

The Commerce Act

Anti-competitive Practices under Part II of the Commerce Act



COMMERCE COMMISSION

NEW ZEALAND

Anti-competitive Practices

under Part II of the Commerce Act

Purpose of this Publication

The purpose of this publication is to promote understanding of the anti-competitive practices (or restrictive trade practices) prohibited under Part II of the Commerce Act, and the role and powers of the Commerce Commission in enforcing the Commerce Act to promote competition.

The publication is written as a general guide to provide an introduction to the relevant provisions of the Commerce Act for those considering raising concerns with the Commission about possible anti-competitive practices, and for businesses wanting to better understand how the Commerce Act impacts on their activities.

It includes a brief introduction to the Commission and the Commerce Act, followed by more detail on the prohibited restrictive trade practices. It also explains exceptions to anti-competitive behaviour and outlines Commission processes.

The publication is introductory only and, in parts, written in more colloquial language than that used in the Commerce Act. It is not intended to be formal advice about particular issues.

If readers have concerns about their position in relation to the Commerce Act, they should seek professional advice and not rely on this publication.



COMMERCE COMMISSION

NEW ZEALAND

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INTRODUCTION

Role of the Commerce Commission

The purpose of the Commerce Commission (the Commission) is to promote market efficiency by fostering healthy competition, informed choice by consumers and sound economic regulation.

To that end, the Commission's activities include investigation and adjudication of possible restrictive trade practices, which are referred to throughout this publication as anti-competitive practices. This can sometimes lead to the Commission prosecuting the business(es) involved.

In addition to the anti-competitive practice provisions of the Commerce Act 1986, the Commission also enforces a number of general and specific regulatory regimes set out elsewhere in the Commerce Act, and in the Fair Trading Act 1986, the Electricity Industry Reform Act 1998, the Dairy Industry Restructuring Act 2001 and the Telecommunications Act 2001.

The Commerce Act 1986

The purpose of the Commerce Act is "to promote competition in markets for the long-term benefit of consumers". The Act applies to all individuals and businesses, including state-owned enterprises, local government and government departments, in so far as they engage in trade.

In relation to anti-competitive practices, the Act:

- prohibits behaviour that restricts competition;
- allows the Commission to authorise on public benefit grounds proposed anti-competitive practices that would lead to the substantial lessening of competition in a market; and
- allows the Commission to recommend to the Minister of Commerce that specific goods and services be controlled.

Anti-competitive Practices

To promote competition in markets, the Commerce Act prohibits a range of anti-competitive practices, that can involve a number of people or businesses ("collective behaviour") or a single person or business ("unilateral behaviour").

Collective Behaviour

Collective behaviour (behaviour by two or more people or businesses) that is prohibited under the Commerce Act includes:

- **substantially lessening competition** – agreements containing provisions that substantially lessen competition in a market (section 27);
- **excluding competitors** – agreements between competitors containing exclusionary provisions that prevent or limit dealings with a rival (this type of behaviour is also referred to as refusals to deal or group boycotts) (section 29);
- **price fixing** – agreements containing provisions that fix prices among competitors (section 30).

Unilateral Behaviour

Unilateral behaviour (behaviour by a single person or business) that is prohibited under the Commerce Act includes:

- **taking advantage of market power** – a person with a substantial degree of market power taking advantage of that position for an anti-competitive purpose (section 36);
- **resale price maintenance by supplier** – a supplier specifying the minimum price at which the supplier's goods can be sold by other businesses (section 37).

In the next section of this publication, each of these anti-competitive behaviours is explained in more detail.



Raising Your Concerns by Contacting the Commission

Readers who are aware of behaviour that appears to breach the Commerce Act can forward information to the Commission. The Commission will consider this information and, if appropriate, initiate an investigation. The Commission also carries out its own market monitoring and surveillance activities.

An investigation that identifies a breach of the Commerce Act may lead to the Commission taking one of a range of actions, including prosecuting businesses in the High Court. Actions the Commission can take are outlined in the *Commission Processes* section of this publication.

To contact the Commission with information:

Telephone 0800 94 3600

Write to Contact Centre
Commerce Commission
P O Box 2351
Wellington

Email contact@comcom.govt.nz

The Commission may also grant leniency, and take a lower level of enforcement action, or no action at all, against a person or business in exchange for information and full co-operation. Details of the Commission's leniency policy are available at www.comcom.govt.nz.

