

Jail risk for cartels from next week – are you ready?

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On 8 April 2021, it will become a criminal offence to enter into a cartel arrangement under New Zealand law. Operating in parallel to the existing civil regime, criminal sanctions will be available for certain breaches of section 30 of the Commerce Act 1986. Even though the substantive provisions aren't changing, it's a good time to refresh your compliance programme, given the increasingly serious consequences of breaching competition law.

Here's what you need to know.

The basics

The offence aims to target individuals who are the decision-makers in cartel arrangements. Unlike the civil standard, criminal prosecution will require proof of intent. Criminal sanctions will apply to breaches that involve entering into or giving effect to a cartel provision with the intention of engaging in price fixing, restricting output, or market allocating.

Individuals will be liable on conviction for imprisonment of up to seven years, a fine not exceeding \$500,000, or both. Companies will be liable on conviction for a fine up to the same level as the current civil penalties (ie the greater of \$10m, three times the value of the commercial gain resulting from the cartel, or 10% of turnover).

A limited defence applies if the defendant reasonably believed that one of the statutory exceptions applied (eg for collaborative activities, vertical supply agreements, or joint purchasing arrangements).

Cartel immunity and leniency

Currently, to encourage cartels to be reported to the Commerce Commission, immunity from civil prosecution is offered to the first member of a cartel who reports the cartel to the Commission if certain conditions are met.

Under the new regime, there will be a parallel regime for immunity from criminal prosecution. The Solicitor-General (not the Commerce Commission) will be responsible for making decisions on granting criminal immunity. This means that the process and conditions for seeking civil leniency/criminal immunity from prosecution will change.

The Commerce Commission is revising its cartel leniency policy and guidelines in light of this, and Crown Law has published draft guidelines on criminal immunity for cartel offences (the drafts are available [here](#)). The final versions of the guidelines are expected to be released in April.

The draft revised guidelines contemplate a two-step process for consideration of immunity. First, as previously, the Commerce Commission may decide to offer leniency for civil prosecution to the first member of a cartel to report the conduct to it. Second, the Commission can recommend that the Solicitor-General grant that participant immunity from criminal prosecution. The Commission will only make a recommendation if certain criteria are met, such as that:

- The conduct is serious
- The evidence provided by the applicant for immunity is valuable in that it is likely to significantly strengthen any potential criminal prosecution case and could not be reasonably obtained elsewhere.

The Solicitor-General will exercise independent discretion when determining whether to grant immunity based on the Commission's recommendation.

What types of conduct have been caught under the criminal provisions in Australia?

Australia criminalised cartel conduct more than 10 years ago. Almost all the cases taken under the criminal provisions in Australia are ongoing, with fines only issued in a small number of cases to date (and no prison terms yet). The types of cases taken under criminal provisions there involve a broad range of industries and may provide insights for New Zealand businesses as they progress through the courts. The cases are:

- **Global shipping:** Several international shipping companies have been prosecuted in Australia for engaging in a cartel to fix prices on the transportation of goods. Total fines of A\$83.5m have been imposed on three companies
- **Pharmaceutical:** In December 2020, charges were laid against a supplier of a pharmaceutical ingredient and its former export manager for alleged arrangements between suppliers to fix prices, restrict supply, allocate customers or geographic markets, and/or rig bids
- **Foreign exchange:** In April 2019, charges were laid against a money transfer business and several individuals for allegedly fixing an exchange rate and fees charged to customers
- **Construction:** In August 2018, charges were laid against the Construction, Forestry, Maritime, Mining and Energy Union and one of its branch secretaries. The conduct concerns alleged attempts to induce suppliers of steel fixing and scaffolding services to enter into cartel arrangements
- **Banking:** In June 2018, charges were laid against three Australian banks and several executives relating to an alleged arrangement about the trading of shares following an institutional share placement
- **Health sector:** In February 2018, charges were laid against a provider of healthcare products, its managing director, and a former employee relating to alleged cartel conduct involving assisted technology products used in rehabilitation and aged care.

What should you be doing?

Our recommendations for managing and minimising your risk include to:

- **Ensure that you and your staff are properly trained and aware of obligations under the Commerce Act.** Some defendants who have had cases taken against them for cartel conduct were unaware that their conduct might breach the Commerce Act. This was the case for some real estate agencies involved in civil proceedings concerning TradeMe listing fees (see our previous update [here](#)). This highlights the importance of having regular competition law compliance training, so that staff can raise potential risks and know when to seek advice before a breach occurs
- **Have internal compliance policies and procedures in place.** As part of a compliance programme, we recommend having internal policies and procedures that are designed to help avoid breaches of the Commerce Act. For example, a policy on how employees should conduct themselves at meetings of industry associations, or in any interactions with competitors, is imperative
- **Consider how you can be ready to respond quickly to an investigation.** Being in a position to respond quickly to a Commerce Commission investigation is particularly important in the context of cartels, given the availability of the leniency and immunity policy. This could include considering matters such as:
 - **document management** – Make sure that your document management and record keeping practices (for both hard copy and electronic material) mean that documents can be found promptly in the event of an investigation, and that legally privileged material can be easily identified
 - **managing the response** – Consider who will be responsible for leading a response to an investigation, and make sure staff know who in the business they can contact if they have concerns about a competition law issue or receive a request for information from the Commerce Commission. While Commerce Commission search warrants are rare, guidelines can also be put in place so that staff know what to do in the event the Commission arrives at your premises to conduct a search
 - **employment issues** – As part of responding to a Commerce Commission investigation, you may need to access things like employee emails, text messages, and phone records, so will need to ensure that appropriate permissions are in place. In some cases, separate legal advice may also need to be arranged for employees involved in a cartel investigation. For example, the Commission's draft cartel leniency policy and guidelines state that it is the Solicitor-General's expectation that all individuals that benefit from derived immunity will receive independent legal advice, and that the costs of obtaining the legal advice will be met by the applicant (ie the business applying for immunity).

If you have any questions about the issues raised in this update or would like assistance developing a compliance programme, identifying risk areas for your business, or providing compliance training, please contact a member of our [competition law team](#).

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