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**REGULATING FOR “WELL-DRESSED THIEVES”:
CRIMINALISATION AS A REGULATORY RESPONSE
TO PRICE FIXING CARTELS**

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Abstract:

The Commerce (Cartels and Other Matters) Amendment Bill will introduce criminal penalties for price fixing and other cartel offences. This law change has faced commentary and critique from several perspectives including competition law, economics, criminal law and its practical effect on business. My paper will examine the criminalisation of cartels through a regulatory lens, starting from the premise that criminal law can be subsumed under the regulatory paradigm. I will identify the regulatory problem that price fixing cartels pose, explore the Bill’s practical implications and then provide a flavour of the debate around whether such change is appropriate or desirable. Finally, I will draw my own conclusions regarding the Bill and its overall desirability, as well as criminalisation as a regulatory response.

Word length

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Subjects and Topics

Criminalisation of Cartels

Regulation

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Introduction

“... I heard my colleague say earlier, that the intent of the bill is good. A hard-working Minister brought it into the House, but this Government has been very slow to move it through because of its distaste, it seems, for the measures in the bill. Right now Government members are under pressure. They are under a lot of pressure to make it look like they are *interested in regulating the market appropriately* (emphasis added) and so they are putting this bill through this evening.”¹

Dr David Clark MP describes the Commerce (Cartels and Other Matters) Amendment Bill (“the Bill”), as an attempt by the Government to appear to be regulating the market appropriately.² I suggest that the Bill is actually more concerned with regulating the market *effectively*, at least in terms of cartels, which is a different proposition. In this context *regulating* refers to the protection of market integrity through anti-cartel measures. The Commerce Act 1986 (the “Act”) currently regulates the market in this respect, through a pecuniary penalty scheme.³ However, there is a school of thought which believes that criminal penalties are a more effective means of both deterring cartelists, and enhancing the methods by which they are exposed.⁴ This point of view has been widely accepted, at least by governments, and is reflected in the global trend towards cartel criminalisation. Legislation, which imposes criminal penalties for cartel conduct, has already been passed in the United States, Canada, the United Kingdom and most recently Australia.⁵ Although many state actors appear to see such laws as desirable, whether they actually are is debatable.

This debate is usually approached from competition law, criminal law and economics perspectives. However, I suggest that the issue can also be looked at through a regulatory lens. I see the discussion as chiefly concerning a choice of approaches to a regulatory problem. As a regulatory instrument, the Bill is concerned with the introduction of new measures designed

¹ (26 November 2014) 702 NZPD 888; Second reading of the Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2).

² Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2).

³ Commerce Act 1986, ss 27,30,80.

⁴ Those discussed in this paper include Wouter J Wils “Is Criminalization of EU Competition Law the Answer?” (2005) 28(2) World Competition 117; Terry Calvani “Cartel Sanctions and deterrence” (2011) 56 Antitrust Bull. 185; Peter Whelan “Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’” (2013) Oxford Journal of Legal Studies 1; Caron Beaton-Wells “Capturing the Criminality of Hard Core Cartels: the Australian Proposal” (2007) 31 Melb. U. L. Rev. 675.

⁵ Ministry of Economic Development *Cartel Criminalisation Discussion Document* January 2010 (see the forward by then Minister of Commerce, Simon Power MP); Sherman Act 15 USC §1 ; Competition Act RSC 1985 c. C-34, s 45 ; Enterprise Act 2002, s 188 (UK); Competition and Consumer Act 2010, s 45 (Cth).

to deter non-compliance with accepted norms of competitive business practice. My paper will explore the Bill, and price fixing cartels, as a context for the discussion of *criminalisation* as a regulatory response.

The Bill appears to have three very clear objectives.⁶ First criminal penalties, with their accompanying stigma and potential deprivation of liberty, would enhance the deterrence of cartel conduct. Second, the detection of cartels would also be improved as the Commerce Commission's leniency scheme would have greater appeal (owing to the possibility of executives facing imprisonment). Third, the change would allow New Zealand to cooperate more effectively in international efforts to combat cartels, as many comparable jurisdictions including the United Kingdom, United States, Canada and Australia have already criminalised such conduct. While these may look like separate goals for the legislative change I suggest that they are actually sub-goals which contribute to the overall regulatory goal: the maintenance of the market's competitive integrity through the prevention of market failure arising from the activities of cartels. The real question is then whether these sub-goals will be actually be furthered by criminalisation, and in turn further the comprehensive regulatory objective.

The question of whether it is desirable to adopt criminal penalties for price fixing is not a new one. Criminal penalties have been available in the United States after the passing of the Sherman Act in 1890 and have been applied since the 1950's.⁷ A cursory look at my bibliography will show that highly regarded scholars have given the issue serious consideration. Similarly I have included opposing viewpoints from submissions on the Bill, from businesspeople and legal practitioners.

My paper will be divided into four parts. Part one will explore criminal and regulatory law and their *prima facie* differences. This section will include some broad definitions, as well as comments from criminal thinkers and jurists on the nature of regulation. I will then discuss those purported distinctions and how I believe criminal law can be subsumed under the regulatory paradigm.

Part two will examine the regulatory problem that cartels pose. First I will identify precisely what is meant by *cartel*. Next I turn to the concepts of harm and wrong, from a criminal

⁶ (24 July 2012) 682 NZPD 3869; these goals were stated in the first reading speech, by Craig Foss MP, then Minister of Commerce.

⁷ Sherman Act 15 USC §1 provides for punishment of restrictive trade practices as a felony, punishable by fines not exceeding \$100,000,000 if a corporation, or, if a person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both.

perspective, and explore how cartels perpetrate harm in a regulatory sense: as a form of market failure. This section will provide some context by including examples of cartel cases, both in New Zealand and overseas. It will also involve a discussion of why cartel conduct can be conceptualized as crime by drawing a direct analogy between cartels and theft.

Part three will explore the Bill itself. I will start with the current legislative response to cartels, as well as the role of the Commerce Commission in cartel prosecutions. Next I will turn to the provisions of the Bill itself, which relate to an attempt to clarify the law and introduce criminal penalties for cartelists. This will include a discussion of the procedural and evidential implications that will arise from criminalisation.

Part four will deal with the debate around criminalisation, beginning with some of the major themes of opposition to criminalisation that have emerged. Next I will deal with the two main justifications for criminalisation: deterrence and the enhancement of leniency programmes. I will provide some insights on the perceived difficulty with pecuniary penalties (whether applied to individuals or corporations) and arguments for the inherently superior deterrent effect of imprisonment. I will end this part with some suggestions regarding possible alternatives to criminalisation. Finally, I will draw some conclusions regarding criminalisation as a regulatory response and make a summative comment on the desirability of the Bill as a response to cartels.

Three important clarifications are necessary before I proceed. First, I will only be discussing cartel conduct within the context of price fixing. This is not to suggest that other types of cartel activities e.g. bid-rigging, output restriction and market allocation, are not as harmful as price fixing.⁸ However, confining the scope of my discussion to price fixing seems appropriate as it is often the most sensationalized of the restrictive trade practices, and there certainly is a sensational element to the debate regarding whether or not such conduct should be punishable by jail time.

Secondly, for the avoidance of doubt, when “criminal penalties” are referred to this can be taken to be synonymous with imprisonment. Third, this Bill raises a wide array of issues and there is only so much scope to cover them in this paper. As such, my regulatory focus is rather narrow and I am leaving aside serious discussion of some of the other concerns raised about

⁸ Market-allocation, for example allows firms to act as though they were monopolists within their allocated territories; Lindsay Hampton and Paul G Scott *Guide to Competition Law* (LexisNexis NZ, Wellington, 2013) at 164.

the Bill. There simply is not space to properly explore the issues that have been raised with regards to the Bill's effect on shipping, extra-territorial jurisdiction, the clearance regime or the capture of procompetitive/efficiency enhancing activity - each of which is worthy of a paper in its own right.

I Criminal vs Regulatory law

A. Initial assumptions

My initial view was that, although they shared some common elements, criminal law and regulatory law were distinct entities. From this perspective criminalisation represented a paradigm shift in the way in New Zealand responds to cartels. What was essentially a regulatory offence was being transformed into a crime.

This criminal/regulatory divide conforms to that of criminal law theorists, such as Asworth and Simester. These scholars view regulatory offences and so-called true crime as clearly distinguishable on the basis of their respective *mens rea*, or lack thereof.⁹ Criminal offences require varying degrees of intention, from the actual intention to do a harmful act to criminal recklessness (intentional running of an unreasonable risk).¹⁰ The more stringent fault standards, for criminal offences, are justified on the basis of the more severe social stigma and penalties that generally follow with criminal liability.¹¹

Regulatory offences are those which criminal theorists would characterize as lacking a mental fault requirement.¹² Usefully, regulatory offences have been categorized as either *strict* or *absolute* liability.¹³ For an absolute liability offence a prosecutor is only required to show that the defendant committed the unlawful act, and liability follows.¹⁴ For strict liability offences the prosecution's task still only extends to proof of the act, but an offender may exonerate themselves by establishing an absence of fault.¹⁵ These workable distinctions were

⁹ AP Simester and GR Sullivan *Criminal Law Theory and Doctrine* (3rd ed, Hart Publishing, Portland, Oregon, 2007) at 165 ; Andrew Ashworth *Principles of Criminal Law* (6th ed , Oxford University Press, Oxford, 2009) at 163.

¹⁰ Ashworth, *Principles of Criminal Law*, above n 9, at 119.

¹¹ At 180.

¹² Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 160.

¹³ At 160; There are many examples of strict liability offences under New Zealand law, e.g. Biosecurity Act 1993, ss 154N, Animal Welfare Act 1999, s 25, Resource Management Act 1991 ss 11, 341 Freedom Camping Act 2011, ss 20-21.

¹⁴ Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 185.

¹⁵ Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 185; *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299.

set out in *R v Sault Ste. Marie (City)* (“*Sault Ste. Marie*”) by the Canadian Supreme Court, and were adopted by the New Zealand Court of Appeal in *Civil Aviation Department v MacKenzie*.¹⁶ While Asworth, Simester and the Judges in *Sault Ste. Marie* might say that lack of a mental fault element makes criminal law distinct *from* regulatory law I submit that rather it makes criminal law distinct *within* the paradigm of regulatory law – an argument I will develop below.

Perhaps the type of conduct that criminal and regulatory offences deal with might provide a more meaningful distinction than mental fault requirements. In *Sault Ste. Marie* the Court characterized regulatory or *public welfare* offences as those which emphasized the protection of social and public interests rather than individual ones, in the words of Dickson J “everyday matters”.¹⁸ While the criminal law is often perceived as dealing with serious offending regulatory law appears to perform a maintenance function – in that it keeps the minutiae of everyday life in order. In the words of Cory J in *R. v. Wholesale Travel Group Inc*:¹⁹

From cradle to grave, we are protected by *regulations*; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and the beverages we drink are subject to regulation for the protection of our health.

In short, regulation is absolutely essential for our protection and well-being as individuals, and for the effective functioning of society.

It also seems to follow that as regulatory offences deal with everyday matters, contrasted with the more serious anti-social behaviour associated with criminal law, they attract less serious penalties. Perhaps this is why, when asked, most lawyers would probably suggest that the difference between a criminal and regulatory offence is the difference between imprisonment and a fine.

There are other distinctions, which appear to set criminal and regulatory law apart. These include both conceptual and practical differences. Conceptually, criminal law appears to have specific moral normative aspects and is based on the principles of harm and wrong. Practically, there are marked differences between the rules of criminal procedure and those involved in

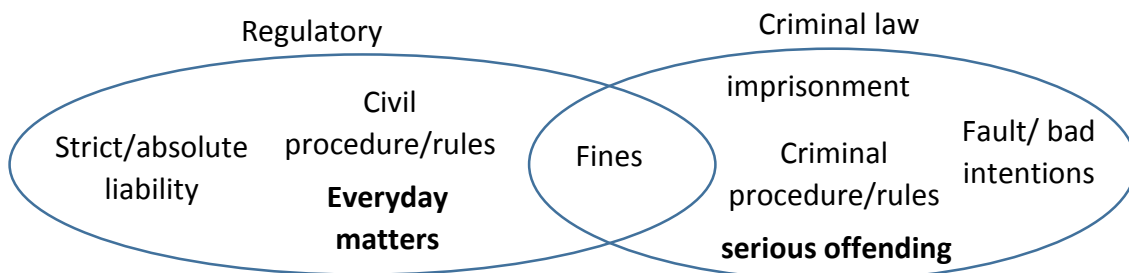
¹⁶ *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299; *Civil Aviation Department v MacKenzie* [1983] NZLR 98.

¹⁸ *R. v. Sault Ste. Marie (City)*, above n 16.

¹⁹ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, in Rick Libman *Sentencing Purposes and Principles for Provincial Offences* (LCO SP June 2010) at 12.

civil proceedings for regulatory offences, as well as clear differences between the types of punishments available.²⁰ I will touch only briefly on such distinctions here, as I will be addressing some of the procedural specifics of criminal law when I discuss criminalisation’s implications for cartel prosecutions in Part two of this paper. For now, it is important to note that the key characteristics of a criminal prosecution include higher levels of scrutiny and proof. These reflect that criminal punishments, which often include imprisonment, are perceived to be more severe than civil pecuniary penalties – both in their direct effect on the offender, and in terms of societal stigma. This higher level of punishment is balanced by a higher level of protection for defendants, via tighter procedural controls.²¹ As a result, the burden of proof in criminal trials is significantly higher and the rules of evidence are more stringent.

In summary, if we accept these purported distinctions then a visual representation of the divide between criminal and regulatory law might look like this:



B. Criminal law within the regulatory paradigm

While the courts and theorists seem to classify crime and regulatory offending separately based on mental fault, subject matter and punishment I submit that these distinctions are unsatisfactory. One does not need to go far to find areas of overlap. With respect to mental fault, price fixing, which could currently be described as a regulatory offence, must by definition involve a conspiracy the *sine qua non* of which is a mental fault element i.e. an agreement to commit an offence.²² In terms of *everyday matters*, the criminal law deals with aberrant conduct, such as murder, but also with offending as mundane as traffic offences.²³

²⁰ Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, 581.

²¹ Andrew Ashworth *Principles of Criminal Law*, above n 9, at 2-4.

²² Commerce Act 1986 ss 27,30.

²³ Land Transport Act 1998, ss 7, 35.

