House Rules

The Art of Using Competition Law to Add Value and Reduce Risk

LegalWise, Inaugural In-House Counsel Conference
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Matthews Law
COMPETITION · REGULATION · POLICY · STRATEGY

What in-house counsel need to know

Competition law matters are inherently linked to firm strategy. In *Telecom v Clear*[1] the Privy Council acknowledged that businesses would always aim to restrict, prevent or deter their competitors. Management and investment theory focuses on investing where there are barriers to entry to protect profits – what the Sage of Omaha (AKA Warren Buffett) calls "moats". It is no coincidence that Michael Porter's "five forces"[2] are the same factors used in any competition analysis.

Unfortunately, **businesses often involve the lawyers too late**. That even seems to be the case for in-house counsel, who are uniquely placed to have significant input assisting their clients implement and develop commercial strategy. This late involvement, perhaps coupled with an insufficient knowledge of how competition law can be used as a **sword and shield** (ie to help advance your competitive goals and undermine competitors' anti-competitive conduct), inhibits your ability to add value.

You will already know how much value you can add to the organisation (even if this isn't necessarily reflected in your pay packet). **You are the right people to help identify and implement competitive strategy**, not the external lawyers – they will always be a step removed and their interests may not always align with those of the organisation.

Obviously, we would encourage you to use competent counsel who don't just know the law, but also how it can best be put to effect based on their experience. (Developed over years of practice and specialisation, working across a range of jurisdictions and industries … etc. etc.) **They, like you, must add value!**

Our talk

The purpose of our talk is to help you identify these issues so that you can add even more value. It goes beyond tweaking contracts, to considering how the organisation structures its arrangements, how it operates internally, and how it deals with external stakeholders. We will cover a range of issues including fish hooks and exemptions in the Commerce Act 1986 (**Act**), and will discuss how to approach business structures, contractual arrangements, and strategy.

Our paper

This paper is designed as a companion to the more strategic nature of our talk. It has the following sections:

- The Commerce Act at a glance.
- Distribution arrangements.
- Competitor dealings.
- Procurement.
- Compliance & immunity.
- Confidentiality & the OIA.
- A quick note on the Fair Trading Act.

[1] [1995] 1 NZLR 385.
[2] (1) Competition in the industry; (2) Potential of new entrants into the industry; (3) Power of suppliers; (4) Power of customers; and (5) Threat of substitute products.

I. The Commerce Act at a glance

Anti-competitive "arrangements"

1. **Section 27 of the Act** prohibits "arrangements" which have the purpose or (likely) effect of substantially lessening competition in a market. To be caught, an arrangement does not have to be a formal contract – it includes an "understanding" and "nudge and wink" type agreements.

2. The arrangement must have an effect on competition which is more than trivial or minimal, although if it does not have an anti-competitive effect, but it has the purpose of being anti-competitive, it will still be caught.

3. Examples of arrangements which may fall within the prohibition include market sharing agreements, exclusive supply agreements and price discrimination.

Price fixing

4. **Section 30 of the Act** prohibits arrangements between competitors which could influence price competition (including discounts, allowances rebates and "freebies"). Conduct that can be caught includes arrangements between competitors that fix prices, rig bids, allocate markets/customers or restrict output.

5. Price fixing is a *per se* breach – it is deemed to substantially lessen competition under section 27 of the Act, regardless of its actual impact on price (if any). There is generally no defence, but the Act provides limited exemptions for certain joint venture and collective acquisition activities. (There are other exemptions in **section 44 of the Act** which we will discuss in our talk.)

6. No formal agreement is required, a "nudge and wink" is sufficient. It is also illegal to *attempt* to fix, control or maintain prices.

7. The price fixing prohibition is extremely broad and can occur in unexpected situations. An information exchange between competitors on prices or costs could potentially be construed as price fixing, as could an agreement not to compete for particular customers (market sharing).

8. There are no criminal sanctions for price fixing in New Zealand. There are proposals to amend the existing prohibition on price-fixing to redefine it as "cartel conduct" (price fixing, market sharing, bid-rigging and output restrictions).

