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Commerce Act – Insights and Guidance

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Paper by Andrew Matthews & Gus Stewart, Matthews Law

INTRODUCTION

"*The* […] *companies obtained legal advice which was to the effect that there was no obstacle to the* […] *agreement in terms of legal liability.* ***The advice did not, however, refer to s 30 of the Commerce Act***."[1]

1. Competition law is not always intuitive, and may in some cases prohibit behaviour that businesses consider to be commercially rational. But it serves an undisputedly important purpose: to promote competition in markets for the long-term benefit of consumers within New Zealand.

2. While only a few practitioners advise on Commerce Act 1986 (**Act**) issues on a day-to-day basis, increasing penalties, recent enforcement action, and an increased focus on individuals indicate that all practitioners should have a good grasp of key competition law principles and potential pitfalls when advising their clients. An innocent oversight could leave practitioners, their PI insurers, and (more importantly) their clients exposed to a costly Commerce Commission (**Commission**) investigation and significant fines.

3. The Commission's November 2015 stakeholders' briefing highlighted its **463 investigations**, resulting in penalties and compensation exceeding $30 million for 2014/2015. Corporate "price fixing" penalties over the last 5 years have ranged from almost $0.5 million to $7.5 million, with the average corporate penalty in that time exceeding $2.5 million. Regulators are increasingly targeting individuals, with New Zealand being no exception – in the *Koppers* litigation, one individual had fines and costs of over $100,000 imposed on him.[2]

4. This paper highlights issues we regularly come across and see as relevant to most practitioners. It gives practical guidance for practitioners to help mitigate or avoid risk. We discuss:

    a. **Distribution Arrangements**: Distribution has always been a problematic area, most obviously in franchise and similar arrangements as highlighted in the early 90s in the *Toyota dealers* litigation.[3] The stakes are now much higher, especially in the "online" world. We highlight potential pitfalls, including price fixing, restraints and resale price maintenance.

    b. **Competitor Dealings**: We highlight the risks when dealing with competitors, including legitimate joint ventures and industry associations, also covering the Act's "hidden" provisions. We discuss the latest "hot topic" in competition law, "*hub and spoke cartels*", and how "Project Mastermind" led to penalties of AU$18 million for Colgate-Palmolive and AU$9 million for Woolworths in the "laundry detergent cartel".

[1] [2016] NZHC 1494 (Courtney J). Emphasis added.
[2] See: *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (High Court, Auckland, Williams J, 4 October 2006, CIV-2005-404-2080).
[3] Ultimately resolved in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608.

c. **Procurement**: On the flipside, we discuss procurement and tendering which, by its very nature, is susceptible to competition concerns including illegal "cover pricing" and joint bidding.

d. **Compliance & Immunity**: No competition law paper is complete without addressing compliance. We highlight the Commission's Leniency Policy (immunity) and its excellent plain-English guides and policies.

e. **Other Issues & Trends:** We briefly discuss recent merger trends (including what has been "declined") and potential issues regarding confidentiality.

DISTRIBUTION ARRANGEMENTS

"***The existence of an agency relationship between two parties does not always mean that those two parties cannot be in competition with each other*** […] *Each case must be considered on its own facts. The precise nature of the agency relationship will no doubt be important, particularly given the broad range of commercial relationships that are sometimes referred to as involving agency* […]"[4]

5. Multi-channel distribution arrangements can raise significant competition law challenges. Suppliers are increasingly supplying end-customers directly online while many traditional bricks and mortar retailers also have an online presence. This development has increased the risks of arrangements inadvertently breaching the Act where parties act as both a supplier and competitor.

6. Arrangements often involve a supplier that has both a vertical (supplier – customer) and horizontal (competitor – competitor) relationship with its customers. This can be further complicated where customers are also competing with each other. Importantly, genuine agencies and franchises are not explicitly exempt from the Act's price fixing prohibition.

7. Care should be taken where there is a risk that suppliers and their customers could be viewed as competing or potentially "in competition".[5] Any "horizontal understandings" between the parties in respect to how each party will compete (especially on price) raise serious competition concerns. Issues can arise in arrangements where suppliers retain the right to supply customers directly, particularly where a supplier considers that a distributor is under-performing.

8. Where suppliers or head franchisors seek to appoint exclusive distributors or franchisees, it is important that territories are well defined. Poorly defined territories which allow competition "at the fringes" can create ongoing competition concerns that are difficult to resolve without further competition law risks. (The same applies to contracts where the terms describe the broader relationship and allocate rights and responsibilities, including around use of IP rights.)

9. Where arrangements have allowed intra-brand competition, issues will arise if further arrangements are entered into to remove that competition. It is therefore important to carefully consider proposed distribution arrangements to minimise the risk of inadvertently creating competition issues in the future.

[4] *Flight Centre Limited v Australian Competition and Consumer Commission* [2015] FCAFC 104 at 163. Emphasis added.
[5] Section 30(2) of the Act provides that "[references] *to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services*."

Real examples

Allowing a distributor to supply outside its territory

A supplier had earlier entered into an arrangement with a distributor to distribute the supplier's products to a particular customer segment (territory). Over the years the distributor supplied customers outside of its territory and, on a number of occasions, competed with the supplier. The supplier never sought to rein in its distributor and restrict it to the territory, which gave the appearance that it acquiesced in the distributor's conduct. In other words, the contract did not reflect how the parties competed in practice.

This raised the risk that the parties could be viewed as competitors despite the territory restriction. In these circumstances the parties had to be alive to the risk that any communications around pricing could be viewed in a horizontal (competitor – competitor) context rather than a vertical (supplier – distributor) context.

Poorly defined territories

A supplier had earlier appointed a number of dealers to distribute its product. The supplier also supplied its products directly to end-customers. The dealers' territories were not clearly defined and the supplier received a number of complaints from dealers that other dealers were "undercutting" them on prices. A meeting was held between the supplier and its dealers and rules were developed to settle disputes and avoid future competition between dealers. The rules risked being viewed as an arrangement between competitors.

The *Eli Lilly case* – subsequently changing arrangements to remove competition

In the *Eli Lilly* case,[6] a manufacturer and wholesaler of animal health remedies entered into an agreement with a competing wholesaler of its products to not compete for customers. The parties agreed that the manufacturer and wholesaler would supply larger customers, and its competing wholesaler (customer) the smaller customers. This agreement also included both businesses knowing the minimum prices the manufacturer and wholesaler would offer to smaller customers. The parties admitted that their market-sharing conduct breached the Act's price fixing prohibition.

The *Flight Centre* case – price fixing between agent & principal?

The *Flight Centre* and *ANZ* cases[7] have challenged the widely held (but perhaps simplistic) view that an agent is its principal's alter ego and therefore the parties can never be viewed as "in competition". After making its way through the Australian courts, a final appeal by the Australian Competition and Consumer Commission (**ACCC**) in the *Flight Centre* case was heard by the High Court of Australia (Australia's highest court) on 27 July 2016. At the time of writing this paper, the High Court's judgment had not been delivered.[8]

The court of first instance: In the original proceedings, the Australian Federal Court (**Federal Court**) found that Flight Centre (an agent), on a number of occasions between 2005 and 2009, sought to prevent three airlines (its principals) from offering cheaper international airfares directly to consumers than the airlines offered to Flight Centre. The Federal Court held that Flight Centre attempted to fix prices with the airlines and Flight Centre was fined AU$11 million.

Many practitioners may ask "how did the Federal Court determine that Flight Centre fixed prices if it did not have any planes to provide air services?" While the Federal Court accepted that Flight Centre did not provide air services, it found that Flight Centre competed with certain airlines for the supply of air travel "booking and distribution" services to consumers. The price for the booking and distribution services was the retail or distribution margin (ie for the agent its commission), which was included in the headline price for the fare. The Federal Court considered that Flight Centre's attempt to control the price of the fares the airlines were offering to consumers amounted to fixing the price for air travel booking and distribution services.

[6] *Commerce Commission v Eli Lilly & Co (NZ) Ltd* (HC) Auckland CL 19/98, 30 April 1999.
[7] **Flight Centre**: *ACCC v Flight Centre Limited* (No 2) [2013] FCA 1313 (6 December 2013); *Flight Centre Limited v Australian Competition and Consumer Commission* [2015] FCAFC 104. **ANZ**: *ACCC v Australia and New Zealand Banking Group Limited* [2015] FCAFC 103.
[8] See: http://www.hcourt.gov.au/cases/case_b15-2016.

