Major competition law changes

Collaboration (cartels), exceptions, mergers & more

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The Commerce (Cartels and Other Matters) Amendment Act 2017 (**Amendment Act**) is significantly different in substance to the original Cartels Bill introduced almost 6 years ago. Most of the amendments are already in force, but there is a 9-month transition period during which pre-existing arrangements cannot be caught by the new cartel provisions (but may still be caught by the old "price fixing" prohibition). The new cartel provisions apply to every new contract, arrangement or understanding entered from 15 August 2017.

SUMMARY OF THE CHANGE	SO WHAT?
The Amendment Act has replaced the old "price fixing" prohibition with a new prohibition (**cartel prohibition**) against entering into a contract or arrangement, or arriving at an understanding (**CAU**), that contains or gives effect to a "cartel provision." A "cartel provision" is a provision that has the purpose, effect or likely effect of **price fixing**, **restricting output** or **market allocating** in relation to the supply or acquisition of goods or services in New Zealand. **Price fixing** means, as *between the parties* to a CAU, fixing / controlling / maintaining: • price, discount, allowance, rebate, or credit • for / in relation to goods or services • supplied or acquired by 2 or more parties in competition. **Restricting output** means preventing / restricting / limiting: • the (likely) *production* of goods • the (likely) *capacity* to supply services • the (likely) *supply* of goods / services • the (likely) *acquisition* of goods/services • supplied or acquired (as applicable) by 2 or more parties to the *CAU in competition with each other.* **Market allocating** means allocating between any 2 or more parties: • the persons or classes of persons to / from whom the parties supply / acquire goods / services; or • the geographic areas where the parties supply/acquire goods / services • *in competition with each other*. Download our summary table of the cartel prohibition and exceptions.	The term "contract, arrangement or understanding" is deliberately broad - no formal legal agreement is required. It will capture a "nudge and a wink." The cartel prohibition is a *per se* prohibition. It is illegal to enter into a CAU containing a cartel provision, or to give effect to a cartel provision, *whether or not there is any actual impact* on competition (even a positive impact). The prohibition is much broader than the old "price fixing" prohibition: • It will catch conduct that is not traditionally thought of as "hard core" cartel conduct. • On their face, the definitions of price fixing, restricting output and market allocating may capture any arrangement between competitors or potential competitors. • For example, "restricting output" catches levels of production, capacity, supply or acquisition by the parties. Most JV arrangements would be captured. • Other key "risk areas" include industry associations and distribution arrangements. • Businesses must satisfy themselves that an exception applies to any CAU with one or more competitors. However, the New Zealand Commerce Commission's (**NZCC**) previous draft Competitor Collaboration Guidelines[1] (**draft guidelines**) stated that the NZCC did not see the new cartel prohibition as "representing a significant shift in types of conduct that should be regarded as breaching section 30."

[1] Published in August 2014 and withdrawn from the NZCC's website when the Amendment Act came into force. At the time of writing on 5 September 2017, the NZCC had yet to publish finalised Competition Collaboration Guidelines.

There is no criminal offence for cartel conduct.	The original Cartels Bill would have introduced a criminal offence relating to the cartel prohibition. However, the New Zealand government announced on 8 December 2015 that **cartel conduct would not be criminalised under the Amendment Act**. The Minister of Commerce and Consumer Affairs at the time, Paul Goldsmith, stated that the reason for the change was that cartel criminalisation would have a chilling effect on pro-competitive behaviour.
There are three new exceptions to the cartel prohibition to replace the old "price fixing" exemptions: 1. Collaborative activity 2. Vertical supply contracts 3. Joint buying and promotion Download our summary table of the cartel prohibition and exceptions.	These are **"substance over form"** exceptions, intended to provide relief to the broad, *per se* cartel prohibition. They are **reverse onus** provisions, meaning that it is up to the person relying on these exceptions to prove, on the balance of probabilities, that the exception applies. Therefore**, if proper steps are taken at the outset**, these exceptions mean businesses can better analyse and structure their arrangements better protect legitimate competitive conduct.