Misuse of market power

9. **Section 36 of the Act** prohibits a party with "substantial market power" (**SMP**) from "taking advantage" of that power for prohibited anti-competitive purposes – namely restricting a person's market entry, preventing/deterring a person from competing, or eliminating a person from a market. All three elements of section 36 (ie SMP, taking advantage, and a prohibited purpose) must be proved in order for there to be a breach.

10. Where a person is considered to have SMP, care must be taken when acting in a way which could be construed as a misuse (or abuse) of that SMP. Examples of conduct to watch out for include refusing to supply product to a competitor or only supplying product on uncompetitive or dissimilar terms. Bundling products together where a customer is required to buy more than one product is not automatically illegal but can be illegal where the supplier has market power in relation to one of the products. Selling below cost to deter or drive out competition is obviously a high-risk area.

Resale price maintenance

11. **Sections 37-41 of the Act** prohibit resale price maintenance (**RPM**). RPM occurs when a supplier specifies the price at which its products are to be resold. This includes:

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

- 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;
- entering into an agreement to supply goods or services 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; and
- withholding the supply of goods to a retailer because the retailer has not agreed to stop discounting.

12. Resale price maintenance is a *per se* breach – it is illegal regardless of its effect on competition.

Exclusionary provisions

13. **Section 29 of the Act** prohibits any person from entering into or giving effect to a contract, arrangement or understanding which contains an "exclusionary provision". Section 29 applies if:

- at least two of the parties to an arrangement are in competition with each other; and
- the arrangement contains a provision that has the purpose of preventing, restricting or limiting the supply or acquisition of goods (or services) to (or from) the target of the exclusionary provision; and
- the business being targeted is in competition with at least one of the parties to the agreement in relation to the supply or acquisition of those goods or services.

14. For the purpose of section 29, parties are in competition if they are likely to be in competition, or but for the exclusionary provision, would be in competition with each other.

15. However, a provision will not be treated as an exclusionary provision if the defendant proves that the provision either does not have the purpose, or does not have the effect, or likely effect, of substantially lessening competition.

Business acquisitions: clearance & authorisation

16. **Section 47 of the Act** prohibits acquisitions which have the effect or likely effect of substantially lessening competition in a market. It is essentially the same as the section 27 test, but does not examine purpose.

17. The Act provides a voluntary pre-notification regime under which parties can, but do not have to, seek clearance for a proposed acquisition. The advantage of obtaining approval is that it provides statutory immunity, for 12 months following approval, from any challenges to the transaction by the NZCC or third parties. On average, it takes about 2 months for the NZCC to assess an acquisition and decide whether or not to grant approval, however some complex acquisitions have taken between 10 to 12 months. Clearance cannot be granted retrospectively.

18. Under **section 66 of the Act**, the NZCC may grant clearances for acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market.

19. Under **section 67 of the Act**, the NZCC may 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. (Note that the NZCC may also grant an authorisation for *most* restrictive trade practices under **section 58 of the Act** – the NZCC cannot authorise a taking advantage of market power.)

20. The NZCC equates a lessening of competition with an ability to either materially increase prices or lower quality. (Incentives to innovate are becoming a focus again, and forms part of the analysis.) In practice, the question is "could prices be higher and/or quality lower as a result of the acquisition when compared with realistic counterfactuals"? (Counterfactuals are "likely" alternative outcomes in the absence of the proposal, ie estimates of how the market would evolve without the acquisition. The likely counterfactual will not necessarily be the status quo.)

21. The NZCC has identified post-merger "market share and concentration indicators" (**concentration indicators**) (previously "safe harbours") within which it generally considers a merger is less likely to give rise to competition concerns. Where a merger falls outside of the concentration indicators, closer scrutiny is required and NZCC approval may be recommended.

A proposed acquisition is unlikely to require approval (or warrant an investigation if no approval is sought) where, post-acquisition:

- the merged entity would have a market share of less than 20%, and the combined market share of the top 3 players is 70% or more;
- in all other cases, the merged entity would have a market share of less than 40%.

22. Other factors that the NZCC considers in its competition analysis include any enhancement in the ability of the remaining players to collude (either explicitly or tacitly), barriers to market entry, the countervailing power of buyers, and whether the proposal removes a "maverick" from the market.

23. Following analysis, it may be clear that a proposed acquisition falling outside the concentration indicators would not result in an SLC and that NZCC approval is not required.

