

## BULLETIN 2

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Editor: Theresa Keenan, LLB



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### FEATURE ARTICLE

# Out with the old and in with the new – Contract and Commercial Law Act

## Introduction

The Contract and Commercial Law Act 2017 (CCLA) came into force on 1 September 2017 and consolidates and modernises New Zealand’s law relating to contracts and sales. It is the first piece of legislation in the Government’s programme to review and revise outdated legislation.

## Revision programme

The Legislation Act 2012 introduces a mechanism for systematically revising the presentation of some New Zealand statutes to make them more accessible, readable and easier to understand.

The CCLA is the first Act passed under the Government’s triennial statute revision programme and the first major statute law revision exercise by any government since 1908.

Revision Bills are prepared under subpart 3 of Pt 2 of the Legislation Act 2012. They may revise the whole or part of one or more Acts and omit redundant or spent provisions, as well as making changes in language, format and punctuation, and any necessary repeals.

A revision Bill must not change the effect of the law or contain any new policy or substantive law changes. The intention is not to make substantive policy changes but to make minor amendments only.

## What is the CCLA?

The CCLA modernises 12 New Zealand statutes that were enacted between 1908 and 1994. These relate to:

- contracts
- the sale of goods
- electronic transactions

- the carriage of goods, and
- various other commercial matters, including mercantile agents and bills of lading.

The CCLA repeals these existing contract and commercial statutes and brings them under one Act. The revision process has resulted in minor amendments to the legislation, including removal of a number of examples of inconsistencies, dated or redundant language, outdated references (eg to repealed legislation) and other anomalies. Schedule 2 lists minor amendments made to clarify Parliament's intention to reconcile prior inconsistencies, however, the substance of the existing law remains intact.

The following contract and commercial law statutes have been repealed and replaced (repealed Acts):

- Contractual Mistakes Act 1977
- Contracts (Privity) Act 1982
- Contractual Remedies Act 1979
- Illegal Contracts Act 1970
- Minors' Contracts Act 1969
- Frustrated Contracts Act 1944
- Carriage of Goods Act 1979
- Sale of Goods Act 1908
- Sale of Goods (United Nations Convention) Act 1994
- Electronic Transactions Act 2002
- Wages Protection and Contractors' Liens Act Repeal Act 1987
- Mercantile Law Act 1908 (in part).

The CCLA is not a complete regime for contract and commercial legislation as a number of key commercial statutes, including the Fair Trading Act 1986, Consumer Guarantees Act 1993, Credit Contracts and Consumer Finance Act 2003, Personal Property Securities Act 1999 and the Property Law Act 1952 are excluded from the CCLA's revisions.

### How is the CCLA different to other statutes?

The provisions in the CCLA substantially replicate those in the existing statutes, except that the language of some provisions has been modernised to make the provisions more accessible for business and users, and minor changes have been made to the legal effect of a small number of provisions in order to clarify Parliament's intent or reconcile inconsistencies.

The schedules to the CCLA are helpful when considering the impact of the CCLA on existing contracts. In particular, sch 2 sets out which provisions have been subject to minor changes in legal effect and which, accordingly, will not apply to pre-1 September 2017 contracts.

#### Examples

##### Section 124(2) CCLA — s 4(1) of the Sale of Goods Act 1908

The provision about the sale of necessities to a person who is incompetent to contract is amended to refer to a person who is incompetent to contract by reason of intoxication (rather than drunkenness).

#### Section 179 CCLA — s 46(1) of the Sale of Goods Act 1908

The provision about the duration of transit is extended to refer to carriers by air (as well as carriers by land or water).

### What changes need to be made?

From 1 September 2017, where applicable, new contracts need to have incorporated the changes required by the CCLA and the key change that is required for new contracts is to update any express reference to a repealed Act or any specific provision of a repealed Act. To assist with this, the CCLA sets out minor amendments to clarify Parliament's intent to reconcile inconsistencies in sch 2, together with a comparative table of the clauses of the repealed Acts and the CCLA in sch 3.

## OTHER MATTERS

### Phase 2 is now in force — are you ready?

#### Background

Phase 1 of the Anti-Money Laundering and Financing of Terrorism Act 2009 (AML Act) came into effect in 2013 and placed obligations on financial institutions and casinos to comply with anti-money laundering obligations (AML) under the AML Act with Government agencies overseeing and enforcing the regime to help businesses comply with it.

In June 2016, the Prime Minister announced the Government would fast track Phase 2 of the AML Act which would extend the regime to more businesses and professions.

The Anti-Money Laundering and Countering of Financing of Terrorism Amendment Act 2017 (Amendment Act) received Royal Assent on 10 August 2017 and implements Phase 2 of the AML Act reforms.

