutions for hard-core cartel conduct since the inception of the Commerce Act have been infrequent. Hence it is exceedingly difficult to assess penalty trends in s 30 case law; a problem magnified by numerous sentencing factors<sup>42</sup> and the inability to quantify precisely the economic harm caused by the cartel. In *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*,<sup>43</sup> Hugh Williams J emphasised the dearth of precedent when determining price-fixing penalties:<sup>44</sup>

New Zealand has so few cases ... even such cases as there are rapidly become no more than very general comparators given the passage of time, the change in penalty maxima and erosion in the value of money, to say nothing of individual circumstances.

Additionally, a review of penalty orders against the current statutory thresholds is ultimately misleading. The courts have not yet applied s 80 to conduct occurring entirely after the 2001 amendments. All price-fixing penalties have been assessed, at least in part, by reference to the previous corporate and individual maxima of \$5,000,000 and \$500,000 respectively.

The highest price-fixing penalty to date in New Zealand is the \$2.85 million fine (with an additional \$750,000 for exclusionary conduct) imposed on the Koppers Arch companies for price coordination on wood preservatives.<sup>45</sup> Observing that Koppers Arch entered two price understandings prior to the 2001 penalty increases, Williams J suggested that harsher penalties would be appropriate for hard-core cartels implemented after 2001.<sup>46</sup> The previous record had been \$1.5 million fines levelled on

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40 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [17].

41 Berry, above n 21, at 6.

42 See *Alstom Holdings*, above n 40, at [20]–[21].

43 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV-2005-404-2080, 4 October 2006 [*Koppers Arch No 2*].

44 *Ibid*, at [36].

45 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV-2005-404-2080, 6 April 2006 [*Koppers Arch No 1*].

46 *Ibid*, at [40].

three meat companies in *Commerce Commission v Taylor Preston Ltd.*<sup>47</sup> However, these fines have since been considered “as providing no more than a largely historical and, now, very general guide”.<sup>48</sup>

Complementing fines on corporations, the presumption of individual accountability introduced in 2001 has led to an increase in fines directed at individual cartelists. Nonetheless, the actual penalties imposed in relevant cases since 2001 have been largely compassionate, ranging from a costs order of \$7,500<sup>49</sup> to an outlier of \$65,000.<sup>50</sup> In the *Koppers Arch* proceedings particularly, judicial preference for a “divide by 20” approach to individual penalties, a guide derived from comparison of the corporate and personal maxima, has resulted in individual fines constituting a tiny fraction of the corporate fines.<sup>51</sup> Other individual sanctions available, such as disqualification orders, have never been utilised.<sup>52</sup>

The small magnitude of penalties has, by and large, been a product of Commerce Commission policy. The Commission overwhelmingly prefers to negotiate settlements with price-fixing defendants rather than contest liability, and often applies jointly for judicial acceptance of agreed penalties. Although s 80(1) emphasises that it is the role of the court to order appropriate penalties, judges have always accepted the parties’ recommended penalties and hence the case law presents a picture of judicial deference to the Commission.<sup>53</sup>

As a consequence of the Commission’s penchant for settlements, considerable uncertainty exists surrounding judicial sentiment towards price-fixing. Of concern also is that fines imposed tend to under-represent the magnitude of penalties available, as gross fines are reduced by considerable discounts for admissions of liability. Discounts ranging from 25 per cent for ophthalmologists<sup>54</sup> to 33 per cent for Schneider Electric<sup>55</sup> and 50 per cent for participants in the *Koppers Arch* cartel<sup>56</sup> have been considered appropriate in light of the “rough-hewn comparability” between Commerce Act and criminal proceedings.<sup>57</sup> Most recently, the Commission’s settlement with Visa, MasterCard and seven other financial institutions

47 *Commerce Commission v Taylor Preston Ltd* (1998) 6 NZBLC 102,598 (HC).

48 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2009] NZCCLR 1 (HC) [*Koppers Arch No 3*] at [27].

49 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [63].

50 *Koppers Arch No 2*, above n 43, at [81]. A further \$35,000 was imposed for exclusionary conduct in this case.

51 *Ibid*, at [54]; *Koppers Arch No 3*, above n 48, at [44].

52 In the *Koppers Arch* litigation, such orders were inexplicably not sought against any of the executives who admitted price-fixing liability. The Commission is however seeking disqualification orders against executives in the air cargo cartel: *Commerce Commission v Air New Zealand* HC Auckland CIV-2009-404-001554, 21 October 2009 at [5].

53 Recommended penalties have been imposed notwithstanding judicial disagreement. See for example *Koppers Arch No 3*, above n 48, in which Williams J viewed the penalty imposed on Fernz defendants as “seemingly stern and slightly out of line” at [34].

54 *Commerce Commission v Ellingham* HC Wellington CIV-2002-485-720, 27 October 2005, at [14].

55 *Alstom Holdings*, above n 40, at [29]–[31].

56 *Koppers Arch No 1*, above n 45, at [22]; *Koppers Arch No 2*, above n 43, at [56], [63], [91]; *Koppers Arch No 3*, above n 48, at [22].

57 *Koppers Arch No 1*, above n 45, at [44].

over alleged breaches of s 30 in relation to credit card interchange fees<sup>58</sup> has further deprived New Zealand's price-fixing jurisprudence of guidance on penalty assessments.

### III ADEQUACY OF CURRENT PECUNIARY PENALTIES

The effectiveness of Commerce Act penalties in achieving deterrence has not been subjected to any economic analysis by MED. Its conclusions on the optimality of current penalties are restricted to the broad assertion that "insufficient deterrence" is indicated by the "lack of detection of domestic cartels";<sup>59</sup> a perfunctory assessment of the current framework that undermines its *prima facie* case for criminalisation. The starting point in any reform must be the status quo, which this Part evaluates.

#### Economic Deterrence Theory

Since enactment, the pecuniary penalties imposed for Commerce Act contraventions have been aimed predominantly at deterrence, both of the individual offender and prospective offenders generally.<sup>60</sup> The recurrent theme of deterrence in the penalties jurisprudence demands, in the context of cartels, that penalties be sufficiently high to eliminate the economic incentives to collude. Penalties should not be seen as a "licence fee"<sup>61</sup> for anti-competitive conduct, or alternatively "just a cost of doing business".<sup>62</sup>

Since Becker's seminal work,<sup>63</sup> a comprehensive body of law and economics literature has developed, which considers the optimal penalties to deter hard-core cartels. Underpinning these deterrence-based theories is the assumption that the offender is rational and performs a cost-benefit analysis before offending. Although rationality is largely an incorrect assumption for traditional crimes committed in response to situational factors, it is legitimate for white-collar crimes, as executives have the time and resources to consider logically their decision to offend.<sup>64</sup>

Pursuant to the rational choice model, pecuniary penalties will effectively deter an offender where the expected penalty exceeds the expected financial benefits from engaging in the anti-competitive behaviour.

58 Commerce Commission "Credit card settlements lower New Zealand business costs" (press release, 5 October 2009).

59 MED, above n 1, at [21].

60 See for example *Koppers Arch No 1*, above n 45, at [30] and *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [197].

61 *Commerce Commission v BP Oil NZ Ltd* [1992] 1 NZLR 337 (HC) at 383.

62 Rebstock, above n 21.

63 Gary Becker "Crime and Punishment: An Economic Approach" (1968) 76 J Pol Econ 169.

64 Julie Clarke and Mirko Bagaric "The desirability of criminal penalties for breaches of Part IV of the Trade Practices Act" (2003) 31 ABLR 192 at 204–205. The Ministry of Commerce supported this assumption of rationality in the context of competition law contraventions: Ministry of Commerce, above n 15, at 7.