Appeal to the Full Court of the Federal Court of Australia (***Full Court***): On appeal, the Full Court overturned the Federal Court's decision and found that there was no separate market for booking and distribution services to consumers. Instead it found that the supply of booking and distribution services was an ancillary part of the supply of international air travel, in which Flight Centre acted as agent for the airlines. Accordingly, Flight Centre and its principal airlines did not compete with each other and could not fix prices. However, the Full Court noted that an agency relationship between two parties does not always mean that those parties cannot be in competition with each other. Each case will turn on its own facts.

Appeal to the High Court of Australia (***High Court***): On 11 March 2016 the ACCC was granted special leave to appeal to the High Court of Australia. That appeal was heard on 27 July 2016, with the High Court reserving its decision.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: DISTRIBUTION MODELS

- Think carefully about who your client is, or may be, in competition with.
- If possible, get the structure "right" at the outset.
- Are territories clearly defined, taking into account online and telephone sales?
- More broadly, have the parties clearly reflected where and how they operate? What about rights to use IP?
- Is the supplier/head franchisor competing (or may compete) with its distributors/franchisees?
- Is a supplier proposing to change existing arrangements to remove competition between itself and its distributors?
- Don't assume that genuine agencies are immune from competition laws.

When restraints of trade can breach the Act

10. We often review restraints between competitors[9] that may, on their face, appear innocuous but in reality could be seen as restraining how those parties compete.

11. These restraints can raise serious competition law concerns. They risk being viewed as forms of "price fixing", including "market sharing", or otherwise anti-competitive under the Act's general prohibition against arrangements containing a provision that has the purpose, or has or is likely to have the effect of, substantially lessening competition in a market.

12. The Act's price fixing prohibition is broad. It captures a broader range of conduct than simply agreeing a headline price. The penalties for breaching the Act are also significant. (Penalties are discussed in the "Competitor Dealings" section of this paper.)

13. The price fixing provision (section 30 of the Act) prohibits contracts, arrangements or understandings (collectively arrangements) between two or more competitors which contain provisions that have the purpose or (likely) effect of fixing, controlling or maintaining (collectively fixing) a price (or any component of price), discount, allowance, rebate or credit of one or more competitors. Such arrangements are deemed to substantially lessen competition in a market regardless of their actual impact on price (if any). It is a *per se* prohibition with limited exemptions which has been broadly interpreted by the courts.

14. Conduct that can be caught includes arrangements between competitors that **fix prices**, **rig bids**, **allocate markets/customers** or **restrict output**.[10]

15. In our experience both clients and practitioners have found aspects of the price fixing prohibition somewhat counter-intuitive. In many cases it may not be immediately obvious to the parties that they could be viewed as "competing" (at least from the Commission's

[9] "Competitors" includes potential competitors and competitors "but for" an arrangement not to compete.
[10] The Commerce (Cartels and other Matters) Amendment Bill, which has been progressing through the parliamentary process since 2011, would specifically define price fixing, market allocation and output restrictions.

perspective). While arrangements involving restraints often have a legitimate commercial rationale and make "good commercial sense" to both clients and advisors, they are red flags to competition lawyers. Such restraints therefore need to be carefully worked through.

16. Importantly the Act contains an exemption from Part 2 of the Act (which includes the price fixing prohibition) for restraints of trade in business sale and purchase agreements where:[11]

"*…the entering into of a contract for, or the giving or requiring the giving of a covenant in connection with, the sale of a business or shares in the capital of a body corporate carrying on a business in so far as it contains a provision that is* ***solely for the protection of the purchaser in respect of the goodwill of the business****.*" [emphasis added]

17. Restraints of trade that are excessively long and clearly unnecessary to protect the goodwill of the purchaser can raise issues, especially where they appear to be mechanisms to permanently exclude a competitor from a market. Restraints in relation to concentrated markets with high barriers to entry raise greater risks under the Act's general prohibition against anti-competitive arrangements given their potential to harm competition or be viewed as having that purpose. The ACCC has had concerns with restraints in relation to highly skilled professions including ophthalmologists, radiologists, nuclear physicians, radiographers and sonographers.

18. The common law also applies to restraints of trade and will often be more restrictive. We find that practitioners sometimes focus on either the Commerce Act or common law, but may forget that both will apply.

Real examples

Trans-Tasman restraint
There was a proposed triangular arrangement between the vendor of a trans-Tasman business and two purchasers (purchasers A and B) whereby:

- purchaser A would acquire the New Zealand assets of the vendor and agree not to supply goods to Australian customers; and
- purchaser B would acquire the Australian assets of the vendor and agree not to supply goods to New Zealand customers.

This proposal raised market sharing risks on both sides of the Tasman and it was difficult to see how it could be solely for the protection of the purchaser in respect of the goodwill of the business without a significant restructuring of the arrangements.

Sale and purchase of building restraint
We advised a client in relation to a provision in a sale and purchase agreement for a building where the vendor and purchaser, who risked being seen as competitors, agreed that the sale was conditional on the parties agreeing that each party would only supply services to different customer segments.

Longstanding restraint
We advised a client in relation to a longstanding arrangement between members of a financial services group that each member, operating as independent businesses, would not compete for the existing customers of another member. They also agreed that if approached by another member's customer they would refer those sales back to the incumbent business.

Commission challenges "pay for delay" IP restraint
In 2015, the Commission issued a formal warning to Consolidated Alloys (NZ) Limited (**CAL**) for the inclusion of an "anti-competitive clause" in a "*negotiated settlement*" with its competitor Edging Systems (NZ) Limited (**ESL**). The parties entered into the settlement agreement to resolve a commercial dispute involving an alleged breach of CAL's registered patent for soft-edge flashing products used on residential metal roofs.

[11] Section 44(d) of the Act.

CAL and ESL were the only manufacturers and distributors of soft-edge flashing products in New Zealand. CAL, a wholly owned subsidiary of Amalgamated Metal (Australia) Limited, registered a patent for a particular type of soft-edge flashing in 1995 which expired in 2015. ESL was founded in 2008 and produced a soft-edge flashing product, EZ-Edge. CAL alleged that ESL's EZ-Edge product breached its patent and issued proceedings. However, a few days before the trial commenced the parties entered into a settlement agreement, under which ESL agreed to:

- pay CAL a lump sum and royalties on annual sales of EZ-Edge for an undisclosed period of time and subject to a minimum annual payment; and
- not sell any other soft-edge flashing products covered by the patent other than EZ-Edge until June 2023 ie eight years past the expiry of the patent (the restraint).

The Commission considered that while the restraint did not breach the price fixing prohibition, it did have the purpose and (likely) effect of substantially lessening competition in the markets for edge products and soft-edge flashing products. Following the Commission's investigation, CAL formally advised that it would not enforce the restrictive clause in the settlement agreement.

19. All of these examples involve an agreement between (potentially) competing parties that restrains how one or more competitors competes. Such restrictions risk being viewed, at least by the Commission, as raising serious concerns (including price fixing). At their most basic, each provision risks being viewed as an agreement between competitors that there will be no price competition for particular customers.

20. As noted, price fixing is a *per se* prohibition, ie **there is no defence** (although there are some limited exemptions). There is no weighing of the pro and anti-competitive effects to determine whether a price fixing arrangement substantially lessens competition in a relevant market(s). Businesses often have difficulties grasping the breadth of the price fixing prohibition. It is not always intuitive that a restraint could risk being deemed to lessen competition in a market overall. Businesses are often perplexed as in their view there is no actual harm to competition as a result of the arrangement given that there are numerous other firms in the market or barriers to entry are low. Accordingly, practitioners need to provide clear guidance to clients to minimise the risk that clients inadvertently breach the Act.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: RESTRAINTS

- Could the parties be viewed as actual or potential competitors?
- What is the purpose of the restraint – for example, in a sale and purchase agreement is the restraint solely to protect the goodwill of the purchaser?
- Is the restraint reasonable and what is the likely effect on the relevant market(s)?
- Just because the arrangements have been in place for a long time does not exclude the application of the Act.
- Any form of reciprocal restraints will need closer scrutiny.

