

The Commerce Act

Trade associations



Belonging to a trade association can bring many benefits for members. Trade associations play a useful role in enabling businesses to meet and discuss industry-wide issues and practices and to share knowledge and technical information.

However, members of trade or industry associations are usually competitors and trade associations can therefore create the environment for discussions and facilitation of cartels.

Price fixing occurs when competitors agree to directly or indirectly fix prices for goods or services.

This means that care must be taken to ensure that associations and individual members do not engage in anti-competitive behaviour that may breach the Commerce Act when taking part in association activities. An individual member of a trade association can be held liable if the trade association to which he or she belongs acts in an anti-competitive way, even if this has occurred without the individual's knowledge or involvement.

For this reason, all businesses and trade associations should familiarise themselves with the relevant provisions of the Commerce Act, and take steps to ensure they are not at risk of breaching the Act. The purpose of the Act is to promote competition in markets for the long term benefit of New Zealanders. Breaches of the Commerce Act may result in penalties being imposed by the courts on businesses, associations and individuals. The Commerce Commission is responsible for investigating alleged breaches of the Commerce Act.

This fact sheet explains some key sections of the Commerce Act for businesses and trade associations and suggests some practical tips to reduce the risks of breaching the Act. Examples are given for each key section. As the Australian Competition and Consumer Act has similar provisions to New Zealand's Commerce Act, some examples given are from Australia.

What is unlawful?

There are a number of provisions of the Commerce Act of which businesses, trade associations and members of trade associations should be aware:

- Section 27, which makes anti-competitive agreements unlawful. It prohibits anyone from entering into contracts, arrangements or understandings (agreements) if those agreements have the purpose, or effect or likely effect of substantially lessening competition in a market.
- Section 30, which makes agreements between competitors containing a cartel provision unlawful (cartel provisions are those that have the purpose, effect or likely effect of price fixing, restricting output or market allocating).

These practices are also sometimes called restrictive trade practices. While there are other provisions in the Commerce Act, this fact sheet focuses on those provisions most likely to be relevant to businesses, trade associations and members of trade associations.



Special provisions for trade associations

Agreements made by associations – section 2(8)(a)

The Commerce Act recognises that trade associations can become a vehicle for anticompetitive behaviour, such as the restrictive trade practices mentioned above.

Under Section 2(8)(a) of the Act any agreement entered into by a trade association is considered to be entered into by all the association's members. In other words, this section deems all the members of an association to be parties to any agreement made by that association, regardless of an individual member's involvement or knowledge of the agreement, unless one of the following two situations apply:

- Section 2(9)(a) states that a member will not be seen as party to an agreement made by the association if the member expressly notifies the association in writing that he or she wishes to disassociate themselves from the agreement, and who then takes steps to disassociate him or herself.
- Section 2(9)(b) states that if a member can establish that he or she had no knowledge, and could not reasonably have been expected to have any knowledge of the agreement, he or she will not be deemed to be a party to the agreement.



Recommendations made by associations – section 2(8)(b)

Section 2(8)(b) states that any recommendation made by the association is deemed to be made both:

- between the association and its members
- between the members.

The next section gives specific examples of the types of conduct prohibited by sections 27 and 30, under which trade associations and their members may be liable.

Price fixing occurs when competitors agree to directly or indirectly fix prices for goods or services.

Section 27

Under Section 27 no one may enter into an agreement that contains a provision that substantially lessens competition in a market. In order to determine 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. Section 27 prohibits both:

- entering into an agreement that has the purpose, or effect or likely effect of substantially lessening competition
- giving effect to an agreement that has the purpose, or effect or likely effect of substantially lessening competition.

Section 30

There are three types of provisions in agreements between competitors that the Commerce Act deems to be cartel provisions and to be illegal. These are provisions that:

- fix prices
- restrict output
- allocate markets.

Agreements that include cartel provisions aim to maximise the profits of cartel members, while maintaining the illusion of competition. Cartel conduct damages the welfare of New Zealanders by raising prices and reducing choice, innovation, quality and investment.

Price fixing

Price fixing occurs when parties enter into or give effect to an agreement fixing, controlling, or maintaining:

- the price of goods and services that two or more of the parties to the agreement supply or acquire in competition with each other
- any discount, allowance, rebate, or credit of goods or services that two or more of the parties to the agreement supply or acquire in competition with each other.

An agreement need not establish a specific price to be price fixing. Rather, price fixing occurs when competitors agree to directly or indirectly fix prices for goods or services. Price includes a component of a price such as a surcharge or fee.

