

IPR and the NZ Commerce Act

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Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY

Overview

Why do we need to know this?

- Traditionally there has been a gap between competition lawyers & IP lawyers on the degree to which IPR were protected from the Commerce Act.
- The Commerce Act had IP exceptions. In both Australia and NZ, these IP exceptions were recently removed with the introduction of new misuse of market power provisions.
- Both countries also have tough new cartel laws with criminal liability.
- This means IP lawyers need to be aware of the Commerce Act when drafting and negotiating contracts and settlements.

Cartel prohibition

Smoke-filled room not required

No person may enter into a contract, arrangement or understanding (**CAU**) or give a land covenant that contains a **cartel provision** (or otherwise give effect to a cartel provision). A cartel provision is a provision with the purpose or (likely) effect of:

| PRICE FIXING | OUTPUT RESTRICTING | MARKET ALLOCATING |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Fixing / controlling / maintaining:</i> <ul style="list-style-type: none">• price, discount, allowance, rebate or credit• for/in relation to goods or services• supplied or acquired by 2 or more parties in competition. | <i>Preventing / restricting / limiting:</i> <ul style="list-style-type: none">• the (likely) production of goods;• the (likely) capacity to supply services;• the (likely) supply of goods/services; or• the (likely) acquisition of goods/services• supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other. | <i>Allocating between any 2 or more parties:</i> <ul style="list-style-type: none">• the persons or classes of persons to/from whom the parties supply/acquire goods/services; or• the geographic areas in which the parties supply/acquire goods/services• in competition with each other. |

Or where the provision “provides for” any of the above.

The cartel prohibition is **very broad** – most arrangements between actual or potential competitors risk being caught

Cartel exceptions

Disapplying the prohibition

| COLLABORATIVE ACTIVITY | VERTICAL SUPPLY CONTRACTS | JOINT BUYING & PROMOTION |
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| <p>The cartel prohibition does not apply if, at the time of entering into / arriving at or giving effect to the cartel provision:</p> <ul style="list-style-type: none">the person and 1 or more other parties are involved in a collaborative activity, ie:<ul style="list-style-type: none">enterprise, venture or other activity in tradecarried on in cooperation by 2 or more personsnot for the dominant purpose of lessening competition between 2 or more of the parties; andthe cartel provision is reasonably necessary for the purpose of the collaborative activity. | <p>The cartel prohibition does not apply where a contract (but not an arrangement or understanding):</p> <ul style="list-style-type: none">is between a (likely) supplier of goods or services and a (likely) customer of that supplier; andthe cartel provision:<ul style="list-style-type: none">relates to the (likely) supply of goods or services to the customer (including the maximum price of resupply); anddoes not have the dominant purpose of lessening competition between 2 or more parties to the contract. | <p>A provision in a CAU does not have the purpose, effect or likely effect of price fixing if the provision:</p> <ul style="list-style-type: none">relates to collective acquisitions (direct or indirect); orprovides for joint advertising of the collectively acquired goods / services; orprovides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; orprovides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU. |

- Even if an exception applies, cartel provisions are still subject to the SLC test
- Collaborative activity clearance eg Anytime Fitness
- Authorisation – Net public benefits test

Comparison with Australia

Some differences

1. “In competition” includes persons who but for a CP would likely be in competition
2. Purpose – subjective or objective?
3. No exclusive dealing prohibition
4. No exclusive dealing or RPM anti-overlap provisions
5. Tension between vertical vs collaborative activity

NZCC guidelines

'Soft law'

- IP guidelines: https://comcom.govt.nz/data/assets/pdf_file/0017/312308/Intellectual-property-guidelines.pdf
- Misuse of market power guidelines: https://comcom.govt.nz/data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf
- Competitor collaboration guidelines: https://comcom.govt.nz/data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf
- Cartel leniency and immunity policy: https://comcom.govt.nz/data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf

Risk areas

Take caution

- Refusals to licence
- Exclusivity / restrictive licensing
- Tying and bundling / portfolio licensing
- Pricing arrangements / restraints on output
- No-challenge provisions, grant-back provisions
- Long-term agreements
- Pay-for-delay agreements
- Settlement agreements eg Consolidated Alloys
- Other restraints – eg Moola, NGB, First Gas

Questions?



Andrew (Andy) Matthews

Principal

p +64 9 972 3754

m +64 222 333 666

e andrew.matthews@matthewslaw.co.nz