Accordingly, economic deterrence theory allows the construction of a methodology to estimate the optimal fine to deter competition law violations. In its simplest form, the penalty must be greater than the size of the firm's unlawful gain, when multiplied by the inverse of the probability of detection and successful prosecution.<sup>65</sup>

Wils, who has conducted the most thorough assessment of optimal penalties, has asserted that the fine required for effective deterrence of hard-core cartels is 150 per cent of annual turnover for the products or services protected by the anti-competitive behaviour.<sup>66</sup> This conclusion assumes profits of 10 per cent of turnover (derived from price increases of 20 per cent), an average duration of five years, and a probability of detection of one-third.<sup>67</sup> However, as Wils has stressed, his optimal fine remains extremely conservative.<sup>68</sup> It does not take into account interest accruing between the time of the anti-competitive conduct and judgment. Moreover, it assumes, perhaps incorrectly, that the individual is risk neutral, although Wils's view is that cartelists tend to underestimate the probability of getting caught.<sup>69</sup> Finally, this optimal fine is calculated using the firm's "unlawful gain" as opposed to the "total harm" caused, and therefore is lower than if the calculation had included the deadweight loss to society.<sup>70</sup>

### Are Optimal Fines Payable?

New Zealand penalties, while flexible, do not completely allow for the levelling of optimal fines as envisaged by Wils. Penalties of up to three times the commercial gain to the firm may be imposed, which is consistent with Wils's assumption of a detection rate of 33 per cent, but does not factor in accrued interest, or, notably, the total harm to society. However, this marginal sub-optimality of the statutory framework would only limit fines if the fixed maximum of \$10 million was too low.<sup>71</sup>

Statutory thresholds aside, the most obvious problem created by Wils's optimal fine is that it is too high. Academics debate whether optimal fines are payable, or whether they would lead, in most cases, to bankruptcy.

65 The construction of optimal penalties should ideally be based on the offender's expectations of the price-fixing gain, but evidence of past gains will suffice as a close proxy: John Connor and Robert Lande "How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines" (2005) 80 *Tul L Rev* 513 at 521.

66 Wouter Wils "Is Criminalisation the Answer?" in Wouter Wils *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, Oxford, 2008) 155 at 180.

67 *Ibid.*, at 178–179. These assumptions based on comprehensive United States and global surveys as well as OECD data, and were revised from 2001 calculations.

68 *Ibid.*, at note 113.

69 By comparison Werden and Simon argue that economic agents are generally risk adverse: Gregory Werden and Marilyn Simon "Why price fixers should go to prison" (1987) 32 *Antitrust Bull* 917 at 920. Such risk aversion would lower the optimal penalty.

70 The "net harm" approach, advocated by Connor and Lande, includes not only price overcharges accruing to the firm but also allocative inefficiencies resulting: Connor and Lande, above n 65, at 516–517. It was first developed by William Landes: "Optimal Sanctions for Antitrust Violations" (1983) 50 *U Chi L Rev* 652.

71 The alternative threshold of 10 per cent of group turnover could potentially be much higher, but only applies where the commercial gain is not readily ascertainable.

The majority of price-fixing firms will arguably be unable to pay the imposed penalty for two crucial reasons.<sup>72</sup> First, the optimal penalty will always be a large multiple of the wealth transferred from consumers, in light of detection rates, interest and the “net harm” approach (if utilised). Thus the firm can never pay the fine from the gain itself. Second, the penalty will be imposed years after the anti-competitive behaviour, during which time the firm would have distributed cartel profits to shareholders, employees and the tax department.

Werden and Simon have concluded that only companies with extremely high asset-to-turnover ratios or those operating across multiple industries could ever pay the Beckerian optimal fine.<sup>73</sup> The more probable outcome is bankruptcy of the price-fixing firm, with the automatic result of increased market concentration. This would be particularly undesirable in New Zealand, as the small size of the economy already dictates a prevalence of duopolies and oligopolies. Further, the adverse effects of bankruptcy would ultimately be borne by many innocent stakeholders such as employees, creditors, suppliers and consumers.<sup>74</sup>

Interestingly, although the bulk of the literature questions firms’ ability to pay optimal fines, certain commentators believe that fines can be dramatically increased from current levels. A 1997 study of United States firms convicted of price-fixing found that about half could have paid Becker’s optimal fines without facing bankruptcy.<sup>75</sup> Even more recently, Spagnolo has argued that European Union fines have not neared firms’ ability to pay,<sup>76</sup> a notable contention as EU administrative fines frequently exceed €100 million.<sup>77</sup>

In summary, while leniency policies have increased the probability of detecting cartels, the sheer magnitude of the unlawful gain obtained by cartels has the effect of making optimal fines prohibitively expensive. In New Zealand, companies are unlikely to have sufficient revenue to pay. First, the lack of economies of scale typically forces companies to specialise, rather than grow to become diversified conglomerates. Further, typical asset-to-turnover ratios of around 1.7 to 1 suggest that optimal fines may only become payable through company liquidation.<sup>78</sup> Still, this conclusion admittedly considers neither the stigmatic effect of the fine, which would lower the optimal penalty, nor the ability to supplement the corporate fine with individual pecuniary sanctions.

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72 Peter Whelan “A Principled Argument for Personal Criminal Sanctions” (2007) 4(1) *Comp L Rev* 7 at 31.

73 Werden and Simon, above n 69, at 928–929.

74 Whelan, above n 72, at 32. See also Wils, above n 66, at 181.

75 Catherine Craycraft, Joseph Craycraft and Joseph Gallo “Antitrust Sanctions and a Firm’s Ability to Pay” (1997) 12 *Review of Industrial Organisation* 171.

76 Giancarlo Spagnolo “Criminalization of cartels and their internal organization” in Katalin Cseres, Maarten Schinkel and Floirs Vogelaar (eds) *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing, Cheltenham, 2006) 133 at 136.

77 The highest has been €896,000,000 against Saint Gobain in 2008 for its membership of the ‘car glass’ cartel.

78 This median asset-to-turnover ratio of 50 NZX companies based on 2009 audited financial data is not truly representative of all New Zealand companies but does give some indication of companies’ abilities to pay.

## Optimal Fines on Individuals

A study of optimal fines is incomplete without addressing the need for financial accountability for those individuals who render the corporation, the artificial entity, culpable. Becker's argument that only firms should be subject to antitrust prosecution<sup>79</sup> is no longer considered persuasive. As the OECD has advocated, individual sanctions are an important complement to organisational fines, as these potentially could be too large for the entity.<sup>80</sup> Further, punishing the corporation alone does not address the agency issues that arise where management seeks the "comfortable life" inherent in cartel participation, yet shareholders oppose such conduct for fear of severe penalties. Individual sanctions thus have a place in aligning employee incentives with those of the corporation as principal.

Assuming rationality once more, the fine directed against the individual clearly must exceed the personal benefits of cartel participation; that is, rewarding and stable remuneration coupled with less stressful employment in the absence of 'true' competition.<sup>81</sup> Yet, the analysis is complicated somewhat by the risk of corporate indemnification of the individual penalty, which would render it futile. The Commerce Act does expressly forbid indemnification,<sup>82</sup> yet the statutory prohibition is not infallible and could potentially be circumvented by individual bonuses that circumspectly include a risk premium.

Even if indemnification is disregarded, calculating the optimal individual fine is inherently imprecise, as it is difficult to quantify the executive's remuneration in a hypothetical competitive market (as compared to their inflated remuneration during the cartel). The only conclusions that can be made with real conviction are that pecuniary penalties must be levelled at individuals in addition to corporate fines, and that those penalties must be sufficient to drive home the illegality of collusion.

## The Optimality of New Zealand Penalties

Assessment of the optimality of fines in New Zealand, by reference to the economics literature, is impeded by the failure of courts to employ economic analysis in cartel sentencing. Although directed by s 80(2A)(b) to have regard to "the nature and extent of any commercial gain", judges often make no attempt at quantification, or reiterate the difficulties in assessing the unlawful gain to cartel members through construction of a competitive counterfactual.<sup>83</sup> Certainly, assessing the commercial gain resulting from cartel participation involves estimation, yet at least some

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79 Becker, above n 63.

