

The Commerce Act

Resale price maintenance



Resale price maintenance (RPM) 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. Some conduct by resellers and third parties can also be resale price maintenance.

This fact sheet describes some different types of resale price maintenance and what suppliers, resellers and others can do to avoid it.

Resale price maintenance 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 minimum price; and
 - takes certain actions to enforce that specified price; or
- a third party (such as another of the supplier’s customers) takes certain actions to ensure that goods are sold at a specified price by a reseller.

Why is it unlawful?

RPM is illegal because it prevents resellers from setting their prices independently, in order to compete with others to attract more customers and sell more products. RPM can be harmful to competition, and to consumers, because it interferes with the competitive determination of price and may result in consumers paying higher prices for goods than they would without the conduct.

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% 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 the price at which a supplier suggests a reseller sells a product.

A supplier can recommend a price to its resellers but it cannot do anything to try to enforce that recommended price.

Breaching the resale price maintenance provisions

RPM can occur by agreement between a supplier and a reseller, indirectly through restrictions on discounting imposed by the supplier, or where there are threats or incentives used to induce a reseller not to sell below a particular price. RPM can also occur where a supplier punishes a reseller for selling below a particular price.

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 resellers and third parties

Parties who are not the supplier or reseller of particular goods can also engage in RPM. An example of this is where a third-party reseller puts pressure on a supplier to sell goods to another reseller at a particular price.

The Commerce Act prohibits a person (**person A**) from:

- making it known to another person (**person B**) that person A intends to hinder or prevent the supply (or purchase) of goods from person B unless person B agrees not to sell those goods below a price specified by person A; and/or
- engaging in conduct (alone or with others) to hinder or prevent the supply (or purchase) of goods from person B, in order to induce person B not to sell those goods below a price specified by person A.



For example:

- A reseller such as a retailer should not put pressure on a supplier not to supply a different retailer who has been discounting goods or to supply that retailer at, or above, a specified wholesale price. For example, “We will no longer stock that product unless you stop supplying a discounting retailer”.
- A retailer should not pressure another retailer not to discount goods. For example, “We intend to ask our supplier not to supply you unless you also sell at our price”.

Where suppliers of goods also sell goods directly to consumers, they may be competing with resellers who are also their wholesale customers. Agreements between competitors as to price and other matters may also be cartel conduct. More information about cartel conduct can be found on our website [here](#).

Practical tips for suppliers

A supplier can:

- suggest or recommend a retail, selling or promotional price for goods
- set a maximum price for the resale of goods
- agree promotional plans with resellers, and support resellers by offering rebates and/or discounts, providing that the reseller maintains the independence to set the ultimate retail price offered to their customers
- provide advice to the reseller about managing stock levels
- choose how they wish to distribute their goods, including:
 - which resellers to supply; and
 - which resellers to supply with certain product model(s) for resale.



A supplier cannot:

- specify or mandate a minimum price for the on-sale of goods
- agree with their customers that the customer will sell goods at a specified or minimum retail price, including promotional prices
- enforce a recommended price for goods
- prevent or limit resellers from:
 - lowering their retail prices,
 - offering promotional prices, or
 - advertising lower prices in certain channels, for example online
- pressure or persuade a customer to increase the price at which they resell goods or to stop discounting goods (eg, by making a threat to stop selling to them)
- refuse to supply or punish a customer who resells goods below the recommended price
- offer a customer an incentive or special deal if the customer agrees to:
 - set a minimum price for goods, or
 - stop offering discounts for goods
- withhold supply of goods:
 - unless the goods are sold at a minimum price; or
 - because the goods have been sold at less than a minimum price.

Practical tips for resellers

Resellers **should** independently set the price of the products they sell, whether online, in-store, or through other sales channels.

Resellers **may** request discounted wholesale pricing, pricing support, or other incentives or special deals from a supplier but must retain the ability to set their own sale prices independently.

A reseller **should not** ask a supplier to influence a competing reseller’s prices, including by seeking to influence the wholesale prices offered to competing resellers.

Commerce Commission's approach to investigating RPM

RPM is illegal *per se*, which means that it is prohibited regardless of its impact on competition.

However, the Commission recognises that some forms of RPM are likely to be particularly harmful to competition, including where:

- the RPM occurs across an industry or sector
- parties to the arrangements have market power, either on their own or collectively
- there is pressure from resellers on suppliers to impose RPM on others
- RPM is used to facilitate collusive conduct (including tacit collusion)

We assess cases in light of our [Enforcement Criteria](#) to determine whether to take an investigation further, and apply our [Enforcement Response Guidelines](#) when deciding on the enforcement responses applicable to the circumstances. The Commission is more likely to prioritise investigating RPM conduct when one or more of the factors above exist and/or where the Commission considers that the RPM conduct is particularly likely to harm competition and/or consumers.

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 authorisation. For more information see the Commission's [Authorisation Guidelines](#) (December 2020).

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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