

CARTEL CRIMINALISATION

Cartel criminalisation is back – businesses of all sizes are potentially affected

March 2018



Criminalisation of cartels is back on Parliament's agenda. This will affect your business and your board. The consultation process for criminalising cartels is very short – but it is not too late to have your say.

Most people think of cartels as only affecting “big, bad” business (and Colombian 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 affect any business that enters into an agreement or arrangement with a competitor. This potentially includes suppliers of goods and services, resellers, joint venture parties, and franchisors and franchisees.

WHAT IS THE PROPOSED NEW LAW?

The Commerce (Criminalisation of Cartels) Amendment Bill (**Bill**) introduces a criminal offence for cartel conduct where the person intends to engage in either price fixing, restricting output or market allocating. An intention to break the law is, of course, not required. The offence carries penalties of:

- Up to seven years' imprisonment for individuals or a fine of up to \$500,000, or both.
- For other legal persons, such as companies, a fine of up to \$10 million or a higher penalty based on commercial gain from the cartel arrangement or the person's turnover.

There will be a defence where the person honestly believed that the cartel provision was reasonably necessary for a collaborative activity. A two year transitional period will apply before the criminal offence comes into effect.

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

SHOULD CARTELS BE CRIMINALISED?

While we support the prosecution of deliberate cartel conduct that is intended to disadvantage consumers or other businesses, we do not think the case has been made out to criminalise cartel conduct. We wonder whether the government understands the reach of cartel regulation or the complexity and uncertainty that can arise when trying to apply the legislation. Whether something is a cartel can be a complex area and an area that the average NZ business will struggle to understand – let alone afford the legal, economic and market analysis necessary to determine compliance to the Commerce Commission's standards.

Criminalising non-intentional infringements in a very complex and technical area that may have minimal impact on competition is, in our view, not good law. We believe the government needs to properly assess the regulatory impact of criminalising cartels, and in particular the impact on businesses that are not large corporates with substantial compliance resources and deep pockets.

In 2015 the then Minister of Commerce and Consumer Affairs, Paul Goldsmith, considered the arguments for and against criminalisation and, on balance found that there was not a clear case to support criminalisation. He considered that there was a significant risk that criminalisation would have a “chilling effect on pro-competitive behaviour”. We think that the case for criminalising cartels in NZ has not been made out and we are making a submission to have our say.

MAKE A SUBMISSION

We encourage everyone to have their say on the passing of the Bill. You can do this by writing a submission to Parliament voicing your concerns with the Bill. The closing date for submissions is midnight on **Friday, 6 April 2018**.

We can assist you with making a submission and with any queries you may have about the impact of the Bill. We would also be pleased to provide you with a template submission (for no charge) that you can use as the base for your submission.

WHAT ELSE DO I NEED TO KNOW AND DO ABOUT CARTELS?

Readers of our cartel updates will recall that the cartel amendments to the Commerce Act were passed into law in a rush before the election last year. These prohibit provisions or arrangements *between competitors* that have the purpose, effect or likely effect of:

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

Severe civil penalties are imposed for their breach.

While the cartel laws (but not cartel criminalisation) are already in force for new contracts, the nine month transitional window for existing agreements or arrangements in force at the time the legislation was enacted expires on 14 May 2018. 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 prioritise this now. You should also check your D&O and statutory liability insurance policies to see what cover (if any) will apply going forward.

If you need help, we can assist with your compliance, training and agreement reviews.

FURTHER INFORMATION

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. We will be providing further guidance to our clients (for no charge) and we will be running a compliance seminar. Please contact us if you would like to attend.

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