80 OECD "Cartels: Sanctions Against Individuals" (2007) 9 (3) OECD J Competition L & Pol 7 [OECD (2007)] at 7.

81 Spagnolo, above n 76, at 142.

82 Commerce Act 1986, s 80A-B.

83 *Koppers Arch No 1*, above n 45, at [33]; *Koppers Arch No 2*, above n 43, at [40].

OECD jurisdictions attempt to estimate harm when calculating penalties.<sup>84</sup> The poor efforts to attempt estimation denote that there is significant ambiguity surrounding the harm caused by cartels to New Zealand markets. Without more comprehensive economic data, the optimality of pecuniary penalties imposed on New Zealand cartels cannot be assessed constructively. A perfunctory analysis of the penalties levelled against the Koppers Arch group, using turnover as a proxy for unlawful gain, suggests that penalties could be markedly increased. An optimal fine, calculated on the extremely limited market data provided, was assessed at \$13.6 million, a 139 per cent increase on the gross penalty of \$5.7 million.<sup>85</sup>

Whether future pecuniary penalties imposed under the more flexible s 80(2B) thresholds will be of sufficient severity for optimal deterrence is unclear. The reality that “New Zealand penalties [have been] low, even miniscule, by comparison with those imposed in OECD and similar countries”<sup>86</sup> does not necessarily indicate sub-optimality. Small penalties have resulted from lower statutory thresholds pre-2001, discounting for admissions and cooperation, and significantly, the proportionately smaller economic effects of cartels in New Zealand.

## Conclusions

MED is dismissive of the pecuniary penalties in the Commerce Act, concluding that “the marginal social costs of cartel behaviour in New Zealand exceed the marginal social benefits of current deterrence measures”.<sup>87</sup> This conclusion is surprisingly forthright, given that the “preceding analysis” it is based upon is the reflection that few domestic cartels have been detected, without any attempt at assessing economic optimality of penalties.

Although the optimality of current penalties cannot be authoritatively known in the absence of economic analysis, MED’s assertion that the current penalty regime is providing “insufficient deterrence”<sup>88</sup> overstates the case for criminalisation. In fact, a number of factors support the continued punishment of hard-core cartels with civil pecuniary penalties:

- (a) The penalty thresholds in the Commerce Act have not been tested by the few litigated cases and hold considerable flexibility for immense fines to be imposed.

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<sup>84</sup> OECD (2002), above n 12, at 96–98.

<sup>85</sup> The figure of \$13.6 million has been calculated by: taking the unlawful gain from anti-competitive conduct to be 10 per cent of Koppers Arch’s turnover over 1999–2002, multiplying this by a probability of detection of one-third, and adjusting the sum of these figures to 2006 dollars using a discount rate of 5 per cent. This calculation is based on the following assumptions: that the market for wood preservatives increased from \$14 million to \$25 million over the relevant period, and that Koppers Arch had a 45 per cent share of the market. It must be acknowledged, yet again, that some price-fixing occurred before the 2001 penalty increases.

<sup>86</sup> *Koppers Arch No 2*, above n 43, at [48].

<sup>87</sup> MED, above n 1, at [24].

<sup>88</sup> *Ibid.*, at [21].

- (b) Judicial and regulator sentiment indicates that severe penalties will, in future, be pursued. Indeed, the Commerce Commission's Statement of Intent states that for the cartel cases currently under investigation, "the Commission will be arguing for very substantial penalties".<sup>89</sup>
- (c) The Leniency Policy revisions have increased the incentive to apply for amnesty and avoid cartel prosecution, and should therefore increase rates of detection.

Ultimately, a shift from civil prosecution to sanctioning cartelists with imprisonment would be a dramatic step for New Zealand competition law. Any amendments must therefore be supported by thoughtful, well-considered analysis of the benefits and costs of criminal enforcement, rather than be a legislative reflex to international developments. Yet MED has devoted less than a quarter of its discussion document to discussing whether hard-core cartel conduct should be criminalised before concluding that there is a case for criminalisation.<sup>90</sup> The following sections of this article seek to address in more depth the justifications for and against criminal sanctions.

#### IV RATIONALES FOR CRIMINALISING CARTELS

##### Increased Deterrence

The advantage of criminalising cartels most often referred to in the literature is the potent deterrent effect of prison sentences for businessmen contemplating cartel formation. According to the OECD, confronting individuals with the prospect of taking away their liberty is the "most powerful deterrent".<sup>91</sup> A potential jail sentence for price-fixing is a "highly personal penalty"<sup>92</sup> which undoubtedly impacts an individual's risk assessment when deciding whether to collude.

However, major issues arise in quantifying that impact. If imprisonment is introduced, the traditional cost-benefit analysis (assuming a rational actor) becomes redundant.<sup>93</sup> While the financial benefits of cartel conduct remain unchanged and quantifiable (in theory at least), the cost of imprisonment cannot solely be measured in monetary terms based

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<sup>89</sup> *Statement of Intent 2009–2012*, above n 8, at 18.

<sup>90</sup> MED, above n 1, at [83].

<sup>91</sup> OECD (2007), above n 80, at 19.

<sup>92</sup> MED, above n 1, at [66].

<sup>93</sup> OECD (2007), above n 80, at 18.

on opportunity cost.<sup>94</sup> The penalty interferes with values intrinsic to all individuals — freedom, dignity, reputation and relationships — which are, at the same time, valued differently by each individual. Therefore the infeasibility of accumulating empirical data that demonstrates the marginal deterrent effect of imprisonment is widely accepted. One can only assess anecdotal evidence from international competition authorities and price-fixing executives when weighing up the strength of jail sentences as a disincentive.

In light of that country's long history of incarcerating price-fixers,<sup>95</sup> statements from the United States Department of Justice are often highlighted to show the deterrent effect of criminalisation. Department officials emphasise that cartelists often refuse to extend their agreements to the United States geographically, because of the personal risks:<sup>96</sup>

Although the U.S. market was the cartelists' largest market and potentially the most profitable, the collusion stopped at the border because of the risk of going to prison.

Indeed, evidence documenting the avoidance of the United States market by the international Gas Insulated Switchgear cartel has been recently adduced in the New Zealand penalty judgment against Schneider Electric.<sup>97</sup> Such avoidance tactics are trumpeted by the Department of Justice's Antitrust Division as a consequence of its vigorous and well-publicised prosecution strategies.<sup>98</sup>

Additionally, executives found guilty of price-fixing would presumably feel the sacrifices of imprisonment more keenly than the average criminal. Through the loss of reputation, career prospects and earning power, a man in a white collar is assumed to be punished more harshly than a man in a blue collar by spending the equivalent period in jail. As Liman commented: "for the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno".<sup>99</sup>

Such evidence is not conclusive. Other anti-cartel enforcement statistics show that the Antitrust Division continues to level record fines, totalling US\$630 million in 2007, and that United States investigators remain preoccupied by predominantly domestic cartelists undeterred by

94 Becker, however, attempted economic analysis of the cost of imprisonment and concluded that businessmen *prima facie* face a higher opportunity cost as calculated by the discounted sum of their foregone earnings: Becker, above n 63, at 179–180.

95 The Sherman Act 15 USC § 1 (1890) introduced criminal antitrust enforcement, although jail sentences were not levelled at businessmen until 1959. See Wils, above n 66, at 161–162.

96 Belinda Barnett, Senior Counsel to the Deputy Assistant Attorney General For Criminal Enforcement, Antitrust Division Department of Justice "Criminalization of Cartel Conduct — the Changing Landscape" (Joint Federal Court of Australia/Law Council of Australia Workshop, Adelaide, 3 April 2009).

