

The Commerce Act

Exceptions under the Commerce Act



This fact sheet provides an overview of the types of agreements and behaviour that are exempt from the Commerce Act. It is designed to give businesses an understanding of when the Act may not apply to them or their activities.

When businesses behave in a way that harms competition, consumers and other businesses can end up paying higher prices or having less choice of goods or services. Part 2 of the Commerce Act sets out the different types of anti-competitive agreements and behaviour that are illegal in New Zealand.

In certain situations, however, some or all of the provisions in Part 2 do not apply. This is because sometimes there are circumstances where a type of agreement or behaviour is unlikely to substantially lessen competition. In some cases, the agreement or behaviour may result in public benefits that are considered more important than any anti-competitive effects.

What is illegal under Part 2 of the Commerce Act?

Part 2 of the Commerce Act prohibits agreements that:

- substantially lessen competition (section 27)
- contain a cartel provision (section 30).

It is also illegal for an individual or business to:

- engage in conduct which causes a substantial lessening of competition in a market if they have substantial market power (section 36)
- specify a minimum price at which goods or services can be sold by someone else – this is called resale price maintenance (sections 37 and 38).

🔗 You can read more about these different types of anti-competitive behaviour on our [website](#).



Who does the Commerce Act apply to?

The Commerce Act applies to every person and organisation in trade. Trade is defined broadly and means anyone who buys or sells goods and services in New Zealand markets. This includes all professions, state-owned enterprises, local government and government departments, if they are buying or selling goods or services.

What agreements or behaviour are exempt?

Some agreements and behaviour are fully exempt from Part 2 of the Commerce Act. Others are exempt only from the cartel prohibition under section 30. We refer to these two kinds of exceptions as full exceptions and partial exceptions.

What are the full exceptions?

- **Statutory exceptions:** any practice that is specifically authorised by another law (or Order in Council), even if it may appear to be anti-competitive. This is a very narrow exception and only exempts the specific practice, or practices, in question (section 43).
- **Partnerships:** agreements between business partners (about their partnership) assuming none of the partners is a body corporate (section 44(1)(a)).

- **Individual restraints of trade:** agreements that restrict the work a person might do. For example, a clause in an employment contract that prevents someone from setting up in competition with their employer in the same area for a certain period (section 44(1)(c)).
- **Protection of business goodwill:** agreements between the seller and purchaser of a business to protect the goodwill of that business. For example, an agreement that the seller of a business will not compete in the same area for a certain period (section 44(1)(d)).
- **Protection of standards:** obligations to comply with standards that are prepared or approved by Standards New Zealand (section 44(1)(e)).
- **Employment contracts:** agreements relating to employees' wages, salaries or working conditions (section 44(1)(f)).



If in doubt, seek legal advice

The exceptions described in this fact sheet are a summary and are not definitive. Whether an exception applies in a given situation can be a complex decision. If you have any doubts about whether your behaviour is exempt, you should seek legal advice.

- **Export:** agreements relating exclusively to the export of goods or services, such as agreements about how exporting quotas are allocated across a New Zealand industry. Exporting businesses must supply full details of any agreements to the Commission within 15 working days of making the agreement (section 44(1)(g)).
- **Consumer agreements:** agreements among users of goods or services who are not in trade, against the suppliers of those goods and services. For example, a consumer boycott of a product for environmental or other reasons (section 44(1)(h)).
- **Interconnected bodies:** agreements between interconnected bodies corporate, for example subsidiaries of the same company (section 44(1A)), except where the agreement involves:
 - misuse of market power by a company with substantial market power in New Zealand markets (section 36)
 - misuse of market power by a company with substantial market power in trans-Tasman markets (section 36A).

What are the partial exceptions?

Some agreements or behaviour are exempt from the cartel prohibition in section 30 of the Commerce Act.

These relate to:

- collaborative activities (section 31)
- vertical supply contracts (section 32)
- joint buying and promotion agreements (section 33)
- belief on reasonable grounds that an exception to the Commerce Act applied at the time of the alleged offending. This applies to criminal proceedings only (section 82C)
- international shipping: some types of provisions in international liner shipping service agreements (sections 44A and 44B). Depending on the provision, the provision could be exempt from only part of the cartel prohibition, and could also be exempt from the prohibition against agreements that substantially lessen competition.