RELEVANT DEFINITIONS

Markets

The Commerce Act is designed to promote competition in markets, and it is necessary to determine which market is likely to be affected by anti-competitive behaviour.

The term ‘market’ is defined in the Commerce Act as:

‘market in New Zealand for goods or services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them.’

This focus on substitution is of primary importance when defining the extent of a market. Goods and services that are close substitutes fall in the same market. This means, for example, that butter and margarine are likely to be defined as part of one ‘spreads’ market, rather than being two separate markets, even though manufacturers could argue their products contain very different ingredients. Different transportation services between two centres could also be part of a single market, even though the vehicles used are different.

Beyond this goods and services dimension of a market, there are dimensions of the market relating to functional level, temporal level and geographic extent:

- the functional level of the market refers to its position in the vertical chain of production or distribution. For example, a ‘wholesale market’ refers to a market where transactions are between wholesale suppliers and retail buyers, whereas a ‘retail market’ refers to a market where transactions are between retail suppliers and consumers;
- the temporal level refers to the time dimension of a market. For example, some markets are seasonal, while others have peak and off-peak components; and
- the geographic extent of the market concerns the geographic area over which transactions between competing suppliers and buyers take place. For example, some markets cover the whole country while others cover regions within New Zealand.

Agreements

For the purpose of this document, contracts, arrangements and understandings are referred to as agreements.

However, there are differences, which are defined in the Commerce Act:

- a contract is a legally enforceable agreement;
- an arrangement or understanding is something less formal than a contract. It is some sort of communication between two or more people, resulting in each person expecting the other to act in a particular manner. Arrangements or understandings may include an agreement that is as informal as being given a “nod or a wink”.

An agreement entered into by a trade association is considered by the Commerce Act to be between all the members of that association unless a member gives written notice that it will not be a party to the agreement.

“Effect”

Deciding whether a provision in an agreement has the effect of restricting competition is closely related to the definition of the market involved.

If the effect of a provision in an agreement is to substantially lessen competition, then it does not matter that there was no purpose to do so.

“Substantial”

Under the Commerce Act, substantial is defined as ‘being real or of substance’.

To be anti-competitive, the purpose, effect or likely effect of a provision in an agreement must be to substantially lessen competition.



ANTI-COMPETITIVE PRACTICES

Substantially Lessening Competition (section 27)

Section 27 provides a broad rule that states that no person shall enter into an agreement that contains a provision that substantially lessens competition in a market.

In order to establish whether competition has been substantially lessened, the Commission considers the impact of the provision on the overall competitive process. This involves assessing the ability of other market participants to compete effectively and the ability of prospective participants to enter the market.

Elements

Section 27 applies where either of the following two elements is established:

- a person *enters* into an agreement containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market; and / or
- a person *gives effect* to a provision of an agreement that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

A provision of an agreement that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, is not legally enforceable. In other words, one person cannot force another to abide by provisions of an agreement if the provisions breach the Commerce Act.

Example 1

The High Court ordered nine North Island meat companies to pay more than \$5.5 million in penalties after it was found agreements between them meant they did not have to compete against each other for livestock on the basis of price.

The Commission had alleged that the nine companies, through a series of more than 90 regular meetings over a number of years, had entered into anti-competitive agreements that related to the prices they would pay farmers for livestock.

By deciding among themselves how much they would offer to pay farmers for their livestock, the meat companies had entered into agreements containing provisions that were likely to have the effect of substantially lessening competition in the North Island market for the purchase of livestock.

Example 2

A port company was ordered to pay penalties totalling \$500,000 after the High Court found that the company had breached both section 27 and section 36 (taking advantage of market power) of the Commerce Act.

The port company, which provided a number of services to harbour users including pilotage, tugs and stevedoring, offered customers a considerable discount if they purchased all of the harbour services they needed from the port company. The Court found that the discount had the purpose and likely effect of substantially lessening competition in the pilotage market.