1. Exception for collaborative activity
 	
The cartel prohibition does not apply if, at the time of entering into / arriving at or giving effect to the cartel provision:
• the person and 1 or more other parties are involved in a collaborative activity, ie:
  ○ enterprise, venture or other activity in trade
  ○ carried on in cooperation by 2 or more persons
  ○ not for the *dominant purpose of lessening competition* between 2 or more of the parties; and
• the cartel provision is *reasonably necessary* for the purpose of the collaborative activity.
	The person relying on the exception must show that the cartel provision in question is **reasonably necessary** for the purpose of the collaborative activity.
	
	What may be considered "reasonably necessary" in this context is yet to be tested. However, the draft guidelines stated:
	• The question of whether a cartel provision is reasonably necessary for the purpose of the collaborative activity will be assessed objectively.
	• What is "reasonably necessary" will depend on the facts and circumstances of each case.
	• A cartel provision need not be essential to be reasonably necessary. This follows the US Department of Justice's Antitrust Guidelines for Collaborations Among Competitors.
	• Conversely, a cartel provision will not be reasonably necessary if it is merely desirable, expedient or preferable.
	• The assessment will include a review of other available options.
	
	Therefore, at the outset of undertaking a collaborative activity, the parties should document the business case for what they are trying to achieve, including why the collaborative activity is necessary in comparison to other options.

2. Exception for vertical supply contracts
 	
The cartel prohibition does not apply to a contract (**but not** an arrangement or understanding) where:
• the contract is between a (likely) supplier of goods or services and a (likely) customer of the supplier; and
• the cartel provision:
  ○ relates to the (likely) supply of goods or services to the customer (including to the maximum price of resupply); and
  ○ does not have the dominant purpose of lessening competition between 2 or more parties to the contract.
	This exception applies only where the cartel provision is in a **contract** – not merely an arrangement/understanding.
	
	A clear benefit of this is that franchisors should be able to allocate territories to franchisees.
	
	The exception also clarifies that businesses are able to set maximum resale prices where they also compete.
	
	The draft guidelines stated that the "dominant purpose" is the main or principal reason for the provision. This will primarily be an objective test, although subjective elements may be taken into account.