EXAMPLE

Price fixing by an association: Livestock

In 2012 the National Animal Identification and Tracing Act introduced a requirement that cattle must have RFID tags. Elders Rural Holdings Limited (Elders), PGG Wrightson Limited, Rural Livestock Limited, and other members of the New Zealand Stock and Station Agents' Association met following the introduction of the legislation. The parties came to agreements on three issues:



- Saleyards would charge a minimum fee of \$25 to tag cattle, and \$10 for any calves, presented to a saleyard without the ear tag required by the NAIT Act. Agents would pass the fee on to farmers.
- Agents would charge farmers a radio frequency identification device (RFID) administration fee of \$1.50 per head of cattle (split equally between the vendor and purchaser), to register saleyard based cattle movements.
- Saleyards would increase existing yard fees by \$1.50 per head of cattle (split equally between the vendor and purchaser).

All three of these agreements breach the price fixing provisions of the Commerce Act. The livestock companies should have decided independently how to respond to the new law, instead of colluding on fees to the detriment of farmers. Without these anti-competitive agreements, fees may well have been set lower than they were.

In December 2015, PGG Wrightson and Rural Livestock were fined \$2.7 million and \$475,000 respectively after admitting their conduct in this case. PGG Wrightson also agreed to pay \$50,000 towards the Commission's investigation costs.

In December 2016, four current or former employees of PGG Wrightson and one former employee of Elders Rural Holdings Limited were ordered to pay penalties totalling \$105,000 for their roles in the price fixing agreements.

As Elders is no longer trading, the Commission and Elders agreed to seek a declaration from the Court that Elders breached the price fixing provisions of the Commerce Act and its parent company agreed to pay \$200,000 towards the Commission's investigation costs.

Restricting output

Output restrictions between competing suppliers of goods or services occur where two or more of those competing suppliers arrange to prevent, restrict, or limit:

- their supply, production, or likely supply or production of those goods, or
- their supply, capacity, or likely supply or capacity to supply those services.

Output restrictions between competing buyers of goods or services occur where two or more competing buyers of goods or services arrange to prevent, restrict, or limit their acquisition or likely acquisition of those goods or services.

EXAMPLE

Tasmanian Salmon Growers cartel

In 2003, the ACCC commenced proceedings against salmon producer Tassal and the Tasmanian Salmon Growers Association, alleging they entered into an arrangement to limit the supply of salmon and to fix, control or maintain the price of salmon.

It was alleged that Tassal and the Association had agreed that the five major growers would grade out 10% of salmon from the 2001 year class, and that they would later consider a possible grading out of a further 5%. The purpose of these agreements was to reduce fish numbers to ensure the financial viability of the salmon farming industry in Tasmania.

The Federal Court of Australia held that there was an arrangement or understanding between competitors to limit the supply of fish and that this would likely have the effect of controlling or maintaining price, in breach of the anti-competitive provisions of the Australian Trade Practices Act 1974. Tassal and the Association agreed with the Court's findings. Because of the very difficult state of the industry, and the fact that legal advice had been sought and cooperation shown, the ACCC decided not to pursue penalties. Instead, Court orders were obtained that required the industry to establish a trade practice compliance training programme, and stop any future culls.



Market allocating

Market sharing, or market allocation, is when businesses agree to divide markets up amongst themselves. This could be by allocating between them the persons or classes of persons to whom the parties supply or acquire goods or services in competition with each other, or the geographic areas in which the parties supply or acquire goods and services in competition with each other.

EXAMPLE

Visy packaging cartel

Visy and its competitor Amcor coordinated price rises and swapped information when negotiating quotes for larger customers to ensure that each would retain specific customers, thereby maintaining static market shares in the corrugated fibre packaging (cardboard) industry. On occasions when the collusion was unsuccessful and a customer elected to swap supplier, another customer contract of around the same value would be exchanged.

The cardboard industry in Australia is worth around AU\$1.8 billion to AU\$2 billion per year. As a result of the cartel, many customers were significantly overcharged for their packaging purchases, and ultimately this was passed on to their own customers.

Amcor management notified the cartel to the Australian Competition and Consumer Commission (ACCC) through its leniency policy and Amcor and its employees were accordingly granted immunity from prosecution.

The Federal Court of Australia, following a settlement agreement between the parties, fined Visy AU\$36 million, and two of its top executives fines totalling AU\$2 million, plus costs for participation in a cartel in the corrugated fibre packaging (cardboard) industry. Visy was fined NZ\$3.6 million in New Zealand following High Court action by the Commerce Commission and two of its top executives were handed fines totalling \$85,000 plus costs.