Excluding Competitors (section 29)

Section 29 prohibits competitors from entering into agreements that contain exclusionary provisions, which restrict rivals from acquiring or supplying goods or services. Examples of exclusionary arrangements could include:

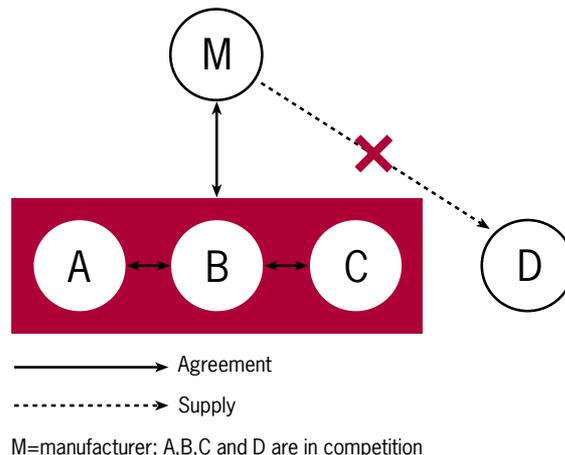
- a group of competitors banding together and threatening a supplier so that the supplier stops supplying rival businesses with goods or services;
- a group of competing suppliers reaching agreement to threaten a business so that it stops buying from a competing supplier; and
- members in a trade association not accepting as members those in the same trade who discount the prices of their goods and services.

Elements

Section 29 applies when the following three elements are established:

1. there must be an agreement between people or businesses, two or more of whom are in competition with each other (or are likely to be in the future);
2. a provision of the agreement must have an exclusionary purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from the target of the exclusionary provision; and
3. the business being targeted must be in competition with (or likely to be in the future) at least one of the parties to the agreement.

In the diagram below, businesses A, B, C and D are all in competition with one another, or potentially in competition with one another, in selling a product manufactured by M. A, B and C collectively threaten M that they will stop buying the product from M unless M agrees to stop supplying D. An arrangement like this is probably anti-competitive.



It is a defence to section 29 to prove that an exclusionary provision does not have the purpose, effect, or likely effect of substantially lessening competition. From the diagram, the parties to the agreement could defend themselves in Court if they could prove that the agreement did not have the purpose, effect, or likely effect, of substantially lessening competition.

Example

A group of two real estate companies and five real estate agents admitted working together to prevent another agent advertising in a property guide. They threatened to boycott the property guide, leading to one issue being cancelled, if the target agent was allowed to advertise in it. The High Court imposed penalties totalling \$60,000.



Price Fixing (section 30)

Section 30 prohibits price fixing, which is when people or businesses that are in competition with each other agree to control, fix or maintain the prices for the goods or services that they supply. This behaviour is anti-competitive because consumers do not have the opportunity to shop around for lower prices. Price fixing is deemed to substantially lessen competition under section 27 of the Commerce Act.

In order to establish a breach of the Commerce Act, there must be evidence of collusion between the people or businesses suspected of price fixing. An apparent similarity in prices or the timing of a price change is not sufficient evidence of collusion. It is also not illegal for a business to follow the prices of its competitors.

Price fixing does not necessarily involve a clear agreement on the final price to charge for goods or services, but might relate to specific parts of the price, such as:

- setting discount levels;
- creating a price range;
- creating a price or discount formula or system;
- setting credit and rebate levels; or
- controlling the components of the price.

Elements

Section 30 applies when the following three elements are established:

1. there is an agreement between people or businesses;
2. the parties to the agreement are in competition with each other (or would be in competition but for the agreement) with respect to the supply or acquisition of goods or services; and
3. the agreement has the purpose, effect, or likely effect, of fixing, controlling or maintaining the price for goods or services, or any discount, allowance, rebate or credit in relation to those goods or services.

Example 1

Three oil companies agreed to stop offering free car washes with \$20 petrol purchases. The free car wash was considered to be a discount in relation to petrol or car wash services. The High Court imposed penalties totalling \$1.175 million on the three companies.

Example 2

A bus company and its Chief Executive admitted that they had breached the Commerce Act by discussing with another bus company how much they should bid for, and who should win, bus route contracts tendered by the Regional Council. The other bus company refused to enter into such an arrangement. The High Court imposed penalties of \$380,000 on the offending bus company and \$10,000 on its Chief Executive.

Example 3

Seven Auckland car dealers admitted breaching the Commerce Act by fixing prices. They had agreed on the maximum discounts they would offer buyers of a new model of car. The High Court imposed penalties totalling \$350,000. An eighth dealer who defended the breach was later found guilty of price fixing and fined \$150,000.

