COMMERCE COMMISSION

This document should be read in view of amendments to the Commerce Act made in August 2017. The Commission will update the document in the near future to reflect changes made under the Act.

THE COMMERCE ACT

PRICE FIXING AND CARTELS

This fact sheet explains the types of agreements between businesses that amount to price fixing. It is designed to give businesses a better understanding of the types of behaviour and communication that could put them at risk of breaching the Commerce Act.

Any agreement between competitors that sets the price of a good or service or interferes with how that price is reached is illegal under the Commerce Act. This is known as price fixing.

Price fixing includes agreements between competitors to charge customers a specific price for a good or service. But it can also include agreements that ultimately affect the price a customer pays for a good or service. For example, agreeing to rig bids, divide markets by customer or area, or restrict output.

Price fixing agreements are also sometimes referred to as cartels. A cartel is formed when businesses agree to act together for an anti-competitive purpose instead of competing against each other.

Price fixing harms competition. Cartel members make more profit than they would if they competed fairly. This means that goods and services become more expensive, consumers end up with fewer choices, and quality or service levels are likely to deteriorate.

WHAT IS ILLEGAL?

Section 30 of the Commerce Act prohibits any:

- **contract, arrangement or understanding**
- between parties who are **in competition** with each other
- that has the **purpose, effect or likely effect**
- of **fixing, controlling or maintaining** the price of goods or services.

The Act states that a price fixing agreement under section 30 "substantially lessens competition" which is illegal under section 27.

WHAT DO THESE TERMS MEAN?

CONTRACT, ARRANGEMENT OR UNDERSTANDING

- A *contract* is a formal agreement between two or more parties that is enforceable under the law.
- An *arrangement* describes something less formal than a contract. Legally, what is required is a "meeting of minds" that leads to an agreed course of action. This simply means there must have been communication between at least two parties that has led to a shared expectation about what each of them will or will not do.
- An *understanding* is less formal again. It also requires a "meeting of minds" leading to an agreed course of action, but merely a "nod and a wink" between parties can be evidence of an understanding.

Practical tips for businesses when engaging with competitors

1. Make sure that you and your staff are familiar with the requirements of the Commerce Act. Keep records of who has attended training.
2. Think carefully about who you are, or may be, in competition with, especially if sub-contracting is involved.
3. Do not agree prices, discounts or any matters relating to price with your competitors (unless it is a specific sub-contract you are discussing).
4. Do not exchange pricing information with your competitors.
5. If you are approached by another business to discuss pricing, allocating customers, bids for contracts or restricting outputs you should raise an objection straight away. Leave the discussion immediately.
6. Review internal documents, policies and procedures for compliance with the Commerce Act.
7. If you become aware of anti-competitive conduct, contact the Commerce Commission straight away.

Do not agree prices, discounts or any matters relating to price with your competitors.

This means a business does not need to have a formal written contract with a competitor to breach the Commerce Act. It can simply be an understanding reached between competitors about how each of them will behave.

In this fact sheet, the term "agreement" covers the terms contract, arrangement and understanding.

IN COMPETITION

- At least two parties to the agreement must be *in competition* with each other. This means that they compete with each other in the same market, and that the agreement relates to buying or selling goods or services in that market.
- If there are more than two parties to the agreement, only two of them need to be *in competition* with each other.

Businesses can still be considered to be *in competition* with each other when they have entered a sub-contracting relationship. For example, sometimes a business sub-contracts to a competitor because it can't meet the customer's full demand. In such a case, these two businesses are still considered to be *in competition* with each other in the market in which they usually compete. While the businesses in such a sub-contracting relationship can discuss the price of the sub-contract with each other, they must ensure that there is no discussion leading to any kind of agreement between them about the final price that the lead contractor offers the customer.

PURPOSE, EFFECT OR LIKELY EFFECT

- The *purpose* is the intention or aim of an agreement. The purpose of the agreement is inferred from what actually happened (or was likely to happen) as a result of the behaviour and from any evidence of what each party intended when entering into the agreement.
- The *effect* is the actual result of the particular agreement.
- *Likely effect* involves considering what might happen. An effect is considered likely if there is a real and substantial risk that it will occur.

FIXING, CONTROLLING OR MAINTAINING

- *Fixing* means to set the price at a certain level, or to agree a formula which sets the price of the good or service.
- *Controlling* means to interfere with the process of how prices are set. This could be interfering with a component of an overall price, such as an agreement between competitors not to offer a discount on a certain good.
- *Maintaining* means to preserve the price.

An agreement will also breach the Commerce Act if it creates a basis or system which causes or allows a price to be fixed, controlled, or maintained. For example, an agreement that prices will be determined by a third party such as a trade association or an independent accountant.

