

Competition Law Year in Review 2021

10 March



Commerce Amendment Bill finally introduced

After years of debate and a long gestation period, the proposed legislation to overhaul New Zealand's misuse of market power prohibition and repeal the current IP exceptions was introduced to Parliament. [Read more...](#)

8 April



Cartels are now a crime

Cartel conduct is now a criminal offence in New Zealand. Individuals who *intentionally engage* in cartel conduct now face up to seven years imprisonment and/or a fine of up to \$500,000. [Read more...](#)

9 April



NZCC updates cartel leniency policy

The New Zealand Commerce Commission (NZCC) has updated its leniency policy, outlining that while the NZCC can grant civil leniency to the first party that reports involvement in a cartel, only the Solicitor General can grant criminal immunity.

4 May



Australia's "first" misuse of market power case

The ACCC settled with TasPorts in Australia's first case under its new misuse of market power prohibition (being the prohibition New Zealand intends to copy). TasPorts admitted it had misused its market power by imposing a port access charge on a customer who had notified their intention to switch to a competing towage supplier. [Read more...](#)

9 June



'Failing firm' argument does not fail

Despite a poor track record of success, the "failing firm" argument was successfully deployed this year in the Concrete Group's clearance application to acquire its competitor, Drymix. The NZCC found that the acquisition would not have the effect of substantially lessening competition due to Drymix being in receivership, and there being no prospect of Drymix being sold to another purchaser or being able to continue to compete with the Concrete Group if the acquisition did not go ahead.

11 August



Recommendations from fuel market study implemented

Following the NZCC's recommendations from the fuel market study and the enactment of the Fuel Industry Act 2020, a new regulatory regime providing the NZCC a monitoring and enforcement role for the fuel industry has come into effect. The new regime requires suppliers to publish a terminal gate price and follow wholesale contract rules, amongst other requirements.

30 August



HP authorised to engage in RPM for five years

The NZCC authorised HP to engage in resale price maintenance (RPM) to enforce specified retail prices for the on-sale of its products sold via HP online stores that are operated by third party resellers, on grounds that authorising the RPM would provide many customer-experience benefits.

1 September



Phone call results in penalties for "attempted" cartel conduct

Christchurch container depot operator SCS and its director were fined \$62,500 and \$24,000 respectively for attempting to fix vehicle booking system fees with its competitor during a single phone call. [Read more...](#)

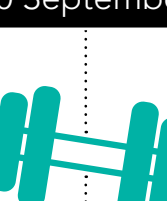
14 September



Select Committee's Report on Commerce Amendment Bill

The Select Committee reported back on the Commerce Amendment Bill. While Opposition MPs supported Russell McVeagh's submissions (including the need for a legitimate business justification and retention of the IP exception), the majority endorsed the Bill in its existing form.

20 September



Anytime NZ seeks clearance for proposed cartel provisions

The NZCC received its first collaborative activity clearance application from Anytime NZ, relating to proposed standardised membership pricing agreements with its franchisees. Anytime NZ claims that the pricing provisions are or may be cartel provisions, but that they are reasonably necessary and do not substantially lessen competition. The NZCC is scheduled to make a decision on the application by 17 December 2021.

28 September



Minimum price on Wellington taxis proves costly mistake

The NZCC successfully took proceedings against a Wellington taxi company for agreeing on a \$25 minimum charge for taxi pick-ups with two other competing taxi companies. The competing companies designed and distributed stickers that displayed the minimum charge and implemented the charge when drivers received the stickers. The defendant company was penalised \$150,000.

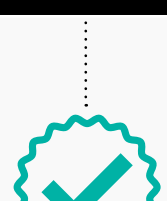
26 October



ACCC secures first-ever criminal cartel conduct guilty plea

Former export manager of pharmaceutical ingredient company, Alkaloids, has pleaded guilty to criminal cartel charges (the first ever guilty plea by an individual under Australia's criminal cartel regime) for price fixing, bid rigging and market allocation arrangements between Alkaloids and other overseas suppliers of SNBB (a key ingredient in antispasmodic medications).

19 November



NZCC exercises provisional authorisation powers

The NZCC has provisionally authorised the New Zealand Tegel Growers Association (NZTGA) to collectively negotiate on behalf of its members, the terms and conditions of its members' supply of chicken growing services to Tegel Foods. This is the first time the NZCC has granted a provisional authorisation, which allows potentially anti-competitive conduct to proceed while the NZCC considers the application, and without the NZCC issuing a draft determination. These powers are intended to remain in place during the "epidemic period" (ending on 19 June 2022) although Parliament has proposed for these powers to be made permanent under the Commerce Amendment Bill.

22 November



Building supplies market study gets greenlight

Consistent with the Labour Party's 2020 election pledge to inquire into the cost of building materials, the Government has given the NZCC the greenlight to commence a market study into the residential building supplies industry. The final report is expected in December 2022.

A busy 12 months for the NZCC...

10

mergers cleared unconditionally (with one further merger cleared subject to a divestment undertaking)

53

average number of working days taken for merger clearance applications (each application taking between 18 - 116 working days)

0

merger clearance applications declined (albeit 2 merger clearance applications withdrawn)

6

investigations into anti-competitive conduct published on NZCC register (ongoing and new)

2

companies faced proceedings for cartel conduct

On the horizon for the next year...

The wait for the NZCC's supermarket final report

After a year-long study into the supermarket industry, including an online consultation conference, stakeholders and the public now await the NZCC's final market study report, due on 8 March 2022.

Significant reforms to NZ competition law

Outlined below are the key things you and your business should look out for relating to the new Commerce Amendment Bill. Despite concerns from the Opposition and businesses regarding the proposed changes to the Commerce Act, the Bill is expected to come into force next year.

The new market power prohibition

About the reform:

New Zealand is set to follow Australia's revised market power prohibition.

What it means for you:

If you are a business with market power, we recommend reviewing whether your business strategy might have the effect of substantially lessening competition in a market, whether you have a legitimate business justification for the strategy or not.

IP rights no longer a safe harbour

About the reform:

The Bill proposes to repeal all IP exceptions in the Commerce Act.

What it means for you:

To prevent allegations of anticompetitive conduct, businesses will need to take extra care when making decisions about licensing IP. If you are a business with market power, you should start reviewing your IP licensing processes and arrangements to consider compliance with the proposed reforms.

Expansion of cartel prohibition to land covenants

About the reform:

The reform proposes to expand the cartel prohibition to include cartel provisions in land covenants.

What it means for you:

If you are a business that regularly sells land and includes restrictions on title to prevent the land from being used in competition with your business, you should start reviewing whether it will be legal under the new regime.

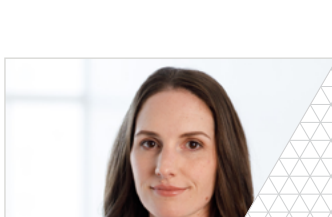
Any questions? Talk to one of our experts



Troy Pilkington
+64 (09) 367 8108
troy.pilkington@russellmcveagh.com



Bradley Aburn
+64 (09) 367 8816
bradley.aburn@russellmcveagh.com



Petra Carey
+64 (09) 367 8831
petra.carey@russellmcveagh.com