Exceptions

The Commerce Act (sections 31 – 33) exempts price fixing in some cases. These exemptions apply only where the price fixing between competitors does not result in a substantial lessening of competition under section 27 of the Act, and in other relatively rare situations. Examples are when two or more people or businesses are involved in a Joint Venture (section 31), when there is a recommended retail price for a good or service (section 32) or when businesses are involved in joint buying and advertising (section 33).

You can seek further advice on these exemptions from a lawyer or other professional adviser.



Taking Advantage of Market Power (section 36)

Section 36 prohibits a person or business with a substantial degree of market power in a market from taking advantage of their market power to prevent competition either in that market or in any other market.

The Commerce Act does not prohibit a person or business from having a substantial degree of market power. A substantial degree of market power could have been gained before the introduction of the Commerce Act, or through legislation, or through highly desirable behaviour, such as utilising sound judgement, skill, foresight and innovation to become more efficient than rivals.

In May 2001, section 36 was amended from a ‘dominance’ threshold to a new threshold of a ‘substantial degree of market power’. This change brought section 36 into line with the equivalent provisions in the Australian Trade Practices Act. The definition of ‘substantial degree of market power’ will evolve through case law but, at the time of publication, there were no court precedents in New Zealand relating to the new test.

Elements

Section 36 applies when the following three elements are established:

1. a person or business has a substantial degree of power in a market;
2. that person or business takes advantage of that power; and
3. the *purpose* of the behaviour is to restrict the entry of any person or business into that or any other market, prevent or deter a person or business from engaging in competitive behaviour in that or any other market, or eliminate any person or business from that or any other market.

Section 36A prohibits a person or business taking advantage of market power in trans-Tasman markets.

Example

The following example of market power is from Australia.

Two major music-recording companies threatened to withdraw significant trading benefits from Australian retailers who stocked parallel-imported CDs. In several cases, the recording companies stopped supplying retailers who stocked parallel imports.

The Federal Court Judge held that the two companies had a substantial degree of market power and took advantage of that market power by refusing to supply retailers who stocked parallel imports. This was to deter retailers from engaging in competitive behaviour. Total penalties of more than \$A1 million were imposed on the companies and its senior executives.

The following New Zealand examples were decided under the old ‘dominance’ threshold.

Example 1

A port company was ordered to pay penalties totalling \$500,000 after the Court found that the company had breached both section 27 (substantially lessening competition) and section 36. In respect of section 36, the Court found that the port company had used its dominant position to prevent a rival company competing with its own pilotage services. The port company did this by refusing to provide tugs for towing services where its pilots were not used.

Example 2

A building insulation materials company was fined \$525,000 for using its dominant position in the South Island market for the supply of insulation, for an anti-competitive purpose. The company had adopted and maintained a “2-for-1” pricing strategy for its goods, offering customers two bales of its insulation material for the price of one, to deter a rival company from competing in the market, or to eliminate that rival company from the market.

Resale Price Maintenance (sections 37 and 38)

Resale price maintenance is prohibited under sections 37 and 38 because it restricts or eliminates competition on price.

Resale price maintenance occurs when a supplier of goods (rather than the seller, as under price fixing) specifies the minimum price that a reseller can charge for those goods.

Suppliers are allowed to issue recommended retail prices for goods and services, but they cannot enforce any minimum price.

Resale price maintenance applies only to goods, not services.

In breaching the Commerce Act, a supplier might specify a minimum resale price in a variety of ways:

- in dollar terms (eg “you must sell at no less than \$20”);
- in terms of any discount to be offered (eg “you must not discount more than 10% off the recommended retail price”);
- in terms of another reseller’s price (eg “you must not sell for less than your competitor’s price”).

Elements

There are many actions or behaviours that would breach *section 37*. For instance, if a supplier refuses to supply goods to a reseller unless the reseller agrees not to sell those goods below a specified price, the supplier breaches the Commerce Act. Other examples include:

1. a supplier that persuades or attempts to induce a reseller not to sell supplied goods below a specified price;
2. a supplier that enters or offers to enter into an agreement for the supply of goods, where one of the terms involves a specified minimum price;
3. a supplier that withholds the supply of goods on the basis that a reseller has not agreed to sell the goods at a specified price, or sells goods at a lower price than the supplier’s minimum specified price;

4. a supplier that withholds the supply of goods from a reseller on the basis that a third person has not agreed to sell goods at a price specified, or sells goods at a lower price than the supplier’s minimum specified price.