Resale price maintenance – when is an RRP not an RRP?

21. Recommended retail prices (RRPs) are everywhere – in print and online marketing, as well as bricks and mortar stores. But do resellers have to sell at that price (or any other price dictated by a supplier)? The short answer is **no**, and suppliers cannot force goods to be sold at that price.

22. Resale price maintenance (**RPM**) occurs when a supplier specifies the price at which its products are to be resold. This is broadly defined under under sections 37-42 of the Act, and includes:

    a. inducing or attempting to induce a retailer not to sell goods below a price set by the supplier;

    b. making it known to a retailer that the supplier will not supply goods unless the retailer agrees not to sell goods at or below a price set by the supplier;

c. entering into an agreement to supply goods to a retailer where one of the terms is that the retailer will not sell the goods at a price less than the price set by the supplier; or

d. withholding the supply of goods to a retailer because the retailer has not agreed to stop discounting,

23. Like price fixing, RPM is a *per se* prohibition, ie it is illegal regardless of its effect on competition.

24. Business people sometimes struggle with this concept, arguing that there are a number of commercial reasons for enforcing price floors, such as brand protection and consistency. While one might have sympathy for those arguments, the reality is that RPM sets an artificial floor, effectively preventing competition price below that floor. The RPM prohibition ensures that resellers are free to resell goods at whatever price they wish.

25. "Inducement" is not defined in the Act, but the courts have considered that the following examples of conduct by suppliers amounted to an inducement:

a. threatening to withdraw supply;[12]

b. delaying the delivery of goods;[13]

c. threatening to withdraw advertising or promotional subsidies;[14]

d. threatening to withdraw a distributorship; and[15]

e. threatening to "tighten" credit facilities.[16]

26. It is **not illegal for a supplier to stipulate a maximum resale price** ie it is acceptable to say "do not sell this product for more than $x". However, care should be taken so as not to convey the impression that a "maximum" price is, in reality, a default minimum price. While the Act does not *expressly* exempt the stipulation of a maximum resale price, the current version of the Commerce (Cartels and Other Matters) Amendment Bill (**Cartels Bill**) does. The exemption was included at the select committee phase of the Bill, with the Commerce Committee considering that "*maximum resale prices are pro-competitive, and that this amendment would ensure New Zealand's approach to this issue is consistent with that of Australia*."

27. It is **not illegal to recommend a price** (ie recommended retail price, or RRP), **so long as it is a genuine recommendation** and there is no obligation, incentive or pressure of any kind on the reseller to sell at the recommended price. However, if the supplier also competes with the reseller (ie there are vertical and horizontal relationships), there is a risk that the RRP could be viewed as price fixing.

28. Even when RRP is permitted:

a. Care must be taken to ensure this does not result in price fixing where the parties have vertical and horizontal relationships.

b. It can be challenging to advertise resale prices/RRP in a way that does not breach the Fair Trading Act 1986 (car dealers appear to have found this challenging at times).

[12] See, for example, *Direct Holdings Ltd v Feltex Furnishings of NZ Ltd* (1986) 2 TCLR 61.
[13] See, for example, *TPC v Pye Industries Sales Pty Ltd* (1979) 5 TPC 239.
[14] See, for example, *TPC v Sharp Corp of Australia Pty Ltd* (1975) 8 ALR 255.
[15] See, for example, *TPC v Kensington Hiring Co Pty Ltd* (1981) ATPR 40-256.
[16] See, for example, *TPC v Pye Industries Sales Pty Ltd* (1979) 5 TPC 239.

Real examples

Shoe distributor fined $30k for RPM
Accent Footwear, an importer and local manufacturer (under licence) of "Doc Martins" footwear, was fined $30,000 in 1993 after admitting it breached the RPM provisions of the Act. Among other things, Accent told a shoe store in Dunedin that it would only supply them with Doc Martin boots if the retailers sold them for a specified price. Accent subsequently refused to supply the boots to the Dunedin shoe store when it advertised and sold the boots below the specified price.

Pressuring a reseller to stop discounting – the *Aqualung* case
Aquanaut Pty Ltd (**Aquanaut**), which was the sole licensed importer and distributor of "Aqualung" diving equipment in New Zealand, was fined NZ$60,000 plus costs in 2004 after admitting that it breached the RPM prohibition. Aquanaut supplied approved dealers with two catalogues: one containing the RRP, and one for the dealer containing a standard formula for calculating those prices. After discovering that one of its dealers had been selling the Aqualung product at a discount, Aquanaut notified the dealer that there was to be "no bargaining on price" and terminated the dealership.

Inducement (or attempted inducement) of sub-distributors – *Acer Computers*
Acer Computers was fined $82,000 plus costs in 1999 after admitting that it induced or attempted to induce sub-distributors not to sell Acer scanners at a price less than that specified by Acer. It was noted that Acer was motivated by a desire to protect the integrity of its products.

"Innocent" RPM provision in terms of trade
Terms of trade for a company which imports, wholesales, and retails sporting goods provided that all resellers must adhere to RRP pricing for all sales, with a clear expectation that goods would not to be discounted. While the terms explained that discounting could damage the company's brand, we advised the company to remove the clause from the terms of trade.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: RESALE PRICE MAINTENANCE

- RRPs should be genuine recommendations, with no obligation, incentive or pressure on the reseller to sell at that recommended price.
- Setting a "maximum" price is OK, provided care is taken so as to not convey the impression that it is, in reality, a default minimum price.
- Think carefully about termination grounds and renewal rights at the outset (and draft accordingly).
- Take care to ensure that "financial inducements" do not fall foul of the "inducement" provisions.
- Take care in terminating "discounters".
- Think about whether an agency or other arrangement may best suit your client's needs.
- Be careful with RRPs when your client may also compete with its resellers.
- Consider whether true "agency" arrangements are appropriate.

COMPETITOR DEALINGS

*"Cartels are **cancers on the open market economy …** By destroying competition they cause serious harm to our economies and consumers. In the long run cartels also undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiencies."*[17]

29. Dealing with one's competitors can lead to efficient and pro-competitive outcomes (for example, joint ventures). In some cases, engaging in meetings or other communications with competitors is unavoidable. But whatever the context, care should always be taken to ensure that legitimate competitor dealings do not stray into anti-competitive arrangements or understandings. This is much harder than it sounds.

[17] Mario Monti, then EU Competition Commissioner, 3rd Nordic Competition Policy Conference (2000). Emphasis added.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: RISK AREAS FOR COMPETITOR DEALINGS

- Exchanges of cost, price or strategy information.
- "Loose talk" about market conductions or new industry costs.
- "Hints".
- Contractual joint ventures (consider structural joint ventures).
- Trade associations (note deeming provisions, discussed below).
- "Government" initiatives, eg NAIT fees and GP fees.

30. The penalties for contravening the Act are significant. For bodies corporate, penalties are up to the greater of $10 million or three times the commercial gain derived from the anti-competitive activity (or 10% of group turnover in NZ if the amount of the gain cannot be determined) per contravention. Individuals can be fined up to $500,000 per contravention.

31. In addition: (1) courts must impose penalties on individuals unless there are good reasons not to; (2) companies cannot indemnify individuals for price fixing penalties or reimburse their legal costs; and (3) courts may order persons who have engaged in price fixing to be excluded from company management (any person who breaches such an order is liable for imprisonment up to 5 years or a fine up to $200,000).

32. The Commission also has a number of other "lower-level" enforcement options in its arsenal which it regularly uses, including issuing warnings and compliance advice letters.