97 *Alstom Holdings*, above n 40, at [16].

98 See, for example, Belinda Barnett, above n 96.

99 Donald I Baker and Barbara A Reeves "The Paper Label Sentences: Critique" (1977) 86 Yale LJ 619 at 630–631 as cited in Clarke and Bagaric, above n 64, at 207.

the threat of prison.<sup>100</sup> Moreover, the foreign origins of so many leniency applications received in New Zealand gives credence to the argument that criminal sanctions internationally are not providing adequate deterrence.

Hence determining the strength of the deterrent provided by criminal sanctions remains elusive. However, the limited evidence does tend to confirm one's natural intuition — that an individual who would otherwise comfortably engage in price-fixing may well be deterred when the ultimate price they fix is their liberty.

### **Increased Effectiveness of the Leniency Policy**

Any increase in deterrence effected by introducing criminal liability will be magnified by the Leniency Policy. Increasing the severity of penalties available enhances the incentive for cartelists to defect in exchange for immunity. Indeed, the Australian Competition and Consumer Commission (ACCC) directly observed an increase in leniency applications following the recent introduction of criminal penalties for cartel conduct.<sup>101</sup> This interdependence between penalties and the Leniency Policy denotes that, under a regime of criminal enforcement, cartelists would face not only harsher sanctions but a heightened risk of detection, as nervous executives contemplating potential jail time rush to blow the whistle.

### **The Unique Signal of Criminal Sanctions**

In addition to straightforward deterrence, the introduction of a cartel offence sends a strong moral condemnation of hard-core cartel behaviour. The possibility of conviction would sensitise businessmen to the immorality of price-fixing like no other sanction, as a stigma attaches to criminal offences that does not exist for pecuniary penalties. This signal of moral opprobrium is critical to changing behaviour. Prevailing societal attitudes to conduct influence individuals in a manner that the rational actor model, based on conventional risk–reward analysis, fails to identify.<sup>102</sup> Where an individual feels morally obliged to behave consistently with norms promoting competition, this responsibility affects their behaviour irrespective of the likelihood of prosecution.<sup>103</sup> Thus the possibility of imprisonment for cartelists would not only potentially change rational risk assessments, but may alter normative perspectives towards compliance.

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100 See Scott D Hammond, Deputy Assistant Attorney-General for Criminal Enforcement, Antitrust Division Department of Justice “Recent Developments, Trends, and Milestones In The Antitrust Division’s Criminal Enforcement Program” (23rd Annual National Institute on White Collar Crime, San Francisco, 5 March 2009).

101 Marsha Jacobs “Attack on cartels as tip-offs climb” *The Australian Financial Review* (Australia, 18 January 2010).

102 Andreas Reindl “How strong is the case for criminal sanctions in cartel cases?” in Katalin Cseres, Maarten Schinkel and Floirs Vogelhaar (eds) *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing, Cheltenham, 2006) 110 at 116.

103 Wils, above n 66, at 185.

## Consistency with Other Crimes

Consistency of sentencing with analogous offences also favours extension of the criminal law to hard-core cartelists. Simplistically, price-fixing and other hard-core cartelisation may be likened to a sophisticated form of theft as they deprive consumers of money through an inefficient wealth transfer.<sup>104</sup> There are, however, certain key distinctions:

- (a) Theft is coerced on an unfortunate victim, whereas with cartels, the consumer voluntarily enters a transaction to pay increased prices.<sup>105</sup>
- (b) Cartel formation and implementation occur at a distance from the eventual victims, whereas theft may often be confrontational.<sup>106</sup>
- (c) Cartel victims are usually unaware of their loss, whereas traditional forms of theft personally target victims.
- (d) The quantum of economic harm caused by cartels far exceeds the sums involved in traditional thefts.<sup>107</sup>

Therefore the comparison with theft does not truly illustrate the nature of hard-core cartel conduct. Likewise, analogies with fraud and the crime of obtaining by deception<sup>108</sup> also miss the mark. As Fisse and Beaton-Wells emphasise,<sup>109</sup> cartels distort competition and more closely resemble white-collar offences that also subvert market forces, such as insider trading, market manipulation or tax evasion.

The comparison with insider trading is particularly instructive. In 2008, the Securities Markets Amendment Act 2006 introduced criminal liability for insider trading and market manipulation with penalties of five years' imprisonment or a \$300,000 fine.<sup>110</sup> Interestingly, when comparing hard-core cartelisation with tax and customs duty evasion and insider trading in 1998, the Ministry of Commerce concluded that hard-core cartels were a "far more serious offence than the civil law offence of insider trading" and "more akin to tax and customs duty evasion" by reason of their significant

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104 Caron Beaton-Wells and Brent Fisse "Criminalising serious cartel conduct: Issues of law and policy" (2008) 36 ABLR 166 at 186. Competition authorities often make the comparison with theft to highlight the gravity of cartels. See for example Margaret Bloom, Director of Competition Enforcement, Office of Fair Trading "Key Challenges in Public Enforcement" (British Institute of International and Comparative Law, 17 May 2002).

105 Mark Furse *Competition Law of the EC and UK* (5th ed, Oxford University Press, New York, 2006) at 240. However, the degree of voluntariness with which the consumer enters the transaction will depend on the elasticity of demand for that good: see MED, above n 1, at [10].

106 David King *Criminalisation of Cartel Behaviour* (prepared for MED, 2010) at 14.

107 *Ibid.*

108 MED, above n 1, at [11]–[12].

109 Beaton-Wells and Fisse, above n 104, at 186.

110 Securities Markets Act 1988, s 43(1).



economic effects.<sup>111</sup> Still, insider trading managed to leapfrog hard-core cartels on the criminalisation agenda.

While analogies may clearly be drawn between cartels and other financial crimes, the “extension–analogy argument”<sup>112</sup> avoids the real issue. Comparisons alone can permit the conclusion that cartel conduct be characterised as criminal without further justification. Yet, as Clarke and Bagaric point out, the criminal law itself lacks substantial unification.<sup>113</sup> More importantly, one must ascertain whether hard-core cartels are seen in New Zealand as deserving of imprisonment.

### International Developments

Another justification for criminalisation is the perceived need for New Zealand to update its penalties in line with overseas legislative developments. The trend internationally over the past decade has been to strengthen sanctions for the gravest competition law contraventions, with the result that there has emerged a sharp divergence between New Zealand’s sanctions and international practice. A review of the 30 OECD member countries indicates that New Zealand is the sole English-speaking country in the minority that does not criminalise hard-core cartel conduct.<sup>114</sup> This evaluation is insightful as these countries provide 59.3 per cent of New Zealand’s international trade.<sup>115</sup> Significantly, all of New Zealand’s top seven trading partners except China provide for some form of criminal penalties.<sup>116</sup>

MED rightly observes that international cooperation would be greatly enhanced through alignment of New Zealand sanctions with its trading partners.<sup>117</sup> Reciprocity between national criminal laws would facilitate extradition of cartelists to and from New Zealand, to face deserving punishment pursuant to the Extradition Act 1999. Further, introducing criminal liability would engage the Mutual Assistance in Criminal Matters Act 1992, which promotes information-sharing between New Zealand and other jurisdictions on criminal matters. The improved exchange of information between countries would increase the likelihood of detection and successful prosecution of multi-jurisdictional cartels, which is currently impeded by constraints that prevent the Commerce Commission from

111 Ministry of Commerce, above n 15, at 28.

112 Clarke and Bagaric, above n 64, at 197.

113 Clarke and Bagaric instead support criminalisation on the basis that increased prices undermine human enjoyment of material amenities, and that the criminal law operates to punish those who interfere with essential human interests: *ibid.*, at 203.