Section 38 prohibits resale price maintenance by third parties covering situations where a third party has acted in a way that leads to resale price maintenance. Examples of situations where *section 38* would apply include:

- a third party that threatens to hinder or prevent the supply of goods to, or acquisition of goods from, a person unless that person agrees not to sell those goods below a specified price;
- a third party that hinders or prevents the supply of goods to, or acquisition of goods from, a person to induce that person not to sell those goods below a specified price.

Example 1

A brewery tried to prevent a tavern selling promotional packs of beer at less than the recommended retail price. The brewery admitted that one of its sales representatives had induced or attempted to induce the tavern not to sell the packs for \$15. The High Court imposed a penalty of \$110,000 plus \$5,000 costs on the brewery.

Example 2

A bed manufacturer told a retailer to stop discounting beds. It threatened to exclude a retailer from a free linen promotion if discounting continued. The High Court imposed a \$30,000 penalty on the bed manufacturer.

Exception (section 39)

The Commerce Act allows a supplier to issue recommended prices for the resale of its goods and services. However, the supplier must make it clear to its customers that there is no obligation to follow the recommendations. The supplier must also not take any action to attempt to enforce recommended prices.



GENERAL EXCEPTIONS TO ANTI-COMPETITIVE PRACTICES

In addition to the exceptions to specific sections of the Commerce Act, which have already been mentioned, a number of other areas are exempt from the anti-competitive practice provisions of the Commerce Act:

- practices specifically authorised by other statutes (section 43). Any practice that is otherwise anti-competitive, but is specifically provided for in another statute, will not come under the Commerce Act;
- agreements between business partners (concerning their partnership) where none of the partners is a body corporate (section 44(1)(a));
- agreements entered into by a person that restrict the work they might do (for example, a clause in an employment contract that prevents a person from setting up in competition with the employer in the same area for three years) (section 44(1)(c));
- agreements between the seller and the purchaser of a business to protect the 'goodwill' of that business (for example, an agreement whereby the seller of a business will not compete in the same area for three years) (section 44(1)(d));
- obligations to comply with standards that are prepared or approved by Standards New Zealand (section 44(1)(e));
- agreements relating to wages, salaries or working conditions of employees (section 44(1)(f));
- agreements relating exclusively to the export of goods or services, such as agreements involving how exporting quota are allocated across a New Zealand industry. Exporting businesses must supply full details of any agreements to the Commission within 15 working days of making the agreement (section 44(1)(g));
- agreements among users of goods or services who are not 'in trade', against the suppliers of those goods and services (section 44(1)(h));
- agreements between interconnected bodies corporate, (for example subsidiaries of the same body corporate), except those agreements captured by sections 36 and 36A (taking advantage of power in trans-Tasman markets) (section 44(1A));
- agreements relating exclusively to international shipping to or from New Zealand. This exemption does not apply to the carriage of goods to or from a ship, or the loading or unloading of a ship (section 44(2));
- intellectual property rights, except for those agreements captured by sections 36, 36A (taking advantage of power in trans-Tasman markets), 37 and 38 (section 45).



COMMERCE COMMISSION PROCESSES

Members of the public and businesses are encouraged to contact the Commission and provide information about behaviour that appears to breach the Commerce Act. The Commission assesses information it receives in this way, along with information it gathers from its own market monitoring and surveillance activities, to determine the investigations that it carries out into anti-competitive practices.

If the Commission considers that a breach of the Commerce Act has occurred, it has a number of options open to it for resolving each investigation. The options include prosecuting the offending business where this is considered the most appropriate action. Only the Courts can decide whether a behaviour breaches the Commerce Act and award appropriate penalties.

The following section describes the processes followed by the Commission, along with the penalties that Courts can impose for breaching the Commerce Act.

Assessing Information

Investigations are commenced according to a set of criteria the Commission has developed. In general terms, investigations are focused on matters where the available information indicates that:

- there is a significant detriment to consumers, other businesses or competition in the specific market or associated markets;
- the nature of the behaviour is in itself serious or raises serious issues in law; and
- the behaviour is an area of strategic priority for the Commission.

Carrying out an Investigation

In the course of carrying out an investigation, the Commission is able to use a number of significant statutory powers to assist it in gathering information and evidence about the behaviour it considers is in breach of the Commerce Act. These powers enable the Commission to:

- require businesses and individuals to provide information;
- obtain and execute search warrants; and
- control access to information.

