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LAWNEWS

+ cover story

CARTEL CONDUCT CRIMINALISATION APPEARS ALMOST 'INEVITABLE'

The criminalisation of cartel conduct in New Zealand now appeared to be inevitable, said Kensington Swan partner, Hayden Wilson.

Mr Wilson, who specialises in competition and regulatory matters and wrote a research paper entitled *Go directly to jail? Criminal Penalties for Cartel Conduct in New Zealand*, told *Law News* that there were a number of strong, principle-based arguments as to why criminalisation was desirable.

"But I think the thing that makes it inevitable now, is that most of our major trading partners have introduced it and it is becoming the international norm. I do think it's inevitable and the question really is 'how'?"

• Continued on page 2



Judge Ajit Singh of Manukau District Court (left) is presented with the India Empire Award, in New Delhi, by the Minister of Overseas Indian Affairs, Mr Vayalar Ravi, for "community leadership in the Asia Pacific region." Judge Singh received the award while in India as a guest speaker at the Pravasi Bharatiya Divas conference of the Global Organisation of People of Indian Origin (GOPIO) where he delivered an address on hate crime (see page 5). Two years ago, Judge Singh was presented by the President of India, Srimati Pratibha Devisingh Patil, with the Pravasi Bharatiya Samman Award for outstanding achievement in the field of public service through his valuable contributions to law and society, and for fostering the interests of India and Indians overseas.



Hayden Wilson

LAWNEWS THIS ISSUE:

Cartel conduct criminalisation appears almost 'inevitable'
New application form for Royal mercy
New Zealand has good race relations but...

CARTEL CONDUCT CRIMINALISATION APPEARS TO BE ALMOST 'INEVITABLE' BUT MORE DEBATE IS NEEDED



• *Continued from page 1*

Mr Wilson was commenting following the release on January 27, 2010 by Commerce Minister Simon Power of a discussion document entitled *Cartel Criminalisation* and said there were quite significant differences in the approaches to criminalisation in different jurisdictions.

He was heartened by the fact that, despite an emphasis on harmonisation, it was clearly not a foregone conclusion that New Zealand would follow the Australian approach, as it had been criticised for significant flaws.

Mr Wilson said New Zealand was a small economy with often a limited numbers of players in markets and this made its dynamic different. A cautious approach should accordingly be adopted to following international models.

Mr Wilson said that the same physical elements should be included in both civil and criminal penalty regimes but there would be major practical issues to deal with in drawing up a criminal regime.

Chapman Tripp partner Grant David sounded a warning note about any hasty moves to introduce criminalisation.

Mr David told *Law News* there first needed to be a debate about whether or not cartels were prevalent and harmful in New Zealand and, if so, whether criminalisation was the appropriate remedy. He said that monetary penalties for firms in relation to cartel conduct had been significantly

“The question we should be asking is not whether cartel conduct is bad, but rather whether criminalising cartel conduct is likely to create gains that outweigh the inevitable costs that would accompany criminalisation?”

Simon Ladd, Bell Gully litigation partner

increased in 2001, and as yet, the courts had not used those penalties to their fullest extent as cases were still working their way through the system. Commerce Commission's leniency policy was proving to be effective in identifying cartels.

Mr David cautioned that the introduction of criminalisation could have a chilling effect on commercial activity, as it was sometimes difficult to

draw a clear line between commercial co-operation and unlawful collusion.

New Zealand was embarking on major infrastructure projects that would require close co-operation between firms and it was important such work was not hindered by fears about breaching the law.

He said that the primary sector was another industry which depended on co-operation between firms, both in producing and in marketing products.

Bell Gully litigation partner specialising in competition law, Simon Ladd, said there must be a real question as to whether or not gains from the detection and prevention of cartels as a result of criminalisation would outweigh the costs of changing the law. His assessment would be that the gains would be “at the margin”.

• *Continued on page 3*



Mr Ladd said vigorous debate on these issues was vital. "The cost to society of cartels is real, but the costs of investigating and prosecuting cartel conduct are equally real. The question we should be asking is not whether cartel conduct is bad, but rather whether criminalising cartel conduct is likely to create gains that outweigh the inevitable costs that would accompany criminalisation."

Justice Minister Simon Power, in releasing the discussion document, said that cartel activities such as price fixing and bid rigging were among the most harmful forms of anti-competitive business conduct.