33. The following table includes a selection of recent fines imposed by the courts for contraventions of the Act's price fixing provision:

PARTY	CONDUCT	FINE
Real estate Bayleys, Success Realty and Unique Realty (2016)	Three separate alleged price fixing agreements in relation to Trade Me's proposal to (1) increase its fees for listing properties for sale on its website, and (2) that agents pass the price increase on to vendors	Bayleys: $2.2M Success: $900K Unique: $1.25M
Livestock / NAIT PGG Wrightson & Rural Livestock (2015)	Entering into agreements to set tagging and related fees at livestock saleyards	PGG: $2.7M Rural: $425K
Enviro Waste (2015)	Attempting to reach an understanding to compete less competitively for existing customers and to not enter the separate waste tallow market	Enviro Waste: $425K (plus $5K for an individual)
Carter Holt (2014)	A 7-month arrangement to increase prices for certain timber products in Auckland	Carter Holt: $1.85M (plus $5K for an individual)
Visy (2013)	Collusion on 3 tenders between 2001 - 2004 for packaging materials	Visy: $3.6M (plus $25K and $60K, respectively, for two individuals)
Air New Zealand (2013)	Fixing fuel and security surcharges	Air NZ: $7.5M (Note: 11 airlines were prosecuted in the NZ "Air Cargo" litigation, with over NZ$42.5M in total fines imposed)
Whirlpool (2011)	Conduct over 2 years regarding an arrangement to seek price increases for compressors	Whirlpool: $3M

Pitfalls around trade associations

34. Groups of merchants and individual artisans in various industries have been forming trade associations for centuries, and these forums continue to play an important role in modern day commerce. However, while trade associations provide many industry benefits they can be a "hot-bed" for inappropriate communications between competitors. Adam Smith recognised this risk stating "[p]*eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices"*.[18]

35. Many cartels have their origins in trade associations and industry working groups. Because of the inherent risks of competitors meeting we are increasingly preparing protocols. These are based on international best practice and clearly set out processes to minimise the risk of breaching competition laws. This can include a competition lawyer being present during trade association or industry working group meetings as a precaution and minute taker. This is particularly the case where the matters being discussed could be inadvertently misreported or misconstrued.

36. That said, the Commission does acknowledge the benefits of trade associations, noting that they "*play a useful role in enabling businesses to meet and discuss industry-wide issues and practices and to share knowledge and technical information*".[19]

37. Importantly, the Act deems that any arrangement entered into by a trade association is considered to be entered into by all the association's members. This is regardless of an individual member's involvement or knowledge of the arrangement, unless a member can:

    a. demonstrate that they expressly notified the association in writing that they wished to disassociate themselves from the arrangement, and then took such steps; or

    b. establish that they had no knowledge, and could not reasonably have been expected to have any knowledge, of the arrangement.

38. Additionally, any recommendation made by an association to its members is deemed to be an arrangement made between those members and between the association and those members.

Real examples[20]

The *laundry detergent* case (Europe)

In 2013, Proctor & Gamble (**P&G**)[21] and Unilever were fined €315.2 million by the European Commission for fixing the price of laundry detergents.[22] The price fixing arrangements arose out of an industry working group involving P&G, Unilever and Henkel for the purposes of reducing the environmental impact of laundry detergents.

The parties had originally sought to reduce the size of detergent boxes, energy consumption, packaging and shipping, storage and selling space. The purpose of the working group was to shift the market to greater sustainability, however the parties went one step further.

Having developed cold-water concentrated detergents, which reduced energy consumption by 90% or more, the parties faced a dilemma. It was believed that consumers would prefer a greater quantity of standard detergent for the same price as a concentrated product. Therefore, there would be a first mover "disadvantage" for the party that introduced their concentrated detergent first. To avoid this

[18] Adam Smith L.L.D & F.R.S, 1776 – *The Wealth of Nations*, Book I, Chapter X.
[19] Commission, Guidelines for Trade Associations, 20 September 2010, page 1.
[20] See also: "*The Commerce Commission has concluded its investigation into an allegation of price-fixing by the Committee of Gisborne Farmers Market*": http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2010/gisborne-farmers-market-agrees-to-remove-pricing-rule ; *"The Commerce Commission has told New Zealand Winegrowers it went beyond reasonable bounds by telling its members to limit the amount of grapes they harvested"*: http://www.stuff.co.nz/marlborough-express/news/3795170/Winegrowers-warned-after-complaints.
[21] See: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf.
[22] See: http://europa.eu/rapid/press-release_IP-11-473_en.htm?locale=en.

scenario, the parties agreed to launch their products at the same time, not to initially decrease prices and later to increase prices.

Note: A very similar Australian case is discussed in the "hub and spoke cartels" section below.

"Off the cuff" comments at business functions can lead to investigation

The following example illustrates how easy it is for comments in relation to how competitors should compete to result in an investigation. On 25 March 2015 it was reported in the Australian Financial Review that Andrew Forrest, Chairman of Fortescue Metals Group Ltd stated the following at a business dinner in Shanghai on 24 March 2015:

> *"*[Mr Forrest] *was "absolutely happy to cap [his] production right now" at 180 million tonnes* […] *the other major players, Rio Tinto, BHP Billiton and Brazil's Vale should also cap their production and we'll find the iron ore price goes straight back up to US$70, US$80, US$90* […] *I'm happy to put that challenge out there, let's cap our production right here and start acting like grown-ups."*

Following that article, the ACCC launched an investigation. While the ACCC ultimately concluded that it would take no further action[23] Mr Fortescue had to endure the regulator's scrutiny for some time and likely incurred considerable legal costs.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: TRADE ASSOCIATIONS

Clients involved in trade associations should at the very least undertake the following steps to minimise risk:

- Ensure that the trade association is a legitimate organisation, has a clearly defined purpose, and has an effective competition law compliance regime in place.
- Ensure that agendas are circulated prior to meetings (including to members' legal advisors) and topics not on the agenda are not discussed (including outside of formal meetings).
- At the start of each meeting the Chair should remind members that they are not to discuss prices, costs, capacity or strategy with other members, and seek members' acknowledgment.
- If prices or how members should compete is discussed, clients should immediately object and request that their objection is noted in the minutes. If a discussion continues, the lowest risk option is for the client to leave the meeting. A file note (marked privileged and for the purposes of seeking legal advice) should also be taken recording the client's objection, refusal to be bound, and removal from the meeting (if applicable). Advice should also be sought as to whether any further steps are required in the circumstances.
- Ensure that advice is obtained before providing or receiving sensitive commercial information or participating in surveys.

Joint ventures: a breeding ground for competition issues?

39. Joint ventures between competitors are commonplace, particularly in concentrated markets such as New Zealand. While joint ventures are usually pro-competitive, they can also be a breeding ground for potential competition law issues. We regularly advise clients in relation to the formation and management of joint ventures with competitors. Problematic issues can include discussions about or sharing of individual (as opposed to joint venture) pricing, costs, capacity issues, and refusals to deal with third party competitors (or otherwise preferring the joint venture parties). What may start as legitimate discussions between the parties relating to the joint venture can stray into "anti-competitive territory" if care is not taken.

40. The Act provides a limited exemption from the price fixing prohibition for genuine joint ventures. To be exempt from the price fixing prohibition a joint venture must meet specific requirements set out in section 31 of the Act. The parties must jointly produce goods for supply (ie each joint venture party must play a genuine role in the joint production of the goods) or jointly supply services.

[23] See: https://www.accc.gov.au/media-release/accc-concludes-assessment-of-fortescue-chairman%E2%80%99s-call-for-cap-on-iron-ore-production.

41. The current joint venture exemption has been criticised as focussing "*on the form by which the parties were 'cooperating' to determine whether* [the] *exemption to the price fixing prohibition applied*."[24] In contrast, for the proposed new "collaborative activities" exemption under the Cartels Bill to apply, the collaborative activity must not be carried on for the dominant purpose of lessening competition. Accordingly, the proposed exemption focusses on "substance" over "form" – which, in our view, is an improvement.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: JOINT VENTURES

- Care should always be taken when forming and operating a joint venture with a competitor. If in doubt about what can be discussed/shared, seek legal advice.
- A rule of thumb is that the more independent a joint venture is from its competitor shareholders, the better.
- Do not assume that the joint venture exemption will automatically apply to any pricing discussions between joint venture parties.
- Consideration should be given to establishing clear protocols regarding confidentiality, information flow and management of the joint venture.
- Consider whether an independent pricing committee may be appropriate.
- Always consider the different "hats" that a party might be wearing when they are making decisions on behalf of the joint venture. In particular, consider how sensitive information might be used (or misused) by that party in a different capacity.