Clarke suggests that criminal laws are not restricted to dealing with violent or directly harmful conduct, but are a convenient tool for the deterrence and punishment of anti-social conduct, some of which is no worse than perceived *civil* wrongs.²⁴

In terms of consequences, the simple jail vs. fine demarcation does not always form a consistent division between so-called crimes and regulatory offences. For, certain offences, which would generally be perceived as regulatory, are punishable by incarceration while Category One criminal offences, by definition, are *only* punishable by fines.²⁵

Clearly, the purported distinctions break down under close scrutiny. Perhaps then a more meaningful inquiry will be into the definitions of criminal and regulatory law and what those definitions reveal about their *purpose*.

Regulation is a difficult term to pin down and scholars have suggested that regulation is a comprehensive term which defies simple definitions.²⁶ The New Zealand Law Commission (the "Law Commission") also identified the difficulty posed by the term "regulation" and the breadth of the conduct it can capture. The Law Commission felt that regulation could be narrow, referring to standards and enforcement protocols for a small class of actors in a regulated activity, or wide, including general rules to control the conduct of the entire population.²⁷ Interestingly the Law Commission expressly included the Commerce Act 1986, with which this paper is concerned, within this range.²⁸

The Commission suggested that regulation could include:²⁹

- B. the promulgation of rules by government, accompanied by mechanisms for monitoring and
- C. enforcement, usually assumed to be performed through a specialist public agency;
- D. any form of direct State intervention in the economy, whatever form that intervention might take; and

²⁴ Julie Clarke "The increasing criminalization of economic law – a competition law perspective", (2011) 19(1) *Journal of Financial Crime* 76 at 83.

²⁵ Resource Management Act 1991, ss 11, 339, 341 (contravention of s 338 is punishable by up to 2 years imprisonment). Criminal Procedure Act 2011, s 6(1)(a) (Category One offences are expressly defined as offences which are *not* punishable by imprisonment).

²⁶ Bronwyn Morgan and Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 4; Robert Baldwin Colin Scott Christopher Hood (ed) *A reader on Regulation* (Oxford University Press, Oxford 1998) at 2.

²⁷ Law Commission *Pecuniary Penalties* (NZLC R 133, 2014) at 42-43.

²⁸ At 43.

²⁹ At 43.

E. all mechanisms of social control or influence affecting all aspects of behaviour from whatever source, whether they are intentional or not. (emphasis added)

The final point is particularly useful, because it takes such a wide view of regulation - a purposive view. Weatherill suggests that if we conceptualize regulation in a comprehensive way, it includes any measure that exerts influence over conduct irrespective of its form or intent.³⁰ Similarly, Morgan and Yeung describe the broad notion of regulation as including any system of social oversight.³¹ Taking this broad view of regulation, its purpose can be summed up in a single word: *control*. In this sense regulatory law, just like criminal law, is essentially normative.

Much like regulation, criminal law is also difficult to define. Ashworth described the criminal law chiefly in terms of its function and purpose, because its definition and purpose are inextricably entwined.³² To Ashworth the criminal law is a standing disincentive to crime and reinforcement of social conventions and inhibitions.³³ Glanville Williams described criminal law in terms of being concerned with the punishment of wrongdoers.³⁴ Simester outlines the function of the criminal law to identify behaviours in terms of “things that must not be done” and the law itself as an instrument that “bullies citizens into complying with its injunctions.”³⁶ Such intervention into the population’s lives is justified by the prevention of harm.³⁷ It appears then that the coercion of compliance by threat, is a common feature of both regulation and criminal law e.g. the aforementioned penalty provisions statutes such as of the Resource Management Act.

It is clear that the purpose of criminal law, like regulation, concerns control. It operates to deter anti-social conduct via the threat of fines, deprivation of liberty - and in certain jurisdictions, death.³⁸ If regulation is defined as systems of control, it then becomes clear why criminal law falls under the regulatory paradigm. In Morgan and Yeung’s analysis of regulatory modalities,

³⁰ Stephen Weatherill “The Challenge of Better Regulation” ed *Better Regulation* (Hart Publishing, Oregon, 2007) at 1.

³¹ Morgan and Yeung, *An Introduction to Law and Regulation*, above n 26, at 4.

³² Ashworth, *Principles of Criminal Law*, above n 9, at 16.

³³ At 16.

³⁴ Dennis J Baker Glanville Williams Textbook of Criminal Law (3rd Ed, Sweet & Maxwell, London, 2012) at 25- 26.

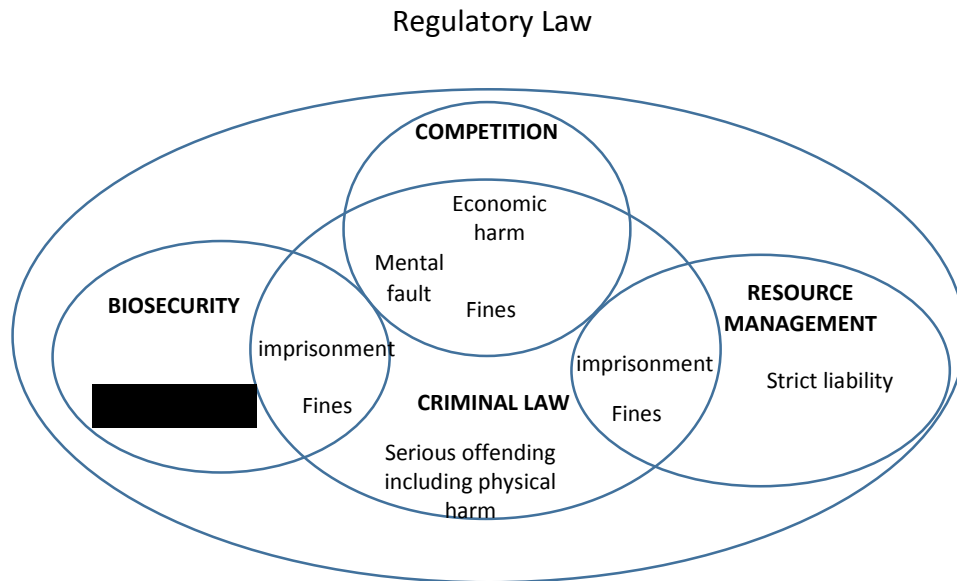
³⁶ Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 5.

³⁷ At 582.

³⁸ Ashworth, *Principles of Criminal Law*, above n 9, at 17.

criminal law generally conforms to the conception of "Command."³⁹ Since both criminal law and so-called regulatory law have the same purpose, and regulation is a comprehensive term, it follows then that criminal law can be subsumed within the regulatory paradigm.

My earlier Venn diagram represented criminal law as distinct from, but overlapping with, regulatory law. However, I believe that this initial view was incorrect. Instead, a more accurate visual representation would be something like this:



I suggest that my model is congruous with Hancher and Moran’s conception of regulatory space.⁴⁰ For, if regulatory space is defined by issues it pertains to and the actors and subjects within it, then criminal law can be seen as occupying the space involving both direct and indirect (e.g. via property, in a case of burglary) human interactions which involve certain types of harm.⁴¹ Within that space it seeks to influence conduct, chiefly in the form of deterrence. While criminal law occupies a distinct regulatory space it *intersects* with the regulatory spaces occupied by other areas of law when criminal processes and penalties are applied in those other fields.⁴²

³⁹ Morgan and Yeung, *An Introduction to Law and Regulation*, above n 26, at 80.

⁴⁰ L Hancher and M Moran “Organising Regulatory Space” *A reader on Regulation* Robert Baldwin Colin Scott and Christopher Hood (eds) (Oxford, Oxford University Press, 1998) at 153.

⁴¹ At 155.

⁴² NOTE: If /when the Bill passes into law, then I will need to amend the diagram so that imprisonment also appears within the Competition law scheme.

The New Zealand Treasury has described regulatory instruments as the tools available for government institutions to apply, including legislation.⁴³ In this sense I suggest that it is appropriate to think of the different fields of law as regulatory instruments. Seen in this way, their differences become reduced to their particular approach to different types of human and market interactions. I prefer the word “approach” to instrument, particularly in reference to criminal law. This is because when a particular field of law is applied to a particular kind of undesirable conduct it brings with it a very distinct set of procedures, fault standards and consequences.

The Biosecurity Act 1993 is a good example of intersection, between two regulatory approaches, one of them being criminal. A criminal prosecution for contravention of s 154(15) the Biosecurity Act 1999 is subject to a criminal standard of proof and upon conviction carries a term of imprisonment of up to five years.⁴⁴ In contrast a prosecution under s 16A is subject to a civil standard of proof and carries a pecuniary penalty of up to \$ 500,000.⁴⁵ While these distinctions exist within the same statutory regime, the aim of the Act remains the same: to regulate importation of plant and animal matter in such a way as to manage the introduction of pests.⁴⁶ Although the criminal process is *mechanically* different from the civil process both are still just regulatory approaches, aimed towards achieving the same regulatory objective.

As a final word on my diagram, I acknowledge that it only provides a rudimentary representation of criminal law’s intersection with other regulatory approaches. For simplicity’s sake I have only included three other areas of law. However, taking the broadest and most encompassing view of regulation, to be truly representative the diagram would have to be much larger and three dimensional - in order to represent the myriad of ways in which criminal law intersects with other legal fields. Whether such intersection, between criminal and competition law, is actually complimentary or an inappropriate intrusion is the true topic of this paper.

⁴³ Kevin Guerin *Encouraging Quality Regulation: Theories and Tools* (New Zealand Treasury Working Paper 03/24, September 2003) at 3.1. < <http://www.treasury.govt.nz/publications/research-policy/wp/2003/03-24>>

⁴⁴ Biosecurity Act 1993, ss 154O(15), 157(2).

⁴⁵ Sections 16A, 154H, 154J.

⁴⁶ Biosecurity Act 1993, long title: “An Act to restate and reform the law relating to the exclusion, eradication, and effective management of pests and unwanted organisms”

II The Regulatory Problem

A. Identifying Cartels

Before exploring criminalisation as a regulatory response to cartels, it is necessary to look at the perceived regulatory problem that they pose. Since the Bill is designed to criminalise so called “hard core cartels” the first question to ask is “what is a cartel?” Harding describes the etymology of the word “cartel” as complicated, given that to the ordinary person it would more likely raise associations with vicious criminal organisations involved in the manufacture and distribution of drugs.⁴⁷ Growing up in Canada in the 1980’s, and having been inadvertently exposed to the media’s fascination with the American “War on Drugs” this was certainly my experience.

However, in this particular context cartel conduct refers to agreements between business competitors to limit competition by colluding to fix the price of a particular good or service.⁴⁸ Such anti-competitive agreements are designed to maximise the conspirators’ profits, often by limiting output.⁴⁹ Doubtless this conjures up less sinister images than that of Columbia’s Medellin cocaine syndicate.⁵⁰ Perhaps this is why, as Harding suggests, enforcement agencies preface the description of cartels with the words *hard core*.⁵¹

However the hard core label serves more than just sensationalist purposes. A hard core cartel can be differentiated from a *soft core* cartel with regards to its harmful effects. Soft core cartels involve collusion between competitors to increase profits, but without resulting in any distributive or deadweight losses or where those losses are offset by other benefits.⁵² King gives the example of competitors sharing transport systems to reduce costs, thereby increasing profits, but then allowing for lower prices of service to consumers.⁵³ Such collusive conduct, while prima facie illegal, would likely qualify for an authorisation under the Act.⁵⁴

⁴⁷ Christopher Harding “Business collusion as a criminological phenomenon: exploring the global criminalisation of business cartels” (2006) 14 *Critical Criminology* 181 at 183.

⁴⁸ Christine Parker “The war on cartels and the social meaning of deterrence” (2013) 7 *Regulation & Governance* 174 at 174.

⁴⁹ David King *Criminalisation of Cartel Behaviour* (Ministry of Economic Development, Occasional Paper 10/01, January 2010) at 2.

⁵⁰ Andres Restrepo and Alvaro Guizado “From smugglers to warlords: twentieth century Colombian drug” (2003) 28 *Canadian Journal of Latin American & Caribbean Studies* 249.

⁵¹ Christopher Harding, “Business collusion as a criminological phenomenon: exploring the global criminalisation of business cartels” above n 47, at 183.

⁵² King *Criminalisation of Cartel Behaviour*, above n 49, at 4.

⁵³ At 4.

⁵⁴ Commerce Act 1986, ss 58 -65.

Similarly the OECD does not consider “hard core” agreements to include those which are: ⁵⁵

- I. reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies.
- II. are excluded directly or indirectly from the coverage of a Member country’s own laws, or
- III. are authorised in accordance with those laws.

While such conduct is prima facie collusion, its effect is essentially procompetitive, and thus distinguishable from “naked restraints” targeted by cartel criminalisation theorists. ⁵⁶

A naked or hard-core restraint benefits the cartelists but harms consumers. Price fixing is generally considered to be just such a restraint and thus a hard core cartel activity. ⁵⁷ Naturally, it is outlawed under New Zealand law. ⁵⁸ Section 27 of the Act proscribes collusion between business competitors to enter into contracts, arrangements or understandings that have the effect or likely effect of substantially reducing competition in the market. Section 30 deems that agreements which have the purpose, effect or likely effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services substantially lessen competition. Thus, price fixing thus violates s 27 of the Act, via s 30, and is *per se* illegal. ⁵⁹

The statute appears to draw a clear line that prohibits any collusion which has the effect of fixing prices. However, much like the hard core / soft core cartel distinction the Courts have made similar distinctions between conduct which would amount to literal price fixing, but which is procompetitive and should not be penalized, and price fixing which can be characterized as a naked restraint and which results in harm. This characterization approach emerged from the United States Supreme Court’s decision in *Broadcast Music Inc. v Columbia Broadcasting Systems*. ⁶⁰ The Court held that an agreement between artists and a licence-

⁵⁵ OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels OECD 1998 at 3 < <http://www.oecd.org/daf/competition/2350130.pdf> > .

⁵⁶ Terry Calvani “Cartel Sanctions and deterrence” (2011) 56 Antitrust Bull. 185 at 194.

⁵⁷ Hampton and Scott, *Guide to Competition Law*, above n 8, at 186.

⁵⁸ Commerce Act 1986, ss 27,30

⁵⁹ Hampton and Scott, *Guide to Competition Law*, above n 8, at 154.