Each of these powers is discussed in more detail below.

Power to obtain information (section 98(a)(b) and (c))

The Commerce Act gives the Commission power to require a person or business to:

- provide in writing any specified information or class of information (section 98(a));
- produce any specified document or class of documents (section 98(b));
- appear before the Commission at a specified time and place to give evidence, and produce any specified documents or class of documents. Evidence may be taken on oath (section 98(c)).

These powers to obtain information are significant because they mean that the Commission can compel a business to provide information that could assist the Commission to prove that the business has breached the legislation. The Commission is able to take criminal action against any business that refuses to provide the information the Commission has requested under its section 98 powers.

Search warrant powers (sections 98A and 98B)

The Commerce Act gives the Commission the power to obtain and execute search warrants.

A search warrant, issued by the District Court, means that the Commission may:

- search specified premises, seize and remove goods, documents, computer records and other items;
- enter premises with force if necessary; and
- obtain assistance in the search from, for example, the police or computer experts.

The occupier or person in charge of the premises to be searched has to provide the Commission with reasonable facilities and assistance when a search warrant is executed (section 98E and 98F). This includes assisting in:

- identifying and locating the information required; and
- reproducing information stored or recorded (such as computer records).

Any power to exercise a search warrant is significant. The Commission's power to execute a search warrant is even more significant since the occupier or person in charge of the premises being searched must assist the Commission. Again, the Commission is able to take criminal action against any occupier or person in charge of the premises that refuses to assist the Commission in executing a search warrant that has been properly issued.

Confidentiality orders (section 100)

Often, when the Commission is investigating a possible breach of the Commerce Act, it needs to see highly confidential or sensitive material. The Commission has wide powers to control access to information. Under section 100 of the Commerce Act, the Commission is given the power to order individuals or businesses to not publish or talk about any evidence given to the Commission during an investigation. This is commonly referred to as a confidentiality order. Section 100 applies this power to any information, document or any other evidence (for example, photographs or statements made to the Commission).

To support the effect of a confidentiality order, the Commerce Act makes it an offence for anyone, including the Commission and the owner of the information, to publish or communicate the information covered by the confidentiality order. Often the confidentiality order will state the period for which it remains in effect. If the order does not specify any time period, it will remain in effect until the investigation is finished.

The Commission has certain obligations under the Official Information Act 1982, this Act does not however, apply to

the information controlled under a confidentiality order until after the order has expired.

Again, the Commission is able to take criminal action against any person that breaches the terms of a confidentiality order.

Resolving an Investigation

In the course of some investigations, the Commission may reach the finding that no breach has occurred, or that it is more appropriate for another enforcement agency (such as the Serious Fraud Office) to investigate the matter, and therefore that no further enforcement action is required by the Commission.

Once the Commission is satisfied however, that a breach of the Commerce Act has been found, it has a number of options available for resolving the investigation.

The Commission applies the same enforcement criteria that it uses in assessing whether to commence an investigation, to guide its decision about the most appropriate way in which to resolve an investigation.

In determining the best resolution, the Commission considers both the individual circumstances and the seriousness of the breach, including the impact on consumers, other businesses or competition itself, the nature of the behaviour and the strength of the evidence.

In all cases, however, the Commission's primary goal is for industry and business groups and individual businesses to behave competitively, consistent with the Commerce Act. Thus, the Commission's actions are aimed at stopping businesses continuing to undertake prohibited practices and deter others from beginning or repeating such practices.

Where the Commission assesses that it is necessary to act urgently to prevent a particular person or consumers from suffering further serious loss or damage, or in the general interests of the public, it may either seek a Cease and Desist Order or apply to the High Court for an injunction.



In resolving an investigation, the Commission may:

- issue an advisory letter to businesses that have inadvertently breached, or may be at risk of breaching, the Commerce Act, outlining what is expected of them under the legislation;
- issue a formal warning, where the behaviour that is at risk of breaching the Commerce Act is not considered to be either deliberate or significant;
- enter into a settlement, where the business acknowledges it has breached the legislation, agrees to modify its behaviour and provides formal signed undertakings (sometimes in the form of a deed) to this effect. The conditions specified in the undertaking or deed will depend on the facts of the case;
- prosecute the person or business through the Courts.

