

Legal alert - Cancel the prison jumpsuits order

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In a significant about-turn, Minister of Commerce and Consumer Affairs, Paul Goldsmith, yesterday announced the removal of criminal sanctions for cartel behaviour currently contained in the Commerce (Cartels and Other Matters) Amendment Bill.

The Bill was introduced into the House in October 2011, following the release of a discussion paper in January 2010 and an exposure draft in June 2011, and workshops with practitioners and interested parties in between.

In Buddle Findlay's [submission](#) to the Ministry of Economic Development (now MBIE) on the exposure draft in July 2011, we expressed our concern that criminalising cartel conduct may have the effect of inhibiting pro-competitive behaviour. We noted that we did not consider that there was a sufficient case to criminalise cartel conduct in New Zealand. In particular, we said that we understood the proposal to criminalise cartel conduct as being driven by the perceived need to keep up with the neighbours, rather than a real concern about economic harm. We said that we did not consider that keeping up with our neighbours was a sufficient reason to criminalise cartel conduct.

We reiterated our concerns to the Commerce Select Committee in our [written submission](#) to the Select Committee in September 2012, and again at the Select Committee hearing in October 2012.

In his [media release](#), the Minister pointed to the Government having to consider the significant risk that cartel criminalisation would have a chilling effect on pro-competitive behaviour between companies. This indicates a return to economic analysis rather than a 'keeping up with your neighbours' approach. The Minister will introduce a supplementary order paper into the House to remove the criminal sanctions for cartel conduct from the Bill.

The Bill will clarify what cartel conduct constitutes, and the current penalties available under the Commerce Act (being civil sanctions) will remain. Collaborative arrangements will continue to be exempt under the Bill, and the Bill will introduce a new clearance regime for cartel conduct.

For competition lawyers, the past four years since the Bill was first introduced have involved advising many clients to get ready for cartel criminalisation, with the catch phrase being "you can't send companies to jail, only individuals". While the need for prison jumpsuits for cartel conduct no longer exists, the threat of criminalisation has been a significant factor in renewed compliance training and focus for New Zealand businesses. In our view, the threat of criminalisation by itself has been critical to deterring anticompetitive behaviour.

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