⁶⁰ *Broadcast Music Inc v Columbia Broadcasting Systems* 441 US 1 (1979).

holder, which had the effect of literally fixing prices but was otherwise procompetitive and practical, would not violate the per se rule.⁶¹

Similar jurisprudence has also developed in Australia. In *Radio 2UE Sydney Pty Ltd v Stereo FM Ltd*, Lockhart J held that the literal price fixing of advertising rates, between two radio stations, was not price fixing for the purposes of the relevant statute.⁶² The position in New Zealand is not quite so clear. Although *Radio 2UE J* was cited by Elias J in *Commerce Commission v Caltex NZ Ltd* Hampton and Scott suggest that the New Zealand Courts’ approach to characterization has not been clarified and remains uncertain.⁶³

B. Cartel harms and wrongs as a regulatory problem

Before tackling the specific harms and wrongs associated with cartel conduct, it is worthwhile engaging in some discussion of why *any* kind of conduct is deemed an offence, and thus becomes subject to regulation in the first place. Ashworth and Simester would likely suggest that justification for conduct being proscribed turns on the harms and wrongs that it involves.⁶⁴ Ashworth suggests that harmfulness is the primary principle upon which the State can justify intervention into its citizens’ lives.⁶⁵ The next logical question is “what is harm?” Simester and Sullivan describe harm in Feinberg’s terms of the deprivation of or negative impact on an individual’s interests.⁶⁶ This is a useful approach to defining harm, as it encompasses the full spectrum of offences, from murder (an obvious violation of a personal interest i.e. the interest in being alive) to tax evasion (violation of collective welfare through unfairly shifting the tax burden onto other taxpayers).⁶⁷ Under this paradigm offences which have a clear victim, and those which do not, can be also included.⁶⁸

Later in this paper I will provide arguments as to why cartels should be criminalised, based on their violations of moral norms and their direct analogy with theft. However, at this stage I

⁶¹ Hampton and Scott, *Guide to Competition Law*, above n 8, at 168; *Broadcast Music Inc v Columbia Broadcasting Systems*, above n 60.

⁶² Hampton and Scott, *Guide to Competition Law*, above n 8, at 166; *Radio 2UE Sydney Pty Ltd v Stereo FM Ltd* (1982) 44 ALR 557, (1982) 62 FLR 437.

⁶³ *Commerce Commission v Caltex NZ Ltd* [1998] 2 NZLR 78 (HC); Hampton and Scott, *Guide to Competition Law*, above n 8, at 169.

⁶⁴ Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 581; Ashworth, *Principles of Criminal Law*, above n 9, at 28.

⁶⁵ Ashworth, *Principles of Criminal Law*, above n 9, at 27-29.

⁶⁶ Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 582-3.

⁶⁷ At 584-5.

⁶⁸ At 585.

feel it is worth examining the problem in regulatory terms. Essentially the problem is one of *market failure*: the misallocation of resources.⁶⁹ From a public interest theory viewpoint, cartels harm the collective good by interfering with the natural allocation of resources that would occur in a competitive market. Clarke suggests that cartel-related harm is essentially distributional.⁷⁰ Cartelists re-allocate wealth from their victims (consumers) by depriving them of the possibility of purchasing goods and services at competitive prices that would ordinarily exist in a free market.⁷¹ In this way cartels can also be analogized with monopolies, in that they restrict output to a level that is sub-competitive, and by charging supra-competitive prices transfer income from buyers to the monopolists.⁷² At the same time a deadweight loss arises from cartels' impact on the natural competitive process, as by distorting prices they lead to misallocation of consumer funds.⁷³ Simply put, price fixing harms consumers via increased prices as a result of diminished competition in a market.⁷⁴

What does this mean in practical terms? Both Beaton-Wells and the OECD concede that determining precisely how much money is lost to cartels each year is impossible.⁷⁵ However, OECD reports indicate that the figure is in the billions of dollars and typically accounts for ten per cent price raises.⁷⁶ In estimating how much cartels have cost the US economy, the report stated that ten condemned international cartels were costing individuals and businesses hundreds of millions of dollars annually, and affected over \$ 10 billion in US commerce.⁷⁷ Furthermore, the report estimated \$ 1 billion of damage in terms of overcharge and \$ 1 billion in economic waste. To calculate the total global harm caused by all the cartels in the world would require a calculation based on the above losses, plus the losses caused by those same ten cartels outside of the United States and then added to the losses caused by every other domestic and international cartel (both known and as yet undiscovered).⁷⁸

Given the secretive nature of cartels, prosecutions for cartel conduct in New Zealand are not numerous. For example, in 2014 Statistics New Zealand recorded 66 murders 58 of which

⁶⁹ Morgan and Yeung, *An Introduction to Law and Regulation*, above n 26, at 17.

⁷⁰ Clarke, "The increasing criminalization of economic law – a competition law perspective", above n 24, at 78.

⁷¹ At 78.

⁷² John M Connor *Global Price Fixing* (2nd Ed, Springer-Verlag, Heidelberg, 2008) at 19.

< <http://link.springer.com/book/10.1007%2F3-540-34222-2> > .

⁷³ Clarke, "The increasing criminalization of economic law – a competition law perspective", above n 24, at 78.

⁷⁴ Hampton and Scott, *Guide to Competition Law*, above n 8, at 186-7.

⁷⁵ OECD *Hard Core Cartels* (2000) at 7 < <http://www.oecd.org/competition/cartels/2752129.pdf> >.

⁷⁶ Caron Beaton-Wells *Capturing the Criminality of Hard Core Cartels: the Australian Proposal* 31 *Melb. U. L. Rev.* 675 2007 at 690.

⁷⁷ OECD *Hard Core Cartels*, above n 75, at 7.

⁷⁸ OECD *Hard Core Cartels*, above n 75, at 7.

were resolved, more than one per week.⁷⁹ In contrast, the Regulatory Impact Statement refers to 17 judgments against domestic cartellists, following prosecutions by the Commerce Commission between 1990 and 2011.⁸⁰ This amounts to approximately one per year. However, the relatively few prosecutions may reflect not so much a small number of cartels, but rather the difficulty in detecting that cartel conduct is occurring – a clear point of distinction with homicide.

As an example of cartels operating within New Zealand’s jurisdiction, in 2013 the Commission prosecuted Visy, an Australian packaging company, for colluding with its competitor Amcor in both trans-Tasman market allocation and price fixing.⁸¹ Visy settled, rather than defend the charge, and the company was fined \$ 3.6 million while senior executive John Carroll was fined \$ 25,000. This prosecution followed a similar action by the Australian Competition and Consumer Commission (“ACCC”), who also prosecuted Visy Industries for price fixing in the cardboard box industry in 2007. In finding for the ACCC, Heerey J commented that Visy’s activities potentially affected every Australian, because every Australian purchases items transported in cardboard boxes.⁸² Visy was fined \$ 36 million, its former CEO \$1.5 million and Mr Carroll \$ 500,000 (a marked contrast to his \$ 25, 000 fine in New Zealand). This case also illustrates the international dimension of cartels, that an overseas-based cartel can still harm New Zealand consumers: in the Visy case the Commerce Commission was required to serve proceedings in Australia and the Court of Appeal had to first determine a protest to jurisdiction.⁸³

Large scale international cartels are capable of significant overcharges to consumers. For example, the “The Global Lysine Cartel” which doubled the international price of lysine for three years, and was the subject of a Hollywood film.⁸⁴ The five most significant lysine

⁷⁹ Statistics New Zealand Annual Recorded Offences for the latest Calendar Years (ANZSOC) < <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7405> > .

⁸⁰ Ministry of Economic Development *Regulatory Impact Statement: Criminalisation of Cartels* (June 2011 at 28-31 <<http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/ris-cartel-criminalisation>> .

⁸¹ *Commerce Commission v Visy Board Pty* [2012] NZCA 383; Fiona Rotherham “Visy fined over Cartel Case”, (22 August 2013) *Stuff.co.nz* <<http://www.stuff.co.nz/business/industries/9074146/Visy-fined-over-cartel-case>> .

⁸² *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd* (No 3) [2007] FCA 1617; Leonie Wood “Pratt headed worst cartel, says judge” *The Age* (online ed, Melbourne, 3 November 2007) < <http://www.theage.com.au/news/national/pratt-headed-worst-cartel-says-judge/2007/11/02/1193619147550.html> > .

⁸³ *Commerce Commission v Visy Board Pty* [2012] NZCA 383 at [3].

⁸⁴ OECD *Hard Core Cartels*, above n 75, at 16. The Informant” based on the eponymous book by Kurt Eichenwald, and starring actor Matt Damon, is a dramatization of the confessions of Lysine Cartel whistleblower Mark Whitacre.

producers colluded with a seeming disdain for consumers, one cartel member stating “our competitors are our friends. Our customers are the enemy.” By raising prices by S \$ 0.01 per pound on over US \$ 1.4 billion in global sales, the cartel effectively created an overcharge of US \$ 140 million.⁸⁵

The harm caused by the Lysine Cartel pales in comparison to the Bulk Vitamin Cartels whose overcharges have been estimated between \$1.1 billion (on \$5.5 billion in sales) and \$ 3.0 billion (on \$ 8.4 billion in sales) the former being an overcharge of 20% and the later 36%. Taken as a whole these cartels are responsible for between \$ 4 and \$ 9 billion in overcharges to global customers.⁸⁶ These examples of cartels in action illustrate how a tiny incremental harm to individual consumers becomes a massive collective harm when its total value is calculated.

Even higher levels of economic harm are outlined by Connor, who refers to the total revenues in a market, during a price-fixing conspiracy, as “affected sales.”⁸⁷ The affected sales, in 2005 dollars, for all uncovered international cartels since 1990 total 1.4 trillion dollars.⁸⁸ The vast and largely unknown scope of cartel-related harm is reflected in the 1980’s US sentencing guidelines, which were designed with an assumed 10% overcharge.⁸⁹ However, Connor suggests that after surveying more than 1000 price effects by cartels, the median price mark-up is actually 25% and that 79% of cartels overcharge by more than 10%.⁹⁰ The mean overcharge for global cartels is generally higher than that of domestic ones, with a mean overcharge of 30%.⁹¹

In summary these examples show that, irrespective of difficulties with precise quantification of resource-misallocation, it is possible to infer that cartels bleed significant resources away from the world economy.⁹²

⁸⁵ OECD *Hard Core Cartels*, above n 75, at 16.

⁸⁶ John M Connor, *Global Price Fixing*, above n 72, at 8.

⁸⁷ At 8.

⁸⁸ At 8.

⁸⁹ At 8.

⁹⁰ At 8.

⁹¹ At 8.

⁹² OECD *Hard Core Cartels*, above n 75, at 7.

C. Conceptualizing Cartels as Crime

Earlier I discussed the purpose of the criminal law, and how that purpose and its focus on control allows it to fit under the regulatory paradigm. It follows then that if price fixing can be conceptualized as crime that the criminal law is the “right tool for the job” with respect to dealing with cartels. Later I will discuss why the practical problems of deterrence and detection give strength to arguments that price fixing should be a criminal offence. For now, I will discuss three reasons why price fixing can be characterized as *theft* or *stealing*. This is not a metaphorical characterization but a direct analogy to the crime of theft. While the mechanics of cartels operate in a different way than a pick-pocket or safe-cracker following Calvani’s logic the ultimate effect is no different, although the target is not an individual or a bank but consumers within a market.⁹³

Firstly, in practical terms, price fixing fits within the conception of theft as laid out in the Crimes Act 1961.⁹⁴ The crime of theft involves the dishonest taking of property, without a claim of right. Calvani’s economic analysis of cartel-related harm allowed him to analogize price fixing with just such a taking, in the context of Irish law.⁹⁵ He argues that Irish consumers have a vested right to purchase goods at competitive prices, provided for by the Competition Act 2002.⁹⁶ Calvani describes this right as a proprietary interest. Thus price fixers deprive them of this right by charging an inflated price and in doing so dishonestly take what is not theirs.⁹⁷ While a similar proprietary interest is not explicitly protected in New Zealand it is not difficult to see why New Zealanders, or consumers in any country, deserve protection from such practices.

Secondly, the crime of theft involves the violation of a moral norm: the taking of something that does not belong to you is not just wrong because it is illegal, it is intrinsically immoral. As the methods by which cartelists allocate resources away from consumers is dissimilar to the methods of burglars or pick-pockets Beaton-Wells and Whelan both described cartels as a

⁹³ Terry Calvani, Member, The Competition Authority; Instructor in Law, Trinity College, Dublin. “Competition Penalties & Damages in a Cartel Context: Criminalisation & the Case for Custodial Sentences” (Presentation to the Law Society, Dublin, 13 December 2004) at 1. < <http://www.tca.ie/EN/Promoting-Competition/Speeches--Presentations/Terry-Calvani-Competition-Penalties--Damages-in-a-Cartel-Context.aspx> >.

⁹⁴ Crimes Act 1961, s 219.

⁹⁵ Calvani “Competition Penalties & Damages in a Cartel Context: Criminalisation & the Case for Custodial Sentences”, above n 93, at 4.

⁹⁶ At 4.

⁹⁷ At 4.

form of *white-collar* crime.⁹⁸ These two drew on the work of Green, in outlining the characteristics of so-called white-collar crime, and applied Green’s tripartite analysis of the moral framework of a crime:⁹⁹

- 1) Mens rea (or omission of mens rea)
- 2) Harmfulness
- 3) Moral wrongfulness

Whelan also applied this framework to characterize cartel conduct as *stealing*.¹⁰⁰ He also analysed the four necessary elements of theft, to show how cartels satisfy each of these including:¹⁰¹

1. The “thing” being stolen. In this case the purchasing power of consumers
2. A right of ownership over the “thing” by the cartel’s victims. In this context it is the right of consumers to pay competitive prices.
3. A fundamental violation. The cartel’s a substantial interference with the right of the consumer.
4. Wrongful Intention. That the violation is brought about by the cartel’s intention to obtain the overcharge. Interestingly, in Whelan’s conception *oblique intention* (a fundamental criminal law mens rea concept) will suffice: that the cartelist need not have the intention to cheat consumers, so long as they intend the offending price control.

Green would suggest that as cartel conduct can be analogized with stealing clearly it clearly violates a widely held moral norm.¹⁰² Similarly, Whelan submitted to the Commerce Select Committee that cartels, as well as displaying negative moral content, undermine a fundamental economic and political philosophy of Western democracy (i.e. the free market).¹⁰³

A third justification is the strong rhetoric used by notable competition enforcement officials, which describes price fixing as a species of theft, and criminal in nature. In his discussion of the criminality of cartels Harding cited former US Attorney-General Robert Kennedy:¹⁰⁴

⁹⁸ Caron Beaton-Wells “Capturing the Criminality of Hard Core Cartels” above n 76, at 678 ; Peter Whelan “Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’ “ (2013) Oxford Journal of Legal Studies 1 at 5.

⁹⁹ Stuart Green *Lying, Cheating, Stealing A moral theory of White-Collar crime* (Oxford University Press, New York, 2006) at 30.