114 See *The International Comparative Legal Guide Series to Cartels & Leniency 2010* (Global Legal Group Ltd, London, 2010). By comparison, in 2002 only 9 OECD countries provided for imprisonment: OECD (2002), above n 12, at 74.

115 Statistics New Zealand “*Global New Zealand – International Trade, Investment, and Travel Profile: Year ended June 2009*” (2009) Statistics New Zealand at 4 <[www.stats.govt.nz](http://www.stats.govt.nz)>.

116 *Ibid.*, at 5. Those trading partners are Australia, China, United States, Japan, Germany, Korea and the United Kingdom.

117 MED, above n 1, at [75].

providing investigative assistance and compulsorily acquired information to overseas competition agencies.<sup>118</sup>

Notwithstanding the certain benefits of coordination on competition law, New Zealand should not feel compelled to shift towards criminalisation. International practices of criminal anti-cartel enforcement are largely untested, and do not constitute best practice by dint of their increasing uptake.<sup>119</sup> MED cites the OECD as regarding criminalisation as best practice,<sup>120</sup> yet the OECD's recommendation that countries introduce criminal sanctions is subject to the stipulation that those sanctions "be consistent with social and legal norms"<sup>121</sup> within the relevant jurisdiction. The responses of other jurisdictions therefore do not, in themselves, denote that criminalisation is appropriate — legislative change in New Zealand must be supported by *this* country's legal and social environment. Perhaps the most pressing consideration is that alignment of New Zealand's regulatory framework with its trading partners may be indispensable for the maintenance of economic credibility.<sup>122</sup> MED has echoed this concern, noting the disinclination for New Zealand to be a "soft touch" on cartels by international comparison.<sup>123</sup>

### Harmonisation with Australia

Of all New Zealand's trading partners, harmonisation with Australia presents the most compelling motivation for criminalisation. The Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth) created two cartel offences, which impose penalties of up to 10 years' imprisonment or \$220,000 in fines on individuals who make or give effect to agreements containing a 'cartel provision' with the requisite mens rea.<sup>124</sup> In light of the strong political support for equivalent trans-Tasman penalties,<sup>125</sup> it is difficult to see any other eventuality but criminalisation for New Zealand, irrespective of broader cost-benefit analysis. Aside from the obvious advantage of investigative coordination, a cartel offence would remedy the present imbalance in liability. The government is uncomfortable with the perception of New Zealand as a safe haven for cartel operations, as New Zealanders face prosecution when their cartel conduct extends to Australian markets, yet there exists no corresponding criminal liability

118 The Commerce Commission (International Co-operation and Fees) Bill 2008 (293-1) however intends to reduce present restrictions where cooperation agreements are in place.

119 Australian commentators have similarly argued that consistency with international practice is a weak justification for the introduction of jail terms: see Clarke and Bagaric, above n 64, at 208, and Adrian Hoel "Crime does not pay but hard-core cartel conduct may: Why it should be criminalised" (2008) 16 TPLJ 102 at 108.

120 MED, above n 1, at [76].

121 OECD "Hard Core Cartels: Recent Progress and Challenges Ahead" (2003) at 46 <browse.oecdbookshop.org>. The OECD report is quoted by MED, above n 1, at [4].

122 Hoel, above n 119, at 108.

123 MED, above n 1, at [76].

124 Trade Practices Act 1974 (Cth), ss 44ZZRF, 44ZZRG and 44ZZRD.

125 MED *Single Economic Market Outcomes Framework*, above n 3, at 3.

here.<sup>126</sup> The treatment of hard-core cartelisation as a less serious offence in New Zealand would bring into question this country's commitment to trans-Tasman coordination of business laws and to competitive markets more generally, to the potential detriment of trans-Tasman trade.

## V FACTORS WEIGHING AGAINST CRIMINALISATION

### Costs of Criminalisation

A strict cost-benefit analysis of the effectiveness of criminal sanctions is, admittedly, futile. Quantification of the benefits of criminal anti-cartel enforcement is impossible, given the difficulties ascertaining the marginal deterrent effect on cartelists. Nonetheless, the costs of criminal enforcement can be more readily identified, notwithstanding that many remain contingent on the details of practical implementation.

The obvious direct cost is the cost of incarceration, assessed to be nearly \$100,000 a year for each offender.<sup>127</sup> This price tag moreover fails to recognise opportunity costs; that placing a price-fixing executive in jail ceases their potentially sizeable intellectual contribution to the nation's GDP (if their skills and business acumen were to be legitimately employed in creating economic wealth). In addition, such prison costs may pale by comparison to costs of investigation and prosecution under a regime of criminal enforcement.<sup>128</sup> At present, the Commerce Commission explicitly prioritises and devotes considerable resources to cartel conduct (\$3.679 million on coordinated behaviour cases in the past year)<sup>129</sup> and staunchly follows a policy of litigation, considered a "vital part of the regulatory tool kit", to maximise overall deterrence.<sup>130</sup> This budget would require reconsideration if New Zealand shifted to criminal prosecution.

Most obviously, litigation costs would increase, assuming an increased incidence of contested litigation as opposed to fine settlements, and longer lengths of criminal trials, especially where juries may possibly be involved.<sup>131</sup> Substantially more resources are required for cases proceeding to litigation — with an investigation phase of 35 months compared to 7.9 months for administrative resolutions.<sup>132</sup>

126 See Simon Power, Minister of Commerce "Speech to 10th annual Competition Law and Regulatory Review Conference (Competition Law and Regulatory Review Conference, Wellington, 22 February 2010).

127 Department of Corrections *Briefing for the Incoming Minister* (November 2008) at 9, as cited by Sian Elias "Blameless Babes" (Annual 2009 Shirley Smith Address, Wellington, 9 July 2008) at [23].

128 As observed by the United States: OECD "OECD Policy Roundtables: Cartel Sanctions against Individuals 2003" (2003) at 112 <[www.oecd.org](http://www.oecd.org)>.

129 Commerce Commission *Annual Report 2008–2009* (2009) at 58.

130 PricewaterhouseCoopers *Commerce Commission Baseline Review* (prepared for MED, 2008) at 29–30.

131 Criminal cases however may proceed more quickly through the High Court, due to the right "to be tried without undue delay" in the New Zealand Bill of Rights Act 1990, s 25(b).

132 Commerce Commission *Annual Report*, above n 129, at 14.

Further, the different treatment of costs in civil and criminal cases would be unlikely to favour the Commission. Costs orders following civil proceedings are subject to the High Court's discretion, but are generally paid by the unsuccessful party.<sup>133</sup> By contrast, s 5(3) of the Costs in Criminal Cases Act 1967 prescribes no presumption for or against the granting of costs in criminal cases. It appears that it is unlikely that the Commerce Commission would be required to pay or be awarded costs under a criminal regime, provided criminal prosecutions are reasonably pursued,<sup>134</sup> whereas previously, successful civil proceedings have resulted in favourable costs orders.<sup>135</sup>

In addition to direct costs, the higher standard of proof that must be satisfied for criminal liability potentially operates to undermine the Commerce Commission's success in cartel prosecution and therefore weaken the deterrent effect of imprisonment. At present, the Commission need only meet the civil standard in proceedings for pecuniary penalties.<sup>136</sup> Even so, obtaining sufficient proof of cartel conduct is "time-consuming, arduous and expensive" in light of the covert nature of anti-competitive agreements.<sup>137</sup>

Failure to meet the higher threshold of 'beyond reasonable doubt' would create the perception that the law was ineffective, and would therefore remove the incentive for compliance. After all, it is the degree of certainty surrounding conviction, as opposed to the severity of penalties imposed, which the sentencing literature emphasises as crucial to deterrence.<sup>138</sup> At an OECD Roundtable Discussion, it was this risk of difficulty obtaining conviction that was emphasised by New Zealand when discussing its choice not to criminalise cartels.<sup>139</sup> Moreover, the impediment to conviction presented by the higher standard of proof would likely be compounded with jury trials.<sup>140</sup> Legal counsel could potentially manipulate juries to acquit price-fixers through emotional overtures that take advantage of societal misconceptions surrounding the immorality of price-fixing.<sup>141</sup> Accordingly, the shift to the criminal standard of proof may hinder Commerce Commission proceedings, and likely restrict use of a cartel offence to rare cases of very serious offending.