"Such activities cause significant harm by reducing economic output, undermining trust in markets, slowing productivity growth and distorting investment signals by making cartels appear more profitable than they would be in an undistorted market."

Mr Power said that introducing criminal penalties, including imprisonment, could be a strong deterrent to organisations contemplating hard-core cartel behaviour. Many cartels were so large that current fines were seen as a cost of doing business, rather than a deterrent, so further measures to deter such conduct needed to be considered.

The minister noted that countries like the United States, the United Kingdom, Canada and Australia had already criminalised cartel behaviour and said it was important for New Zealand to keep in step with those jurisdictions.

The paper released by Mr Power said that there were concerns about whether or not New Zealand's current civil penalty regime was effective in deterring cartel behaviour.

"The single intervention most likely to have a significant impact on deterrence and detection is the possibility of imprisonment. This requires criminalisation which brings with it a number of costs and benefits. A greater deterrence of the most serious forms of cartel behaviour will have significant benefits for the effective operation of markets. Criminalisation, and particularly the possibility of imprisonment, provides strong disincentives for executives of corporations to engage in cartel behaviour."

The document, which was prepared by the Ministry of Economic Development, discussed three possible approaches to criminalising cartel conduct:

- Creating an offence based on the existing civil prohibitions in the *Commerce Act*. The paper said the advantage of this option would be that businesses would be given certainty as they would be dealing with familiar language and concepts, but there could be "under-reach" caused by uncertainty about whether or not the prohibition on controlling prices included market allocation schemes.
- Adopting the Australian offence provisions. This would be beneficial for harmonisation reasons - reducing compliance costs for trans-Tasman businesses complying with competition laws in both jurisdictions
- Developing new offences based on first principles. The document said this would address most of the concerns relating to the first two approaches, but would have the disadvantage of being new and untested, meaning that there would be little ability to draw on case law from other jurisdictions.

A "Starter for 10" was set out in the paper, laying out the basic elements for the physical and mental elements of cartel offences. The document said the majority of cartel trials would be by judge alone and asked whether provision should be made for all such trials to be judge only?

It suggested that maximum jail terms of between five and seven years would probably be appropriate for cartel offences.

The MED also noted that the current level of fines for obstruction offences in the *Commerce Act* was inadequate and said that consideration should be given to bringing it into line with the *Securities Act* penalties.

The paper posed 35 questions for submitters, including whether or not New Zealand should introduce criminal penalties for hard-core cartel conduct, what the physical elements of a cartel offence should be, whether or not there should be a competition element and whether or not conspiracy should be brought into an offence.

A second document about cartels, entitled *Criminalisation of Cartel Behaviour*, written by David King for the Ministry of Economic Development, was also released on January 27.

It said that empirical work over the past two decades had established that cartels did significant harm.



David King

Mr King discussed two frameworks for dealing with such conduct:

- Retribution - because cartel conduct was widely seen as having the serious moral component associated with such a framework.
- Deterrence - both to minimise social loss and because it was a widely-used economic framework applied to cartel behaviour.

He concluded cartel conduct had a serious moral dimension and that criminalisation of the offence, including jail terms, was justifiable when a retributive approach was taken.

Mr King said that, while there would be significant evidential problems, he also believed that criminalisation would be optimal from a social loss deterrence perspective. Other penalties such as high fines and leniency programmes had drawbacks, many of which would be overcome by criminalisation.

"I find a number of the arguments against criminalisation unpersuasive, in particular those relating to judicial processes, for example the difficulty of defining the offence and the higher standard of proof, and the impact on incentives for innovative business behaviour."

Mr King said that it should be possible to define a hard-core offence with sufficient clarity to avoid impacts on innovation. Achieving broad community support, including from the judiciary and regulators, for the use of criminal sanctions would be critical to achieving credible deterrence. Submissions on the issue close on March 31, 2010.

- By Catriona MacLennan

New application form for those seeking Royal mercy

A new application form and explanatory brochure, for people considering if they want to seek the exercise of the Royal Prerogative of Mercy, are now available on the internet.

"The new documents have been written in plain language and can be downloaded from the website of the Governor-General, or provided in hard copy on request," says Robert Taylor, Official Secretary to the Governor-General.

"The Royal Prerogative of Mercy is an important constitutional safeguard providing a special avenue for cases to be re-opened where a person may have been wrongly convicted or sentenced," Mr Taylor said.

"It is essential that potential applicants have easy to follow information about the process and know what details they need to provide on making an application.