¹⁰⁰ Peter Whelan *Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’*, above n 98, at 10-14.

¹⁰¹ At 10-14

¹⁰² Stuart Green *Lying, Cheating, Stealing: A moral theory of White-Collar crime*, above n 99, at 92.

¹⁰³ Peter Whelan “Submission To The Commerce Committee Of The New Zealand Parliament On The Commerce (Cartels And Other Matters) Amendment Bill” at [12] < http://www.parliament.nz/en-nz/pb/sc/documents/evidence/50SCCO_EVI_00DBHOH_BILL11153_1_A275528/dr-peter-whelan > .

¹⁰⁴ Christopher Harding “Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation” (2002) 9 Maastricht J. Eur. & Comp. L. 393 at 408. in Quoted in Gordon B. Spivack, 'The

We are talking about clear-cut questions of right and wrong. I view the businessman who engages in such conspiracies in the same light as I regard the racketeer who siphons off money from the public in crooked gambling.... A conspiracy to fix prices or rig bids is simply economic racketeering and the persons involved should be subject to as severe punishment as the courts deem appropriate

Similarly when speaking in Australia Belinda Barrett, Senior Counsel for the US Department of Justice, cited a senate speech which described “, crimes such as price fixing... are serious offenses that steal from American consumers just as surely as does a street criminal with a gun.”¹⁰⁵

Following the decision in *Visy* ACCC Chairman Graeme Samuel, commented that cartels are simply "theft, usually by well-dressed thieves."¹⁰⁶ In describing the appropriateness of criminalisation Sir John Vickers, Chairman of the UK Office of Fair Trading, stated that "hard-core cartels are like theft, criminalisation makes the punishment fit what is indeed a crime."¹⁰⁷

The 1998 OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels described cartels as “the most egregious violations of competition law, which injure consumers by raising prices resulting in goods and services becoming unavailable to some and unnecessarily expensive to others.”¹⁰⁸ Interestingly, such perceptions are not confined to enforcement authorities. Mark Whiteacre, the Lysine cartel *whistleblower* described price fixing as “ Bank robbery without the mask and gun.”¹⁰⁹

Such rhetoric is not, in of itself, a compelling argument that price fixing should be considered a crime. However, I submit that such statements are significant as they may have a *normative* effect and influence public thinking in respect of cartels as criminal enterprises. Public

System of Enforcement', in British Institute of International and Comparative Law, *Comparative Aspects of Anti-Trust Law in the US, the UK and the EEC*, (British Institute of International and Comparative Law, 1963).

¹⁰⁵ Belinda A. Barnett, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division U.S. Department of Justice “Criminalization of Cartel conduct – the Changing Landscape” (Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide, Australia 3 April 2009) .

¹⁰⁶ Graeme Samuel reported in Leonie Wood “ Pratt headed worst cartel, says judge”, above n 82; *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd* (No 3) [2007] FCA 1617.

¹⁰⁷ Sir John Vickers, Chairman of the Office of Fair Trading “Policy for Markets and Enterprise” (address to the British Chamber of Commerce 4, 31 March 2003).

¹⁰⁸ OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels, above n 55, at 2.

¹⁰⁹ Mark Whiteacre quoted in “Just one more fix” *The Economist* (online ed. 29 March 2014) < <http://www.economist.com/news/business/21599799-trustbusters-have-got-better-detecting-cartels-and-bolder-punishing-them-incentives> > .

indifference to cartels has been identified as part of the problem with cartel criminalisation, outside of the United States, where the Department of Justice has made a concerted effort to publicize cartel trials.¹¹⁰ Clarke suggests that the public perception that cartel-related harm is not serious has undermined political actors’ will to criminalise cartels.¹¹¹ Harding states that business crime is generally perceived as having a weak sense of criminality, perhaps owing to its elite context of business crime.¹¹² He also suggests that public opinion needs to be led by legal opinion, and particularly that of experts, if a convincing case for criminalisation is to be made.¹¹³ As such, the views of such important public officials is key in changing the public’s perception of the harmfulness of cartels.¹¹⁴

From a regulatory perspective, these three justifications concern whether criminalisation will be the correct regulatory approach to cartels in a general sense. The arguments that cartel conduct is clearly crime suggest that the criminal law is “the right tool for the job” as I mentioned above. However, these arguments are *not* concerned with whether this approach will be appropriate in the New Zealand context, which I will discuss in Part 4.

III The Bill

A. The current legislative response

So far I have framed the problems that cartels create. Before moving on to the proposed reforms, it is important to explore the current anti-cartel regulatory instrument, the Commerce Act 1986 (the “Act”). Price fixing and other activities, as discussed above, are outlawed by the Act.¹¹⁵ Prosecutions for cartel offences are undertaken by its independent competition-law enforcement agency, the Commerce Commission.¹¹⁶ The Commission also has specific regulatory enforcement duties over a number of regulated industries including telecommunications, dairy, electricity, gas pipeline and airports.¹¹⁷

From a regulatory perspective, the Act represents the law in its expressive function, both as threat – coercing compliance by punishing transgressions - and also institutionalizing the

¹¹⁰ Christopher Harding, “Business collusion as a criminological phenomenon: exploring the global criminalisation of business cartels”, above n 47, at 197.

¹¹¹ Clarke, “The increasing criminalization of economic law “, above n 24, at 78.

¹¹² At 197.

¹¹³ At 200.

¹¹⁴ At 200.

¹¹⁵ Commerce Act 1986, ss 27, 30.

¹¹⁶ Commerce Commission “About us” <<http://www.comcom.govt.nz/the-commission/about-us/>> .

¹¹⁷ Commerce Commission “About us”

normative value of free market competition. In theory, at least, from a public interest point of view the collective good i.e. allocative efficiency, is enhanced when businesspeople do not form cartels, and allow prices to be set by free competition.¹¹⁸ The Act’s current regulatory approach involves deterring non-compliance via its pecuniary penalty regime.¹¹⁹

So long as the deterrent effect of the regime is effective then this approach seems sensible. As Ogus suggests, “the regulatory regime can do what the market cannot.”¹²⁰ For, if the regime prevents cartels from operating within New Zealand, then it is preventing market failure. This is an example of regulation enhancing the general welfare of the community – in this case by preventing consumers from being “ripped off.” Of course this is premised on the deterrent actually being effective. This question of efficacy is the one of the key issues underpinning the criminalisation debate, and will be discussed in part three of this paper.

Currently, the Act permits the Commerce Commission to pursue price fixers via civil proceedings. The Act does provide for criminal prosecutions in certain circumstances i.e. for breaches of Part 4 of the Act, s80C, which prohibits a person who has been disqualified as a director, promoter or manager of a body corporate from taking on such a role: breach of this provision can be punishable by up to five years imprisonment.¹²¹

However, price fixing falls under the prohibition against restrictive trade practices in Part 2 of the Act, thus only civil proceedings are provided for.¹²² Upon conviction, price fixers can face pecuniary penalties of up to \$ 500, 000 for individuals or \$ 10 million for body corporates, as well as three times the value of the commercial value arising from the breach, or ten per cent of turnover.¹²³

In the recent case of *Commerce Commission v Kuene + Nagel AG* the court penalized the offender \$ 3.1 million.¹²⁴ In his judgment Venning J characterized the conduct as:¹²⁵

...at the serious end of the spectrum because it was not a one-off transgression but part of a sustained course of conduct that gave effect to a covert hard core arrangement. Such

¹¹⁸ King *Criminalisation of Cartel Behaviour*, above n 49, at 10.

¹¹⁹ Commerce Act 1986, s 80(2B).

¹²⁰ Anthony Ogus “Regulation” Regulation: Legal, Form and Economic Theory, (Hart, Oxford, 2004) in Morgan and Yeung, *An Introduction to Law and Regulation*, above n 26, 17.

¹²¹ Commerce Act 1986, s 80C.

¹²² Commerce Commission *Enforcement Response Guidelines* (October 2013) at 56 and 59.

¹²³ Commerce Act 1986, s 80.

¹²⁴ *Commerce Commission v Kuene + Nagel AG* [2014] NZHC 705 at [50].

¹²⁵ At [29].

conduct is particularly difficult to detect and prosecute. It operated for a significant period of time, namely five years.

Interestingly he also commented that:

There is no issue as to KNI's ability to pay the recommended penalty. KNI has already been fined overseas for its participation in the UK NES agreement:

- (a) US\$1,116,552 by the Department of Justice of the United States; and
- (b) €3,320,000 by the European Commission of the European Union in relation to its involvement in the UK NES agreement in those jurisdictions.

What I find interesting about his Honour's comments, is that the level of fine seems to be acceptable in part at least *because* the offender can pay. One wonders then what deterrent effect such penalties have, if any, for what appears to be a serious breach?

Regardless, from a regulatory theory perspective Morgan and Yeung would doubtless characterize this regime as a very straight-forward “Command” approach.¹²⁶ Legal rules which prohibit cartel conduct are in place, via the Act, and are backed up by sanctions i.e. the penalty regime and enforced by a regulatory body, the Commerce Commission. As well as providing for penalties, it also provides for exemptions to the offence provisions. These include an authorisation scheme which allows the Commission to authorise certain practices that would normally be restrictive, and thus illegal, if they have a sufficient public benefit.¹²⁷ Exemptions for price fixing can also be made in the case of legitimate joint ventures.¹²⁸ Similarly the clearance regime allows concerned businesspeople to manage the risk that an agreement they are about to enter may breach s 27, 28 or 29 by seeking a clearance to do so.¹²⁹ Finally, the Commission is empowered to offer conditional immunity from prosecution, to cartelists who agree to provide information regarding their co-conspirators throughout an investigation and court proceedings.¹³⁰

¹²⁶ Morgan and Yeung, *An Introduction to Law and Regulation*, above n 26, at 80.

¹²⁷ Commerce Commission “Authorisations fact sheet” < <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/authorisations> >.

¹²⁸ Commerce Act 1986, s 31.

¹²⁹ Section 58.

¹³⁰ Commerce Commission *Cartel Leniency Policy* (12 April 2011). <<http://www.comcom.govt.nz/dmsdocument/9401>> .

B. The Commerce (Cartels and Other Matters) Amendment Bill

The criminalisation of cartels started its slow but inexorable creep in November 2009. Following a round of consultation, Cabinet decided that the prime facie case was made out for adding criminal penalties to the existing sanctions against hard-core cartels.¹³¹ A Discussion Document followed in 2010, and then in June 2011 a Draft Exposure Bill. Both of these received a number of submissions from academics, legal practitioners and the business community.¹³² A Regulatory Impact Statement (“RIS”) was released in June 2011 and The Commerce (Cartels and Other Matters) Amendment Bill was introduced to Parliament on 13 October 2011.¹³³ The Bill had its first reading on 24 July 2012 and was subsequently referred to the Commerce Committee, who reported back to the House in late September 2012 and May 2013. At present the Bill has survived its second reading (over two sessions) in July and November 2014, although several Supplementary order papers have been raised.

While the Bill proposes a number of changes to the existing regime the most relevant of these, for the purposes of this paper, is contained in clause 18.¹³⁴ This clause would insert a new provision into the principal Act: section 82B, which introduces a term of imprisonment for up to seven years for contravention of s 30.

Helpfully, the Bill also expressly defines the words “cartel provision” and “price fixing”, which do not appear in the current Act.¹³⁵ This glaring omission was pointed out in the RIS.¹³⁶ Some submitters, while opposed to criminalisation in general, praised these definitions as enhancing certainty and transparency around the anti-cartel provisions.¹³⁷

¹³¹ CAB Min (09) 39/15.

¹³² Ministry of Economic Development *Cartel Criminalisation Discussion Document* (January 2010); Submissions on the Discussion Document included those from Caron Beaton-Wells and Brent Fisse, Professor Christopher Harding, the New Zealand Council of Trade Unions, Russell Mc Veagh and the Business Roundtable. <<http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/?searchterm=cartel%2A>> ; Submissions on the Exposure Draft Bill included those from Beaton-Wells and Fisse, The New Zealand Law Society, Telecom and Air New Zealand <<http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-cartel-criminalisation/?searchterm=cartel%2A>> .

¹³³ Ministry of Economic Development *Regulatory Impact Statement*, above n 80.

¹³⁴ Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2) cl 18.

¹³⁵ Clause 7.

¹³⁶ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 14

¹³⁷ Russell McVeagh “Submission to the Commerce Committee: Commerce (Cartels and Other Matters) Amendment Bill” at 7 <http://www.parliament.nz/en-nz/pb/sc/documents/evidence/50SCCO_EVI_00DBHOH_BILL11153_1_A275530/russell-mcveagh> .

When the Bill is enacted, clause 7 would see ss 30 to 33 repealed and replaced with “cartel provisions” which are defined as:¹³⁸

“30A Meaning of cartel provision and related terms

“(1) A **cartel provision** is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the 30 supply or acquisition of goods or services in New Zealand:

“(a) price fixing:

“(b) restricting output:

“(c) market allocating.

Price fixing is at the top of the list of proscribed cartel activities and, very helpfully, expressly defined as follows:¹³⁹

“(2) In this Act, **price fixing** means, as between the parties to a contract, arrangement, or understanding, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of,—

“(a) the price for goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or

“(b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other

This is certainly a step further than s 30 of the current Act, which outlaws contracts which have the effect of fixing price, but does not so explicitly describe the mischief for which it was drafted.

Earlier in this paper I touched on the distinction that is often made between regulatory offences and so-called “true crimes”, the mental fault element. Given the importance of mens rea to criminal liability, the Bill now expressly provides for the requisite mental fault for cartel offences:¹⁴⁰

(1) A person commits an offence if—

“(a) the person,—

“(i) in contravention of section 30, enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision; and

(ii) *intends, at that time, to engage in price fixing* (emphasis added) restricting output, or market allocating, or bid rigging (as those terms are defined in section 30A);

or

¹³⁸ Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2) cl 7.

¹³⁹ Clause 7.

¹⁴⁰ Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2) cl 18.

“(b) the person,— 5

“(i) in contravention of section 30, gives effect to a contract, arrangement, or understanding that contains a cartel provision; and

“(ii) *intends (emphasis added)*, at the time the contract, arrangement, or understanding is given effect to, to engage in price fixing, restricting output, or market allocating, or bid rigging (as those terms are defined in section 30A).