The considerable costs of criminalisation (and its disconcerting

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133 High Court Rules, rr 14.1 and 14.2.

134 Law Commission *Costs in Criminal Cases* (NZLC R60, 2000) at 8.

135 Orders of costs amounted to \$50,000 in *Alstom*, above n 40, at [34]; \$100,000 against the Koppers Arch companies in *Koppers Arch No 1*, above n 45, at [59]; \$100,000 against the Osmose companies in *Koppers Arch No 2*, above n 43, at [82]; and \$75,000 against the Fernz companies in *Koppers Arch No 3*, above n 48, at [36].

136 Commerce Act 1986, s 80(3).

137 *Koppers Arch No 1*, above n 45, at [30] per Williams J.

138 Geoffrey Hall *Hall's Sentencing* (online looseleaf ed, LexisNexis) at [I.3.3]. See also Finlay J in *Fleming v Commissioner of Transport* [1958] NZLR 101 (HC) at 103.

139 OECD "OECD Policy Roundtables: Cartel Sanctions against Individuals 2003" (2004) at 111.

140 However, the right to trial by jury may well be denied to cartel defendant pursuant to s 361D of the Crimes Act 1961, on the basis of the foreseen length and complexity of the trial: MED, above n 1, at [331].

141 *Ibid*, at [339].

potential to weaken deterrence if convictions cannot be obtained) highlight that any legislative development should not be a hasty reaction. Crucially, the costs of criminal enforcement are borne well before realisation of the benefits.<sup>142</sup> The initial burden of increased resources for criminal trials may be matched by a decline in successful prosecutions, as the Commerce Commission would carefully test a cartel offence only against cartels for which it has incontrovertible evidence. Meanwhile, the assumed long-term benefit of decreased cartel activity in New Zealand through enhanced deterrence may never become readily apparent.

Finally, although cartels undermine dynamic and allocative efficiency, the costs of criminal enforcement may be disproportionate to the economic effects of cartels within New Zealand. MED suggests that the low cartel detection rate in New Zealand stems from insufficient deterrence or a lower domestic incidence of cartels generally.<sup>143</sup> It is unlikely that cartel activity is relatively lower in New Zealand, as the prevailing highly concentrated markets should encourage cartel formation and stability, all else being equal.<sup>144</sup> Nonetheless, the small size of the New Zealand economy does bear on the criminalisation decision. The smaller economic effects of cartel formation in New Zealand, relative to its OECD partners, render the costs of maintaining criminal enforcement comparatively more expensive, and potentially out of proportion with the deterrence objective.

### Issues of Definition

Costs aside, introducing a cartel offence necessitates that a distinction be made between “hard-core” cartel behaviour, prohibited with a ‘per se’ offence, and that which should be considered “soft-core”; even before mens rea issues are addressed.<sup>145</sup> The OECD definition<sup>146</sup> of hard-core cartels to include price-fixing, bid-rigging, output or quota restrictions, and market sharing cannot be dispositive, as these four characterisations may cover pro-competitive conduct where cost or output efficiencies result.

MED has proposed a number of definitions of a ‘cartel offence’ which serve to underline the complexity of definition. Essentially, cartel behaviour would be subject to a ‘per se’ offence, which is then subject to exceptions or defences that reduce its application to pro-competitive or competitively neutral activity.<sup>147</sup> However, the uncertain scope of such defences (for example, their application to joint ventures) does emphasise the

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142 Reindl, above n 102, at 125.

143 MED, above n 1, at [21]–[24].

144 Margaret Levenstein and Valerie Suslow “What Determines Cartel Success?” (2006) 44 *J Econ Lit* 43 at 86.

145 The need to promote economically efficient behaviour created significant problems when defining the cartel offence in Australia. For an in-depth discussion of the Australian offence, see Caron Beaton-Wells and Brent Fisse “The Cartel Offences: An Elemental Pathology” (Joint Federal Court of Australia/Law Council of Australia Workshop, Adelaide, 4 April 2009).

146 OECD *Recommendation*, above n 9.

147 MED, above n 1, at [134].

difficulty in identifying which cartels really do deserve criminal treatment. Moreover, the alternatives — whether creating a ‘rule of reason’ offence or an efficiency defence — would require a nuanced economic analysis of efficiency gains and losses based on substantial empirical evidence, with the result that securing convictions would be lengthy and complex.

Therefore, given that cartel conduct may or may not be economically efficient, economists question the suitability of criminal penalties. In New Zealand particularly, the absence of economies of scale within domestic markets encourages greater use of efficiency criteria when condemning restrictive trade practices.<sup>148</sup> As Evans has argued, there lacks a sharp dichotomy between competition and cooperation to justify the regulator sending some cooperating individuals to jail.<sup>149</sup> The identification and definition of hard-core cartel behaviour is simply not clear-cut, and resort to prosecutorial discretion in cases of ambiguity is unsatisfactory. Individuals have the right to demand certainty when the criminal law may potentially be triggered.

These outstanding issues surrounding the design and definition of a cartel offence tend to weaken support for criminalisation. Definition of the cartel offence is critical, as its creation may deter individuals from legitimate, valuable behaviour creating economic wealth, if they apprehend unexpected regulatory interference with their business agreements. The actual risk of type one errors, where innocent people are imprisoned, is slight due to the high standard of proof and prosecutorial caution.<sup>150</sup> Yet the inevitable complexity of any ‘cartel offence’ settled upon will create ambiguity capable of stifling pro-competitive or neutral business ventures.

### **The Absence of a Culture of Criminal Enforcement**

Finally, there exists considerable uncertainty as to whether New Zealand society perceives hard-core cartels as deserving of severe punishment. Societal consensus on the propriety of criminal enforcement is critical to the effectiveness of criminal sanctions.<sup>151</sup> Without such consensus, juries and judges may be loath to convict and apply harsh sentences (regardless of the sentiment of the competition authority), and thereby deterrence will be undermined.

Unfortunately, certain features of hard-core cartelisation make it exceedingly difficult for the layperson to comprehend its immorality. First,

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148 Lewis Evans and Patrick Hughes “Competition Policy in Small Distant Open Economies: Some Lessons from the Economics Literature” (New Zealand Treasury Working Paper 03/31, 2003) at 28.

149 Lewis Evans “The efficiency of collusion: implications for the efficiency of criminal sanctions” (paper presented to LEANZ seminar, Wellington, 1 March 2010).

150 This view accords with that of Werden and Simon, who believe that “erroneous findings of guilt in criminal antitrust cases are negligible” due to the caution of the United States Antitrust Division: Werden and Simon, above n 69, at 932.

