

23 June 2022

Resale Price Maintenance – your responsibilities under the Commerce Act 1986

Dear industry participants,

1. Following a recent investigation by the Commission into allegations that manufacturers of consumer electronics were engaging in resale price maintenance (RPM), I am contacting you as a key stakeholder in the consumer electronics sector to remind you of your responsibilities under the Commerce Act 1986.
2. As you may be aware, resale price maintenance is a breach of the Commerce Act. RPM occurs when a supplier of goods enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods. Some conduct by resellers and third parties can also be resale price maintenance.
3. As New Zealand's competition, consumer and economic regulatory agency, the Commission aims to ensure that our local markets are working well for consumers, business and the economy.
4. We are taking this opportunity to engage with all manufacturers, suppliers and retailers of consumer electronics to highlight your obligations under the law, and to provide guidance (including our Resale Price Maintenance fact sheet), and outline the actions for suppliers and retailers to take if they observe RPM conduct occurring in the market.

Commission's investigation

5. The allegations recently investigated by the Commission include that manufacturers were:
 - 5.1 inducing retailers to raise their retail prices;
 - 5.2 changing terms of supply to a retailer to be less desirable than the terms of supply provided to other retailers because the retailer was selling below prices specified by the manufacturer; and
 - 5.3 threatening to stop supply of consumer electronics or increase wholesale prices (eg, by reducing promotional support) because the retailers were selling the goods at a price less than the price specified by the manufacturer.

Resale price maintenance is illegal

6. Competition law exists to protect businesses and consumers from anti-competitive behaviour.
7. RPM can occur by agreement between a supplier and a retailer, indirectly through restrictions on discounting imposed by the supplier, or where there are threats or incentives used to induce a retailer not to sell below a particular price. RPM can also occur where a supplier punishes a retailer for selling below a particular price.
8. RPM is illegal because it prevents retailers from setting their prices independently, in order to attract more customers and sell more products.
9. RPM is prohibited per se under sections 37 and 38 of the Commerce Act 1986. That is, RPM is illegal irrespective of its effect on competition.
10. However, RPM is likely to be particularly harmful to competition where:
 - 10.1 it occurs broadly across an industry or sector;
 - 10.2 parties to the RPM arrangements have market power (either on their own or collectively);
 - 10.3 there is pressure from retailers on manufacturers to impose RPM;
 - 10.4 it is used to facilitate collusive conduct (including tacit collusion)
11. The Commission is more likely to prioritise investigation of RPM conduct when one or more of these factors exist, and/or where the Commission considers that the RPM conduct is particularly likely to harm competition and/or consumers.

Guidance for suppliers and retailers

12. The Commission has published a series of fact sheets and other resources to help businesses comply with the Commerce Act 1986. The Commission has recently updated its fact sheet on RPM, which is available here: <https://comcom.govt.nz/?a=96181>.
13. The Commission strongly encourages suppliers and retailers to review the fact sheet on RPM, in particular the sections setting out practical tips for suppliers and retailers to comply with the law.
14. **Suppliers** are prohibited from engaging in RPM conduct, including in situations where one retailer has complained to a supplier about a competing retailer's prices or discounts.
15. If a supplier attempts to cause a retailer to stop discounting, or to agree to follow specified pricing, the retailer may find it useful to refer the supplier to this letter and to the Commission guidance referenced above.

16. **Retailers** should independently set the price of the products they sell, whether online, in store, or through other sales channels. Retailers can also look to match a competitor's price by requesting discounted wholesale pricing or price support from a supplier.
17. However, retailers should **not** ask a supplier to influence a competing retailer's retail prices. This includes by seeking to influence the wholesale price a supplier offers to a competing retailer.
18. If a retailer attempts to cause a supplier to influence the retail price offered to a competitor, the supplier may also find it useful to refer the supplier to this letter and to the Commission guidance referenced above.

Penalties for contravention of the Commerce Act 1986

19. Only the New Zealand courts can decide if there has been a contravention of the Commerce Act 1986. If a Court finds that a business has engaged in RPM, the business can be subject to pecuniary penalties, being the greater of:
 - 19.1 \$10 million; or
 - 19.2 three times the value of any commercial gain resulting from the contravention (or if this is not easily established, 10% of the turnover of the business and all interconnected bodies corporate).
20. An individual can be fined a maximum of \$500,000 and/or be prohibited from being a company director.
21. Every separate contravention of the Act (even if undertaken by the same person) may incur a penalty.

Further information

22. The Commerce Act 1986 and other legislation is available here: www.legislation.co.nz
23. If you have information on companies in your industry that may have been involved in anti-competitive conduct you should report this to the Commission using the form on our website (<https://comcom.govt.nz/make-a-complaint>), emailing contact@comcom.govt.nz or calling us on 0800 943 600.

Yours sincerely,

Antonia Horrocks
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Commerce Commission