"Hub and spoke" cartels: Doing someone else's dirty work could land you in hot water

"[…] *the conduct of Woolworths through its employee was* ***a necessary component to give effect to the contraventions***."[25] [emphasis added]

42. "Hub and spoke" cartels have been a hot topic amongst competition regulators and practitioners over recent years. The name, while sounding relatively sophisticated, is based on the humble wheel. A "hub and spoke" cartel generally involves competitors (the "spokes") and one or more of their common suppliers and/or customers (the "hub") reaching an understanding whereby the hub either intentionally or naively facilitates the cartelistic behaviour of the spokes. For example, the competitors may exchange sensitive information through a third party retailer, and not necessarily be in direct contact with each other. The concept has been described by the US courts as:

> "*Such a conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes*."[26]

43. Given the complexity and evidential difficulties in investigating (and proving) such "hub and spoke" arrangements, cases seem to have been relatively few and far between – with most of the successful cases coming out of the UK and EU.

44. Despite the relatively rare instances of successful cases to date, practitioners and their clients should be aware of the potential risks for clients if they are sharing sensitive information with (or receiving such information from) their suppliers or customers.

[24] Commission, Revised Draft Competitor Collaboration Guidelines, para 5.4. See: http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/.
[25] *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676, at [17].
[26] *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc*., 602 F.3d 237, 255 (3d Cir. 2010).

Real examples

The *laundry detergent* case (Australia)
The "spoke(s)": In April 2016 Colgate-Palmolive Pty Limited (**Colgate**) was fined AU$18 million by the Australian Federal Court for contraventions of the Trade Practices Act 1974 (now the Competition and Consumer Act 2010) after admitting to entering into understandings which limited the supply, and controlled the price, of laundry detergents in Australia. The fine was made up of $12 million for an understanding with Unilever Australia Limited (**Unilever**) and PZ Cussons Australia Pty Ltd (**Cussons**) (the other "spokes") to cease supplying standard concentrate detergents in early 2009 and only supply ultra concentrates from that time (the "timing of supply agreement"), and $6 million for an information sharing understanding with Unilever (including information about when the parties could increase the price of their laundry detergents). Unilever was the leniency applicant in Australia.

The "hub": 2 months later in June 2016, the Federal Court of Australia ordered grocery retailer Woolworths to pay penalties totalling $9 million for its role in the laundry detergent cartel after Woolworths admitted to being knowingly concerned in the making, and giving effect to the timing, of a supply agreement between Colgate, Cussons and Unilever. The penalty was the largest obtained by the ACCC against a party that was an accessory to competition law breaches by being knowingly concerned in anti-competitive conduct.

Belgian regulator settles hub and spoke cartel case with 18 retailers and suppliers for €174M
On 22 June 2015, the Belgian Competition Authority (**BCA**) adopted its first settlement decision and fined 11 suppliers and 7 retailers a total of €174 million for their participation in a "hub and spoke" cartel in the drugstore, perfumery and hygiene sector between 2002 and 2007. Most of Belgium's major retail chains were involved, and the authority opened an investigation following a leniency application by Colgate-Palmolive.

The BCA found no proof of direct contact between the distributors or suppliers. Instead, price coordination was the result of indirect contact between the retailers by way of their suppliers, which acted as intermediaries and facilitators. Suppliers, either on their own accord or at the request of a retailer, provided information to retailers in order to try to arrange a coordinated increase of the retail prices. The practices had varying degrees of success, with some retail chains not applying them at all or for short periods only.

The early UK cases
Replica Kit: In 2003, the UK Office of Fair Trading (**OFT**) found that a number of sportswear retailers, Manchester United plc, the Football Association Ltd and Umbro Holdings Ltd had entered into price fixing agreements in relation to replica football kit, in violation of competition laws.[27] The OFT concluded that the parties were involved in various agreements or concerted practices which fixed the prices of the top-selling adult and junior short sleeved replica football shirts manufactured by Umbro Holdings Ltd, including replica football shirts of the England team, and the Manchester United and Chelsea clubs. High street chain JJB Sports received the biggest fine, £8.373 million, followed by Umbro with £6.641 million and Manchester United which was fined £1.652 million. The Football Association (which was granted leniency and accordingly a reduced fine) was fined £158,000.

Toys: Also in 2003, the OFT found that Hasbro (one of the largest toy and games suppliers in the UK), Argos and Littlewoods (retailers) had entered into price-fixing agreements to fix the price of certain Hasbro toys and games, in violation of competition laws. This included two bilateral price-fixing agreements and/or concerted practices: one between Hasbro and Argos, and the other between Hasbro and Littlewoods. Hasbro was granted 100% immunity, meaning that its penalty (determined to be £15.59 million) was reduced to nil. Argos and Littlewoods were fined £17.28 million and £5.37 million respectively.

In both the Replica Kit and Toys cases, appeals were lodged with the UK Competition Appeal Tribunal (**CAT**) challenging both the findings of the OFT and the level of fines imposed. The CAT largely upheld the OFT decision but the parties further appealed to the Court of Appeal on a point of law. However, in October 2006, the Court of Appeal dismissed both appeals.

[27] See https://assets.publishing.service.gov.uk/media/555de4c5e5274a74ca00014b/replicakits.pdf.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: HUB & SPOKE CARTELS

- Sharing sensitive information in a vertical relationship can raise price fixing concerns.
- Retailers should be wary of concerted (or individual, but similar) approaches from suppliers about pricing, cost and capacity etc.
- A "red flag" should be raised if a supplier asks you to pass on information to another supplier, or states that the suppliers have "agreed" when new products will be launched or pricing reviewed.
- Do not pass sensitive information from one supplier on to another supplier.
- Do not tell one supplier what another supplier is doing.

Beware: Professional services are not immune

45. An early case involving South Auckland lawyers illustrates that professional services are not immune to the Act's price fixing prohibition. In 1995, the Commission entered into a settlement with two lawyers who admitted they attempted to fix prices for conveyancing fees. According to the Commission's media release,[28] the two lawyers considered a third lawyer's conveyancing fees to be "too low" and threatened that they would reduce their own conveyancing fees (ie to undercut the third lawyer) unless the third lawyer agreed to increase his fees. The third lawyer did not increase his fees, but did complain to the Commission.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: DEALING WITH COMPETITORS

DO

- ✓ Discuss any proposed agreements or meetings with competitors with legal advisers first.
- ✓ Ensure that pricing decisions are made independently of competitors.
- ✓ Leave meetings with competitors if discussions about pricing arise. Make diary or file notes or have it recorded in minutes of meetings that you left because issues of price were being discussed.
- ✓ Take care with the language you use in any correspondence, whether to employees of competitors or within your own workplace. Remember that the Commission has the power to demand copies of all such correspondence including emails.
- ✓ Remember that you **can** discuss matters that will not impact price, competition or strategy (but avoid reaching an understanding as to what you may do).
- ✓ Remember that you **can** reach understandings with competitors provided they are not "price fixing", "exclusionary conduct" or "anti-competitive" as defined. *But take legal advice before entering any such understanding*.
- ✓ Seek advice if you are in any doubt.

DON'T

- ☒ Forget that price fixing agreements with competitors are illegal unless authorised by the Commission (even if they lower prices).
- ☒ Exchange price or capacity information with competitors. "Price" includes any information relating to pricing such as rates, commissions, expected volumes, discounts, and credit terms.
- ☒ Discuss with competitors your relationship with individual customers, or agree with competitors to target different customers or to restrict output.
- ☒ Reach any form of collective agreement or understanding on what you will or will not do *unless* it is subject to obtaining legal advice; or conditional on seeking authorisation.
- ☒ Signal price changes to competitors. Again, this extends to any information relating to pricing.

[28] See: http://www.comcom.govt.nz/the-commission/media-centre/media-releases/1995/twolawyersadmitpric.

Proposed changes to New Zealand's cartel laws – the Cartels Bill

46. The Cartels Bill will, among other things, replace the current "price fixing" prohibition in the Act (section 30) with a new prohibition against entering into a contract or arrangement, or arriving at an understanding that contains a "cartel provision", or giving effect to a "cartel provision". A cartel provision would be defined as a provision in a provision in a contract, arrangement or understanding that has the purpose, effect, or likely effect of "**price fixing**", "**restricting output**", and/or "**market allocating**" (ie "hard core" cartel conduct) in relation to the supply or acquisition of goods or services in New Zealand.