151 Wils, above n 66, at 174.

the victim of the anti-competitive conduct is an unidentifiable consumer, for whom it is difficult to feel affiliation and sympathy.<sup>152</sup> Further, the conduct is often perceived as morally neutral where it forms part of other lawful business undertakings,<sup>153</sup> or justifiable where motivated by legitimate concerns for the welfare of the business.<sup>154</sup> Additionally, the respected position of business executives can muddle public perceptions as to the immorality of their anti-competitive conduct.<sup>155</sup> This is exemplified by the high profile *Visy* prosecution in Australia,<sup>156</sup> during which political support cultivated the perception that Visy's well-respected owner Richard Pratt had not acted immorally, despite his admission of price-fixing.<sup>157</sup>

Currently, no surveys reveal whether the New Zealand public understands the immorality of hard-core cartels or supports criminalisation.<sup>158</sup> A recent United Kingdom survey found that most individuals recognised price-fixing as harmful (73 per cent) but only 11 per cent favoured imprisonment.<sup>159</sup> Indeed, recent warnings to Trade Me sellers suggest that many individuals may be ignorant of the illegality of price-fixing, much less its immorality.<sup>160</sup>

Ultimately, if a consensus develops between politicians, the Commerce Commission and competition law practitioners as to the merits of criminal enforcement, public education through media publicity can lead to the widespread consensus crucial for the regime's success. Yet it may take years for a cartel offence to gather the community support required for appropriate sentencing and achievement of the desired deterrence objective. Until then, in the absence of a criminal antitrust culture, judges may view the criminalisation of cartels as an unjustified importation of the United States's penal tradition and be hesitant to put more individuals into overcrowded prisons.<sup>161</sup> The Sentencing Act 2002 allows penalties such as home or community detention, community work and supervision to be imposed as alternatives to imprisonment and in combination with fines.<sup>162</sup> The risk of such lenient sentencing as the outcome of a cartel offence considerably lessens the impetus for its creation.

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152 Louise Castle and Simon Writer "More than a little wary: Applying the criminal law to competition regulation in Australia" (2002) 10 CCLJ 1 at 22.

153 Hoel, above n 119, at 112.

154 Beaton-Wells and Fisse, above n 104, at 184 note the classic example of *Attorney-General (Cth) v Associated Northern Collieries* (1911) 14 CLR 387.

155 Castle and Writer, above n 152, at 24.

156 *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617, (2007) 244 ALR 673 [*Visy*]. This judgment imposed a penalty of \$36 million on *Visy* and two smaller awards against company directors.

157 Hoel, above n 119, at 106.

158 Greater knowledge as to public support may be obtained through reviewing public submissions on the MED discussion document.

159 Andreas Stephan "Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain" (2008) 5(1) *Comp L Rev* 123 at 144.

160 Commerce Commission "Trade Me seller warned against anti-competitive behaviour" (press release, 3 February 2010).

161 See further, Department of Corrections *Summary of the 2008-16 Justice Sector Prison Population Forecast* (2008) at 2.

162 Sentencing Act 2002, s 19.

## VI ALTERNATIVES TO CRIMINALISATION

The arguments for and against criminalisation, and particularly the immense costs involved with criminal anti-cartel enforcement, encourage a careful scrutiny of alternative means to deter price-fixers effectively.<sup>163</sup> As the OECD has observed:<sup>164</sup>

Sanctions on individuals are not the only instrument available to agencies in the fight against cartels, and each country must determine its own “right” mix of sanctions that has the most effective deterrent effects against cartels.

Not only must the “right” mix of sanctions for New Zealand be considered, but also whether improvements to the likelihood of detection and prosecution can increase deterrence, as these factors also heavily impact individual compliance.

### Increased Individual Penalties

Having reviewed the status quo, it is apparent that the current Commerce Act thresholds for pecuniary penalties on corporations are generally sensitive to the scale of corporate offending, and (barring marginal sub-optimality) could not be increased to affect deterrence markedly. A higher statutory maximum for individual penalties, however, is attractive. While in line with Australia,<sup>165</sup> the \$500,000 maximum penalty in New Zealand is dwarfed by the C\$10 million fine in Canada<sup>166</sup> and the unlimited fines available in the United Kingdom.<sup>167</sup> Moreover, \$500,000 would be trifling for many New Zealand businessmen based on annual income and net worth.<sup>168</sup>

Increased statutory thresholds fulfil an important signalling function to the judiciary as to appropriate sentencing levels, as courts frequently refer to statutory maxima in assessing the sufficiency of a fine.<sup>169</sup> Amendments could therefore encourage more suitable penalties.

This route of increasing thresholds and continuing to pursue harsh pecuniary penalties for anti-competitive behaviour certainly has

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<sup>163</sup> In the European Union context, Spagnolo for example has advocated testing more efficient administrative mechanisms prior to criminalisation: above n 76, at 147.

<sup>164</sup> OECD (2007), above n 80, at 11 (emphasis added).

<sup>165</sup> An individual civilly prosecuted in Australia faces a maximum fine of A\$500,000, whereas an individual criminally prosecuted faces a fine of up to A\$220,000 as an alternative to or in conjunction with imprisonment: Trade Practices Act 1974 (Cth), ss 76(1B) and 79(1)(e).

<sup>166</sup> Competition Act RSC 1985 c C-34, s 45(1).

<sup>167</sup> Enterprise Act 2002 (UK), s 190(1).

<sup>168</sup> MED, above n 1, at [47].

<sup>169</sup> See for example *Koppers Arch No 2*, above n 43, at [34].



the advantage of cost-effectiveness.<sup>170</sup> Still, it remains questionable whether fines can ever reach the optimal levels required for deterrence, notwithstanding higher thresholds. The possibility that sub-optimal financial sanctions will provide inadequate deterrence has led MED to advocate change despite the pecuniary penalty framework being untested against serious cartel behaviour. Otherwise, “our law [may be] ill-suited to modern business practices on the few occasions when it is tested”.<sup>171</sup>

### Criminal Fines

One alternative to current pecuniary penalties not canvassed by MED is the levelling of criminal fines on corporations and individuals. The stigma of a criminal conviction attached to a financial penalty would attract cumbersome travel and work restrictions for individual offenders and severely damage key relationships for corporations.<sup>172</sup> Still, this option appears unappealing. The scarcity of criminal fines for hard-core cartelisation globally is reflective of their weak marginal deterrent effect.<sup>173</sup> Further, they are unlikely to find favour with the Commerce Commission, which would be forced to satisfy the criminal standard of proof to achieve prosecution.

### Disqualification Orders

MED suggests that the maximum length of disqualification orders on individuals<sup>174</sup> could be increased from 5 years to up to 15 years in line with United Kingdom legislation.<sup>175</sup> There is scant academic commentary or anecdotal evidence as to the deterrent effect of such orders, which are rarely imposed and usually operate in conjunction with individual fines. Whelan has criticised such orders as being ineffective compared to imprisonment, as the message of societal censure delivered by criminal sanctions is absent.<sup>176</sup> Conversely, they may simply catalyse retirement<sup>177</sup> or be wasted on cartelists already unemployed following their anti-competitive conduct.<sup>178</sup> These criticisms led Wils to label such orders a “defensible second-best”<sup>179</sup> to imprisonment. They may usefully accompany personal penalties, but in themselves are insufficient to maximise deterrence. Certainly, as

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170 The costless penalty of fines was preferred by Becker in 1968: Becker, above n 63, at 180.

171 MED, above n 1, at [43].

172 Beaton-Wells and Fisse, above n 104, at 234.

173 King, above n 106, at 28.

174 Commerce Act 1986, s 80C.

175 MED, above n 1, at [51]. The Enterprise Act 2002 introduced Competition Disqualification Orders (CDOs) which must be made ordered where conduct makes an individual unfit to be concerned in management: Company Directors Disqualification Act 1986 (UK), ss 9A–9E.

176 Whelan, above n 72, at 37–38.

177 Wils, above n 66, at 188.

178 This was encountered by the *Koppers Arch* cartelists.

179 Wils, above n 66, at 188.

disqualification orders have to date never been applied in New Zealand, increasing their length would likely have negligible impact.

### Private Class Actions

Another means of enhancing deterrence through increased accountability would be to encourage private anti-cartel enforcement. Section 82 of the Commerce Act offers victims of hard-core cartel conduct the opportunity to recover damages, regardless of whether pecuniary penalties have been imposed. Unfortunately, though, the legislative provision for private remedies has been neglected. No private action for cartel conduct has reached trial, in sharp contrast to the plentiful private suits for treble damages that typically follow criminal prosecution in the United States.<sup>180</sup> At present, the cost and length of antitrust litigation discourages private litigants. While class action lawsuits<sup>181</sup> and contingency fees<sup>182</sup> remain unavailable in New Zealand, private actions will remain accessible solely for well-resourced companies.

