

# Cartel Criminalisation

Cartel Conduct is now a crime - all businesses need to be prepared

April 2021

Following the end of the two-year transition period on 8 April 2021, it is now a criminal offence to intentionally engage in conduct in breach of the cartel laws in the Commerce Act 1986. The consequences for breach are severe - jail time and/or large fines.

Cartel laws have been in force for several years so you should already have taken action to ensure your business complies. If not, set out below is a short overview of the changes and what you need to do. As the law applies to businesses of all sizes, it is important that *all* businesses are aware of the laws and have procedures in place to ensure compliance.

## WHAT IS CARTEL CRIMINALISATION?

Amendments to the Commerce Act make it a criminal offence to intentionally engage in price fixing, restricting output or allocating markets. The offence carries penalties of:

- **Individuals:** Up to **7 years** imprisonment for individuals or a fine of up to **\$500,000**, or both.
- **Corporates:** A fine of up to **\$10 million** or a higher penalty based on commercial gain from the cartel arrangement or the person's turnover.

The government's reasons for criminalising cartel conduct include bringing our cartel law regime in line with key trading partners and promoting detection and deterrence of cartel behaviour.

## WHO DOES THE NEW OFFENCE AFFECT?

Most people think of cartels as only affecting "big, bad" business (and Columbian drug smugglers!) but this is wrong. Cartel laws do not discriminate between large, well-resourced corporate entities and small "mum and dad" businesses. Cartel laws apply to *any business* that enters into an agreement or arrangement with a competitor.

## WHAT ARE CARTEL LAWS?

Under the Commerce Act it is unlawful for a business agreement or arrangement between competitors to include a "cartel" clause unless one of the Commerce Act exemptions apply. A "cartel" in the general sense refers to an association of competing businesses designed to limit competition or control prices. This is broadly what the cartel rules seek to prohibit. In a nutshell, arrangements between competitors are illegal where competitors are:

- fixing prices;
- allocating markets; or
- restricting output.

It is important to remember that:

- Cartel rules apply to agreements and arrangements with your competitors.
- The rules extend to associated persons, eg each company in a group.
- Informal (including verbal) agreements, arrangements and even understandings are caught.
- The restrictions apply to the entry into a new agreement or arrangement with a cartel clause or the enforcement of a cartel clause under an existing agreement or arrangement.

For conduct before 8 April 2021, breaches of these laws could only incur civil penalties (i.e. severe fines but no jail time).

## WHAT DO I NEED TO DO?

It is important that all businesses have taken the time to understand the cartel laws. We recommend that businesses:

- identify and assess competition law risks;
- set up policies, procedures and training to reduce the likelihood of the identified risks occurring;
- establish a system so that employees can get advice before action (for example, legal advice on a contract); and
- regularly review your risk assessment and compliance processes.

As individuals can be personally liable and face jail time (and their actions can lead to company liability) it is very important that senior management/directors ensure their managers and staff understand cartel laws – and other relevant laws.

As we say above, cartel laws have been in force for several years so you should already have taken action to ensure your business complies. If you have not already updated your compliance procedures, trained your staff and checked your existing contracts to ensure you do not have any cartel provisions, then you need to do so now. You may also wish to check your D&O and statutory liability insurance policies to see what cover (if any) will apply going forward – of course you will not have cover for fines.

## HOW CAN I LEARN MORE?

For further information please see the competition articles on our [website](#). The Commerce Commission has more, general information and resources available on its [website](#) (or search Commerce Commission cartel criminalisation).

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## FOR FURTHER HELP

If you need help, we can assist with your risk assessment and your compliance, training and agreement reviews. For further information or to discuss how cartel laws may impact on your business, please call or email one of the Jackson Russell business lawyers listed.

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