47. The following table summarises the key components of each form of "hard core" cartel conduct:

PRICE FIXING	RESTRICTING OUTPUT	MARKET ALLOCATING
Fixing / controlling / maintaining • price, discount, allowance, rebate, or credit • for/in relation to goods or services • supplied or acquired by 2 or more parties in competition	*Preventing / restricting / limiting* • the (likely) production of goods • the (likely) capacity to supply services • the (likely) supply of goods/services • the (likely) acquisition of goods/services • supplied or acquired (as applicable) by 2 or more parties in competition	*Allocating between any 2 or more parties* • the persons or classes of persons to/from whom the parties supply/ acquire goods/services; or • the geographic areas in which the parties supply/acquire goods/services • in competition with each other
Provisions are caught where they "*provide for*" the above		

48. References to persons "*in competition with each other*" would include persons that would be in competition with each other *but for* a cartel provision.

49. The Cartels Bill originally included provisions for the criminalisation of cartel conduct when it was introduced in 2011. Those provisions would have provided for up to 7 years' jail time for individuals who intentionally engaged in cartel conduct, but were removed from the Cartels Bill by the Minister of Commerce and Consumer Affairs in December 2015.[29]

50. A cartel provision would be deemed to breach section 27 of the Act and be unenforceable, unless an exemption applied. The following table summarises the key components of the proposed new exemptions:

COLLABORATIVE ACTIVITY	VERTICAL SUPPLY CONTRACT	JOINT BUYING & PROMOTION
• parties involved in a **collaborative activity**, ie: - enterprise, venture, or other activity **in trade** - carried on in ***cooperation*** *by* 2 or more persons - *not for the* ***dominant purpose of lessening competition*** *between 2 or more of the parties*	• a ***contract*** (not an arrangement or understanding) • between a (likely) supplier of goods (services are excluded) and a (likely) customer of the supplier • the **cartel** provision: - **relates to** the (likely) supply of goods to the customer (including to the maximum price of resupply); and	• **relates to price** for goods/services to be collectively acquired (directly/ indirectly); or • provides for **joint advertising** of the price for the resupply of goods/ services so acquired; or • provides for a **collective negotiation** of the price for goods/services followed by individuals purchasing at

[29] For detailed commentary on the Cartel Bill before cartel criminalisation was removed, see Matthews and Stewart, Getting up to speed with Cartel Criminalisation - 19 November 2014, http://www.matthewslaw.co.nz/wp-content/uploads/2016/08/CONFERENZ-Getting-up-to-speed-with-Cartel-Criminalisation-19-November-2014-Matthews-Stewart-paper.pdf.

• the cartel provision is ***reasonably necessary*** for the purpose of the collaborative activity • at the time of entering into/arriving at, or giving effect to	• does not have the ***dominant purpose of lessening competition*** between 2 or more of the parties	the collectively negotiated price; or • provides for an **intermediary to take title** to goods and resell or resupply them to another party to the arrangement

51. **Collaborative activity exemption**: The proposed collaborative activity exemption would replace the current joint venture exemption in the Act, which has been criticised as focussing on the "form" rather than "substance" of cooperation between the parties. It is intended to be sufficiently broad as to cover both joint ventures and "ancillary restraints".

52. **Vertical supply contracts**: Vertical relationships can exist where, for example, a manufacturer supplies goods or services to a retailer, but also competes with that retailer downstream (either directly, or through one of its subsidiaries). The application of the proposed exemption for *vertical supply contracts* is limited in that it only applies to the extent that the cartel provision relates to the supply or likely supply of goods – the cartel prohibition would otherwise apply. Clear benefits of the proposed new exemption are that franchisors should be able to allocate territories to franchisees, and the exemption clarifies / resolves the issue for suppliers setting maximum prices where they also compete. Resale price maintenance would remain *per se* illegal.

53. **Joint buying and promotion**: The proposed exemption for *joint buying and promotion agreements* would apply 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. This replaces (and expands on) the current exemption for joint buying and promotion arrangements under the Act. Unlike the other exemptions, this exemption would only apply to "price fixing", not the other forms of cartel conduct. Accordingly, even if the exemption applied, it would still be illegal if the provision amounted to "market allocation" or "capacity restriction" and the collaborative activity exemption did not apply, or it otherwise had the purpose, effect, or likely effect of substantially lessening competition.

54. At the time of writing this paper, the Cartels Bill was sitting at number 23 on the Parliamentary Order Paper. There has been no clear guidance on when the Cartels Bill will ultimately be passed into law.

COMPLIANCE & IMMUNITY

55. An effective competition compliance regime can help raise awareness of competition laws among staff, bring potential concerns to the attention of management and the firm's legal team, and potentially save firms from the considerable time and expense of a Commission investigation and/or fines. Identifying potentially anti-competitive conduct as early as possible may be the difference between neutralising risk, and being fined millions of dollars.

56. The Commission has an excellent database of guidelines on its website which are both user-friendly and informative, and can easily be passed on to clients. The following table contains a list of the Commission's current business competition guidelines and policies:

#	GUIDELINE / POLICY	LINK
Guidelines		
1	Authorisation Guidelines	http://www.comcom.govt.nz/business-competition/guidelines-2/authorisation-guidelines/
2	Cease & Desist Guidelines	http://www.comcom.govt.nz/business-competition/guidelines-2/cease-and-desist-guidelines-2/
3	Competitor Collaboration Guidelines [**in draft**]	http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/
4	Criminal Prosecution Guidelines	http://www.comcom.govt.nz/the-commission/commission-policies/criminal-prosecution-guidelines/
5	Document Production Guidelines [**in draft**]	http://www.comcom.govt.nz/the-commission/commission-policies/document-production-guidelines/
6	Enforcement Response Guidelines	http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/
7	Guidelines for Overseas Requests for Compulsorily Acquired Information and Investigative Assistance	http://www.comcom.govt.nz/the-commission/commission-policies/guidelines-for-overseas-requests-for-compulsorily-acquired-information-and-investigative-assistance/
8	Guidelines for procurers – How to recognise and deter bid rigging	http://www.comcom.govt.nz/business-competition/guidelines-2/how-to-recognise-and-deter-bid-rigging-guidelines-for-procurers/
9	Guidelines for Quantitative Analysis	http://www.comcom.govt.nz/the-commission/commission-policies/guidelines-for-quantitative-analysis/
10	Investigation Guidelines	http://www.comcom.govt.nz/the-commission/commission-policies/competition-and-consumer-investigation-guidelines/
11	Mergers and Acquisitions Guidelines	http://www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/
12	School uniforms and supplies – procurement guidelines for schools	http://www.comcom.govt.nz/business-competition/guidelines-2/school-uniforms/
13	Trade Associations Guidelines	http://www.comcom.govt.nz/business-competition/guidelines-2/trade-associations/
Policies		
14	Cartel Leniency Policy & Process Guidelines	http://www.comcom.govt.nz/the-commission/commission-policies/cartel-leniency-policy/cartel-leniency-policy-and-process-guidelines/
15	Cooperation Policy	http://www.comcom.govt.nz/the-commission/commission-policies/cooperation-policy/
16	Enforcement Criteria	http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-criteria/
17	Model Litigant Policy	http://www.comcom.govt.nz/the-commission/commission-policies/model-litigant-policy/

Leniency (conditional immunity): The benefits of whistleblowing

57. "Immunity" or "leniency" is a common tool worldwide to detect and prosecute illegal price fixing cartels. They are unquestionably effective and have led to a rise in prosecutions internationally. Under these regimes, the party who is "first in" to "blow the whistle" will get conditional immunity. For many, these regimes raise policy and moral issues, but they work.

58. The Commission's current cartel leniency policy was introduced in 2010, replacing the 2004 policy. The key changes were to add a marker system, remove the availability of amnesty for "coercers" and introduce Amnesty Plus. The current policy is under review.