It is submitted that more frequent private antitrust litigation initiated by legislative amendments could effectively supplement other deterrence measures. True, private actions for damages attract the same criticisms that may be levelled at all financial sanctions.<sup>183</sup> Further, these actions only target corporate accountability, and hence lack the strong *individual* deterrence inherent in the personal sanction of imprisonment. Still, they fulfil significant secondary objectives<sup>184</sup> — victim compensation and private assistance to the Commerce Commission to lighten its prosecutorial burden — which denote their worth in New Zealand anti-cartel enforcement.

### Rewarding Whistleblowers

The Commerce Commission has recently introduced, with the adoption of “Amnesty Plus” penalty concessions,<sup>185</sup> a limited reward system for cartelists who disclose participation in a separate cartel not under investigation. Beyond “Amnesty Plus”, however, whistleblowers are not rewarded. By contrast, competition authorities in South Korea<sup>186</sup> and the

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180 Federal antitrust law allows a private party “injured in his business or property” as a result of an antitrust violation to bring proceedings and recover “threefold the damages by him sustained”: see Clayton Act 15 USC § 15.

181 The High Court Rules only allow representative actions where one person sues on behalf of a group with the same interest who are bound by the judgment: High Court Rules, r 78.

182 But see, Lawyers and Conveyancers Act 2006, ss 333–336, which provides for conditional fee agreements.

183 Namely, that financial penalties cannot reach optimal levels as they will lead to liquidation. See Wils, above n 66, at 188 and Whelan, above n 72, at 36.

184 See Whelan, above n 72, at 37.

185 Commerce Commission *Cartel Leniency Policy*, above n 22, at [3.59]–[3.62].

186 OECD “Hard Core Cartels: Third Report on the implementation of the 1998 Council Recommendation” (2005) at 27 <[www.oecd.org](http://www.oecd.org)>.

United Kingdom<sup>187</sup> (the latter trialling the measure) provide cash rewards for general public informers, aiming to destabilise cartels with the risk that innocent individuals are incentivised to report any leaked information about cartel activity.

Although some commentators consider rewards to be an attractive and cost-effective means of enhancing deterrence,<sup>188</sup> MED doubts that cash rewards to whistleblowers would actually undermine coordination or enhance detection. The clandestine nature of cartels means that few outsiders could access sufficient evidence to uncover cartel activity.<sup>189</sup> Rewards are thus, at best, a backstop for detecting cartels, and an option for review following any success of the United Kingdom trial.

### **Increased Prosecutorial Resources**

The Commerce Commission's prioritisation of cartel investigation is hindered by resource constraints, with a budget for coordinated behaviour cases of only \$2.952 million.<sup>190</sup> An increase in resources for cartel enforcement could allow the pursuit of cartels identified outside of leniency applications that the authority currently must abandon,<sup>191</sup> and enhance the quality of existing investigations.<sup>192</sup> Admittedly, though, increased funding would necessarily exhibit diminishing marginal returns.<sup>193</sup> The evidence obtained from leniency applicants is crucial to successful cartel prosecution, so the authority rightly focuses at present on the investigation of leniency-discovered cartels.

### **Greater Investigatory Powers**

Part 7 of the Commerce Act bestows on the Commerce Commission a relatively strong arsenal of powers with which to investigate domestic cartels. The regulator may, for example, require the supply of information or documents or the giving of evidence (s 98) or obtain search warrants over premises to search for, remove or copy documents, articles or things, where such items are relevant (ss 98A–E). MED observes that current investigatory powers could be complemented by the capability to conduct covert surveillance during cartel investigations.<sup>194</sup> A heightened risk of detection from the monitoring and interception of communications arguably would alter cartelists' risk assessments when choosing to engage in anti-competitive conduct.

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187 Office of Fair Trading "Rewards for information about cartels" (2009) <[www.oft.gov.uk](http://www.oft.gov.uk)>.

188 Spagnolo, above n 76, at 139.

189 MED, above n 1, at [34].

190 Ibid, at [26].

191 PricewaterhouseCoopers *Commerce Commission Baseline Review*, above n 130, at 28.

192 MED, above n 1, at [27].

193 Ibid, at [29].

194 Ibid, at [35]–[38].

However, an upgrade of the Commission's investigatory powers appears unlikely. Wider surveillance powers would be inconsistent with present confinement of interception devices to the investigation of violent, terrorism and drug-related offences.<sup>195</sup> Although the Search and Surveillance Bill 2009 would make surveillance device warrants available to investigate a wider range of offending, their grant would nonetheless remain restricted to *criminal* offending.<sup>196</sup> In addition, the significant resource commitment required for the Commission to maintain interception capabilities or to outsource surveillance activities to the police may be seen as unsupportable as few cases warrant such substantial intrusion.

### Summary

A review of alternatives makes clear that the policy choice lies between criminal anti-cartel enforcement, which pursues imprisonment rather than criminal fines; and civil enforcement by means of tougher fines, supplemented by disqualification orders and private class actions. Increased resource funding to pursue more leads and greater investigatory powers would benefit the Commerce Commission, but are unlikely to find political favour. This author's view is that the alternative to imprisonment which maximises deterrence has, in fact, already been effected — the recent improvements to the Leniency Policy. These amendments have the greatest potential to deter cartels meaningfully in New Zealand by improving detection rates, and their introduction thus weakens the argument that stronger sanctions are presently needed.

## VII CONCLUSION

This article began with the assertion that criminal sanctions for hard-core cartel conduct were rightly being scrutinised by the government. Yet, having reviewed the arguments for and against criminal enforcement, the case for imprisoning price-fixers in New Zealand is unconvincing when viewing the costs and benefits of a 'cartel offence' in isolation.

Little is known about the elasticity of the response of cartelists to changes in punishment. Hence the claimed advantage of criminal sanctions — enhanced deterrence — cannot be used to justify the substantial costs of utilising the criminal law. Moreover, New Zealand simply lacks cases that deserve such strong sanctions, and the very creation of a criminal offence may, in fact, stifle productive business activity due to misplaced fears of jail time. Criminalisation requires the government to commit scarce resources to a process in which securing convictions may prove difficult. Further, the

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195 Law Commission *Search and Surveillance Powers* (NZLC PP97, 2007) at 331.

196 Search and Surveillance Bill 2009 (45-1), Part 3.

offence may ultimately be underutilised due to reluctance to impose prison sentences without an entrenched culture of criminal antitrust enforcement. All in all, a 'cartel offence' is unlikely to be net beneficial.

Simon Power does not want us "to think the New Zealand Government is pursuing cartel criminalisation just because Australia has".<sup>197</sup> But on the basis of other rationales, criminalisation is difficult to justify. Current political dedication to criminalisation does not stem from evidence of devastating harm caused by cartels domestically, any glaring deficiency in current penalties, or widespread perception as to the innate immorality of cartels. Criminalisation is, in fact, an aspect of a much wider government agenda of harmonising trans-Tasman business laws, one that assists in maintaining this country's economic credibility with its closest trading partner.

The real benefit to New Zealand from criminalising cartels therefore lies not in deterrence, but in the relational and economic benefits that accrue from alignment of our anti-cartel enforcement measures with Australia and other trading partners. New Zealand quite simply cannot afford to be seen to undermine international enforcement. Therefore, while criminal penalties cannot be justified on their own merits, the government rightly views the potential economic cost of inconsistent price-fixing sanctions as outweighing any costs of criminalisation. For the price-fixing thief, New Zealand will not be left as the only unlocked house on the street.

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197 Simon Power, above n 126.