24. The NZCC's **Mergers and Acquisitions Guidelines** are available here: http://www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/.

25. The NZCC's **Authorisation Guidelines** (for both business acquisitions and restrictive trade practices) are available here: http://www.comcom.govt.nz/business-competition/guidelines-2/authorisation-guidelines/.

NZCC's compulsory information gathering powers

26. **Section 98 of the Act** gives the NZCC wide powers to require the supply of information or documents, or to require a person to give evidence. (The NZCC has similar powers under **section 47G of the Fair Trading Act 1986**.) The NZCC may also request that a person provide information or documents on a voluntary basis (ie that person does not have to provide the information or documents, but it may be in their interests to do so).

27. The NZCC can apply to an "issuing officer"[3] for a warrant to search a particular place under **section 98A of the Act**.

28. The NZCC may make confidentiality orders under **section 100 of the Act** prohibiting the publication or communication of information relating to a NZCC investigation or an application seeking clearance or authorisation. (Note there is no corresponding power under the Fair Trading Act 1986.)

Penalties

29. Anyone can take private court action under the Act in relation to restrictive trade practices, but only the NZCC can seek a pecuniary penalty from the courts for a breach of the Act. The NZCC generally does not have the power to determine a breach of the Act.

30. The penalties for breaching the restrictive trade practices (eg price fixing, SMP, RPM, exclusionary conduct) provisions of the Act are severe. They include:

- For companies – 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.
- For individuals – up to **$500,000** per contravention.
- Courts must impose penalties on individuals unless there are good reasons not to.
- Companies cannot indemnify individuals for price fixing penalties or reimburse their legal costs.
- 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).

31. Remedies for breach of the merger provision of the Act include:

[3] As that term is defined in section 3 of the Search and Surveillance Act 2012.

- For companies – up to **$5 million** per contravention.
- For individuals – up to **$500,000** per contravention.
- Divestiture of shares or assets.
- Injunctions to prevent an acquisition.
- Declarations that the proposed acquisition would breach the Act.

32. While pecuniary penalties can only be sought by the NZCC, the other three remedies, as well as damages, can be sought by any person who has suffered loss or damage from a breach of the merger provision. Other remedies under the Act include:

- Injunctions (which can be sought by both the NZCC and third parties).
- Damages (which can be sought by any person who has suffered loss or damage from the prohibited behaviour).
- Exemplary damages.

33. It is a **criminal offence** under **section 103 of the Act** to mislead the NZCC or to fail to comply with a section 98 notice. Such offences are punishable by a fine of up to **$30,000** for a body corporate or **$10,000** for an individual per breach. Those penalties are expected to increase by 10x when the Commerce (Cartels and Other Matters) Amendment Bill (**Cartels Bill**) passes into law.

Jurisdiction

34. **Section 4(1) of the Act** provides that the Act applies to conduct outside New Zealand by any person resident or carrying on business in New Zealand, to the extent that this conduct affects a New Zealand market.

35. The Act's merger provision applies to offshore acquisitions (whether or not the parties are resident or carrying on business in New Zealand) if they affect New Zealand markets.

Limitation periods

36. Under the Act, proceedings for breach of the restrictive trade practices provisions can "*be commenced within **3 years** after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered*" with a **long-stop limitation of 10 years**.

37. In relation to the merger provision, proceedings for penalties and damages can be commenced within **3 years** after the matter giving rise to the contravention arose. Proceedings seeking a divestiture can be commenced within **2 years** from date on which the contravention occurred.

II. Distribution arrangements

38. 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.[4] The stakes are now much higher, especially in the "online" world.

39. **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.

40. 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.

41. 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.

42. 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.)

43. 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.

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

The *Flight Centre* and *ANZ* cases[6] 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.[7]

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.

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

[4] Ultimately resolved in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608.

[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*."

[6] **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.

[7] See: http://www.hcourt.gov.au/cases/case_b15-2016.

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: DISTRIBUTION MODELS

- Think carefully about who you are, 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.

Restraints between competitors

44. We often review **restraints between competitors**[8] **that may, on their face, appear innocuous but in reality could be seen as restraining how those parties compete**. 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.

45. The Act's price fixing prohibition is broad. It captures a broader range of conduct than simply agreeing a headline price.