59. The leniency policy has two main parts:[30]

> "***Immunity****: Conditional immunity will be granted where an applicant is the first participant in a cartel to apply to the Commission and to meet the prescribed conditions. Immunity is 'conditional' in that the holder must continue to meet the prescribed conditions to maintain their immunity status.*
>
> ***Cooperation****: The Commission may exercise its discretion by taking a lower level of enforcement action, or, in exceptional cases for individuals, no action at all, in exchange for information and full, continuing and complete cooperation throughout a cartel investigation and any subsequent proceedings*."
>
> *"The availability of conditional immunity and concessions for cooperation reflect the exercise of the Commission's discretion as to how it will deal with a cartel member who offers significant assistance in detecting and proving cartel conduct. The Commission has determined that conditional immunity from prosecution is justified where the cooperation and full admission by a party enable the Commission to detect and/or prove the existence of cartel."*

60. If a cartel member has all the required information about the cartel (including who is involved) and meets the necessary requirements, it may contact the Commission and receive conditional immunity immediately. If a cartel member does not have all the required information to hand, but wants to make sure they are "first in", they may contact the Commission and request a "marker". This allows the cartel member to gather the information necessary to perfect the marker and be granted immunity.

61. The conditions for conditional immunity are:[31]

    a. the applicant is the first to apply for a marker or conditional immunity in respect of a cartel that:

        i. the Commission is not aware of; or

        ii. the Commission is aware of but does not yet have evidence that is likely to warrant issuing proceedings;

    b. the applicant is or was a participant in the cartel;

    c. the applicant admits that it participated in conduct that may constitute a contravention of the cartel prohibition;

    d. the applicant has ceased involvement in the cartel or otherwise acts as directed by the Commission;

    e. the applicant has not coerced others to participate in the cartel;

    f. in the case of applications by companies, the admissions by the company must relate to genuine corporate acts (not those taken by individuals); and

    g. the applicant agrees to full and continuing cooperation with the Commission's investigation and any subsequent proceedings.

62. The first party to lodge a leniency application receives full immunity from Commission-initiated proceedings (assuming full and continuing co-operation). This does not protect the "whistle-blowing" party from third party proceedings, but these have been relatively rare. If immunity is

[30] Commission, Cartel Leniency Policy and Process Guidelines, para 1.07 and para 1.04 respectively.
[31] Commission, Cartel Leniency Policy and Process Guidelines, para 3.06.

granted to a body corporate, it will usually extend with the same conditions to any current or former directors, employees, officers or its subsidiaries. By contrast, an individual's leniency application will generally render their employer ineligible for leniency.

63. If leniency is not available (ie someone else was already "first in"), cooperating parties may request a lower level of enforcement action from the Commission. This could be in the form of reduced penalties if the Commission proceeded to prosecution.

64. Cartelists (or potential cartelists) or their lawyer can make a "hypothetical" or "off the record" inquiry to the Commission to see if leniency is available. This usually only requires disclosing to the Commission the general industry involved and establishing that no Commission investigation has been initiated and no other leniency applications have been lodged. Time is of the essence during this phase as other cartelists may also be contemplating applications. Hypothetical inquiries will not constitute an application for immunity or a marker.

65. Where an investigation was commenced on the Commission's own accord (for example from an anonymous tip-off where none of the cartel members had sought leniency), the Commission may (but will not always) offer leniency to one of the parties in return for that party providing fulsome and incriminating evidence on the other cartel members.

66. Amnesty Plus allows an applicant not eligible for immunity for one cartel to receive a reduced penalty for involvement in that cartel by informing the Commission of a separate cartel.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: COMPLIANCE & IMMUNITY

- Conditional immunity is only available on a "first in" basis. Any delay in applying for a marker could be the difference between being granted "immunity" or not.
- Immunity is not available to any person who has coerced other participants to participate in the cartel. (Coercion includes conduct such as threats of physical or serious economic harm, or intimidation, to compel or force persons to take part in the cartel.)
- If you or your client suspect that your client or its employees have engaged in cartel conduct, urgently consider whether a marker should be sought. It may be advisable to consult a competition law specialist.
- Consider all relevant jurisdictions in which your client operates, and whether it is appropriate to seek leniency in those jurisdictions. Time is off the essence, especially if it becomes a "race" between cartelists to secure leniency in key jurisdictions.
- A strong compliance culture is important for preventing or detecting cartel conduct.
- A good compliance programme should promote a culture of ethical conduct and compliance with the law. Senior managers and staff should be well trained in competition laws. Where possible, companies should appoint compliance officers.

PROCUREMENT

67. Tender and procurement is universally acknowledged as high risk for competition (antitrust) concerns. In New Zealand, there can be particular issues as a number of parties may need to collaborate with one or two parties with "control" over key inputs. Conversely, monopsonists (ie firms with purchasing market power) may want suppliers to consolidate on a joint bid for supply. Questions may be asked about how tenderers can participate in a "safe" way.

68. Bid rigging (collusive tendering) occurs when two or more competitors agree not to compete with each other for tenders, allowing one of the parties to "win" the tender. It can take a number of different forms, including:

a. "cover bidding" or "cover pricing", where competitors choose a winner and everyone but the winner deliberately bids above an agreed amount to establish the illusion that the winner's quote is competitive;

b. "bid rotation", where usual tenderers appear to take turns in submitting (and the other parties take measures to ensure the right party "wins"); and

c. "bid withdrawal", where a winning bid is withdrawn to allow another bidder to win instead.

69. Bid rigging is a form of cartel conduct, and is illegal under the Act. Some industries, for example construction, are more susceptible to collusion than others. Participants in those industries need to be extra vigilant and ensure that all bids are independently considered and submitted.

70. The Commission has produced dedicated websites for the construction and health industries for members of those industries to increase their understanding of competition and consumer laws so they can improve their compliance. See http://construction.comcom.govt.nz/ and http://health.comcom.govt.nz/.

Real examples

"The Christchurch bus cartel"[32]
The chief executive officer of Christchurch Transport Limited had approached its 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 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 ordered Christchurch Transport 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.

Cover pricing by Queensland construction companies
In 2011, the Australian Federal Court fined 3 Queensland-based construction companies a total of AU$1.3 million for engaging in illegal cover pricing. The conduct related to tenders for one Local Government and three State Government construction projects in Queensland, and amounted to a controlling of the price at which services were to be supplied. Two individuals were also penalised $50,000 and $30,000 respectively for their involvement in the bid rigging cartel.

"Brisbane fire protection cartel"[33]
For about 10 years until 1997 most of the companies in the fire alarm and fire sprinkler installation industry in Brisbane held regular meetings, at which they agreed to allow certain tenders to be won by particular competitors.

Calling themselves the "Sprinkler Coffee Club" and the "Alarms Coffee Club", the groups would meet up over a cup of coffee at hotels, cafes, and various sporting and social clubs. At these meetings they would share tenders and decide who was to submit "cover prices" to make the tender process look legitimate, while ensuring the agreed company won the tender.

It has been estimated that this conduct affected contracts worth more than AU$500 million. The Federal Court imposed more than AU$14 million in penalties on the companies and some of their executives.

ACCC authorises Sydney councils' joint waste tender

[32] Source: Commission, Guidelines for procurers – How to recognise and deter bid rigging, September 2010, page 3.
[33] Source: ACCC, Cartels Case Studies and Legal Cases. See: https://www.accc.gov.au/business/anti-competitive-behaviour/cartels/cartels-case-studies-legal-cases.

In 2014, the ACCC granted authorisation to 4 Sydney councils to jointly tender for services to process "household clean-up" waste. This waste included bulky household items such as mattresses and whiteware, which are collected outside of the weekly collection. The authorisation provided statutory immunity from court action for six years, covering both the tender period and the maximum possible contract term of 5 years. In authorising the joint tender, the ACCC acknowledged that the joint tender was likely to lead to some efficiency and cost savings, and may also provide incentives for waste providers to compete more vigorously to win the tender.

PRACTICAL TIPS FOR PRACTITIONERS AND THEIR CLIENTS: PROCUREMENT

- Be aware of suspicious bidding patterns, including where:
  - suppliers "take turns" to win (or share) tenders;
  - a number of the bids include excessively high prices or otherwise include unacceptable terms (ie the bidders appear to not want to win the tender);
  - there is only one acceptable bid, against a number of clearly non-conforming bids;
  - usual suppliers decline to tender without a legitimate reason;
  - a usually "low priced" bidder suddenly puts in a high bid for the same type of work;
  - bids are suddenly withdrawn without any legitimate reason;
  - a number of parties have made the same amendments to the template tender contract;
  - there are indications that the bidders have met before the tender closes; or
  - the winning firm regularly subcontracts to bidders that submitted higher tenders.
- Refuse to engage with other bidders in relation to "tactics" or pricing.
- Take care (or seek legal advice) when considering making a joint bid, including where the party running the tender has asked you to do so.
- Clients in industries that are susceptible to bid rigging (eg construction) should take extra care. All bids should be independently considered and submitted.