The wording is clear that *intent* is the mental fault requirement. In their submission to the Select Committee Beaton-Wells and Fisse recommended that intention be defined differently from the proposed Australian legislation, with intent being construed in the “sense of meaning to engage in the conduct.”¹⁴¹ This is a markedly different threshold from that proposed by the Australian Exposure Draft Bill, which required a *dishonest intent* to obtain a benefit.¹⁴² Beaton-Wells and Fisse suggested that this was an element that New Zealand should *not* adopt into its offence provision on the basis that dishonesty is unrelated to the primary problem i.e. collusive practices which damage the competitive process.¹⁴³ They also felt that the dishonesty element would give rise to a great deal of uncertainty in cartel prosecutions due to the imprecise nature of the “standards of ordinary people” test adopted by the Australian courts.¹⁴⁴ Similarly, the Commerce Commission submitted that dishonesty had been a problematic element in UK attempts to enforce criminal sanctions against cartels.¹⁴⁵

As well as clarifying proscribed conduct, the Bill also provides for a defence to prosecution: that the cartel provision was honestly believed to be necessary for a collaborative activity, defined as:¹⁴⁶

“(2) In this Act, **collaborative activity** means an enterprise, venture, or other activity, in trade, that—

“(a) is carried on in co-operation by 2 or more persons; and 15

“(b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.

“(3) The purpose referred to in subsection (2)(b) may be inferred

¹⁴¹ Caron Beaton-Wells and Brent Fisse “Submission For The Ministry Of Economic Development (Nz) Commerce (Cartels And Other Matters) Amendment Bill” at 5. < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/Caron%20Beaton-Wells%20and%20Brent%20Fisse%20-245%20KB%20PDF.pdf> >.

¹⁴² Exposure Draft Bill Trade Practices Amendment (Cartels and Other Measures) Bill 2008, s 44ZZRF (Cth).

¹⁴³ Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2) cl 18 ; Caron Beaton-Wells and Brent Fisse The Australian Criminal Cartel Regime: A Model for New Zealand ? SSRN Electronic Journal August 2008 at 2.3 < <http://www.researchgate.net/publication/228192335> >.

¹⁴⁴ Beaton-Wells and Fisse, The Australian Criminal Cartel Regime: A Model for New Zealand ?, above n 143, at 2.3.

¹⁴⁵ Commerce Commission “The Commerce (Cartels and Other Matters) Amendment Bill: Submission to Commerce Select Committee” at 31. < http://www.parliament.nz/en-nz/pb/sc/documents/evidence/50SCCO_EVI_00DBHOH_BILL11153_1_A273131/commerce-commission >.

¹⁴⁶ Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2) cl 7.

from the conduct of any relevant person or from any other relevant circumstance.

Under s 31 such collaborative activities are exempted from the prohibition in s 30. The Commerce Commission submitted that this defence was unnecessary, but should it be retained, require a belief that was both honest and reasonable. This was so that careless or wilfully blind defendants would not escape liability.¹⁴⁷

C. Procedural and Evidential implications

The addition of criminal penalties will also have a range of procedural implications for cartel prosecutions. Firstly, the decision-making process in determining whether or not to undertake a prosecution will follow the Criminal Prosecution Guidelines, which mirror the Solicitor-General’s Prosecution Guidelines document.¹⁴⁸ This means that the Commission will now be required to satisfy both the *Evidential* and *Public Interest* tests before initiating a prosecution, which require that:¹⁴⁹

14.1 the evidence which can be adduced in court is sufficient to provide a “reasonable prospect of conviction”: the Evidential Test; **and**

14.2 criminal prosecution is required in the public interest: the Public Interest Test.

In terms of satisfying the Evidential Test, reference will need to be made directly to the Evidence Act 2006, with its considerations of reliability and admissibility.¹⁵⁰ These are the same tests that the Police Prosecution Service must undertake before commencing a prosecution.¹⁵¹ This is not a completely foreign exercise for the Commission, who already apply these tests, with respect to their capacity to initiate criminal proceedings for contraventions of Part 4 of the Commerce Act 1986. However, now the same approach will be taken to breaches of Part 2 of the Act.

Similarly, proceedings will now be subject to the criminal standard and burden of proof i.e. that the prosecution will have to prove guilt to “beyond reasonable doubt.”¹⁵² This increased

¹⁴⁷ Commerce Commission “Submission to Commerce Select Committee”, above n 145, at 32.2

¹⁴⁸ Commerce Commission *Criminal Prosecution Guidelines* (October 2013) at 3

< <http://www.comcom.govt.nz/the-commission/commission-policies/criminal-prosecution-guidelines/>> ; Crown Law Office *Solicitor-General’s Prosecution Guidelines* 2013.

< http://www.crownlaw.govt.nz/artman/docs/cat_index_13.asp >.

¹⁴⁹ Commerce Commission *Criminal Prosecution Guidelines*, above n 148, at 14.

¹⁵⁰ At 5.

¹⁵¹ Police Prosecution Service *Statement of Policy and Practice 2013* (July 2013).

¹⁵² Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 54.

threshold of proof may make it much more difficult for the Commission to secure convictions, as opposed to under the lower civil “balance of probabilities” standard.¹⁵³

Another implication that arises is the difficulty and expense associated with jury trials. A maximum 7 year term of imprisonment makes place price fixing a Category three offence, for the purposes of the Criminal Procedure Act 2011 (the “CPA”).¹⁵⁴ The CPA provides for offenders charged with a Category three offence the right to elect trial by jury.¹⁵⁵ It would seem that this provision will now apply to cartelists facing criminal penalties. Jury trials in competition law matters are not uncommon in the American jurisdiction. The guaranteed right to a jury trial from the Seventh Amendment to the United States’ Constitution, and the similar rights contained in the Australian Constitution have been applied in complex competition law cases.¹⁵⁶

Jury trials also have implications in terms of additional enforcement costs. The selection and empanelling of a jury would add expense, as would the in the increased difficulty of proving a charge sufficiently to satisfy twelve community members.¹⁵⁷ Proceedings will also become more prolonged, as juries will likely be faced with both highly complex commercial information, and difficult determinations regarding the necessary *mens rea* elements.¹⁵⁸ Finally, Commerce Commission prosecutions can be presided over by a Justice of the High Court sitting alongside a lay expert. Bell Gully submitted that the practice of having an expert work with a judge was indispensable, as it compensated for any lack of knowledge or experience on the part of the judicial officer.¹⁵⁹ This approach may be fall into disuse if jury trials become the norm.

Similarly, a criminal prosecution affords defendants and co-defendants the right to not provide evidence, the so-called “right to silence”, as well as the other protective provisions of the Evidence Act 2006.¹⁶⁰ In its submission to the Commerce Committee Bell Gully noted that

¹⁵³ At 54.

¹⁵⁴ Criminal Procedure Act 2011, s 6.

¹⁵⁵ Section 50.

¹⁵⁶ For a US example *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) the trial took 14 months with 38 days of jury deliberations; As price fixing is an indictable offence under the Competition and Consumer Act 2010 (formerly the Trade Practices Act) s 80 of the Australian Constitution guarantees a right to a jury trial.

¹⁵⁷ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 81.

¹⁵⁸ At 80.

¹⁵⁹ Bell Gully “Submission to the Commerce Select Committee on the Commerce (Cartels and Other Matters) Amendment Bill” at 36(e) < http://www.parliament.nz/en-nz/pb/sc/documents/evidence/50SCCO_EVI_00DBHOH_BILL11153_1_A274903/bell-gully >.

¹⁶⁰ Evidence Act 2006, s 73.

under current law the Commerce Act 1986 does not provide for the right to silence, in respect of the provision of information or documents to the Commission - although statements made in answer to questions asked by the Commission are not admissible in either criminal or civil proceedings.¹⁶¹ If this provision applies in a Commission-initiated criminal proceeding the Commission will have access to evidence that, although inadmissible, it would not ordinarily have seen before a trial. This raises issues of trial fairness, an important aspect of criminal proceedings, as it potentially would provide a significant strategic advantage that enforcement bodies would not ordinarily have.¹⁶² Should a full “right to silence” even be available in such proceedings? This could potentially give rise to prisoner’s dilemma scenarios, where none of the defendants testify and prosecutions collapse for want of evidence. King suggests that leniency provisions have the effect of destabilizing calculated silence, as they incentivize conspirators to provide information against each other cartelists in order to escape punishment.¹⁶³

Another important aspect of the Bill is how it alters the Act’s interactions with other legislative regimes, particularly evidence-gathering ones. One of the reasons the Commerce Commission was in favour of criminalisation, because it would allow them to access additional tools of evidence gathering, under the Search and Surveillance Act 2012.¹⁶⁴ Part 4 of the Search and Surveillance Act 2012 would apply to Commission investigations as the length of the proposed term of imprisonment would permit the use of trespass surveillance and interception techniques (which are prohibited, unless used to obtain evidence for an offence that is punishable by at least 7 years).¹⁶⁵

The Commission also submitted that criminalisation would assist in matters of cooperation between New Zealand and overseas anti-cartel enforcement agencies.¹⁶⁶ In a general sense, the idea of harmonisation with overseas regulation was also one of the stated objectives announced at the Bill’s first reading.¹⁶⁷ More specifically, making cartel conduct a criminal offence would allow for enhanced cooperation with international competition agencies by

¹⁶¹ Bell Gully “Submission to the Commerce Select Committee on the Commerce (Cartels and Other Matters) Amendment Bill” above n 159, at 36; Commerce Act 1986, s 106(4).

¹⁶² Bell Gully “Submission to the Commerce Select Committee on the Commerce (Cartels and Other Matters) Amendment Bill” , above n 159, at 36(b);

¹⁶³ King *Criminalisation of Cartel Behaviour*, above n 49, at 26.

¹⁶⁴ Commerce Commission “The Commerce (Cartels and Other Matters) Amendment Bill Submission to Commerce Select Committee”, above n 145, at 12.3.

¹⁶⁵ Search and Surveillance Act 2012, s45.

¹⁶⁶ Commerce Commission “ Submission to Commerce Select Committee”, above n 155, at 12.

¹⁶⁷ (24 July 2012) 682 NZPD at 3869.

allowing the Commission to access the New Zealand legislation that regulates requests for assistance with criminal matters from overseas states.¹⁶⁸ Specifically the Bill will bring cartel offences within the scope of the Mutual Assistance in Criminal Matters Act 1992 (“MACMA”) and allow the Commerce Commission to employ the MACMA. Requests for assistance with criminal cartel prosecutions will be able to be made through the Crown Law Office.¹⁶⁹

Furthermore, the Commission would be able to rely on the Extradition Act 1999, as extradition offences are defined as those which are punishable by at least 12 months imprisonment.¹⁷⁰ While not all submitters agreed that enhanced international cooperation is sufficient justification for criminalisation, it is not difficult to see the attraction of the Commission gaining access to MACMA and the Extradition Act in order to better investigate and prosecute overseas-based cartelists who operate in New Zealand.¹⁷¹

IV The Criminalisation Debate

A. Opposition to criminalisation

I have already discussed the arguments which suggest that cartel conduct should be conceptualized as crime and the practical implications of such a change. I will now explore the arguments, both for and against, importing this conceptualization into the New Zealand jurisdiction.

First, several general concerns were raised about the necessity of criminalisation. A number of submitters have also suggested that from a numerical perspective cartels do not appear to be a serious threat to the New Zealand economy. Submitters referred to the small number of cartel cases prosecuted in New Zealand, on average less than one per year.¹⁷² Overall, a lack of

¹⁶⁸ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 70.

¹⁶⁹ Mutual Assistance in Criminal Matters Act 1992, s 10.

¹⁷⁰ Extradition Act 1999, ss 4,61.

¹⁷¹ NOTE: Over the 2014-2015 summer I worked at the Crown Law Office, as a law clerk for the Criminal Process Team, among my tasks was the processing of several MACMA requests – which I thoroughly enjoyed, mostly due to the challenge involved with reconciling foreign documentation and formulations of law with the requirements of MACMA (irrespective of translation anomalies !) Part of the difficulty in processing these requests was working out whether the conduct in question was indeed a criminal offence (punishable by at least 2 years in prison), so any clarification of whether an offence is criminal or not is highly significant in terms of international cooperation.

¹⁷² Business NZ “Submission By Business NZ to The Commerce Select Committee on the Commerce (Cartels & Other Matters) Amendment Bill” at 4.10 << http://www.parliament.nz/en-nz/pb/sc/documents/evidence/50SCCO_EVI_00DBHOH_BILL11153_1_A275436/business-new-zealand>> ; Bell Gully “submission on MED Cartel Criminalisation – Exposure Draft Commerce (Cartels and Other Matters) Amendment Bill” at 8-10 << <http://www.mbie.govt.nz/info-services/business/competition->

statistically useful empirical information was promoted as a reason not to proceed with criminalisation.¹⁷³ Furthermore, given that the Courts had yet to mete out the maximum penalties, there was no indication that the current regime was insufficient to deter cartels.¹⁷⁴

From reading the RIS, Submissions on the Discussion Document, the Draft Exposure Bill and the Bill itself, four general themes of *opposition* to criminalisation emerge including:

- That criminalisation is simply unnecessary.
- That it will have a “chilling effect” on competition.
- That it will significantly increase costs.
- That international cooperation/harmonisation is insufficient justification for the change.

While I will outline these arguments, I will not attempt to substantively refute them, although I will mention some obvious counter-arguments. This is mostly because any discussion of the likely consequences of criminalisation is highly speculative. Even with evidence and commentary available from other jurisdictions, just how criminalisation will function in New Zealand’s particular economic environment is guesswork at best.

B. The “Chilling effect” and Costs

The RIS conceded that any uncertainty with respect to the new penalties may result in more risk-averse behaviour and a corresponding reduction in entrepreneurship and innovation.¹⁷⁵ This so-called “chilling effect” on legitimate competitive conduct was also mentioned by several submitters.¹⁷⁶ The last of these submitted that while the small number of business

[policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/documents-images/Comp.0037%20-%20Bell-Gully.pdf](http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/documents-images/Comp.0037%20-%20Bell-Gully.pdf) >

; Air New Zealand “Cartel-Criminalisation Discussion Document” < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/documents-images/Comp.0036%20-%20Air-New-Zealand.pdf> >.

¹⁷³ New Zealand Business Roundtable “Submission to the Ministry of Economic Development on the Discussion Document *Cartel Criminalisation*” < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/documents-images/Comp.0023%20-%20Business-Roundtable.pdf> > .

¹⁷⁴ Simpson Grierson “Submissions on the Discussion Document on Cartel Criminalisation” at 2.2-2.4. < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/documents-images/Comp.0039%20-%20Simpson-Grierson.pdf> > .

¹⁷⁵ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 74.

