



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Commerce (Criminalisation of Cartels) Amendment Bill

05/04/2018

Commerce (Criminalisation of Cartels) Amendment Bill

1. Introduction

- 1.1. The New Zealand Law Society welcomes the opportunity to comment on the Commerce (Criminalisation of Cartels) Bill (Bill). The Bill amends the Commerce Act 1986 (Act) by introducing criminal offences for cartel conduct.
- 1.2. The Law Society provides brief comments on the Bill, to assist with its clarity and workability.
- 1.3. The Law Society does not seek to be heard.

2. Clause 4 – new section 82B: Offence relating to cartel prohibition

Intention

- 2.1. Clause 4 proposes new criminal offences for cartel conduct, by adding new section 82B to the Act.
- 2.2. For a person to be found guilty of an offence under new section 82B, the Crown must prove that the person *intended* to engage in price fixing, restricting output, or market allocating.
- 2.3. The “intention” required for the new section 82B(1) offence is an important element and should be made clear. The Law Society notes that:
 - 2.3.1. A person who carries on business activities that are prohibited may do so intentionally, but without any knowledge or reckless intent as to whether the activities amount to cartel activities; and
 - 2.3.2. There is also at times uncertainty in case law about the meaning of “intention”. In the present context, it could be limited to actual knowledge of the consequences of the contract, arrangement or understanding, or the term could also include recklessness as to those consequences.

Recommendation

- 2.4. For the avoidance of doubt, a new subsection should be added after section 82B(1):

“For the purposes of this section, a person intends to engage in price-fixing, restricting output, or market allocating, if that person:

- i. knows that the contract, arrangement, or understanding has the purpose, effect or likely effect of price-fixing, restricting output or market allocating; or*
- ii. is reckless as to whether the contract, arrangement, or understanding has the purpose, effect or likely effect of price-fixing, restricting output, or market allocating.”*

Notification by defendant of defence

- 2.5. Proposed section 82B(2) requires a defendant to notify the prosecution of an intention to rely on one of the exceptions or defences available within 20 working days, or, with the leave of the court, at any later time.
- 2.6. Under proposed section 82B(2)(b), the defendant must provide sufficient details about the exception or defence to “fully and fairly inform” the prosecution of the manner in which the exception or defence is claimed.
- 2.7. The words “fully and fairly” are unusual. Normally where there is a requirement to give notice of a statutory defence or exception, it is sufficient to state the facts relied on. The words “fully and fairly” add evaluative qualifiers, which generate additional room for disagreement about whether a notice is adequate.
- 2.8. It is also apparent from the explanatory materials accompanying the Bill that the notice requirement does not place any onus on the defendant to prove his or her defence (the burden of proof remains on the prosecution).¹ This is an important point and it would be helpful for the Bill to make this clear.

Recommendations

- 2.9. Omit the words “fully and fairly” in new section 82B(2)(b).
- 2.10. For the avoidance of doubt, add a new subsection after section 82B(2):

“The requirement to give notice does not –

- a) impose any onus of proof on a defendant; and*
- b) relieve the prosecution of the burden to prove each element of an offence and to negate any exception or defence, beyond reasonable doubt.”*

3. Clause 12 – amended section 82A: Civil and criminal sanctions

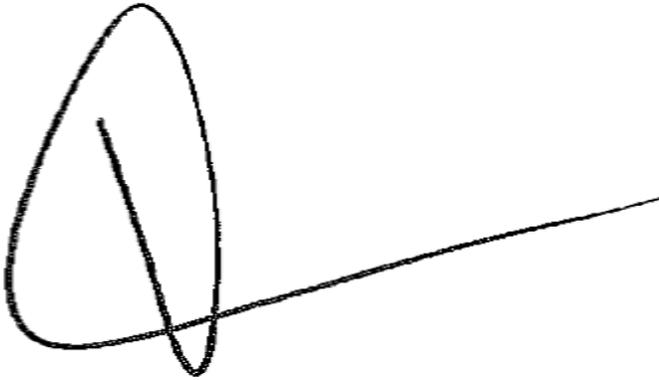
- 3.1. Clause 10 proposes to amend section 79B of the Act, to avoid double jeopardy through the imposition of both civil liability for pecuniary penalties and criminal liability arising out of the same conduct. The Law Society considers that this amendment is appropriate and necessary, but submits that clause 12 should likewise amend section 82A, to preclude a person being liable for both exemplary damages and criminal penalties for the same conduct.

¹ Departmental Disclosure Statement at paragraph 4.4.

Recommendation

3.2. Add a new subsection to section 82B:

“A prosecution may not be brought under section 82B against any person who has been ordered to pay exemplary damages under section 82A for the same conduct.”

A handwritten signature in black ink, consisting of a large, stylized loop on the left and a long, thin horizontal stroke extending to the right.

Andrew Logan
Vice President
5 April 2018