These documents have been designed with that in mind.

All applicants will be required to complete the application form. Assistance may be requested by persons who are not fluent in English."

The information pamphlet and application form may be downloaded from:
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PPSA UPDATE - 10 YEARS ON

Thursday 11 February 2010, 4 to 6pm, Heritage Hotel

Identifying where problems are likely to arise

This seminar is designed to provide a practical update for practitioners in this field and for general and suburban practitioners and legal executives - seeking an introduction or refresher in this field of law. In a practical way it will outline the everyday issues practitioners need to know about to acquire a sound working knowledge of this subject and an update on the related law.

Topics:

The scope of the Act:

- What is a security interest?
- What is an account receivable?
- Recent case law – eg North Shore City Council v Stiassny Feltex

Registrations

- Legal Requirements
- Significance of registration
- Registering a Financing Statement
 - Mistakes/Seriously misleading statements
 - Debtor details
 - Serial numbers

- Expiry of Financing Statements

Practical Issues

- Seriously misleading names:
 - Ltd liability companies – validation on registration
 - Other organisations – no validation
 - Example – Ltd Partnerships – organisation type “other” and not “partnership”
 - Problems with names of sole traders and individuals
- Special rules for motor vehicles
 - “Industry” error rate for vin and reg number 30%
 - Risk of reg number changing
- The need to monitor for expiry
 - Have to have systems
 - May no longer act for client
 - May not have current address
- Risk of accepting appointment as person “acting on behalf”
 - Obligations – such as provide information
 - Time bound tasks – name changes of debtor

- Time bound tasks – change demands
- Debtor service issues – discharges

• Enforcement

Legal Requirements

- Scope of Part 9 – Enforcement of security interests
- Credit Repossession Act
- Receivers
- Interface with Property Law Act 2007
 - Mortgages of goods
- PLA 2007 amendments to PPSA
- Restriction on remedies
- Practical Issues

Presenters:

Associate Professor Mike Gedye, University of Auckland
 Michael Bos, Barrister
 Greg Blanchard, Barrister
 Kim Powell, principal, EDX Ltd

Chair:

Geoff Hardy, Principal, Madison Hardy

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Best practice for Property Lawyers

Unit Titles Bill Update

- vendor and purchaser disclosure requirements
- Body Corporate resolutions
- unit and common property boundaries and maintenance
- dispute resolution

Unusual things that happen when buying

Unit titles:

- maintenance issues
- defects in unit title plans
- unit entitlement errors
- s36 Certificates
- insurance issues
- vendor warranties

Westpac v Clark

- Overview
- Implications for conveyancers
- Practical tips

Essential Terms

- Where time is of the essence

Encroachments

- Identifying encroachment rights at the outset
- Where buildings encroach
- Title requisitions; etc

Recognising Potential Pitfalls

- Trustee liability clause (value of assets at the time rather than the assets)
- Changes to Building Amendment Act
- Enduring Powers of Attorneys – Practical Update
 - Who to act for, how to deal with these, how to interpret EPAs.

Questions & Answers

Unit Titles Bill update on

- vendor and purchaser disclosure requirements
- Body Corporate resolutions
- unit and common property boundaries and maintenance
- dispute resolution

Unusual things that happen when buying

Unit titles:

- maintenance issues
- defects in unit title plans
- unit entitlement errors
- s36 Certificates
- insurance issues
- vendor warranties

Presenters:

Liza Irvine, Glaister Ennor
 Nicola Robertson, partner, Sanderson Weir
 Des Wood, barrister
 Denise Marsden, partner, Alexander Dorrington

Chair:

Anne Needham, Glaister Ennor



New Zealand generally has good race relations but ...

New Zealand is generally blessed with a good race relations record, Judge Ajit Singh, Manukau District Court judge, told a major conference in New Delhi, India last month.

Judge Singh addressed the Pravasi Bharatiya Divas conference of the Global Organisation for People of Indian Origin (GOPIO) on the subject "State and Judicial Responses to Racially Aggravated Offences: Hate Crime."

In introducing his subject, Judge Singh quoted American Civil Rights activist, Dr Martin Luther King who said in an address to the US National Press Club: "It may be true that morality cannot be legislated but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless."

Judge Singh said hate crimes were of topical interest to minority communities, including persons of Indian origins and national resident Indians in their host nations.