¹⁷⁶ Air New Zealand “Cartel-Criminalisation Discussion Document” above n 172, at 1; New Zealand Business Roundtable “Submission to the Ministry of Economic Development on the Discussion Document *Cartel Criminalisation*” , above n 173, at 3.3; Buddle Findlay “Submission on the Commerce (Cartels and Other Matters) Amendment Bill” at 12 and 17 < http://www.parliament.nz/en-nz/pb/sc/documents/evidence/50SCCO_EVI_00DBHOH_BILL11153_1_A275432/buddle-findlay > .

people who wish to engage in cartel activities may indeed be deterred, this may be at the price of reducing the incentive to honest business people to compete vigorously.¹⁷⁷ However *none* of the submitters, who opposed criminalisation, gave examples of the types of legitimate conduct that has been or would be disincentivized, and referred to this problem in very general terms. This suggests that while they have raised a legitimate concern, the degree to which that concern may be realised is highly speculative.

The need to avoid regulatory over-reach was also identified by the Commerce Commission, in their submission in support of the Bill. The Commission suggested that the s 31 exemption should expressly refer to considerations of whether the collaborative activity was efficiency enhancing or had a procompetitive purpose – essentially a “rule of reason” approach similar to that applied in the *Broadcast Music* case.¹⁷⁸

The RIS also referred to the chilling effect, in the context of being part of the cost of criminalisation.¹⁷⁹ It also pointed to the practical expenses associated with administration and enforcement. In particular it conceded that prosecutions would become more expensive, given the higher criminal standard of proof and the likelihood of complex jury trials.¹⁸⁰ In terms of the cost of imprisonment it noted that the United States, by comparison, have imprisoned less than 400 people for cartel offences in the last decade.¹⁸¹ The small number of cartel prosecutions in New Zealand is very small, approximately one per year.¹⁸² Even if this number increased tenfold, it is unlikely to contribute significantly to the prison population, which in 2012 stood at 10,160.¹⁸³

The issue of investigation, prosecution and punishment costs exceeding potential benefits was also raised, as well as the likelihood of increased compliance costs for businesses to avoid the possibility of falling afoul of the law.¹⁸⁴ As mentioned above, criminal trials may involve juries

; Business NZ “Submission by Business NZ to the Select Committee on the Commerce (Cartels and Other Matters) Amendment Bill”, above n 172, at 4.8 – 4.10 .

¹⁷⁷ Buddle Findlay “Submission on the Commerce (Cartels and Other Matters) Amendment Bill” above n 176, at 16.

¹⁷⁸ Commerce Commission “Submission to Commerce Select Committee”, above n 145, at 16-25; *Broadcast Music Inc v Columbia Broadcasting Systems* 441 US 1 (1979).

¹⁷⁹ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 79.

¹⁸⁰ At 79-81.

¹⁸¹ At 80-83.

¹⁸² Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 79-82.

¹⁸³ Statistics New Zealand *New Zealand Official Yearbook 2012* < http://www.stats.govt.nz/browse_for_stats/snapshots-of-nz/yearbook/society/crime/corrections.aspx >.

¹⁸⁴ Air New Zealand “Cartel-Criminalisation Discussion Document”, above n 172, at 3; Bell Gully “Submission On MED Cartel Criminalisation – Exposure Draft Commerce (Cartels And Other Matters) Amendment Bill”, above n 172, at 14; Simpson Grierson “Submissions on the Discussion Document

which will add expense to the proceedings. Imprisonment itself is costly, in part due to the inherent expense of incarceration, but also due to the inevitable *type one errors* (the imprisonment of the innocent) which may occur.¹⁸⁵ In response to these concerns, again, the small number of cartel prosecutions per year suggest that neither over litigation nor imprisonment costs will rise significantly.¹⁸⁶

Finally, it was submitted that the RIS had not performed a proper cost-benefit analysis, and if it had then it would have found that criminalisation was not worth the required expenditure.¹⁸⁷ As a general answer to concerns regarding the costs and benefits of criminalisation Calvani suggests that the increased procedural safeguards do not necessarily mean that marginal prosecutorial cost will exceed the marginal deterrent benefit.¹⁸⁸ Rather, he argues that the US approach of imprisoning cartelists has yielded an enhanced deterrent effect which outweighs the additional costs involved with a criminal defence.¹⁸⁹

C. International cooperation/harmonisation

One of the Government’s stated goals, in pursuing cartel criminalisation, is enhancing New Zealand’s capacity to cooperate with other jurisdictions in anti-cartel activities.¹⁹⁰ Some submitters have suggested that this might be the primary justification for criminalisation, and questioned whether that justification is sufficient.¹⁹¹ Submitters argued that the enhancement of international co-operation should not be considered an end in itself, but rather be evaluated based on its economic benefit to New Zealand.¹⁹² They also suggested that overseas regulators are generally hesitant to share confidential information, and that despite allowing the

on Cartel Criminalisation”, above n 174, at 6.4.; Business NZ “Submission by Business NZ to MED on the Draft Commerce (Cartels & Other Matters) Amendment Bill” at 6.3-6.7 < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/Business%20New%20Zealand%20-254%20KB%20PDF.pdf> > .

¹⁸⁵ King *Criminalisation of Cartel Behaviour*, above n 49, at 16.

¹⁸⁶ At 83.

¹⁸⁷ New Zealand Business Roundtable “ Submission on the Ministry of Economic Development Exposure Draft Cartel Criminalisation” July 2011 at 3.1-3.9 < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/documents-images/New%20Zealand%20Business%20Roundtable%20-78%20KB%20PDF.pdf> > .

¹⁸⁸ Calvani Cartel “Sanctions and deterrence”, above n 56, at 195.

¹⁸⁹ At 195.

¹⁹⁰ (24 July 2012) 682 NZPD at 3869.

¹⁹¹ Simpson Grierson “Submissions on the Discussion Document on Cartel Criminalisation”, above n 174, at 2.2-6.5.; Buddle Findlay “Submission on the Commerce (Cartels and Other Matters) Amendment Bill”, above n 176, at 12.

¹⁹² Bell Gully “Submission on MED Cartel Criminalisation” above n 172, at 5; Business NZ “Submission by Business NZ on the Commerce (Cartels and Other Matters) Amendment Bill” above n 172, at 4.17.

Commerce Commission to access the MACMA regime, very little material benefit would be realised.¹⁹³

David Matthews, General Counsel and Company Secretary of Fonterra Co-operative limited, suggested, in a private capacity, that any desire to harmonise with Australian law was cause for concern.¹⁹⁴ He suggested that Australia only legislated for criminal penalties in order to secure a Free Trade Agreement with the United States – and without properly consulting with New Zealand, despite a previous agreement to do so on competition law matters. As such, harmonisation should only be pursued if the resulting laws are improvements on previous ones.

To summarise these arguments, from a regulatory perspective, the overall concern seems to be that criminalisation will have no net economic benefit when weighed against the costs. As such it represents over-regulation of the market. Rather than combating misallocation of resources in the market, it will instead create a misallocation of both State and corporate resources through increased procedural and compliance costs. Again, I suggest that these concerns are speculative. However, given the level of concern, the New Zealand Law Society’s submission seems eminently sensible: that when passed the new Act should require a statement of objectives to be issued, which would be reviewed after five years.¹⁹⁵

As I stated above, I have not tried to substantively refute any of these arguments. However, I feel obliged to provide a little context from which a reader may judge for themselves the degree to which some of the submitters’ objections can be taken at face value. Much in the same way complaints about speeding fines from so-called “boy racers” are not afforded serious consideration, it is difficult to endorse some of these submissions when they represent cartel offenders. Recently, Air New Zealand admitted to breaches of s 27 and s 30, and was ordered to pay \$7.5 million in fines and costs of \$ 300,000 and \$ 259, 079. In Venning J’s words:¹⁹⁶

The conduct in this case (price-fixing) is at the serious end of the spectrum of the types of conduct prohibited by the Act.

¹⁹³ Bell Gully “Submission on MED Cartel Criminalisation”, above n 172, at 13.

¹⁹⁴ David Matthews “Submission on Cartel Criminalisation Discussion Document.” < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/documents-images/Comp.0035%20-%20David-Matthews.pdf> > .

¹⁹⁵ New Zealand Law Society “Submission on the Commerce (Cartels and Other Matters) Amendment Bill” 25 at 6.7. < < http://www.parliament.nz/en-nz/pb/sc/documents/evidence/50SCCO_EVI_00DBHOH_BILL11153_1_A275536/new-zealand-law-society > .

¹⁹⁶ *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414 at [31].

Air New Zealand suggesting that there is no need to criminalise price fixing is a bit like a wolf suggesting that there is no need for sheep farmers to build fences.

D. Deterrence theory and problems with fines

Deterrence is a key theme, if not *the* key theme, of the criminalisation debate. From a regulatory perspective, Morgan and Yeung might suggest that deterrence is a functional aspect of command: the process of controlling socially-undesirable behaviour via coercive sanctions.¹⁹⁷ Calvani describes deterrence as the *raison d’etre* of cartel penalty regimes.¹⁹⁸ Similarly, the OECD has stated that the principal purpose of sanctions in cartel cases is deterrence, and that sanctions should remove the prospect of gain from criminal activity.¹⁹⁹

Contemporary deterrence theory suggests that in order to effectively deter conduct punishment must be certain and reasonably swift – the greater the certainty of punishment, the greater the disinclination to participate in a proscribed activity.²⁰⁰ Deterrence can be specific, in that it deters a particular person from repeating their proscribed conduct, or general, in that it deters the citizenry from breaking the rules.²⁰¹ Essentially, deterrence relies on the calculation of a potential offender that the reasons not to offend outweigh those in favour of proscribed conduct.²⁰²

Deterrence theory has been criticized in its application to criminal offending because it relies on offenders making a rational decision having first performed the cost/benefit or risk/reward arithmetic - which is seldom the case in crimes of violence.²⁰³ In contrast, the theory would seem to apply well for cartelists, who are required to make a conscious choice to collude and are also likely to have the capacity, as businesspeople, for cost/benefit analyses.²⁰⁴ In the

¹⁹⁷ Morgan and Yeung, *An Introduction to Law and Regulation*, above n 26, at 80-81.

¹⁹⁸ (24 July 2012) 682 NZPD at 3869; Calvani Cartel “Sanctions and deterrence”, above n 56, at 186. OECD *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002) at 72 < <http://www.oecd.org/competition/cartels/1841891.pdf> > .

¹⁹⁹ Calvani Cartel “Sanctions and deterrence”, above n 56, at 186; OECD *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes* above n 198, at 72.

²⁰⁰ Roger Hopkins Burke *Introduction To Criminological Theory* 4th ed (Routledge, New York, 2014) at 40. Online < <http://web.a.ebscohost.com/ehost/ebookviewer/ebook/bmxlYmtfXzY3NzZmMI9fQU41?sid=e40ea860-5d7e-4355-881e-88e840426dc6@sessionmgr4004&vid=0&lpid=NavPoint-18&format=EK> > .

²⁰¹ Roger Hopkins Burke, *Introduction To Criminological Theory*, above n 200, at 40.

²⁰² At 40.

²⁰³ Parker, “The War on Cartels and the Social meaning of deterrence”, above n 48, at 174.

²⁰⁴ Terry Calvani and Torello H Calvani “Custodial Sanctions for cartel offences: An appropriate sanction in Australia?” (2009) 17 *Competition & Consumer Law Journal* at 128; Clarke, “The increasing criminalization of economic law “, above n 24, at 85.

context of cartels, both specific and general deterrence are desirable. Businesspeople should be disincentivized from colluding to fix prices, and those who are already engaged in such activities, and get caught, are incentivized to refrain from repeating their crimes.²⁰⁵

Of course the deterrence debate is not about whether or not cartelists *should* be deterred but rather the method by which such deterrence will be most *effectively* and efficiently achieved. That the government is considering following Australia in criminalising cartels suggests that the current pecuniary penalty scheme is perceived as sub-optimal in its deterrent effect.

The key problem with fines is that the level of penalty imposed against price fixers is generally too low to effectively deter cartelists.²⁰⁶ Wils suggests that with a mark-up of 10 per cent over a five year duration, that the optimal fine would be at least 150 per cent of annual turnover related to products concerned by the violation.²⁰⁷ Wils’ calculation has been cited by Calvani, King and Whelan, and was also accepted by the OECD in its *Report on the nature and impact of hard core cartels*.²⁰⁸ Only with fines set at such a level would cartelists’ risk/reward calculations break down based on the low rates of detection – Wils estimated a 33 per cent chance of detection and punishment at best.

While fines at such levels might have a real deterrent effect, they are highly problematic for several reasons. First, approximately, 60 per cent of firms would be unable to pay such a high penalty without entering bankruptcy.²⁰⁹ This would have the perverse effect of actually reducing competition, as firms went out of business.²¹⁰ Secondly, the liquidations arising from such fines would result in serious economic consequences for employees, shareholders and creditors.²¹¹

Thirdly, given the above consequences, policy-makers would be reluctant to create such drastic fines and the judiciary would also be reluctant to impose them –which would undermine their

²⁰⁵ Clarke, “The increasing criminalization of economic law “, above n 24, at 85.

²⁰⁶ Wouter J Wils, “Is Criminalization of EU Competition Law the Answer?” (2005) 28(2) World Competition 117 at 148.

²⁰⁷ Terry Calvani and Torello H Calvani “Custodial Sanctions for cartel offences”, above n 204, at 127.

²⁰⁸ At 125. ; Peter Whelan “Submission To The Commerce Committee Of The New Zealand Parliament On The Commerce (Cartels And Other Matters) Amendment Bill”, above n 103, at [8] ; King *Criminalisation of Cartel Behaviour*, above n 49.; OECD *Report on the nature and impact of hard core cartels and sanctions against cartels under national competition laws* at 19 (2002), < <http://www.oecd.org> >, at 19.

²⁰⁹ Terry Calvani and Torello H Calvani “Custodial Sanctions for cartel offences: An appropriate sanction in Australia?” above n 204 at 130.

²¹⁰ Terry Calvani “Cartel Sanctions and deterrence”, above n 56, at 192.

