COMPETITION LAW

Commerce Act: cartelling is now a crime

By Gary Hughes

A significant change in anti-competitive cartel law is almost upon us, after a decade's worth of debate, policy u-turns and delayed implementation.

From 8 April 2021, engaging in cartel conduct will attract criminal sanctions under the Commerce Act 1986. Directors and officers of a business who are actively involved in collusion may in future land themselves a jail sentence.

This is the first in a series of articles to provide a refresher to busy commercial/corporate practitioners on key aspects of the law of cartels and collusion. The goal is to improve accurate issue-spotting in commercial transactions and contracts. For clients and advisers, imminent criminalisation means the stakes are now higher if straying close to such conduct.

Although the law change was passed in 2019, as the Commerce (Criminalisation of Cartels) Amendment Act 2019, the two-year lead time before implementation means it has flown under the radar, understandably buried beneath coronavirus news.

Reform process

The biggest law changes have come about in two phases.

Before 2017, price fixing was illegal and already subject to heavy civil penalties in the Commerce Act. Amendments in 2017 significantly redefined and broadened the scope of what is deemed cartel conduct (in s 30A). That expressly added (to traditional price fixing) arrangements affecting supply or acquisition of goods or services by allocating markets or restricting output (including bid rigging).

Policy arguments raged about whether the campaign against cartels needed stronger criminal penalties, especially to target individual wrongdoers.

The 2017 reforms were originally supposed to include criminalisation. But after an off-again, on-again series of party-political proposals, the Labour-led government in 2019 finally made criminalisation effective.

Across the ditch

Australia changed its law in 2009 towards a criminal regime. After a slow start, since 2016 we have seen more severe outcomes there, with the ACCC succeeding in criminal cases against three shipping lines, most recently a A$24 million fine against Wallenius Wilhelmsen in February 2021.

And a prosecution that recently committed to trial six high-profile bankers and their firms (ANZ, Citigroup, Deutsche Bank) looks set to be a blockbuster in the Federal Court.

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New Zealand's Commerce Commission is likely to begin slowly too, although there are no guarantees. It is raising awareness through mass-market advertising and has several investigations in the pipeline that may attract attention later in 2021.

The commission will have the option to consider how each case should be addressed – by the existing civil regime seeking a pecuniary penalty or by laying criminal charges.

Temptation to go criminal may be tempered by the additional complexity of the task, such as availability of criminal defence procedures. A new iteration of its *Enforcement Response Guidelines* due soon should give clues on how the commission intends to approach these issues.

Nuts and bolts

Potential maximum penalties are one way to grab attention. For an individual committing the new offence (s 82B) of entering into a contract or arrangement, or arriving at an understanding, that contains a cartel provision (or giving effect to one), imprisonment for up to seven years is possible. This is on par with Crimes Act fraud, money laundering and bribery offences, and can be imposed alongside a fine of up to $500,000.

For corporations, the existing penalty regime remains: $10m per offence, or up to three times the commercial gain, or 10% of group turnover.

The *mens rea* element that will apply is an intent to engage in one of the defined categories of cartel conduct, at the relevant time. That does not require any intention to deceive or mislead or screw the market, simply to engage in the proscribed conduct.

Statutory defences are provided in the 2019 amendments (s 82C) if the defendant believed at the time, on reasonable grounds, that one or more of the Commerce Act exceptions applied in relation to the conduct.

Importantly, the defence cannot stretch to scenarios where the belief is based on "ignorance, or mistake, of any matter of law". So, reliance on legal advice alone won't assist.

Exceptions

The Commerce Act exceptions were restructured in the 2017 expansion of cartel conduct notions beyond price fixing.

At least three general exceptions, along with several sector or statute-specific exemptions and carve-outs, might now afford reasonable belief as a defence, covering:

- collaborative activities, replacing the narrow joint venture pricing exception, where a cartel provision is reasonably necessary for a genuine collaborative activity between competitors;
- vertical supply agreements; and
- joint buying and promotion agreements.

There have been no court cases examining the interplay of the new cartel definitions and the available exceptions. However, even the commission acknowledges (in its *Competitor Collaboration Guidelines*, 2018) that cartel conduct can cover a wide field of activity, and "the role of the exceptions is to mitigate the potential for overreach by the cartel prohibition".

Key legal battlegrounds in future criminal cases might include questions of whether:

- the conduct fits the defined categories
- the parties reached an arrangement or understanding
- they reached that position, or "engaged in conduct", with the requisite intent
- the parties were truly "in competition with each other" in a particular market
- one or other of the new 2017 exceptions (eg, "collaborative activities") applies.

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