

# Departmental Disclosure Statement

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Commerce (Criminalisation of Cartels) Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill; and
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment ('MBIE').

MBIE certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

14 February 2018

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## Part One: General Policy Statement

### Introduction

The Commerce (Criminalisation of Cartels) Amendment Bill (the **Bill**) amends the Commerce Act 1986 (the **principal Act**) to introduce a criminal offence for cartel conduct.

Cartels are formed when rival firms agree not to compete with each other. A cartel is an anticompetitive arrangement by competitors to:

- fix, control, or maintain prices:
- establish output restrictions or quotas:
- share or divide markets by allocating customers, suppliers, territories, or lines of commerce.

Cartels are harmful to consumers, other businesses and the economy. They reduce consumer welfare through higher prices or lower quality for goods or services, have the potential to impede new entrants or 'mavericks' from participating in markets, and stifle innovation and productivity improvements in the economy. Cartels, by their nature, are secretive and difficult to detect. The Commerce Commission has investigated numerous alleged domestic and international cartels and successfully taken enforcement actions, including prosecutions for civil pecuniary penalties. These enforcement actions show that cartel conduct is active in New Zealand.

### Policy to be given effect by the Bill

The policy to be given effect in this Bill was informed by a review initiated in January 2010 which looked at whether to introduce a criminal cartel offence. The review arose from a concern that the existing civil regime may not provide optimal disincentives for cartel conduct. It also reflected a concern that New Zealand's competition regime may be out of step with overseas jurisdictions that were increasingly imposing criminal sanctions for cartel conduct and this could reduce the Commerce Commission's ability to cooperate with those jurisdictions in investigating international cartels.

The specific policy objectives for introducing criminalisation for cartels are:

- to promote detection and deterrence of cartels (while ensuring that efficiency enhancing collaborative activity is not deterred):
- to improve cartel enforcement by the Commerce Commission and facilitate New Zealand's contribution to enforcement efforts against global cartels.

These objectives are to be read in light of the purpose of the Act which is to promote competition in markets for the long-term benefits of consumers within New Zealand.

Clause 4 of the Bill inserts section 82B to the Act which includes the new criminal cartel offence. This offence is targeted at the individuals who are the decision-makers for the cartel and their corporations. The key element of the offence is the requirement to show 'intention' to engage in cartel conduct. The maximum fines are the same as the maximum pecuniary penalties that may be imposed under the civil cartels regime, with the additional sanction of up to seven years imprisonment in the case of individuals.

There are also other elements in the Bill which are designed to mitigate business uncertainty and compliance costs from the new criminal regime. These include the following:

- existing exceptions and exemptions in the Act to the civil prohibition for cartel conduct will also apply to the new criminal offence, including the exception

relating to collaborative activities (such as joint ventures) and the exception for specified international shipping activities (such as vessel-sharing agreements):

- new defences in new section 82C to provide for circumstances where a defendant believes that the impugned conduct was reasonably necessary as provided for in one of the exceptions:
- a 2-year transitional period before the criminal offence comes into force, which would allow for businesses to learn from experience under the existing civil regime for cartel conduct, which came into effect in August 2017