An agreement to set output or allocate markets is illegal regardless of whether an effect on price is proven. These type of agreements (in addition to price fixing) are deemed to substantially lessen competition and therefore are illegal.

Bid rigging

Bid rigging, or collusive tendering, will almost always involve a cartel provision to either fix price, restrict output, or allocate markets. This provision will be contained in an agreement between businesses as to which of them should win the bid, thus eliminating competition among the colluding bidders.

EXAMPLE

Christchurch bus cartel

The Chief Executive Officer of Christchurch Transport Limited had approached the next biggest competitor in the market for subsidised passenger bus services in metropolitan Christchurch. He had proposed an exchange of tender information with a view to bid-rigging in order to ensure the retention of the routes historically held by each of the companies.

Despite the discussions, the businesses did not enter into a bid-rigging arrangement. Accordingly this conduct amounted only to an attempt to breach the Commerce Act. However, the High Court accepted that if major competitors had exchanged sensitive information or bid-rigged, there would have been considerable scope for profit to be made in the form of an increased subsidy to be paid by the Regional Council to the successful tenderer.

The High Court of New Zealand ordered Christchurch Transport Limited to pay a fine of \$380,000, and its Chief Executive Officer a fine of \$10,000, for an attempt to fix prices by bid rigging.

Exceptions to section 30

There are a number of exceptions to section 30. The major exceptions are:

- collaborative activities (section 31)
- vertical supply contracts (section 32)
- joint buying and promotion agreements (section 33).

Of particular relevance to trade associations are the collaborative activities and joint buying and promotion agreements.

The exceptions are set out in our fact sheet *Exceptions under the Commerce Act* www.comcom.govt.nz

Clearances and authorisations under the Commerce Act

A party proposing to enter into an agreement containing a cartel provision that is part of a collaborative activity can apply for clearance for that agreement. This is a voluntary regime and there is no statutory requirement to seek clearance.

Where we clear an agreement, parties to the agreement will not contravene the cartel prohibition or the prohibition on agreements that substantially lessen competition. In essence, a clearance provides certainty that the agreement is lawful under the Commerce Act.

Under the Commerce Act, the Commission can also authorise an anti-competitive agreement where it is satisfied that the benefits to the public outweigh the harm of the agreement.

🔗 You can read more about clearances and authorisations in our *Competitor Collaboration Guidelines*. www.comcom.govt.nz

EXAMPLE

Action by BoP Chicken Growers Association to acquire Authorisation for their members' behaviour

The Waikato Bay of Plenty Chicken Growers Association applied on behalf of its members, for authorisation to collectively bargain on the terms and conditions under which its members supply chicken growing services to Ingham's.

Ingham's is one of the largest chicken processors in New Zealand. It outsources its chicken growing requirements to contract growers located in close proximity to its processing plant near Ngarua. Ingham's has never obtained growing services from a grower who was not a member of the Association or who was located outside of the Waikato or the Bay of Plenty regions.

The Commerce Commission granted authorisation to allow members of the Waikato – Bay of Plenty Chicken Growers Association Incorporated to collectively bargain with Inghams Enterprises (NZ) Pty Limited.

The Commission reached a view that while it is likely that the proposed collective bargaining arrangements would lessen competition, any reduction in competition is likely to be outweighed by the public benefits including reducing the cost of multiple growers arranging individual supply contracts with Ingham's. The detriment was found to be low, and growers would be able to opt out of any collective arrangements and continue to contract individually if they wished.

Information exchange

Trade associations sometimes gather information about their members' activities, services and prices. This information may then be collated then redistributed back to the membership. This is not unlawful in itself unless there is an implicit understanding that association members will act in a certain way on receipt of the information.

Trade associations should be particularly careful when gathering or exchanging information with members.

Clearly, this is particularly important when the information gathered and shared with members relates to prices or outputs or market shares. Under section 30A of the Act, it is sufficient if the arrangement to exchange information has the likely effect of controlling or maintaining prices, restricting output or market allocating – an actual effect does not have to be demonstrated.

In general terms, it is less likely that a likely effect could occur if:

- the information gathered and/or exchanged is general rather than specific
- the members, producers or customers to which the information relates are not able to be identified in any way
- provision of information is on a voluntary basis and only relates to historical information
- the information is gathered and collated anonymously and independently.