TYPES OF PRICE FIXING AGREEMENTS

Price fixing is not limited to agreements between competitors where a specific price of a good or service is set. Any agreement between competitors that interferes with how a price is reached is illegal under the Commerce Act.

There are four kinds of agreements between competitors that are illegal because they tend to fix, control or maintain prices. These are:

- price fixing;
- bid rigging;
- market sharing; and
- output restrictions.

PRICE FIXING

Price fixing is when there is an agreement between competitors to fix, control or maintain the price, or any component of the price of goods and services. In effect, price fixing includes any agreement or behaviour that interferes with how the price is reached by each competitor individually. It includes agreements to:

- set a minimum price;
- eliminate or reduce discounts;
- adopt a formula for calculating price;
- increase prices; or
- maintain prices.

BID RIGGING

Bid rigging, or collusive tendering, is a type of price fixing where there is an agreement between competitors about which of them should win a bid. The customer is unaware that these bidders are not actually competing with each other to offer the lowest price.

MARKET SHARING

Market sharing, or market allocation, is where competitors agree to divide up markets between themselves. This could be by allocating customers, products or geographic regions to each other.

OUTPUT RESTRICTIONS

Output restrictions occur where competitors agree to reduce or restrict output of a good or service with the aim of limiting production, then maintaining or increasing prices.

EXAMPLE

A Commission investigation found competitors in the wood preservatives market were taking part in price fixing and market sharing agreements. This included sharing pricing information and agreeing not to compete on price, and not to compete for each other's customers. As a result, farmers were paying higher prices for fence posts and homeowners were paying more for their house framing and decking timber.

Following proceedings in the High Court, Koppers Arch Wood Protection (NZ) Limited, its Australian parent company, three Nufarm companies and two Osmose companies (including individual executives), were fined a total of more than $7.5 million for breaches of the Commerce Act.

ARE THERE ANY EXCEPTIONS?

There are some exceptions in the Act where an agreement between competitors may not be illegal under section 30. These include:

- where two or more businesses are involved in a joint venture (section 31);
- certain joint buying or advertising arrangements (section 33); and
- partnership arrangements between individuals (section 44(1)(a)).

Businesses should seek legal advice if they are considering entering into an agreement with competitors on the basis that they believe the agreement falls under any of these exceptions.

In addition, there is an exception for price recommendations where there are 50 or more parties to the agreement for a recommended price, and it is a genuine "recommendation" (section 32). In other words, the exception only applies where the parties to the agreement are free to depart from the recommendation and decide for themselves at what prices they will actually sell the goods or services.

AUTHORISATIONS UNDER THE COMMERCE ACT

Under the Commerce Act, the Commission can authorise an anti-competitive agreement where it is satisfied that the benefits to the public outweigh the harm of the agreement. More information about authorisations is available on the Commission's website **www.comcom.govt.nz/streamlined-authorisation-process-guidelines/**

LENIENCY POLICY

The Commission has a leniency policy to encourage those in a cartel to stop their involvement, break up the cartel and limit the damage caused by the cartel.

The first cartel member to inform us about the cartel will receive immunity from prosecution by the Commission. To qualify for immunity, the cartel member must fully cooperate in the investigation and any subsequent proceedings.

You can read the Commission's leniency policy and process guidelines on our website at **www.comcom.govt.nz/cartel-leniency-policy**

To check for updates to this fact sheet visit: **www.comcom.govt.nz/anti-competitive-practices**

This fact sheet is part of a series looking at the Commerce Act and anti-competitive practices. Other fact sheets in this series can be downloaded from **www.comcom.govt.nz/anti-competitive-practices**

CONTACT

Contact the Commerce Commission with information about possible breaches of the Commerce Act.

TELEPHONE
Our Contact Centre during office hours on 0800 943 600

WRITE
To us at Contact Centre,
PO Box 2351, Wellington 6140

EMAIL
Us at contact@comcom.govt.nz

This fact sheet is a guideline only and reflects the Commission's view. The publication is not intended to be definitive and should not be used instead of legal advice. It is businesses' responsibility to remain up to date with legislation.

Only the courts can make a ruling on breaches of the Commerce Act.

PENALTIES

If the courts find an individual or body corporate has breached the Commerce Act, penalties can be heavy:

- **for an individual, a maximum of $500,000; or**
- **for a body corporate, the greater of:**
  - $10 million, or
  - three times the commercial gain, or, if this cannot be easily established, 10 percent of turnover.

Every separate breach of the Act (even if done by the same person) may incur a penalty.