²¹¹ Terry Calvani and Torello H Calvani “Custodial Sanctions for cartel offences: An appropriate sanction in Australia?” above n 204, at 127.

deterrent effect.²¹² King also suggested that difficulty would arise in courts actually calculating an appropriate optimal fine.²¹³ King, in agreeing with Wils, argued that the current level of fines in New Zealand, is far below the optimal level to deter would-be cartelists, as the benefits of cheating outweigh the penalty, coupled with the low chance of detection.²¹⁴

Alternatively, fines can be imposed on individuals.²¹⁵ Prima facie this seems logical. As Calvani points out, prices are fixed by individuals, not corporations.²¹⁶ Therefore, sanctions should be focussed on the individual actors.²¹⁷ However, individuals who are convicted of price fixing are unlikely to be able to pay fines themselves and are thus either “judgment proof” or can be indemnified against such penalties by their employer, the corporation who has benefitted from their illegal activities.²¹⁸ The RIS suggests that cartelists subvert often this prohibition by either paying individuals “up front”, paying additional remuneration/bonuses after the fine or making payments to them outside of New Zealand’s jurisdiction.²¹⁹ Calvani also suggests that the sheer difficulty in devising and then imposing an effective fine regime for individuals is thus prohibitive.²²⁰

In summary, it has been argued that fines are simply an ineffective deterrent at current levels, but cannot be practicably raised to effective levels.²²¹ Therefore, a different kind of deterrent is not just desirable, but necessary.²²²

²¹² King *Criminalisation of Cartel Behaviour*, above n 49 at 16; Calvani “Cartel Sanctions and deterrence”, above n 56, at 192

²¹³ King *Criminalisation of Cartel Behaviour*, above n 49 at 16

²¹⁴ At 16, 22; Commerce Act 1986, s 80(2B)(b)(ii)(b); compare with Competition and Consumer Act 2010 s 44ZZRF 3(c) (Cth).

²¹⁵ Commerce Act 1986, s 80(2B)(a), which provides that individuals can be liable for up to \$500,000 for a contravention of s 27-30.

²¹⁶ Calvani “Cartel Sanctions and deterrence”, above n 56, at 192.

²¹⁷ At 192.

²¹⁸ Clarke, “The increasing criminalization of economic law “, above n 24, at 86.

²¹⁹ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 18.

²²⁰ Calvani “Cartel Sanctions and deterrence”, above n 56, at 187.

²²¹ Clarke, “The increasing criminalization of economic law “, above n 24, at 85.

²²² At 85.

E. Criminal penalties

Clearly the Bill reflects the belief that criminal penalties will be more effective as a deterrent.²²³ But why is this so? Why is the deprivation of liberty perceived as an inherently more serious penalty than a large fine? Simester suggests that criminal liability carries a much more serious stigma than other types of offending.²²⁴ However, I suspect it is more likely that prison terms are so daunting because they are, as Hampton and Scott suggest a non-indemnifiable penalty.²²⁵ Furthermore, imprisonment is an *individual* penalty which directly targets the people responsible for the proscribed conduct, punishing *them* rather than the company – which in effect may be punishing shareholders and employees.²²⁶ Imprisonment also seems to address Libman's point, that a problematic element of regulatory enforcement is that often the transgressor is able to immediately return to the regulated activity, despite conviction and punishment.²²⁷ In contrast, a prison sentence ensures that the offender is removed from the regulatory activity completely, if even for a short time.

These views are echoed by Barnett, speaking from the US experience of anti-cartel enforcement, who describes prison as a punishment for which an employer cannot reimburse an employee:²²⁸

As a corporate executive once told a former Assistant Attorney General of ours: “[A]s long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me.”¹ Executives often offer to pay higher fines to get a break on their jail time, but they never offer to spend more time in prison in order to get a discount on their fine.

Similarly, after the successful prosecution of the Visy cardboard box cartel, ACCC chairman Graeme Samuel suggested that “nothing concentrates the mind of an executive contemplating creating or participating in a cartel more than the prospect of a criminal conviction and a stretch in jail.”²²⁹ The Australian legislature had a similar view and subsequently passed legislation making price fixing an indictable offence, punishable by up to 10 years in prison.²³⁰ Clarke also surmises that it is difficult to place a dollar value on the loss of freedom and the stigma of

²²³ Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2) cl 18.

²²⁴ Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 9, at 5.

²²⁵ Hampton and Scott, *Guide to Competition Law*, above n 8, at 187.

²²⁶ Calvani, “Cartel Sanctions and deterrence”, above n 56, at 192.

²²⁷ Libman, *Sentencing Purposes and Principles for Provincial Offences*, above n 19, at 7.

²²⁸ Belinda A. Barnett, “Criminalization of Cartel conduct”, above n 105.

²²⁹ Leonie Wood, “Pratt headed worst cartel, says judge”, above n 82.

²³⁰ Trade Practices Amendment (Cartels and Other Measures) Bill 2008 (Cth); the Act is now known as the Competition and Consumer Act 2010, s 44ZZRF (4) (Cth).

a criminal conviction – which is likely to make imprisonment a daunting prospect to business executives.²³¹

Despite such tough talk whether imprisonment is actually more effective than fines has yet to be conclusively determined. King concedes that there is no hard evidence on whether the addition of criminalisation actually increases the law's deterrent effect. However there is anecdotal evidence, from US Department of Justice interviews with international cartelists, which supports the proposition that criminal penalties deter cartels from operating within the American jurisdiction.²³² This view is supported by Wils, who suggests that the US experience provides ample evidence that Arthur Liman's 1997 statement is accurate:²³³

“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, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations”

Wils provides the high-profile example of elderly billionaire A. Alfred Taubman owner of Sotheby's auction house, sentenced to one year in prison (as well as US \$ 7.5 million in criminal fines and US \$ 150 million in civil pecuniary penalties).²³⁴

In their submission on the Cartels Discussion Document Meredith Connell, holder of the Crown Solicitor's Warrant, made some comments regarding the deterrent value of prison terms.²³⁵ In acting for the Commerce Commission in *Commerce Commission v Siemens AG* Meredith Connell prosecuted Siemens for participation in a global cartel which fixed prices of gas insulated switchgear in New Zealand.²³⁶ The firm noted that the cartelists expressly operated outside of North America. According to their witnesses the reluctance to offend within the American jurisdiction was based on the perception that in the United States “people go to prison” for price fixing.²³⁷ Furthermore, they noted the attitude of a key witness that the cartel's operations were technically illegal, but not wrong – while pecuniary penalties, “only

²³¹ Clarke, “The increasing criminalization of economic law “, above n 24, at 86.

²³² King *Criminalisation of Cartel Behaviour*, above n 49, at 24-25.

²³³ Wils, “Is Criminalization of EU Competition Law the Answer?”, above n 206, at 143.

²³⁴ At 143; *United States v. Alfred Taubman*, No. 01 CR 429, 2002 U.S. Dist. LEXIS 6251 (S.D.N.Y. Apr. 11, 2002), *aff'd*, 297 F.3d 161 (2d Cir. 2002).

²³⁵ Meredith Connell “Submission on Cartel Criminalisation to Ministry of Economic Development on Draft Discussion Document” at 2-3 < <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation/submissions-on-discussion-document-cartel-criminalisation/documents-images/Comp.0038%20-%20Meredith-Connell.pdf> >.

²³⁶ *Commerce Commission v Siemens AG* (2010) 13 TCLR 40.

²³⁷ Meredith Connell “Submission on Cartel Criminalisation to Ministry of Economic Development”, above n 235, at 2-3.

money” were the only risk. They were of the view that criminal penalties not only undermined the risk-reward analysis, but also sent the message that cartel activities were not mere technical illegalities but serious offences.

Anecdotes aside, how has imprisonment worked in practice, for those countries who have chosen to add it to the regulatory arsenal? Criminal penalties are available for cartel offending in Estonia, Russia, Ireland, Japan, Brazil, Korea, Canada the United Kingdom and the United States.²³⁸ No sentences of imprisonment have been handed out in Estonia or Russia and Irish Courts have suspended every custodial sentence delivered.²³⁹ While Canadian courts have given out terms of imprisonment, these have been commuted to community service in all cases bar one.²⁴⁰ The United Kingdom has jailed price fixers, including three oil executives for terms of 2 and ½ to three years.²⁴¹ However, British enforcement has also suffered some humiliating setbacks, in particular the high profile failure of the prosecution of British Airways and Virgin Airlines, for price fixing on fuel surcharges.²⁴²

The story is somewhat different in the United States, not only have the number of prosecutions increased, but also the terms of imprisonment imposed.²⁴³ The average term of imprisonment served has increased from 8.7 months in 1998, to 30.8 months in 2007 (although this trend is not without its crests and troughs, in 2005 the average was 24.4 months, but in 2006 it was only 9.4).²⁴⁴ What can be said is that American courts are generally more likely to give out custodial sentences in price fixing cases, than those of other jurisdictions.²⁴⁵

In summary, other than anecdotal evidence there does not seem to be much proof that criminal penalties alone deter price fixers. However, the vigour with which the American authorities approach prosecuting and seeking jail terms for such offenders complimented by evidence that

²³⁸ Terry Calvani and Torello H Calvani “Custodial Sanctions for cartel offences”, above n 204, at 125.

²³⁹ At 124.

²⁴⁰ At 124.

²⁴¹ At 125; Melvyn Howe “Executives jailed in marine hose case” *The Guardian* (online ed, London, 12 June 2008) <<http://www.theguardian.com/business/2008/jun/12/corporatefraud.ukcrime>>.

²⁴² “Trial collapses of four senior British Airways executives accused of price-fixing with Virgin” *Daily Mail UK* (online ed, London, 10 May 2010) <<http://www.dailymail.co.uk/news/article-1276179/British-Airways-price-fixing-trial-collapses.html>> ;

Julian Joshua “Shooting the Messenger: Does the UK Criminal Cartel Offence Have a Future ?” (August 2010) *The Antitrust Source* <www.antitrustsource.com> <http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug10_Joshua8_2f.authcheckdam.pdf>.

²⁴³ Terry Calvani and Torello H Calvani “Custodial Sanctions for cartel offences”, above n 204, at 126.

²⁴⁴ At 126.

²⁴⁵ At 125.

suggests international cartelists are hesitant to operate within the US, does seem to suggest that criminalisation has at least some deterrent effect.

F. Deterrence disputed

It is worth remembering that deterrence is not actually a goal in of itself. As I suggested in the introduction, deterrence is merely a contributory means to achieve the overall regulatory goal of maintaining market integrity by safeguarding competition against cartels. In this context Parker describes the policy of deterrence, underpinning the criminalisation of cartels, as a an attempt to impose a social control, which in turn relies on the rationality of participants in the regulated activity – in this case business competitors in a market.²⁴⁶

As suggested above, the deterrent value of criminal sanctions is questionable. Some dispute whether it will have any effect at all. In particular, Parker argues that the policy of deterrence that underpins cartel criminalisation ignores the way that businesspeople understand and interact with competition law.²⁴⁷ Although businesspeople are generally rational actors those who do not understand anti-cartel law ignore it. Their surprise, when they are caught within its grasp, suggests that its general deterrent value is low.²⁴⁸

In contrast, those who are intimate with anti-cartel law can attempt to game the system, which again undermines its deterrent effect. Even if criminal penalties, and enhanced investigative powers become a reality, these players merely find more sophisticated methods of gaming. The escalation of consequences, rather than deterring cartel conduct, simply escalates the sophistication of cartelists’ avoidance and indemnification tactics.²⁴⁹

In its submission on the Draft Exposure Bill, Bell Gully argued that given the small number of anti-cartel proceedings taken by the Commission each year, the deterrent effect of criminalisation would be minimal.²⁵⁰ Similarly, Air New Zealand described the belief that criminal penalties will have a greater deterrent effect than a punitive personal fine an

²⁴⁶ Christine Parker, “The War on Cartels and the Social meaning of deterrence”, above n 48, at 174.

²⁴⁷ At 175.

²⁴⁸ At 189.

²⁴⁹ At 189.

²⁵⁰ Bell Gully “Submission on MED Cartel Criminalisation” above n 172, at 8-10.

unsubstantiated assumption.²⁵¹ Furthermore, that most participants in cartels do so from sheer ignorance or a mistaken belief about the lawfulness of their activities.²⁵²

A further challenge to the deterrent effect of criminal penalties was based on the increased standard and burden of proof involved in criminal prosecutions, along with the increased rights of defence.²⁵³ It was argued that since cases will be more difficult for prosecuting agencies to win, the actual deterrent effect will be lower.²⁵⁴

At first, from a common-sense perspective there appears to be some force in these arguments. It certainly is conceivable that given the complexity of competition law mistakes can be made. However, it is precisely for the avoidance of such risk that businesspeople obtain the advice of legal counsel. In terms of promulgating clear rules, the Commerce Commission maintains a very straightforward webpage which outlines proscribed conduct.²⁵⁵ Also, as discussed above, the Bill will add some clarity to the kinds of conduct that are prohibited, with its express inclusion of the definition for price fixing and other cartel conduct.

There is also the question of how effective a deterrent imprisonment will be against overseas cartelists. While imprisonment may be a viable deterrent against domestic offenders, problems arise when the offenders are located overseas. In reviewing the US approach Connor points to a number of issues that have arisen from the reliance of criminal penalties to deter international cartelists including: 1) the complications arising from a jury trials 2) the failure of extradition processes to keep pace with developments in criminal enforcement and 3) the lack of usable statistics regarding imprisonment.²⁵⁶ While these points are concerning the Bill does take a step towards addressing them by allowing the Commission to make use of MACMA and the Extradition Act.

²⁵¹ Air New Zealand “Cartel-Criminalisation Discussion Document”, above n 172, at 3.

²⁵² At 3.

²⁵³ Calvani, “ Cartel Sanctions and deterrence” , above n 56, at 195.

²⁵⁴ At 195.

²⁵⁵ Commerce Commission fact sheet “Anti-Competitive Practices” < <http://www.comcom.govt.nz/business-competition/anti-competitive-practices/> >.

²⁵⁶ John M Connor “Problems with Prison in international cartel cases” (2011) 56 (2) The Antitrust Bulletin 311 at 313-315.

G. Criminal penalties and leniency schemes

As suggested above there is no conclusive proof that criminal penalties, *in of themselves*, deter cartelists more so than fines. The deterrent effect of severe penalties, criminal or civil is likely undermined by the low detection rate for cartel activity. The RIS suggests the chance of detection is somewhere between 10-20%, which is in line with 16% (or 1 in 6) as suggested by Calvani and King.²⁵⁷ However, when combined with leniency programmes criminal penalties appear to increase the rate of detection of cartels – and certainty of detection is arguably more of a deterrent than the threat of a severe punishment alone.²⁵⁸ Thus deterrence and detection become interrelated concepts, when viewed in the context of leniency programmes.

Leniency programmes, which originated in the United States, offer reduced penalties to cartelists who inform on their co-conspirators, appear to substantially increase the number of cartels detected.²⁵⁹ In theory, criminal penalties enhance the attractiveness of leniency schemes by incentivizing cartelists to implicate each other, in an attempt to avoid incarceration.

