

The Commerce Act

Resale price maintenance



Resale price maintenance occurs when a supplier of goods enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods. A reseller may be a distributor or a retailer. Resale price maintenance prevents resellers from setting their prices independently and can lead to increased prices for consumers. It is a form of anti-competitive conduct and is unlawful under sections 37 or 38 of the Commerce Act.

What is unlawful?

It is a breach of the resale price maintenance provisions of the Commerce Act if a supplier of goods:

- specifies a price
- takes certain actions to enforce that specified price.

What is a specified price?

A specified price is where a supplier stipulates a price below which the goods may not be sold. In other words, it is a minimum price, as specified by the supplier.

The specified price does not need to be an exact figure. A supplier can specify a price by referring to a formula, a range of prices, a document containing prices, or a price list.

Some examples of specified prices include:

- A price in dollar terms. For example, “You must sell at no less than \$20.”
- A retail margin. For example, “You must sell at a price at least 30% above the wholesale price.”
- A discount to be offered. For example, “You must not discount more than 10%t off the recommended retail price.”
- A reference to another reseller’s price. For example, “You must not sell for less than your competitor’s price.”

What is a recommended retail price?

A recommended retail price (RRP) is where a supplier recommends a price at which their goods should be sold.

It is fine for a supplier to recommend a price to its resellers but it cannot do anything to try to enforce that recommended price.

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Breaching the resale price maintenance provisions

A supplier will breach section 37 of the Commerce Act if they do any of the following:

- Tell a reseller that they will not supply them with goods unless those goods are sold, advertised or offered for sale above a specified price. For example, “We will not supply you with these goods unless you sell them for at least \$20”.
- Persuade or attempt to induce a reseller to sell, advertise or offer for sale goods above a specified price. For example, “If you sell these goods below \$20 we will raise our wholesale price to you”.

- Enter or offer to enter into a written or oral agreement for the supply of goods where one of the terms is a specified minimum price. For example, a contract that stipulates the goods must be sold for at least \$20.
- Withhold supply of goods to a reseller because:
 - the reseller has not agreed to sell the goods above a specified price; or
 - the reseller has sold the goods (or the supplier believes the reseller is likely to sell, advertise or offer the goods for sale) at less than a specified price.

To withhold supply includes:

- refusing or failing to supply
- supplying a reseller on disadvantageous terms compared to other resellers, or otherwise treating a reseller less favourably
- causing another to withhold supply.

Anything done by a person acting on behalf of the supplier (for example, an employee) is said to have been done by the supplier.

EXAMPLE

Morning Star Computer Limited was a wholesaler of computer parts and systems. It told its resellers not to advertise six products for sale below the recommended retail price. It threatened to increase wholesale prices to the resellers if they advertised the products below the recommended retail prices.

The Commerce Commission issued proceedings in the High Court and Morning Star pleaded guilty and was convicted and fined \$50,000, plus ordered to pay the Commission's legal costs.

Resale price maintenance by a third party

Resale price maintenance also extends to situations where a third party (a person who is not the supplier or reseller) makes it known to another person that they intend to hinder or prevent the supply (or purchase) of goods unless the person agrees not to sell below a specified price. For example, the third party may be a retailer who is putting pressure on the supplier not to supply a different retailer who has been discounting goods. This could breach the law.

Practical tips:

A supplier can:

- recommend a retail price for goods
- set a maximum price for the on-sale of goods.

A supplier cannot:

- enforce a recommended price for goods
- set a minimum price for the on-sale of goods
- pressure a purchaser to stop discounting goods
- refuse to supply or punish a purchaser who sells goods below the recommended price
- offer a purchaser an incentive or special deal if the purchaser agrees to set a minimum price for goods
- offer a purchaser an incentive or special deal if the purchaser agrees to stop offering discounts for goods
- withhold supply unless the goods are sold at a minimum price
- withhold supply because the goods have been sold at less than a minimum price.



Authorisation of resale price maintenance

The Commission can authorise resale price maintenance if it is satisfied that the resale price maintenance will result, or be likely to result, in benefits to the public that will outweigh the harm.

If you wish to engage in conduct that you think may risk breaching the resale price maintenance provisions of the Commerce Act, you can apply to the Commission for an authorisation. For more information see *Authorising anti-competitive transactions that will benefit New Zealand*: <https://comcom.govt.nz/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand>

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
- for a body corporate, the greater of:
 - \$10 million, or
 - three times the commercial gain, or, if this cannot be easily established, 10% of turnover.

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

This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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Phone: 0800 943 600 **Write:** Contact Centre, PO Box 2351, Wellington 6140 **Email:** contact@comcom.govt.nz