Aside from the shipping exception, the Commission may still challenge an agreement or behaviour, however, if we believe it may substantially lessen competition (section 27). This means that even where the exception from the cartel prohibitions apply, we may still look at the overall effect of the agreement or behaviour on competition to consider whether it is legal. Third parties may also challenge such agreements or behaviour.

It is up to a person relying on the exception to prove on the balance of probabilities that the exception applies.

Collaborative activities

The collaborative activity exception replaces the former joint venture exception. The joint venture exception focussed on the form by which the parties were 'cooperating' to determine whether that exception to the price fixing prohibition applied. In contrast, the collaborative activity exception is focused on the substance of the parties' cooperation.

The collaborative activity exception applies to a cartel provision in an agreement if:

- the parties to the agreement are involved in a collaborative activity (a co-operative enterprise, venture, or other activity, in trade that is not carried on for the dominant purpose of lessening competition)
- the cartel provision is reasonably necessary for the purpose of the collaborative activity.

Simply labelling an agreement as a collaborative activity will not be sufficient to bring the collaboration under the protection of the exception. To qualify as a collaborative activity the parties need to be combining their businesses, assets, or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly. They need to be doing something more than simply agreeing how to run their separate businesses.

The Commission may still challenge an agreement or behaviour, however, if we believe it may substantially lessen competition.

To gain the benefit of the exception, the cartel provision must be reasonably necessary for the purpose of the collaborative activity. Reasonably necessary does not mean essential, but it does mean the provision must be something more than merely desirable, expedient, or preferable. In determining whether a provision is reasonably necessary we ask why the parties included the cartel provision, what the scope/duration of the clause is and why the parties chose the cartel provision as opposed to other alternatives.

Finally, to qualify for the exception, the collaborative activity must not be carried out for the dominant purpose of lessening competition between the parties to the agreement. While an agreement may have more than one purpose, a dominant purpose is the main or principal reason for the collaboration.

Where a cartel provision exists, parties must be able to explain why they are collaborating – ie, they must be able to explain that the dominant purpose of their activity is benign or pro-competitive for the benefit of the exception to apply. Examples may include combining different capabilities or resources to improve their ability to compete, collaborating to help attain economies of scale, or joining forces to achieve some environmental, health or other social welfare purpose. If parties cannot persuasively provide a good reason for the collaboration, then it is likely that the Commission or a court will infer that their dominant purpose is to lessen competition between the parties.



The collaborative activity exception also applies to a cartel provision in an agreement that constitutes a restraint of trade if:

- the collaborative activity has ended
- the cartel provision was reasonably necessary for the purpose of the collaborative activity
- the collaborative activity did not end because the lessening of competition between any two or more parties became its dominant purpose.

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.

🔗 We set out the clearance regime in more detail in our *Competitor Collaboration Guidelines*. www.comcom.govt.nz

Vertical supply contracts

Vertical agreements that involve a contract between competitors will be subject to the cartel prohibition in section 30. However, the vertical supply exception may apply to provisions in supply contracts between a supplier and a customer that would be prohibited as cartel provisions but for the exception.



There are four criteria that must be met for the vertical supply exception to apply:

- A supplier or likely supplier of goods or services (A) and a customer or likely customer of that supplier (B) must have entered into a contract. The exception is not available where the parties only have an agreement or understanding. This means the exception is only available where the parties have entered into a legally enforceable supply contract for consideration.
- The contract must contain a cartel provision. If there is no cartel provision, then there is no need for the exception in the first place.
- The cartel provision in the contract must relate to the supply or likely supply of goods or services by A to B, including to the maximum price at which B may resupply the goods or services supplied by A to B ('B's maximum resale price').
- The cartel provision must not have the dominant purpose of lessening competition between A and B.

The term 'relate to' is imprecise as to the degree of connection required. However, we consider it requires a relatively close connection between the cartel provision and the act of A supplying goods or services to B for B to resupply.

The dominant purpose is the main or principal reason for the provision. In other words, the prevailing objective of the cartel provision must not be to lessen competition between the parties. If the cartel provision is simply a device to engage in anti-competitive conduct, then the exception will not apply.

Joint buying and promotion agreements

The joint buying and promotion exception applies when competing buyers arrange to purchase goods or services collectively on terms that an individual buyer would be unlikely to be able to negotiate on their own.

The exception applies only to price fixing, not to the other forms of cartel conduct.

