

Exemptions 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, 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 other 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)
- exclude competitors, often known as “refusals to deal” or “group boycotts”, unless it can be shown that the agreement does not substantially lessen competition (section 29)
- fix, control or maintain prices (section 30).

It is also illegal for an individual or business to:

- take advantage of a substantial degree of market power for an anti-competitive purpose (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 at www.comcom.govt.nz/anti-competitive-practices

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 price-fixing rules under section 30. We refer to these two kinds of exemptions as full exemptions and partial exemptions.

This document should be read in view of amendments to the Commerce Act made in August 2017. The Commission will update the document in the near future to reflect changes made under the Act.

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 are the full exemptions?

- **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)).
- **Restraint 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)).
- **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)).
- **Not in trade:** 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:
 - takes advantage of market power in New Zealand (section 36)
 - takes advantage of market power in trans-Tasman markets (section 36A).
- **International shipping:** agreements relating exclusively to the transport of goods by sea to or from New Zealand (section 44(2)). The exemption does not extend to agreements relating to:
 - goods being transported to or from a ship
 - the loading or unloading of a ship (section 44(3)).
- **Intellectual property rights:** intellectual property rights (section 45), except where the behaviour or agreement:
 - takes advantage of a substantial degree of power in New Zealand markets (section 36)
 - takes advantage of a substantial degree of power in trans-Tasman markets (section 36A)
 - amounts to resale price maintenance (sections 37 and 38).

If in doubt, seek legal advice

The exemptions described in this fact sheet are a summary and are not definitive. Whether an exemption 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.

Other Acts also contain exemptions from the Commerce Act. These exemptions are not covered in this fact sheet.

Any agreement about the purchase or sale of a business's assets or shares is exempt from Part 2 but subject to Part 3 of the Commerce Act, which covers business acquisitions.

What are the partial exemptions?

Some agreements or behaviour are exempt from the price fixing rules in section 30 of the Commerce Act. These relate to:

- recommended prices (section 32)
- joint buying or advertising arrangements (section 33)
- joint ventures (section 31).

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 exemption from the price-fixing rules applies, 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.

Recommended prices

An exemption from the price-fixing rules applies where there are 50 or more parties to an agreement for a recommended price and it is a genuine "recommendation".

In other words, the exemption applies if parties to the agreement are free to depart from the recommendation and decide for themselves at what prices they will actually sell the goods or services.

You can read more about recommended prices at www.comcom.govt.nz/guidelines-for-trade-associations

Joint buying or advertising arrangements

Another exemption from the price-fixing rules applies when a group of individuals or businesses come to an arrangement to purchase goods or services together. For example, a group of small grocers might get together to collectively purchase a large order of tinned fruit at a volume discount, or real estate businesses might jointly purchase advertising in a newspaper.

If goods have been bought jointly, any arrangement by the group of buyers to jointly advertise the price of those goods is also exempt from the price-fixing rules. However, the parties to the advertising arrangement must still be free to depart from the advertised price if they choose. For example, one of the small grocers in the example above might decide to advertise and sell the tinned fruit at a price lower than the agreed advertised price for a weekend special.

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

Joint ventures

A joint venture typically involves individuals or businesses pooling their resources and supplying goods or services as if they were a single entity.

In some circumstances, a joint venture arrangement where competitors have agreed to fix prices may actually have a positive effect on competition. For example, two construction businesses who are individually too small to tender for a large building project might pool their resources and form a joint venture to submit a joint bid for the project. This would make the market more competitive as, without the joint venture, they would not have been in a position to bid at all.

To be exempt from the price-fixing rules, a joint venture must meet specific requirements set out in section 31.

A joint venture must:

- jointly produce goods for supply (that is, each party to the joint venture must play a genuine role in the joint production of the goods – the goods cannot simply be jointly owned)
- or*
- jointly supply services.

There are two types of joint venture:

- unincorporated joint ventures – involving two or more parties who have not formed a company
- incorporated joint ventures – involving a body corporate where at least two parties have joint control or ownership.

In the case of an unincorporated joint venture, the parties to the joint venture can decide how they wish to market and supply their goods or services – jointly at an agreed price or separately. If they choose to market and supply the goods or services separately, they must do so in proportion to their interests in the venture. So, if a business had a 30% interest in a joint venture, it may only separately market 30% of the product at the agreed price.

For a joint venture to be exempt from the price-fixing rules, it needs to be genuine. Whether a joint venture is genuine will depend on the specific facts in each case. Factors indicating a genuine joint venture include whether:

- the joint venture is likely to create new capacity for production, new technology, new products, or entry into a new market
- the parties to the joint venture substantially integrate their functions, including production, management, distribution or financial functions
- the purpose of the joint venture is to lower prices or increase output.

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There may also be other factors that need to be taken into account. We recommend that anyone wishing to enter a joint venture seek legal advice on their proposed arrangements.

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 at www.comcom.govt.nz/streamlined-authorisation-process-guidelines/

This fact sheet is a guide only and reflects the Commission's view. The publication is not intended to be definitive and should not be used instead of legal advice. It is businesses' responsibility to remain up to date with legislation. Only the courts can make a ruling on breaches of the Commerce Act.

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; or
- 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.

To check for updates to this fact sheet visit: www.comcom.govt.nz/exemptions

This fact sheet is part of a series looking at the Commerce Act and anti-competitive practices. Other fact sheets can be downloaded from www.comcom.govt.nz/business-competition

Contact Us

Contact the Commerce Commission with information about possible breaches of the Commerce Act.

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