

Commerce Act 1986: Recent significant developments

2019 saw a number of significant developments in relation to the Commerce Act 1986.

These developments included:

- The Commerce (Criminalisation of Cartels) Amendment Act 2019 was passed into law.
- MBIE published a Discussion Paper consulting on proposed changes to section 36 of the Act.
- The Commerce Commission completed its first market study into the retail fuel sector.

Cartel criminalisation

Nearly 10 years after it was first proposed, cartel conduct will soon become a criminal offence, punishable by up to seven years in prison. The Commerce (Criminalisation of Cartels) Amendment Act 2019 comes into force on 8 April 2021, and will make it an offence to intentionally enter into or give effect to a contract, arrangement or understanding containing a cartel provision.

What is a cartel provision?

Cartel provisions, include agreements between competitors to:

- fix prices;
- restrict output;
- limit the geographic area they will each operate in;
- not buy from a certain supplier, or sell to a certain customer.

Cartel provisions are already prohibited by the Commerce Act and can lead to hefty financial penalties.

Under the change, someone involved in a cartel could also face a jail term.

Businesses need to be mindful of the cartel provisions when they negotiate contracts and interact with competitors. Now is a good time for businesses to ensure they comply with the cartel laws ahead of next year's change.

Review of section 36 of the Commerce Act

Last year MBIE undertook consultation on proposed changes to section 36 of the Commerce Act. Significant changes were proposed to that section, which is one of the key provisions of the Act

Why review section 36?

Section 36 of the Commerce Act prevents a firm with substantial market power from misusing its market power for an anticompetitive purpose. Courts have interpreted section 36 in a narrow way which has made it difficult for the Commerce Commission to prove a breach of the section. This has led the Commerce Commission and the Productivity Commission to label section 36 as ineffective and call for it to be changed.

MBIE's Discussion Paper

MBIE proposed changing the section to align with the law in Australia, which has recently been changed. In summary, rather than focusing on whether a firm would have acted in the same way if the market had been competitive, the focus would be on the effects of the firm's conduct: Would the conduct in question have the likely effect of substantially lessening competition in a market?

Next steps?

The Government is considering the submissions received by MBIE, and expects to make final policy decisions in early 2020.

Commerce Act 1986: Recent significant developments (Continued)

Market study into the retail fuel sector

Under a 2018 amendment to the Commerce Act, the Commerce Commission was granted a new power to carry out market studies. A market study is an investigation into whether there are factors impeding competition in a market. The Minister of Commerce and Consumer Affairs can direct the Commission to carry out such a study.

In December 2018 the Minister required the Commerce Commission to conduct a market study into the retail fuel industry. The Commission completed that market study in December 2019 and reported on its findings.

Conclusions and recommendations

The Commission concluded that fuel companies' profitability and retail pricing have been persistently higher than would be expected in a competitive market. This is largely because New Zealand lacks a competitive wholesale market for fuel: Z Energy, BP and Mobil together dominate both fuel importation and retail fuel supply markets. It is difficult for new fuel importers to enter the New Zealand market because those three companies own required infrastructure. Discount and loyalty programs and consumers unnecessarily buying premium fuels also keep prices high.

The Commission's Report makes recommendations for improving competition including:

- publishing processes and criteria for other importers to participate in shared infrastructure arrangements;
- regulating wholesale fuel supply contracts, to enable fuel resellers to seek out competitive supply agreements;
- introducing a Terminal Gate Pricing regime, based on Australia's model, where wholesale suppliers

would post spot prices at which they will sell fuel to wholesale customers at storage terminals; and

- developing an enforceable Code of Conduct.

Next steps?

The recommendations made by the Commerce Commission in a market study report are not binding. However the Government has stated it accepts the Commission's findings and intends to implement the recommended changes swiftly.

It is also expected that the Government will soon be requiring the Commission to carry out a second market study into another industry. Watch this space.

Want to know more?

If you have any questions about the Commerce Act and how it affects your business, please contact Sarah Simmers our [Competition](#) specialist.