While price fixing agreements between competing buyers will normally be regarded as price fixing, the conduct will be exempt if the provision either:

- relates to the price of goods or services some or all of the competing buyers collectively acquire (either directly or indirectly) and joint advertising of the price for resupply of these goods or services (although parties must remain free to sell the goods at whatever price they choose)
- provides for the competing buyers to collectively negotiate the price for goods or services which they then purchase individually, or
- provides for an intermediary to take title to the goods and resell or resupply them to one or more of the competing buyers.

As an example of joint buying, a group of small grocers might get together to collectively purchase a large order of tinned fruit at a volume discount.

🔗 You can read more about these different types of exceptions in our *Competitor Collaboration Guidelines*. www.comcom.govt.nz

Authorisations

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

🔗 You can read more about authorisations on our [website](#).

Agreements prior to 15 August 2017

If a cartel was entered into or given effect before 15 August 2017, the Commission can proceed under the previous section 30 price fixing prohibition.

Exceptions in other legislation

There are a number of other Acts that contain exceptions to the Commerce Act. You need to be cognisant of how the relevant legislation in your market interacts with the Commerce Act. New acts and regulations will be introduced from time to time however the below provides a guide as of August 2018 to a number of important exceptions found in other legislation:

- **Certain charges by an airport company:** Nothing in section 43 of the Commerce Act 1986 applies in relation to the setting and charging of charges by an airport company (s4A(3) of the Airport Authorities Act).
- **Civil aviation levies:** Imposition of levies by the Civil Aviation Authority to fund the Authority to carry out its functions are specific authorisations for the purposes of s43 of the Commerce Act (s 42D of the Civil Aviation Act 1990).
- **International carriage by air:** Part 9 of the Civil Aviation Act 1990 provides a specific regime for agreements such as capacity sharing, tariff schedules and service agreements between airlines. As long as they are authorised by the Minister of Transport they are exempt from Part 2 of the Commerce Act.
- **Electricity industry and gas industry:** The actions of the respective electricity and gas governance bodies and any acts in compliance with rules set by them are specifically authorised for the purposes of section 43 of the Commerce Act (section 130 of the Electricity Industry Act 2010 and section 43ZZR of the Gas Act 1992). Section 47 of the Commerce Act does not apply to any transfer of assets undertaken by a state generators pursuant to a direction given under s117 of the Electricity Industry Act 2010.
- **Telecommunication industry:** Part 2 of the Commerce Act does not apply to TSO instruments to facilitate the supply of certain telecommunications services to groups of end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by the Minister to be affordable to those groups of end-users.
- **Agricultural producer boards:** Agricultural producer boards are exempt from Part 2 of the Commerce Act to enable them to undertake their activities such as setting a levy to fund the Board's activities (section 14 Pork Industry Board Act 1997) and set quota allocations (part 3 of the Meat Board Act 2004).

- **Tertiary education:** Nothing in the Commerce Act applies to the Tertiary Education Commission except to the extent that the Commission engages in supplying goods and services for which it charges (section 159K Education (Tertiary Reform) Amendment Act 2002).
- **Fisheries:** The Ministry of Fisheries may devolve certain fisheries management to other service providers where efficient. The outsourcing arrangements are exempt from the Commerce Act (section 296C Fisheries Act 1996).
- **Health care:** There are a number of Commerce Act exceptions for health care services.
 - Arrangements between public health providers: certain public health providers are treated as interconnected bodies corporate under s2(7) of the Commerce Act which exempts arrangements wholly between these parties.
 - Blood products: arrangements in relation to blood or controlled human substances approved by the Governor General or Order in Council (section 64 Human Tissue Act 2008).
 - Emergency ambulance services: joint purchasing arrangements between the MoH and DHBs for emergency ambulance services are exempt from Part 2 of the Commerce Act, other than sections 36 and 36A (section 305 Accident Compensation Act 2001).
 - Pharmaceutical subsidies: nothing in Part 2 of the Commerce Act applies to any agreement to which Pharmac is a party and that relates to pharmaceuticals for which full or part payments may be made (section 53 New Zealand Public Health and Disability Act 2000).



- **Crown exceptions:** the Commerce Act does not apply to the Crown unless the Crown engages in trade. Even where the Crown engages in trade, it shall not be liable to a pecuniary penalty or liable to prosecution for an offence under the Act. However, the Court may make a declaration that the Crown has contravened a provision of the Commerce Act when acting in trade.

Penalties

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

- for an individual, up to 7 years in prison and financial penalties up to \$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 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. Financial penalties for civil and criminal matters remain the same.



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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