### **Previous consideration of criminalisation of cartels**

The matters outlined in this Bill are largely the same as the criminal offence provisions in the Commerce (Cartels and Other Matters) Amendment Bill ('Cartels Bill'), which was introduced in October 2011. The criminal cartel offence was removed from the Cartels Bill by supplementary order paper 343 during the Committee of the Whole House stage. The resulting Commerce (Cartels and Other Matters) Amendment Act 2017 received Royal Assent on 14 August 2017 and came into effect on the same day.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<p>The issue of criminalisation of cartels has been subjected to public policy debate by a range of stakeholders and academics, both in New Zealand and overseas. Reports include:</p> <ul style="list-style-type: none"> <li>• David King, <i>Criminalisation of Cartel Behaviour</i>, Ministry of Economic Development Occasional Paper 10/01, January 2010, which considers the case for criminalisation of hard core cartel behaviour in New Zealand. The paper is available on the MBIE website at: <a href="http://www.mbie.govt.nz/publications-research/publications/economic-development/2010-occasional-papers/Criminalisation%20of%20Cartel%20Behaviour.pdf">http://www.mbie.govt.nz/publications-research/publications/economic-development/2010-occasional-papers/Criminalisation%20of%20Cartel%20Behaviour.pdf</a></li> <li>• The OECD Competition Committee has held roundtables and published reports regarding effective enforcement against hard core cartels. The link is: <a href="http://www.oecd.org/competition/cartels/">http://www.oecd.org/competition/cartels/</a></li> </ul>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<p>MBIE has not prepared a new Regulatory Impact Statement (RIS) for this Bill. The policy outlined in the Bill is largely the same as that covered by an earlier RIS prepared for the Cartels Bill and an amendment is not required. The original RIS entitled <i>Criminalisation of Cartels</i> prepared by the then Ministry of Economic Development was finalised on 25 August 2011 (and posted on the Treasury website on 11 October 2011). A copy of that RIS can be found at:</p> <ul style="list-style-type: none"> <li>• MBIE website: <a href="http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform/ris-cartel-criminalisation">www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform/ris-cartel-criminalisation</a></li> <li>• Treasury website: <a href="http://www.treasury.govt.nz/publications/informationreleases/ris">http://www.treasury.govt.nz/publications/informationreleases/ris</a></li> </ul>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>YES</b>
<p>The Regulatory Impact Analysis (RIA) Team in the Treasury reviewed the RIS and associated supporting material. The RIA Team considered that the information and analysis summarised in the RIS met the quality assurance criteria and provided the following comment:</p> <p>“Because of the hidden nature of cartels, and the difficulty of accurately determining the costs they impose on the economy, a more precise cost benefit analysis is not feasible. This makes it difficult to precisely determine the incremental impact of criminalisation in deterring cartel conduct, and so whether it is a proportionate response to the problems posed by cartel conduct. The effectiveness of criminalisation in deterring cartel conduct will also rely mainly on the effectiveness of the enforcement activities undertaken by the regulator.”</p>	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
<p>The policy to be given effect by this Bill does not materially differ from the preferred option outlined in the RIS (being option 3), however there are a number of changes that are worth noting:</p> <ul style="list-style-type: none"> <li>• The definition of cartel conduct in the RIS included bid rigging as a specific form of cartel conduct that would be subject to civil and criminal sanctions. Bid rigging was removed by the Commerce Committee in its report back to the House and it is not proposed to be reinserted by this Bill. The Committee believed that defining bid rigging as an additional and overlapping category would create uncertainty and that prohibiting the other categories of cartel conduct (price fixing, restricting output, and market allocating) would adequately prevent anti-competitive bidding practices.</li> <li>• In parallel to the policy analysed in the RIS, separate policy decisions were made to transition competition oversight of international shipping arrangements to the Act. A specific exception from the cartel prohibition for vessel sharing arrangements has subsequently been incorporated in sections 44A and 44B of the Act, which will also apply to the new criminal cartel offence in the Bill.</li> <li>• The counterfactual for the analysis in the RIS has changed as the Act was subsequently amended in August 2017 to better target the civil cartel regime in the Act (as outlined in option 2 in the RIS).</li> </ul> <p>MBIE considers that these changes do not materially impact on the analysis of the policy options in the RIS.</p>	

### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
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Since the RIS was prepared there has been no further impact analysis carried out. However, we note the following:

**Incidence of domestic cartels**

At the time the RIS was prepared, the number of enforcement actions against domestic cartels were limited, with many of the detected incidents being local, minor in scope or degree of damage, and resulting in a warning only. Since 2011, the Commerce Commission has taken successful enforcement actions in relation to some significant domestic cartels, indicating their existence in New Zealand. Recent cases include price fixing in commercial timber (2014), waste oil collection services (2015), real estate services (2016/17) and national livestock identification (2015/17). For more information refer the Commerce Commission website:

<http://www.comcom.govt.nz/business-competition/enforcement-response-register-commerce/>

**Melbourne Law School – Cartel Project**

The University of Melbourne Law School carried out research over the period 2009 to 2011 to evaluate the impact of criminalisation of cartels in Australia. The outcomes of that research are available here: <http://law.unimelb.edu.au/centres/cen/research/cartel#research>. This Project provided important insights on the effectiveness of cartel criminalisation in promoting detection and deterrence in Australia. For example, it found that the deterrent effect was weakened by lack of business awareness of the legal cartel standard or that cartel conduct was criminalised. This highlights the importance of regulator efforts to raise awareness (discussed further in section 2.6 below).

**New Zealand Productivity Commission Report on Boosting Productivity in Services Sector**

The New Zealand Productivity Commission considered the case of criminalisation of cartels in its Inquiry to Boosting Productivity in the Services Sector. In particular, it raised concerns about the potential chilling effect on business and recommended efforts to raise awareness of the new legal standard. The 2014 final report is available here: <https://www.productivity.govt.nz/inquiry-content/1624?stage=4>

**Australian Competition Review**

In 2015, an independent panel carried out a review of the Australian competition regime which included its criminal offence against cartel conduct in Division 1 of Part IV of the Australian Competition and Consumer Act 2010. This criminal offence was introduced in 2009 and has many similar features to the offence proposed in this Bill. In its final report, the panel noted that:

- submissions expressed broad support of criminalisation for serious cartel conduct; and
- the regime proposed in the New Zealand Cartels Bill was superior in a number of respects.