Scott Hammond, Director of Criminal Enforcement of Antitrust Division of the US Department of Justice, argues that in the American experience criminal sanctions do make leniency schemes more appealing, which in turn greatly increases the number of cartels that are detected.²⁶⁰ He reports that while the original 1978 leniency programme was ineffective, revisions in 1993 have led to a twenty-fold increase in applications for leniency.

Arlman suggests that there are three objectives behind a leniency policy: 1) the incentive for cartelists to report their transgressions (arising from a Prisoner’s Dilemma scenario) 2) deterrence of cartel conduct by increasing the risks involved in collusive offending and 3) reduction of costs involved with detection and investigation –much time and effort is saved when one cartelist turns in his/her co-offenders in return for reduced penalties or immunity from prosecution.²⁶¹ Arlman also described the EU’s leniency programme, as of 2005, as only “moderately” successful in contrast to the US version in which both criminal penalties and

²⁵⁷ Calvani, “Cartel Sanctions and deterrence”, above n 56, at 192; King *Criminalisation of Cartel Behaviour*, above n 49, at 22; Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 6.

²⁵⁸ Roger Hopkins Burke *Introduction To Criminological Theory*, above n 200, at 40.

²⁵⁹ King *Criminalisation of Cartel Behaviour*, above n 49, at 9.

²⁶⁰ Scott D. Hammond, Director of Criminal Enforcement Antitrust Division U.S. Department of Justice “Cornerstones Of An Effective Leniency Program” (Presented to the ICN workshop on Leniency Programs Sydney, Australia 22 November 2004).

²⁶¹ Sjoerd Arlman “Crime But No Punishment An empirical study of the EU’s 1996 Leniency Notice and cartel fines in article 81 proceedings”(Master’s Thesis, University of Amsterdam, 2005) at 14.

private suits (with treble damages) were available, and recommended that the European Commission consider criminalising cartel conduct.²⁶²

Hammond also argues that “The first prerequisite to creating an effective amnesty program is the threat of severe sanctions for those who lose the race to amnesty.”²⁶³ While he concedes that it is possible to have an effective amnesty programme, without criminal penalties he qualified that statement by also stating that a jurisdiction which relied on fines alone must impose severely punitive pecuniary penalties in order to attract amnesty applicants. Furthermore, he suggests that jurisdictions without individual liability and criminal penalties will never be as effective at securing amnesty applications as one that includes such measures.²⁶⁴

The Commerce Commission, who introduced a leniency programme in 2004, receive approximately two leniency applications per year and suggest that overall leniency has assisted with the detection of cartels.²⁶⁵ Applications for immunity from prosecution under s 82D are outlined in the Guidelines on Immunity from Prosecution for Cartel Offences.²⁶⁶ The implication is that since leniency programmes are working now, at least to some degree, they would work even better if the potential penalties for cartel conduct included imprisonment – much like the US approach.

H. Alternatives to Criminalisation

While criminalisation is the solution that the government is currently pursuing, it is not the only one that has been raised. The RIS identified two other options, which could be adopted instead of criminalisation (the third option).²⁶⁷ These too required significant legislative amendment. Option one involved maintaining the status quo, while improving international cooperation via a new framework for negotiating bilateral cooperation agreements.²⁶⁸ This option would also see the possibility for private prosecutions, by the provision of class action suits for private litigants. Unfortunately, this is unlikely to happen any time soon, as a draft Class Action Bill has been before the Secretary for Justice since 2009, without further

²⁶² Sjoerd Arlman “Crime But No Punishment” above n 260, at 69.

²⁶³ Scott D. Hammond, “Cornerstones Of An Effective Leniency Program”, above n 259.

²⁶⁴ Scott D. Hammond, “Cornerstones Of An Effective Leniency Program”, above n 259.

²⁶⁵ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 22.

²⁶⁶ Crown Law Office *Guidelines on Immunity from Prosecution for Cartel Offences*. May 2011

²⁶⁷ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 42.

²⁶⁸ At 42; the framework would be provided by, the Commerce (International Cooperation and Fees) Bill 293-3A.

movement.²⁶⁹ Wils also suggests that while private enforcement might be an alternative to criminalisation, damages suffer the same problem as fines, in terms of deterrence – that unless they are nearly 150 per cent of turnover they will be ineffective as a deterrent, and that the actual loss is borne by relatively innocent shareholders and employees as well as cartelists.²⁷⁰

The RIS identified that additional funding for the Commerce Commission would enhance its ability to take a more proactive approach to detecting and prosecuting cartels.²⁷¹ Part of such funding could be used to reward confidential informants who provide valuable information in the detection of cartels.²⁷² Of course, given the nature of cartels, and the small size of New Zealand it is questionable how many such informants would actually be found.

The RIS’ second option involved improving the current civil regime.²⁷³ This option centred on improving certainty around the prohibition against cartels and would create a clearance scheme to allow businesses to avoid falling afoul of the law. These changes appear in the Bill, in the amendments to ss 30, 31 and 65.²⁷⁴ This option also suggested an update to the penalty regime including increased penalties for individuals, which have not been reviewed since 1990.²⁷⁵ However, the RIS simultaneously identified the unlikelihood of any significant benefits arising from such a change – citing the difficulty posed by imposing optimal fines, as mentioned above. Also, despite increased fines to individuals, cartels would still be able to indemnify defendants. Finally, neither of these changes would enhance New Zealand’s ability to request assistance or participate in international anti-cartel cooperation efforts.

Another possible alternative, suggested by Wils, is Director disqualification. This has been implemented in the UK where a court can order a director or de facto director be removed from a management role for up to 15 years.²⁷⁶ Wils suggests this is a reasonable “second-best” alternative to criminalisation, owing to the stigma and moral condemnation that are associated with it.²⁷⁷ He also suggests that being prohibited from holding management roles may punish

²⁶⁹ Liesle Theron “Class action litigation: a new frontier” *Law Talk* (issue 840).

< <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-840/class-action-litigation-a-new-frontier> >.

²⁷⁰ Wils, “Is Criminalization of EU Competition Law the Answer?”, above n 206, at 148.

²⁷¹ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 43(a).

²⁷² At 43(b).

²⁷³ At 46.

²⁷⁴ Commerce (Cartels and Other Matters) Amendment Bill 341-2 cl 7, 12.

²⁷⁵ Ministry of Economic Development *Regulatory Impact Statement*, above n 80, at 55-57.

²⁷⁶ Wils, “Is Criminalization of EU Competition Law the Answer?”, above n 206, At 147 ; Enterprise Act 2002 s 204 (UK); Company Directors Disqualification Act 1986 ss 2,3,4,5,8, 10 (UK).

²⁷⁷ Wils, “Is Criminalization of EU Competition Law the Answer?”, above n 206, at 147

an offender in a way for which a firm cannot fully compensate.²⁷⁸ Disqualification also appears to at least partially address Libman's observation, discussed above, regarding a convicted regulatory offender's ability to return immediately to the regulated activity despite their transgression.²⁷⁹

Perhaps some form of specific or general disqualification is a more appropriate penalty than a prison sentence, as it removes the offender from the regulated activity, without a complete deprivation of their liberty. In New Zealand, the penalty could take the form of a restraint, which prevents the transgressor from engaging in the activity, similar to that found in s 80C of the Act which already provides for up to 5 years' disqualification for breaches of s 30.

However disqualification is not a perfect solution. Firms could still at least partially indemnify disqualified executives and resources would have to be expended to police convicted offenders.²⁸⁰ Also, despite its merits, disqualification does seem somewhat of a halfway-house approach. Why not aim for maximum deterrent effect? For, if objective is deterrence and the purported success of the US approach is accepted, then a little criminalisation appears to go a long way. Also, while it is a purely subjective standard, the moral condemnation of being disqualified as an executive does not damage a reputation in the same way that a prison sentence will. Furthermore, policing a disqualification regime would appear to be *prima facie* time and resource consuming, and of questionable efficacy. Incarceration is also resource consuming, but it would be arguably easier to make sure that the prisoner is performing the requirements of their sentence – at least while in custody.

As a final alternative I suggest that instead of changing the penalties imposed, why not change the process by which cartel offences are prosecuted to increase the certainty of punishment? From a regulatory perspective, rather than switching to a new regulatory tool, there may be gains to be made simply from improving the efficacy of the tool that is already in use. This approach relies on cartelists being rational actors or at least capable of cost-benefit calculation.²⁸¹ Deterrence theory suggests that an unpalatable punishment has a limited deterrent effect as many potential offenders do not believe that they will be caught – and given the difficulty in detecting cartels our potential cartelists are correct.²⁸² However, what is more

²⁷⁸ At 147.

²⁷⁹ Libman, *Sentencing Purposes and Principles for Provincial Offences*, above n 19, at 7.

²⁸⁰ Wils, "Is Criminalization of EU Competition Law the Answer?", above n 206, at 147

²⁸¹ Clarke, "The increasing criminalization of economic law – a competition law perspective", above n 24, at 85.

²⁸² Roger Hopkins Burke *Introduction To Criminological Theory*, above n 200, at 40.

likely to be deter (although this too is limited) is the certainty of apprehension and punishment, rather than the punishment itself.²⁸³

To that end perhaps offences against Part 2 of the Commerce Act could be removed from the jurisdiction of the Courts. Instead they could be tried before a tribunal, composed of a judge and several experts, or a single specialist judge? In the same way that the Employment Relations Authority (the "ERA") streamlines the way in which employment disputes are resolved, a Commerce tribunal could deal with a higher volume of Commerce Act infringements, including cartels owing to its less stringent rules (e.g. The ERA does not have the same rules of evidence as the courts) and the expertise of its adjudicators.

At the same time fine levels could be adjusted, by being imposed according to statutorily defined minimum levels. The current Act provides for a penalty which must not *exceed* three times the gains made from the cartel conduct, or 10 % of turnover.²⁸⁴ If this became a mandatory minimum i.e. "penalties of *at least* three times the gain or 10% of turnover" in combination with the streamlined process, it would arguable have greater deterrent effect than the current level of fines.

These fines could also be applied to individuals - which should address concerns that imprisonment is too severe a sanction. Furthermore, natural justice fears could be further allayed by guaranteeing a right of appeal to the Court of Appeal. As part of this reform the Bill's proposed changes, in terms of defining and clarifying cartel conduct, as well as the changes to the should be retained.

This idea is not without its drawbacks. There would be significant costs involved with setting up such a body. However, the more efficient proceeding would lead to less prolonged, and thereby less costly hearings. The imposition of crippling pecuniary penalties against individuals would encounter the same problems with indemnification by the body corporate, but the statutory minimum fine would circumvent issues of judicial reluctance.

Furthermore, with a less stringent process conduct which was not previously considered to be cartel, might be captured. This would result in more type one errors, and the imprisonment of innocent parties. Such arguments are not convincing for two reasons. First, if the cartel definition provisions, in s 30A and related sections, are still enacted then this adds substantial clarification to the law, which then reduces the chance of non-hard core cartel conduct being

²⁸³ At 40.

²⁸⁴ Commerce Act 1986, s80(2B).

caught. Second, the authorisation and clearance regimes create opportunities for businesspeople who are concerned about breaking the law to manage their risks. While this does create a compliance cost, such an expense may be minimal if the reforms enhance the transparency of the law, regarding which kinds of conduct will be captured.

Finally, a tribunal would not address the problems of international cooperation, or allow the Commission access to MACMA or the Extradition Act – unless these too were amended. However, such a quasi-judicial body might actually have some domestic deterrent effect if its efficiency demonstrably increased the swiftness and likelihood of punishment.

V CONCLUSIONS

In the introduction to this paper I suggested that I would be able to draw conclusions on two matters: criminalisation as a regulatory response and the Bill’s desirability, as a response to cartels.

Firstly, in terms of criminalisation as a regulatory response I have come to the conclusion that it is merely one regulatory approach. While it has some distinctive procedural features and consequences for transgressors criminal law fits neatly under the regulatory paradigm. This is because it exists for the same purpose as other areas of law, the control of conduct. In this context the criminal law is being applied to regulate the conduct of “well dressed thieves” and deter them from forming cartels.

While it has the distinction of being associated strongly with deprivation of liberty, and serious offending, criminal law is simply a form of command. Thus criminalisation, the decision to make particular conduct criminal, still keeps the conduct within the broad sphere of regulation, but takes a particular regulatory approach to dealing with it. Looking specifically at the cartel context, criminalisation still has the same comprehensive regulatory goal as the existing regime: the preservation of the market’s allocative efficiency by preventing the market failure that results from cartels. Neither the current regime, nor the goal itself are fundamentally altered by the addition of criminal penalties. The real question is whether the regime’s overall effectiveness will be enhanced by the change.

This leads to my second conclusion, the overall desirability of the criminalisation of cartels. In terms of meeting the regulatory sub-goals, deterrence detection and harmonisation, criminalisation has some merits. While its actual deterrent effect is unclear the US experience

suggests that detection of cartels will be enhanced by criminalisation. In terms of harmonisation with overseas jurisdictions, while the likely success of information-sharing is speculative criminalisation will overcome certain jurisdictional investigative impediments by allowing access to MACMA and extradition regimes.

Overall, it appears as though criminalisation will at least make some progress towards the overall goal although that progress will come at a cost – for both the regulator and commercial actors. While that cost may be significant I believe that, in the absence of actual evidence to the contrary, it is justified.

While cost is a factor that may weigh against criminalisation, there is at least a partial answer to cost concerns in that cartel conduct is a violation of moral norms.²⁸⁵ Imprisoning cartelists, as Wils argues, sends a moral message.²⁸⁶ Similarly, our society does not criminalise murder on the basis of a cost-benefit ratio. This is fortunate, as the investigation, trial and punishment of murder requires the expenditure of enormous resources, with no financial return. Rather, we criminalise murder because as a society we regulate anti-social conduct, and perceived violations of moral norms. In the same way price fixing, while not as directly harmful as murder, can clearly be conceptualized as a crime that harms the public good of free competition. In that sense its harmfulness and moral deviancy are deserving of a strong regulatory response, which criminalisation will hopefully provide.

Finally, above I suggested that the true topic of this paper was whether the intersection of criminal law and competition law (under the regulatory paradigm) was complimentary or intrusive. To answer this, I submit that if price fixing can be accurately conceptualized as a crime, then criminal law seems to be the appropriate regulatory approach for dealing with it. In that sense the intersection is indeed complimentary, and thus desirable.

²⁸⁵ Wils, “Is Criminalization of EU Competition Law the Answer?”, above n 206, at 144.

²⁸⁶ At 145.

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