

CARTEL AMENDMENTS TO COMMERCE ACT NOW IN FORCE

15 August 2017

INTRODUCTION

The Commerce (Cartels and Other Matters) Amendment Bill (**Bill**) received royal assent on 14 August 2017 and has now become law. The Bill brings changes to the “cartel provisions” of the Commerce Act 1986 (**Commerce Act**) that will affect many businesses. It is important that businesses take the time to understand the changes – and take action if the cartel provisions apply.

END OF A LONG JOURNEY FOR THE BILL

Readers of our cartel updates will recall that there have been considerable delays in the Bill. The Bill was introduced in 2011. The Bill originally sought to criminalise cartel conduct (among other changes). Following extensive lobbying this was dropped due to the perceived chilling effect on pro-competitive behavior and a report from Treasury that the civil cartel regime worked well. The Bill, as finally passed under some haste before the election, still brings significant changes to New Zealand competition law.

SIGNIFICANT CHANGES TO COMPETITION LAW

Key changes to the Commerce Act include:

- **Cartel conduct restrictions:** New “cartel conduct” restrictions. These restrictions are:
 - the previous restriction on competitors fixing prices; and
 - new restrictions on competitors jointly “restricting output” and “market allocating”.

Of the changes to the Commerce Act, these new restrictions will have the most far reaching impact on businesses.

- **Collaborative activity exemption:** A new cartels exemption for permitted “collaborative activity”. This is a welcome improvement as it is broader than the previous joint venture exemption. Competitors will be able to seek clearance for proposed collaborative activities, giving certainty that the proposed activities will not breach the Commerce Act.
- **Vertical supply contract exemption:** A new exemption for cartel provisions that are included in vertical supply contracts (where certain requirements are met).
- **International liner shipping exemption:** A new exemption for international liner shipping from the prohibitions against anti-competitive agreements and cartels.

CRITICAL DEFECT IN BILL ADDRESSED

Jackson Russell identified a defect in the Bill and worked with The Franchise Association of New Zealand (**FANZ**) and the Ministry of Business, Innovation and Employment to address the defect. As the Bill was drafted, businesses relying on the “collaborative activity” exemption would not have been able to enforce restraint of trade clauses in their agreements at the end of the collaborative activity. By way of example, this would have meant that otherwise lawful restraints of trade in joint venture agreements or franchise agreements could not be enforced on termination.

Unfortunately the Commerce Commission did not agree to address another important drafting issue with the Bill. The Bill as enacted provides that the collaborative activity exemption applies only if (among other things and summarised) the parties “**are** involved in a collaborative activity” at the time of agreeing to the cartel provision. We and other experts in this area consider that the wording should have been amended to clarify how the exemption applies to new cartel arrangements.

For new cartel arrangements there will generally not be a collaborative activity in place at the time of entering into the underlying agreement – in practice the collaborative activity will commence after the agreement is signed. The plain wording of the exemption does not appear to be satisfied. While it could be said that the collaborative activity commences on signing the agreement, this is not clear, and there could be conditions that need to be satisfied before the agreement or the collaborative activity commences.

The Commission has told us that it considers the Court would interpret the words more broadly than our stricter interpretation. We believe that legislation should be clear so that there is no ambiguity. Important threshold questions such as this should not be left to the Court to interpret – and the risk that the Court takes a different interpretation.

WHO IS AFFECTED?

The amendments to the Commerce Act will affect many New Zealand businesses including:

- many suppliers and resellers e.g. distribution agreements with territorial allocation clauses; and
- most franchisors and franchisees (as most franchise agreements contain territorial allocation clauses and restraints of trade).

Disclaimer: The information contained in this publication is of a general nature and is not intended as legal advice. It is important that you seek legal advice that is specific to your circumstances.

WHAT STEPS DO BUSINESSES NEED TO TAKE?

If businesses are not already prepared for the cartel restrictions they need to act now. For existing contracts there is a nine month transitional period which will give time to consider existing arrangements. However, there is no transitional period for new contracts. Businesses will need to review and update their contracts and policies.

Please refer to our earlier articles for further information on the application of the cartel restrictions and the steps businesses need to take:

- Suppliers/distributors and resellers – click [here](#).
- Franchisors – click [here](#).

FOR MORE INFORMATION

A copy of the Bill as enacted (the Commerce (Cartels and Other Matters) Amendment Act 2017) can be found [here](#).

The Commission issued draft Competitor Collaboration Guidelines in 2014 in anticipation of the Bill. The Commission is currently updating the guidelines to reflect changes made to the Bill and will publish the updated guidelines on the [Commission's website](#) in the future. The Commission has also said that specific guidelines for franchisors will be published.

HOW WE CAN HELP

We are happy to discuss the impact of the cartel amendments with you in further detail, answer your questions, and assist you to comply with your obligations. We have advised other businesses in preparation for the Bill and can provide you with a fixed fee package to provide you with cost certainty.

If you have any questions on how the Bill may affect your business or if you would like us to assist you to comply, please contact one of the contributors below.

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