	Care should still be taken when a franchisor is also a franchisee or where "vertical" arrangements could lead to a horizontal understanding (ie "**hub and spoke**" cartel issues).
3. Exception for joint buying and promotion A provision in a CAU does not have the purpose, effect or likely effect of **price fixing** if the provision: • relates to **collective acquisitions** (direct or indirect); or • provides for **joint advertising** of the collectively acquired goods/services; or • provides for a **collective negotiation** of the price followed by individual purchasing at the collectively negotiated price; or • provides for an intermediary to take title to goods and resell or resupply them to another party to the arrangement	This exception replaces (and expands on) the old exemption for joint buying and promotion arrangements. This exception **only** applies to "price fixing" – **not** other forms of cartel conduct under section 30 (ie market allocation and output restriction). It is intended to apply where competing buyers arrange to purchase goods or services collectively on terms that an individual buyer would be unlikely to be able to negotiate alone.
The Amendment Act has introduced a new **collaborative activity clearance regime**, where a person can apply for clearance to enter a CAU that contains (or may contain) a cartel provision. The NZCC must give clearance if it is satisfied that: • the applicant and any other party to the CAU are (or will be) involved in a collaborative activity; • every cartel provision in the CAU is reasonably necessary for the purpose of the collaborative activity; and • entering into the CAU will not have/be likely to have the effect of substantially lessening competition (SLC). The clearance process is expected to have two stages: 1. **Stage 1**: The NZCC will consider whether the collaborative activity exemption applies. 2. **Stage 2**: The NZCC will consider whether the collaborative activity will SLC.	The clearance regime will offer businesses certainty regarding their collaborative activities. The draft guidelines indicated that the NZCC would be open to granting fact confidentiality during stage one, however it is highly unlikely that it would grant fact confidentiality during stage 2. The onus will be on the applicant to ensure that the three necessary clearance criteria are met to the NZCC's satisfaction. The applicants must demonstrate that the cartel provisions will not SLC compared with the likely counterfactual. The draft guidelines state that a number of factors are relevant when assessing whether a SLC is likely, including: • The nature of the restrictions. • The nature of the products involved. • The number and size distribution of independent suppliers, and the degree of market concentration. • The conditions of entry. • Other restraints such as countervailing buyer power. The NZCC's concerns can be expected to include market **foreclosure** and the increased risk of **explicit/tacit collusion**. As with any voluntary clearance process, parties will see potential advantages and disadvantages. Publicity will be a concern. "Protection" will be a balancing consideration. One interesting quirk of the amendments is that potential "cartellists" can seek the protection of clearance, whereas parties' other commercial arrangements may not have this opportunity.
The **attribution provisions have been expanded** to, among other things, clarify that conduct by a person (Person A) acting under the direction (or with the consent or agreement, express or implied) of another person (Person B) is deemed to be the conduct of Person B, regardless of whether Person A is the agent or employee of Person B. It has been clarified that a person's conduct in New Zealand may be **attributed to an overseas party** (if one of the attribution provisions applies).	The ambit of the new attribution provision is broad and applies even if person A is not an employee or agent of person B. The **jurisdictional reach** of the Commerce Act has been extended. Therefore, the cartel prohibition will apply to some overseas conduct that would not have been captured prior to the amendments.

There are also new **multi-jurisdictional merger control provisions** which allow the NZCC to seek a declaration from the High Court that an acquisition by an overseas person of a "controlling interest" in a New Zealand body corporate has, or is likely to SLC.	"Controlling interest" means 20% of votes, issued shares or dividend entitlements of the body corporate. Other factors, such as control over the board of the body corporate, may show that there is a controlling interest. This will enable the NZCC to target deals which are occurring overseas but which may have repercussions for NZ consumers. The High Court will then be able to make orders such as requiring that the New Zealand body corporate in question cease carrying on business in New Zealand, dispose of shares or other assets, or any other actions consistent with the purpose of the Commerce Act.
The current **international shipping exemption will be removed** from the Commerce Act and **replaced with an exception** for "specified activities" relating to international shipping.	This exception will not come into force until 15 August 2019.

Comparison of fees and NZCC timing for clearance/authorisation

TYPE OF APPLICATION	FEE	DAYS BEFORE DEEMED DECLINED*
Authorisation for restrictive trade practices (s 58)	$11,250	120 working days (s 61(1A))
Authorisation for business acquisitions (s 67)	$22,500	60 working days (s 67(3))
Clearance relating to cartel provisions (s 65A)	$3,680	30 working days (s 65A(4))
Clearance for business acquisitions (s 66)	$2,250	40 working days (s 66(3))
** subject to any alternative timetable agreed between the NZCC and the applicant.*		

In light of the changes, and in order to seek to benefit from the exceptions, businesses should:

1. Have clear protocols for **all** competitor dealings and communication, including industry associations, JVs and distribution arrangements. This also includes informal contact (the kindergarten pick-up).
2. Have pre-merger and pre-collaboration protocols in place, including MoUs/HoAs.
3. Clearly document how new arrangements fall within the new exceptions.

What action do you need to take now?

There have been important changes. Action should be taken to ensure existing arrangements are not caught out. There are 8.5 months to: review existing JV arrangements, distribution arrangements (including franchise arrangements) and other collaborative activities to align them with one of the exceptions. Going forward, the new laws provide a framework to better protect legitimate competitive conduct, as long as you take sufficient steps at the outset.

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