#### Why Phase 2?

The Amendment Act covers business activities that pose a high risk of being misused by criminals to conduct financial transactions or purchase assets.

Part of the reason for extending the AML regime to the Phase 2 sectors is to bring New Zealand into line with international best practice and help maintain public and business confidence in New Zealand's overall financial system. New Zealand, being a member of the Financial Action Task Force (FATF), aligns with the standards set by the FATF and the FATF requires certain business activities within the Phase 2 sectors to be brought within the AML regime. Phase 2 will help New Zealand comply with the FATF standards by including these additional sectors within New Zealand's AML regime. The measures in Phase 2 will also support New Zealand in its evaluation by the FATF in 2020 to assess New Zealand's compliance with the FATF standards and the effectiveness of the AML regime.

#### Extension to Phase 2 businesses

The main focus of the Amendment Act is to extend the current AML Act regime to the following businesses with the commencement being incremental:

- lawyers and conveyancers by 1 July 2018

- accountants by 1 October 2018
- real estate agents by 1 January 2019, and
- Racing Board and high-value dealers by 1 August 2019.

The businesses and professions in these sectors are considered to be vulnerable to misuse by criminals.

### Obligations before Phase 2

These Phase 2 businesses had obligations to help detect and deter serious criminal activity and the Amendment Act enhances and in some cases replaces those existing obligations.

The Financial Transactions Reporting Act 1996 (FTR Act) (*repealed*) required lawyers, conveyancers, real estate agents and accountants to comply with obligations such as identity verification, record keeping and reporting suspicious transactions. Also, some high value dealers have obligations under the Secondhand Dealers and Pawnbrokers Act 2004.

However, these obligations only applied in limited circumstances and were not as robust as those that apply to reporting entities under the AML Act. Also, unlike the reporting entities under Phase 1, these sectors had not been monitored by a supervisor that assesses the risk of money laundering, monitors and enforces compliance with legislation, and provides guidance.

### Obligations for Phase 2 entities

The obligations of Phase 2 reporting entities are as follows:

- appoint an AML/CFT Compliance Officer
- develop and maintain an AML/CFT risk assessment and compliance programme
- conduct customer due diligence (asking for and verifying customer identification) in a wider range of circumstances
- conduct enhanced customer due diligence (verifying source of funds or wealth) when conducting high-risk transactions
- proactively monitor accounts to identify suspicious activity and where appropriate report suspicious activity to the Financial Intelligence Unit (FIU)
- retain records of documents associated with transactions (including the nature, amount, currency, date and parties involved) for not less than five years
- report transactions or proposed transactions to the FIU if there is a reasonable suspicion they involve money laundering or the proceeds of crime
- meet audit and annual reporting requirements, and
- be supervised by an appropriate authority (see below).

### Supervisor

The Department of Internal Affairs (DIA) will supervise Phase 2 businesses.

### Enhancing and refining the AML Act

The Amendment Act also makes amendments to existing provisions in the AML Act to improve the operation of the regime with some amendments aimed at reducing compliance costs.

The amendments include:

- Extend the current requirement to report suspicious transactions to reporting suspicious activities. For example, a suspicious activity as opposed to a suspicious transaction is where a reporting entity provides or proposes to provide a service to a person, a person requests a reporting entity to provide a service, or a person makes an inquiry to the reporting entity in relation to a service.
- Amendments to the provisions relating to designated business groups and reliance on another business to conduct customer due diligence:
  - The definition of designated business group has been expanded to include related Phase 2 businesses.
  - Where there is reliance on another business to conduct customer due diligence the documents used to undertake due diligence will not have to be provided unless requested. In addition, the entity relying on another reporting entity won't be liable for relying on that entity where certain conditions are met.
- The situations in which low-risk reporting entities are allowed to conduct simplified due diligence is expanded to include state-owned enterprises and subsidiaries of listed companies in countries with sufficient AML systems.
- Amendments to streamline the Ministerial Exemptions process. The exemption process provides a way that businesses can be excluded from either all or part of their obligations, in particular where the businesses are unintentionally captured by the laws.
- Enhancement of information-sharing arrangements under the AML Act to address key gaps identified in the current information-sharing provisions (for example, there are limits on Government agencies' ability to share personal information). The Amendment Act extends the scope of the information-sharing powers by allowing information sharing with, for instance, regulators of the new classes of reporting entity (eg the New Zealand Law Society for lawyers) and where permitted by regulations.
- Amendments to bring certain existing obligations from regulations into the AML Act.