The legal actions the Commission may take are described in more detail below.

Cease and Desist Orders

Under section 74A of the Commerce Act, the Commission can seek a Cease and Desist Order, in certain circumstances and on specific terms, from a Cease and Desist Commissioner.

A Cease and Desist Order may require a person or business to stop doing something or to not start doing something. A Cease and Desist Order may alternatively require a person or business to do something if the Commission is satisfied that simply restraining the person from the behaviour will not restore competition in a market.

The procedures for issuing a Cease and Desist Order, which reflect the principles of natural justice, are set out in the Commerce Act. Specific Cease and Desist Commissioners are appointed under the Commerce Act to consider applications from the Commission for such orders. A Cease and Desist Commissioner has no other powers or role within the Commerce Commission.

A person or business that breaches a Cease and Desist Order is liable to a penalty of up to \$500,000.

Injunctions

Under section 81 of the Commerce Act, the Commission can seek an injunction from the High Court. The High Court has the power to make orders (called injunctions) stopping people from any activity that breaches Part II of the Act. The Court can grant injunctions to stop people breaching, attempting to breach, encouraging other people to breach, being involved in breaches, or conspiring with others to breach the Act. The injunctions can be temporary or final.

Although it is rare for people not to comply with an injunction, anyone who does fail to comply risks being in contempt of Court. The Court has wide powers to ensure people comply with an injunction. It can impose fines, seize property or imprison people. It can also appoint court officers to carry out the Court's orders.

Prosecution

The Commission may also take a civil prosecution, through which it seeks penalties against an individual, business or group of businesses.

Anyone can take private court action under the Commerce Act in relation to restrictive trade practices. The option of private action is available even when the Commission has resolved the investigation in another way or did not investigate the matter. Only the Commission however, can seek a pecuniary penalty for a breach of the Commerce Act.

Court Penalties for Anti-competitive Practices

If the Court finds that a person has breached the Commerce Act, it may:

- impose pecuniary penalties on businesses that must not exceed the greater of:
 - \$10 million;
 - or either:
 - three times the value of any commercial gain or expected commercial gain resulting from the breach; or
 - if commercial gain is not known, 10% of the turnover of the business and all of its interconnected businesses (if any).



In determining the appropriate penalty, the Court must have regard to the nature and extent of any commercial gain;

- impose pecuniary penalties of up to \$500,000 on an individual. The Court must order an individual to pay a monetary penalty unless it considers that there is good reason for not making that order;
- order an individual to pay exemplary damages;
- order named persons to be excluded from management of a business;
- impose injunctions restraining businesses or individuals from behaviour that breaches the Commerce Act;
- award damages to any person who has suffered loss or damage by a breach of the Commerce Act; or
- order a variety of other remedies, including orders varying contracts that breach the Commerce Act.

Examples

- Nine meat companies were fined a total of \$5.5 million for breaching section 27 (substantially lessening of competition) of the Commerce Act.
- A port company was ordered to pay penalties of \$500,000 for breaching both section 27 (substantially lessening of competition) and section 36 (taking advantage of market power) of the Commerce Act.
- Three oil companies were fined a total of \$1.175 million for breaching section 30 (price fixing) of the Commerce Act.
- A brewery was ordered to pay a penalty of \$110,000 for breaching section 37 (resale price maintenance) of the Commerce Act.

Please note, these examples are prior to the Commerce Act amendment in May 2001. The legislation now allows substantially increased penalties.

Authorisations

The Commission may grant authorisations with respect to practices considered to be in breach of the restrictive trade practice provisions (except sections 36 and 36A which involve taking advantage of market power in New Zealand and / or Australian markets) if it is satisfied that the public benefits of the practice outweigh the detriments arising from the loss of competition.

A business can apply to the Commission for an authorisation, and the Commerce Act sets out the procedures for such applications.

The granting of a restrictive trade practice (market behaviour) authorisation protects the applicant from court action under the Commerce Act by the Commission and private individuals.

CONTACT DETAILS

To contact the Commission with information about unfair or misleading trading practices, or anti-competitive behaviour by businesses:

- call the Contact Centre on 0800 94 3600;
- write to Contact Centre Commerce Commission, PO Box 2351, Wellington; or
- email contact@comcom.govt.nz.



COMMERCE COMMISSION

NEW ZEALAND