the requirement that the cartel provision be "reasonably necessary" for the purpose of the enterprise, venture or other activity.

The Commission in its revised guidelines commented that a cartel provision need not be essential for the collaborative activity. However, the Commission also noted that it is not enough for a provision to be "merely desirable, expedient, or preferable".

The Act provides for a new clearance regime for collaborative activity. This enables parties to an arrangement that includes a cartel provision to obtain clearance from the Commission under s 65A if the collaborative activity exception applies (and the Commission is also satisfied that there is no substantial lessening of competition).

The Act provides for a statutory 30 working day timeframe for clearance applications. The process followed for clearance applications is likely to be very similar to the current merger clearance process.

In the absence of a clearance, the parties to a proposed joint venture or other collaboration will likely rely more on the advice of their lawyers. That puts a heavy onus on legal advisers in advising on a new approach to cartel conduct that is so far untested in Australia or New Zealand.

One further change to our cartel law worth mentioning relates to shipping arrangements. The current exception to the Commerce Act for international shipping is being repealed and replaced with new limited exceptions for international liner shipping services. These changes will come into force on 14 August 2019.

The bill has made some other changes to the Commerce Act which do not relate to cartels. Probably the most important one is a change to merger enforcement. The Commerce Commission will now (under ss 47A and 47B) have the ability to seek new orders where an overseas entity has acquired a controlling interest in a New Zealand entity and that acquisition is likely to substantially lessen competition in a market. In such a circumstance, the Commission can seek orders from the court against a New Zealand company that the overseas entity has a controlling interest in, including orders for the New Zealand company to cease trading or to divest shares or assets.

In conclusion, the Cartel Bill makes substantial changes to what can be considered to be cartel conduct prohibited by the Commerce Act while also introducing some new important exceptions to what is prohibited. There is a nine-month transitional period before giving effect to existing contracts will give rise to liability under the new law. In the meantime, it will be desirable to review existing contracts and update Commerce Act compliance programmes. ■

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UPDATE
ARBITRATION

AMINZ Arbitration Rules 2017

BY **JOHN WALTON**

OVER THE LAST 10 YEARS, THERE HAS BEEN A QUIET revolution in the arbitration world.

Internationally, there's been much talk of the Trans-Pacific Partnership (TPP), the Investor-state dispute settlement (ISDS) and sovereignty, but the reality of commercial arbitration, both international and domestic, has been far more prosaic; we've all just got on with the job. But things have been happening behind the scenes to make arbitration more user friendly; and to more clearly distinguish arbitration from the traditional route through the courts.

New Zealand has a good track record with arbitration, being adopters of the UNCITRAL Model Law in 1996, and the first adopters of the 2006 amendments to the Model Law in the Arbitration Amendment Act 2007. Then in 2016, we amended the Act again to recognise awards given by emergency arbitrators and to replace the High Court with the Arbitrators & Mediators Institute of New Zealand (AMINZ) as the default body for arbitral tribunal appointments. In 2017, we have further amendments before Parliament to clarify a number of technical issues, including providing for the arbitration of trust disputes.

For its part, AMINZ has promulgated the Arbitration Appeals Tribunal (2008); Rules and Guidelines for the Award of Costs in Arbitration (2014); an Appointments Policy setting out guidelines and procedures for the appointment of all disputes resolution professionals (2016); and the AMINZ Arbitration Rules (2017), which include an Emergency Arbitration Protocol and a model arbitration clause for insertion into commercial agreements.

We are also co-hosting the ICCA Sydney Congress in April 2018, with the AMINZ-ICCA International Arbitration Day following on 20 April 2018; both will be prestigious events on the international arbitration calendar.

The new Rules are a first for AMINZ; based on the latest editions of rules recently published in other Model Law jurisdictions, they have then been drafted for use in both domestic and international arbitrations, consistent with the approach in our Act.

Flexible approach

While most international arbitration rules have been written with every permutation and possibility in mind, drafted to push readers within an inch of their lives (turgid legalese would be one description), the AMINZ Rules have been drafted with flexibility and clarity in front of mind.

The Rules are in 10 logical sections, largely with the NZ Act in mind (though the Rules can be used with seats outside NZ and under other applicable laws). All provisions may be amended by agreement. The following is of note:

- **Objectives** – the overriding objectives of the arbitral proceedings is to resolve the dispute fairly, promptly, cost effectively and in a manner which is proportionate to the matters in dispute. While this may appear to be a statement of the bleeding obvious, some parties do need reminding of this from time to time.
- **Appointment** – the default position is that appointments are made through AMINZ, with the AMINZ Appointments Policy applying where relevant.
- **Administration** – varying levels of administrative assistance is available, from procedural rulings by the AMINZ Court of Arbitration, direct management by a Registrar or administration by a Tribunal Secretary.
- **Emergency arbitration** – particularly for the purposes of granting interim measures or issuing preliminary orders (in terms of articles 17-17M of the First Schedule) prior to the appointment of the arbitral tribunal. Where giving notice would defeat the purpose of the orders sought, there is provision for applications to be made ex parte.
- **Expedited arbitration** – for disputes below $2 million where the issues in dispute do not raise complex legal issues, the submission periods are truncated, hearings may be dispensed with and a summary award provided within one month of the final submission (with reasons and costs awards to follow).
- **Summary dismissal** – where the claim is manifestly without legal merit and/or fails to disclose any reasonably arguable cause of action or cannot succeed.
- **Preliminary issues hearings** – often referred to as a Kaplan Hearing, the purpose is to narrow the issues in dispute as early as possible in the arbitral process.

By default, the Rules adopt the AMINZ guidelines and protocols on appointment, costs and the use of the Appeals Tribunal, though the Rules assume that there will be no appeals on questions of law in terms of clause 5 of the Second Schedule (where such appeals are provided for, they are dealt with by the Appeals Tribunal). Similarly, regard is to be had to the IBA Rules of Evidence and Guidelines on Party Representation and Conflicts of Interest.

There is always a balance between providing rules with the flexibility and ease of use required by the parties for disputes large and small, while at the same time covering the various options which may be required by the parties and their advisors. The drafting committee went to considerable effort to ensure that, if the Rules are adopted without amendment, they would provide what is required to meet the *objectives* in most disputes without adding to time, cost or complexity. We think we have got it about right.

Why have we gone to all this effort?

Arbitration has always offered party autonomy; the ability to set your own procedures, appoint a specialist tribunal, and to procure a more prompt and effective outcome than the alternatives. The changes to the Act, the provision of new guidelines and procedures and the new 2017 AMINZ Arbitration Rules give parties the tools to make the most of what arbitration has to offer; they are also state of art, cementing NZ's place at the forefront of arbitration practice. ■

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