### Cartel reform

The Commerce (Cartels and Other Matters) Amendment Act 2017 (Amendment Act) came into force on 15 August 2017. The Amendment Act amends the Commerce Act 1986 to better provide for pro-competitive collaboration between firms, while also deterring anticompetitive behaviour.

### What are cartels?

Cartels are formed when rival firms agree not to compete with each other. They allow firms to raise their prices above the competitive level without fear of losing customers

to rival competitors. This increases the profits of cartel participants but does not benefit consumers.

### Scope of the Amendment Act

The Amendment Act clarifies the scope of the prohibition on cartel behaviour and specifies certain exceptions from that prohibition. It establishes a clearance regime so that businesses can manage risk by approaching the Commerce Commission before entering into or amending an arrangement.

### New provisions

Sections 29 to 34 of the Commerce Act have been repealed by the Amendment Act and replaced with specific cartel provisions in ss 30 to 33.

Section 30 sets out the prohibition against cartels. It prohibits the entry into a contract or arrangement or arriving at an understanding that contains a cartel provision or the giving effect to a cartel provision. The prohibition will not apply, however, to conduct covered by any of the exceptions in ss 31 to 33.

Section 30A defines a “cartel provision” as a provision in a contract, arrangement, or understanding with the purpose, effect, or likely effect of one or more of the following:

- price fixing
- restricting output, or
- market allocating.

It also defines the terms “price fixing”, “restricting output” and “market allocating”. Section 30B sets out additional matters of interpretation relating to cartel provisions and s 30C provides that cartel provisions are generally unenforceable.

### Exceptions

At the same time, the new provisions recognise that collaboration between firms can also increase growth and productivity. Consequently, ss 31 to 33 set out exceptions for certain activities that are seen as legitimate, pro-competitive conduct but that might fall within the prohibition on cartel behaviour if they were not specifically exempted.

Section 31 provides an exception for collaborative activities. Collaborative activities are defined as being enterprises, ventures or other activities in trade that are carried on in co-operation by two or more persons, and are not carried on for the dominant purpose of lessening competition between any two or more of the parties. The cartel prohibition does not apply if a party to the collaborative activity and any other person (not necessarily a party) enter into or give effect to a contract, arrangement or understanding that contains a cartel provision as long as the cartel provision is reasonably necessary for the purpose of the collaborative activity.

Section 32 provides an exception for vertical supply agreements limited to contracts where the cartel provision does not have the dominant purpose of lessening competition between any parties to the contract.

Section 33 sets out an exception for joint buying and promotion agreements.

### Clearance regime

The Amendment Act also introduces a clearance regime where businesses may apply to the Commerce Commission to seek clearance in order to provide greater certainty that the collaborative arrangements they are proposing do not raise competition concerns. In assessing whether conduct is prohibited, the Commerce Commission and the courts are likely to look at business documentation such as emails, file notes, board documents, business agreements as well as oral evidence from individual persons.

### Other amendments

The Amendment Act also makes other amendments, including:

- retargeting extraterritorial jurisdiction provisions to better deal with international cartels
- introducing a new regime to regulate overseas mergers
- making agreements relating to international shipping subject to the Commerce Act after a two-year transitional period
- introducing a new targeted exception for specified international liner shipping activities, such as vessel sharing that improve the services to importers and exporters, and
- improving the efficiency of the Commerce Commission’s authorisation process.

## OTHER INFORMATION

### Responsibilities and risks faced by directors clearly explained

#### Duties and Responsibilities of Directors and Company Secretaries in New Zealand — Edition 5

*Duties and Responsibilities of Directors* sets out in a clear and concise manner the duties imposed by law on directors and includes new commentary on the courts’ and regulators’ evolving interpretation of those duties.

The fifth edition has been updated in light of changes brought about by the Financial Markets Conduct Act 2013 coming into force and the redevelopment of the health and safety framework. Practical guidance is given on the steps that can be taken to meet the stricter standards.

#### Topics covered include:

- directors: definition and role
- eligibility and appointment
- termination of office
- powers
- duties
- special responsibilities
- directors’ meetings

- disclosure
- criminal and civil liability (including reference to the Health and Safety Act 2015)
- directors and shareholder litigation
- insider trading
- company secretary.

The guide is an essential resource for directors, governance professionals, management and their advisors, helping them to keep up to date with the legal requirements and developments critical to their roles.

For more information or to order your copy for **only \$120.00** (plus GST and delivery):

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Level 5, 129 Hurstmere Road,  
Takapuna, Auckland 0622.  
PO Box 2378,  
Shortland St, Auckland 1140.  
Telephone: 09-488 2760.  
Facsimile: 09-477 0779.

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