This independent panel report is available here: <http://competitionpolicyreview.gov.au/final-report/>. The Australian Government response to the panel report has been implemented in the Competition and Consumer Amendment (Competition Policy Review) Act 2017, which came into effect on 6 November 2017.

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
The RIS sets out a broad assessment of the costs and benefits of criminalisation of cartels, but no attempt has been made to quantify these due to the difficulties in measurement.	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
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<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>YES</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>YES</b>
<p>The effectiveness of criminal sanctions to increase detection and deterrence of cartel conduct relies upon a number of factors:</p> <ul style="list-style-type: none"> <li>• businesses being aware of the law in relation to cartel conduct and that they will be subject to criminal sanctions; and</li> <li>• individuals or businesses continuing to have incentives to whistle blow on other cartelists through seeking leniency from the Commerce Commission for their own activities in relation to cartel conduct.</li> </ul> <p>The Commerce Commission will be invited to update its 2018 <i>Competitor Collaboration</i> guidelines following the introduction of the new criminal offence and to raise awareness of business obligations under the Act. In addition, the Commerce Commission has identified <i>business understanding their responsibilities under competition and consumer law</i> as one of its performance indicators in its 2017/18 Statement of Performance Expectations and it will continue to monitor this.</p> <p>The Commerce Commission will also be required to liaise closely with Crown prosecutors to ensure the effectiveness of its leniency policy in relation to cartel conduct. Crown Law released a draft guideline on immunity for prosecution from cartel offences, which is available here: <a href="http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform/draft-guidelines-immunity-from-prosecution">http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform/draft-guidelines-immunity-from-prosecution</a>.</p>	



## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

#### 3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

MBIE, in consultation with the Ministry of Foreign Affairs and Trade, has assessed this policy as being consistent with New Zealand's existing international obligations in relation to competition policy and law. New Zealand has no international obligations to introduce (or refrain from introducing) criminal sanctions for cartel conduct. However, we note the following:

##### **Trans-Tasman Outcomes Framework**

In August 2009, the then Prime Ministers of Australia and New Zealand announced a Trans-Tasman Outcomes Framework with the intention of accelerating the creation of a single economic market between Australia and New Zealand. This Framework included an agreed outcome that "*firms operating in both markets are faced with the same consequences for the same anti-competitive conduct.*" The Australian Parliament passed an Act for criminalisation of cartels in July 2009 and this outcome anticipated that New Zealand would take measures to do the same. The Trans-Tasman Outcomes Framework is non-binding and it expired in 2014.

Further information is available here: <http://www.mbie.govt.nz/info-services/business/business-law/sem/?searchterm=single%20economic%20market%2A>

##### **1998 OECD Ministerial Council Recommendation for Effective Action Against Hard Core Cartels**

New Zealand has associated with a 1998 OECD Ministerial Council Recommendation concerning Effective Action Against Hard Core Cartels, which recommends that member countries should ensure that their competition laws effectively halt and deter hard core cartels. It recommends that member countries' laws should provide for effective sanctions of a kind, and at a level, adequate to deter firms and individuals from participating in such cartels. This OECD Ministerial Council Recommendation is not legally binding. A copy is available here:

<http://www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainstharcocartels.htm>. In its *Third Report on the Implementation of the 1998 Council Recommendation*,

the OECD Competition Committee recommended that member countries should consider the imposition of criminal sanctions against individuals for cartel conduct, where it would be consistent with social and legal norms. Approximately 2/3rds of OECD members have some form of criminal cartel offence, including as part of a fraud offence or in relation to bid-rigging only.

### Consistency with the government's Treaty of Waitangi obligations

#### 3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

MBIE considers that this policy is consistent with the government's Treaty of Waitangi obligations.

## Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
<p>The Ministry of Justice has been consulted. Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry of Justice's website at:</p> <p><a href="https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/">https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/</a> .</p>	

## Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>YES</b>
<p><b>Criminal offence</b>            Clause 4 of the Bill, introduces:</p> <ul style="list-style-type: none"> <li>• section 82B which is a new criminal offence for cartel conduct, for which the sanctions include imprisonment up to seven years; and</li> <li>• section 82C which includes a new defence.</li> </ul> <p><b>Jurisdiction of High Court</b>            Clause 10 of the Bill amends the Criminal Procedure Act 2011 to provide that the new offence will be a category 4 offence, to be heard by the High Court.</p>	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
<p>The Ministry of Justice was consulted in the policy development for this Bill and the earlier Cartels Bill. The Ministry was interested in the design of the offence and defence provisions, including the appropriate category for the offence under the Criminal Procedure Act 2011 and the notification requirements for defendants. These views were taken into account in developing the Bill.</p>	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>NO</b>
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## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>MBIE has not carried out external consultation on this Bill, but the policy and Bill is informed by earlier consultation on the Cartels Bill as follows:</p> <p><b>Release of discussion document and exposure draft of Cartels Bill</b></p> <p>The MBIE website includes information considered as part of the policy process in the 2010 and 2011 review of cartel criminalisation, including submissions and Cabinet papers. The link is: <a href="http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform">http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform</a>.</p> <p>The review of cartel criminalisation was initiated by the release of a discussion document in January 2011, and written submissions were received. This was supplemented with workshops with competition law practitioners and general counsel. A range of views were expressed on the merits of criminalisation, but there was a general concern regarding the need for certainty for business. In particular, submitters identified a risk that it would be difficult to express exactly what is (and is not) criminal cartel conduct in legislation and that this difficulty could result in significant uncertainty.</p> <p>In June 2011, an exposure draft of the Cartels Bill was released and further submissions received. This process resulted in further refinements of the policy to better target the offence and the associated regime.</p> <p><b>Commerce Committee consideration of Cartels Bill</b></p> <p>The New Zealand Parliament website includes information considered as part of the legislative process on the previous Cartels Bill. The link is: <a href="https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL11153_1/commerce-cartels-and-other-matters-amendment-bill">https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL11153_1/commerce-cartels-and-other-matters-amendment-bill</a>.</p> <p>The policy given effect to in this Bill is also informed by submissions to the Commerce Committee that considered the Cartels Bill in July 2012 to May 2013. In its report back to the House, dated 13 May 2013, the Committee unanimously supported the introduction of the new criminal regime. A copy of the Commerce Committee report is available here: <a href="http://www.legislation.govt.nz/bill/government/2011/0341/21.0/whole.html#DLM5188700">http://www.legislation.govt.nz/bill/government/2011/0341/21.0/whole.html#DLM5188700</a></p>	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
<p><b>Enforcement agencies</b></p> <p>The Commerce Commission and Crown Law have been consulted in the development of the criminal cartel regime to test its workability and completeness.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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### Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

### Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Existing immunities under the Act will be extended to the new criminal offence. That is:</p> <p><b>Crown immunity</b></p> <p>Under section 5 of the Act, the Crown is bound by the Act to the extent that it engages in trade. However, a criminal proceeding may not be brought against the Crown. Instead, the Commerce Commission or any person directly affected by an alleged contravention of an offence by the Crown may apply to the court for a declaration to that effect.</p> <p><b>International shipping</b></p> <p>Sections 44A and 44B of the Act provide for a targeted exception for specified international liner shipping activities. This exception has the effect of conferring immunity from civil prohibition for cartel conduct in section 80 and the new criminal offence in the Bill. Given that these arrangements are global in nature and that vessel sharing is common practice to achieve economies of scale, this exception is desirable to give certainty to carriers for their operational activities. Safeguards against anticompetitive conduct include that the cooperation must improve the international liner shipping services supplied.</p> <p>The new subsections 82C (4) to (7) in the Bill provide a further defence in relation to international shipping agreements.</p>	

## Significant decision-making powers

<p><b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b></p>	<p><b>YES</b></p>
<p><b>Clearance or authorisation by the Commerce Commission</b></p> <p>Under Part 5 of the Act, the Commerce Commission may grant clearance or authorisation for certain business arrangements if the Commerce Commission is satisfied that that arrangement is either consistent with the provisions of the Act or otherwise in the public interest. Clearance or authorisation is currently available for arrangements in relation to cartel conduct in section 30 of the Act. Following the passage of this Bill, the effect of the granting clearance or authorisation will extend to confer immunity from the new criminal offence in section 82B.</p> <p>The Commerce Commission is an independent Crown entity, with established procedures for making clearance and authorisation determinations. The clearance regime for collaborative activities will enable businesses to manage legal risk if they are uncertain as to how the new offence applies to their transaction. Safeguards relating to these determinations include: clear statutory criteria for decision-making, the voluntary nature of clearances, obligations on the Commerce Commission to consult as part of an authorisation process, and rights of appeal and judicial review.</p>	

## Powers to make delegated legislation

<p><b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b></p>	<p><b>NO</b></p>
<p><b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b></p>	<p><b>NO</b></p>

## Any other unusual provisions or features

<p><b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b></p>	<p><b>YES</b></p>
<p><b>Commencement of the legislation</b></p> <p>Clause 2 of the Bill provides that the new provisions will come into effect two years after the date of Royal assent. This transitional period will allow time for businesses to become aware of their obligations and learn from experience with the new civil cartel regime which came into effect in August 2017.</p>	