OTHER ISSUES AND TRENDS

71. **Merger trends**: The Act prohibits acquisitions that have the effect or likely effect of substantially lessening competition in a market. Unlike many overseas jurisdictions, New Zealand does not have a compulsory pre-merger notification regime. Rather, the Act provides a voluntary pre-notification regime under which parties can, but do not have to, seek clearance or authorisation for a proposed acquisition.

72. The Commission may grant clearance where it is satisfied that a proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The Commission may also grant an authorisation for an acquisition that would result in a substantial lessening of competition, if the public benefits (essentially economic efficiencies) resulting from the acquisition are found to outweigh the detriments caused by the substantial lessening of competition. Clearance or authorisation cannot be granted retrospectively.

73. The number of clearance applications registered with the Commission has remained relatively steady over the last few years (around 11-14 per year), but has not yet bounced back to pre-GFC levels (around 17-21 per year).[34] There appears to be an increasing level of "pre-registration" discussions taking place between merger parties and the Commission, with a proposed merger often being announced in the media weeks before a clearance application is registered (for example the Z/Chevron merger in 2015, and the currently proposed Vodafone/Sky merger in 2016).

74. The timeframe for merger decisions, with the exception of some clear outliers, has also remained relatively constant over the last few years (at around 2-3 months), although some

[34] Only 5 clearance applications were registered in 2009.

more complex mergers have taken over 10 months. This is only slightly longer than the Commission's internal target of 40 working days.[35] Issues that tend to "prolong" a decision include delays by the merging parties to respond to information requests from the Commission, and the time it takes for the Commission to analyse expert evidence that is submitted by the merging parties or other parties submitting on the merger.[36]

75. Declined mergers have tended to be those which have resulted in a monopoly (ie from 2 firms to 1), and some "3:2" mergers where there are high barriers to entry and reduced countervailing buyer power. The following table summarises the Commission's reasons for some of the more recent "declined" mergers:

DECISION[37]	MARKET CONCENTRATION	BRIEF REASONS FOR THE COMMISSION'S DECISION
[2016] NZCC 5: Tennex Capital Limited *San-i-Pak Limited* (February 2016)	**2:1** in medical and quarantine waste	• Lack of existing competition • High conditions of entry • Waste Management and Enviro Waste (who contract IWL and San-i-pak to treat their clients' medical and quarantine waste in the South Island) were unlikely to enter the market, of sufficient extent, in a timely way • The Commission was not satisfied that the countervailing power of large customers would be sufficient to offset the loss in competition from the acquisition and subsequent shift in bargaining power
[2015] NZCC 12: Reckitt Benckiser Group Plc *Johnson & Johnson* (April 2015)	**3:2** in personal lubricants	• The parties were each other's closest competitors in the supermarket and pharmacy markets • Lack of sufficient constraint from existing competitors • Supermarkets lacked an incentive to exercise countervailing buyer power • Trust and familiarity in the brand is important for consumers of lubricant and this could not be replicated easily by a supplier
[2014] NZCC 39: Connor Healthcare Limited[38] *Acurity Health Group Limited* (December 2014)	**3:2** in hospitals (or 2:1 in some specialities)	• Three of the four private hospitals in the Wellington region would come under common ownership • The fourth (Southern Cross Hospital) would be unlikely to expand to provide sufficient competition to replace the competition removed by the merger
[2013] NZCC 7: Hamilton Radiology Limited *Medimaging Limited* (March 2013)	**2:1** in radiology services (*non-DHB funded MRI services in the Waikato region*)	• The merged entity would be the sole provider of MRI services in the Waikato region post acquisition • New entry unlikely • No or limited countervailing buyer power for private or insurer-funded procedures
NZCC 13/2012: epay New Zealand Ltd *Ezi-Pay Ltd* (June 2012)	**2:1** in in-store mobile top-ups	• Limited constraint from existing competitors • High barriers to entry

[35] Commission, Mergers and Acquisitions Guidelines 2003, para 6.24: "We have committed to deciding clearance applications within an average of 40 working days of registering the application."
[36] For a Commission perspective, see the excellent presentation by David Blacktop (Principal Counsel, Competition at the Commission), "An insider's reflections on merger clearances", http://www.comcom.govt.nz/the-commission/media-centre/speeches/an-insiders-reflections-on-merger-clearances/.
[37] Note that the Commission has changed the way it cites its decisions over the years.
[38] Note that the applicant lodged a second clearance application on 17/12/14 with a divestment undertaking whereby Evolution Healthcare (shareholder of Connor) would "sell down" its shares in Connor to no more than 11.7% (note there was an amended undertaking on 1/12/14). That second application was cleared (subject to the amended divestment undertaking) on 19/12/14. The applicant appealed the original decision to the High Court in March 2015, but withdrew that appeal in June 2015.

		• Constraint from the threat of direct integration with large retailers unlikely (eg mobile phone companies establishing links directly with large retailers) • Limited constraint from direct top-ups
658: Tegel Foods Ltd *Brinks Group* (October 2008)	**3:2** in chicken supply	• Would have resulted in loss of vigorous competitor which engaged in price discounting • Low likelihood of new entry and entry unlikely to be sufficiently timely • Reduced countervailing power of buyers in downstream market (ie supermarkets which purchase chickens) • Increased risk of tacit collusion
650: Southern Cross Health Trust *Aorangi Hospital Limited* (September 2008)	**2:1** in hospitals	• Market participants had been competing strongly for some time. Loss of one (Aorangi) eliminates this competition and competitive constraint • High barriers to entry • No evidence of likely new entry
637: Sumitomo Forestry Co Ltd *Carter Holt Harvey Rangiora* (March 2008)	**3:2** in MDF	• Merging parties were each other's greatest constraint • Low likelihood of new entry and limited constraint from imports • Limited countervailing power of buyers • Increased likelihood of tacit collusion
638: DFS Group Ltd *The Nuance Group* (March 2008)	**2:1** in duty free stores (Auckland Airport)	• Removal of only other choice for duty free customers at Auckland Airport • New entry because entry unlikely due to Auckland Airport's policy of only having one duty free concessionaire
607/606: Woolworths Limited / Foodstuffs Limited *The Warehouse* (June 2007)	**3:2** in groceries	• Very high barriers to entry in market for supermarkets • Removal of new, dynamic retail concept • Some scope for tacit collusion
604: Transpacific Industries Group Ltd *Enviro Waste Services Limited* (May 2007)	Varying levels of market concentration in waste services	• High barriers to expansion in certain product markets • Countervailing power of buyers was limited • High risk of tacit collusion in some of the product markets

76. **Confidentiality & the OIA**: Any information that is supplied to the Commission (including compulsorily acquired information) is subject to the Official Information Act 1982 (**OIA**) and the Public Records Act 2005. Potential disclosure to third parties (either in part or in whole) is therefore something to be aware of and address accordingly. In some cases, clients may decide not to submit or provide information.

77. The Office of the Ombudsman has published excellent practice guides on the application of the OIA, which are useful for agencies receiving requests, practitioners who advise on these issues, and the firms to whom official information relates.[39]

78. The Commission may also share compulsorily acquired information with, and provide investigative assistance to, overseas competition regulators with which it has entered into a cooperation arrangement. For more information, see *International Information Exchange*

[39] See: http://www.ombudsman.parliament.nz/resources-and-publications/guides/official-information-legislation-guides.

between Regulators & Third-Party Claimants (Matthews & Borrowdale, 2013)[40] and the international relations section of the Commission's website.[41]

CONTACTS

Andrew (Andy) Matthews Principal
p + 64 9 972 3754
m +64 222 333 666
e andrew.matthews@matthewslaw.co.nz

Gus Stewart Senior Associate
p + 64 9 972 3755
m +64 21 161 8111
e gus.stewart@matthewslaw.co.nz

[40] See: http://www.matthewslaw.co.nz/wp-content/uploads/2013/08/International-Information-Exchange-between-Regulators-Third-Party-Applicants-M-Borrowdale-A-Matthews.pdf.
[41] See: http://www.comcom.govt.nz/the-commission/about-us/international-relations/.