Trade associations should be particularly careful when gathering or exchanging information with members such as:

- the prices of the association's or its members' services, including future pricing
- limits or restrictions on output or volume or quality of members' services
- the persons or classes of persons to or from whom its association members supply or acquire goods or the geographic areas within which they do so.

Codes of conduct

Many trade associations develop and apply their own standards to promote quality, consistency and ethical standards – known as codes of conduct. While an association is entitled to make such rules and impose sanctions on members if the standards are not met, the trade association must ensure that any code of conduct, and any action it may take to ensure members adhere to the code of conduct, complies with the Act.

Well designed and properly enforced, codes of conduct can deliver increased protection for consumers and reduce the regulatory burden for members. However, trade associations must also ensure that:

- the rules are clear and transparent
- the rules do not relate to pricing, output or market allocation
- any restrictions on members or membership rules do not restrict and reduce competition in the industry in a substantial way
- any disciplinary procedures do not restrict and reduce competition in the industry in a substantial way.

Associations should also consider seeking professional advice about possible competition issues arising out of the operation of their code of conduct.

Well designed and properly enforced, codes of conduct can deliver increased protection for consumers and reduce the regulatory burden for members.



Practical tips

There are a number of steps trade associations can take to ensure that they do not put themselves at risk of an allegation of anticompetitive conduct under the Commerce Act:

Membership criteria. Trade associations should ensure that membership criteria are objective, transparent and impartially applied. No members should be expelled unless there is a breach of a clearly defined rule.

Conduct during meetings. Consider reading out a statement at the beginning of the meeting to remind all those present that they should not discuss prices, discounts output or market allocating. They also should not discuss nor come to any agreement which might substantially lessen competition, for example, in relation to supply arrangements.

Price recommendations. If making a joint price recommendation to members, trade associations should state expressly in the price recommendation that the prices are recommended prices only and there is no obligation upon members to charge such prices.

If pricing discussions occur during the meeting members should raise an objection straight away, leave the meeting if the discussion continues and write a letter disassociating themselves from the pricing discussion immediately afterwards.

Review internal documentation, policies and procedures for compliance with the Commerce Act.

Review all publications including websites, magazines and newsletters for compliance with the Act.

Take care when gathering or exchanging information.

Consider whether to seek clearance under section 65A of the Act for collaborative activities that may contain a cartel provision.

Consider whether to seek an authorisation under section 58 of the Act for any agreements that may lessen competition but for which public benefits may outweigh competitive detriments.

Seek external legal advice promptly whenever potential competition issues arise.

Apply for leniency if you discover your company has been involved in cartel conduct.

The Commerce Commission's powers

The Commerce Commission is responsible for investigating alleged breaches of the Act and has significant and broad-ranging powers when doing so. This includes the power to:

- require a person to provide information, furnish documents or appear before it to give evidence
- undertake a search, and seize documents, subject to obtaining a search warrant.

Failure to comply can result in a fine of up to \$100,000 for individuals and \$300,000 for bodies corporate. This is a criminal offence.



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 of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.

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

Cartel Leniency Policy and Guidelines

The Commerce Commission offers a leniency programme. This means that the first cartel member to disclose the existence of the cartel, by applying to the Commission for conditional immunity, can receive conditional immunity from prosecution. The condition on which immunity is provided is that the cartel member fully cooperates in the investigation and any subsequent proceedings. The Commission's *Cartel Leniency Policy and Guidelines* are available on the Commission's [website](#).

Reporting cartel conduct anonymously

We recognise there are situations where someone who has knowledge or specific information about a cartel might be reluctant to report it for fear of negative consequences or reprisals. However, this knowledge may be key to detecting and breaking up cartels.

For such cases, the Commission has a secure anonymous whistleblowing tool which uses encryption methods to allow you to submit a report anonymously. The information provided through this online tool cannot be traced back to you, as long as you do not enter any information that identifies you.

The Commission will not accept leniency applications from parties involved in cartel conduct made via the anonymous whistleblower tool – they need to instead make an application to the General Manager Competition and Consumer.

See more on our [website](#).



Important notice

Although these guidelines cover the main process issues for businesses and their advisers, they do not cover every issue that may arise. They are not intended to be:

- a binding indication how the Commission will respond to any in a particular situation
- a substitute for legal advice
- a restatement or definitive interpretation of the Commerce Act (or any regulations or orders made under it).

Anyone in doubt about whether they may be affected by the legislation should consider seeking legal advice.

🔗 To check for updates to this fact sheet visit www.comcom.govt.nz

🔗 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

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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Contact us with information about possible breaches of the laws we enforce:

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