"Our happiness, peace and tranquillity depend on the protections our adopted home state and the judicial system provide for us. Our achievements and productivity are assured when we and our families feel safe."

While New Zealand's record was generally good in this regard, there had been some racially motivated attacks in New Zealand which had been dealt with by the courts with a view to denouncing such offending and sending a message that hopefully would have a deterrent effect, Judge Singh told the conference.

"Various laws deal with race relations issues. In particular, s.9 (1) (h) of the *Sentencing Act 2002* provides for enhanced sentence in a case where it is committed because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and:

- (i) the hostility is because of the common characteristic, and
- (ii) the offender believed that the victim has that characteristic."

Judge Singh said the offending needed to be attributable either wholly or partly to that hostility. "Often, the motive will be self-evident from the use of racist expressions, either in the course of offending itself, or in the subsequent incriminating statements," he said.

The rationale for treating racially motivated offences as an aggravating feature was because, they not only impacted on individuals, but also because the offences engendered fear among the whole group to which the offender belonged and fostered wider disharmony within New Zealand society. In particular, it effectively alienated the victim and his/her group.

In *Wiremu & Buddock v NZ Police* (30/03/2009), the accused were convicted of throwing pipe bombs and threatening acts, in the period April

to August 2008, at the Manurewa Sikh Temple, Auckland. They had also defaced the temple walls by spray paint with obscenities, including sexually explicit depictions of male and female genitalia, said Judge Singh.

Further, KKK and Nazi swastika images were used as symbols of religious and ethnic hatred. Judge Singh said, that in upholding the decision, the New Zealand High Court had stated: "The need to denounce adequately offending motivated by hate for particular sectors of the community needs to be balanced against the outcome of the restorative justice conference ..."

While the Sikh community accepted the apologies offered by [W & B], it is far from clear that they accepted the weak explanations for their conduct. Impetuous conduct caused by the use of alcohol on four separate occasions, during which time pipe bombs were manufactured on two occasions, is implausible.



'It may be true that morality cannot be legislated but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless'

Dr Martin Luther King

"Whilst the two prisoners were entitled to credit for facing up to their victims and apologising to them, that particular mitigating factor cannot outweigh the need for denunciation and deterrence in relation to the offending itself."

The High Court upheld the sentence of two years and nine months imprisonment for each of the convicted person.

Judge Singh said it was of interest to note the views of a Parliamentary Select Committee in regards to the law and hate crimes: "We want the law to say that we simply will not tolerate this kind of behaviour ... It is important for the court to send a real message on fundamental values. There is a different moral quality and a different risk to the society which we should be reflecting."

Judge Singh said that in *R v Curry* in the Court of Appeal, Justice Robertson had stated that: "It is impossible to avoid the stark reality that what occurred here was an outrageous attack with racial overtones permeated by arrogance and a total disregard for others by a group of vicious bullying cowards perpetrated on a young and defenceless lad.

"Behaviour of this sort is anathema in our society. It has overtones and aspects which call for strong denunciation and the imposition of penalties which will hopefully deter others who are minded to act in this way."

Judge Singh told the GOPIO conference there had been other cases of hate crimes in New Zealand including the defacing of various mosques in Auckland, for which the offenders were convicted and sentenced to imprisonment.

"The desecration of a Jewish cemetery resulted in our Parliament passing a motion condemning anti-Semitism," he said.

"And recently, the New Zealand Foreign Affairs, Defence and Trade Committee recommended that our Government raise concerns with Iran about the human rights violations and the treatment of the detained members of the Baha'i community."

Judge Singh said the foregoing exemplified the commitment of the New Zealand Government and the New Zealand Judiciary to both denounce and deter racial hatred.

It was also important to differentiate between "hate crime" and "opportunistic crime," he said. "Often, PIOs and NRIs [persons of Indian origin and national resident Indians] and other minority groups are victims of opportunistic crimes.

"Our community members are generally in the frontline businesses such as dairies, service station operators, bank officers and retail businesses"

Armed robberies of such premises were generally committed, not because the operators were or Indian origin or Indian residents, but because such businesses carried cash and had valuables.

"Such crimes do not constitute 'hate crime' and it is important for us to educate our communities on ways to mitigate being targets."

• By Colin Taylor

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+ wills

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Michael Joseph ROZIJN, late of 1/1 Mountfield Terrace, Mt Albert, Auckland, Architect, Aged 29, (died 08'11'2009)

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