46. 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 NZCC's 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.

47. 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:[9]

> *"…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]

48. **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.

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

Example: NZCC challenges "pay for delay" IP restraint
In 2015, the NZCC 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.

[8] "Competitors" includes potential competitors and competitors "but for" an arrangement not to compete.
[9] 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 NZCC 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 NZCC's investigation, CAL formally advised that it would not enforce the restrictive clause in the settlement agreement.

PRACTICAL TIPS: 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 & RRPs

50. 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.

51. 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 price competition below that floor. The RPM prohibition ensures that resellers are free to resell goods at whatever price they wish.

52. We discuss the elements of the RPM prohibition earlier in this paper. The concept of "inducement" is not defined in the Act, but the courts have considered that the following examples of conduct by suppliers amounted to an inducement:

- threatening to withdraw supply;
- delaying the delivery of goods;
- threatening to withdraw advertising or promotional subsidies;
- threatening to withdraw a distributorship; and
- threatening to "tighten" credit facilities.

53. 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."
- **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.

54. Even when an RRP is permitted, **care must be taken to ensure this does not result in price fixing where the parties have vertical and horizontal relationships**.

55. It can also be **challenging to advertise resale prices/RRP in a way that does not breach the Fair Trading Act 1986**.

Example: 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.

PRACTICAL TIPS: 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 needs.
- Be careful with RRPs when your employer/client may also compete with its resellers.
- Consider whether true "agency" arrangements are appropriate.

III. Competitor dealings

56. Dealing with one's competitors can lead to efficient and pro-competitive outcomes (for example, joint ventures). In some cases, engaging 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.

Trade associations

57. 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*".

58. 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.

59. That said, the NZCC 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*".[10]

60. 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 (section 2(8)(a) of the Act)**; and
- **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 (section 2(8)b) of the Act)**.

61. This is regardless of an individual member's involvement or knowledge of the arrangement, unless a member can:

- demonstrate that they expressly notified the association in writing that they wished to disassociate themselves from the arrangement, and then took such steps; or
- establish that they had no knowledge, and could not reasonably have been expected to have any knowledge, of the arrangement.

Example: The *laundry detergent* case (Europe)
In 2013, Proctor & Gamble (**P&G**)[11] and Unilever were fined €315.2 million by the European Commission for fixing the price of laundry detergents.[12] 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 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 & spoke cartels section below.

[10] NZCC, Guidelines for Trade Associations, 20 September 2010, page 1.
[11] See: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf.
[12] See: http://europa.eu/rapid/press-release_IP-11-473_en.htm?locale=en.

PRACTICAL TIPS: TRADE ASSOCIATIONS

- 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, immediately object and request that your objection is noted in the minutes. If a discussion continues, the lowest risk option is to leave the meeting. A file note (marked privileged and for the purposes of seeking legal advice) should also be taken recording your objection, refusal to be bound, and removal from the meeting (if applicable). It may be appropriate to seek specialist legal advice 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

62. 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.

63. 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.

64. The current joint venture exemption has been criticised as focussing "o*n the form by which the parties were 'cooperating' to determine whether* [the] *exemption to the price fixing prohibition applied*."[13] In contrast, for the proposed new "collaborative activities" exemption under the Cartels Bill (discussed later in this paper) 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: JOINT VENTURES

- Care should always be taken when forming and operating a joint venture with a competitor.
- 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 & spoke" cartels

65. **"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

[13] NZCC, Revised Draft Competitor Collaboration Guidelines, para 5.4. See: http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/.

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."* [14]

66. 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.

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

Example: 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.

PRACTICAL TIPS: DEALING WITH COMPETITORS

DO	***DON'T***
✓ Discuss any proposed agreements or meetings with competitors with legal advisers first.	☒ Forget that price fixing agreements with competitors are illegal unless authorised by the Commission (even if they lower prices).
✓ Ensure that pricing decisions are made independently of competitors.	☒ Exchange price or capacity information with competitors. "Price" includes any information relating to pricing such as rates, commissions, expected volumes, discounts, and credit terms.
✓ 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.	☒ Discuss with competitors your relationship with individual customers, or agree with competitors to target different customers or to restrict output.
✓ Take care with the language you use in any correspondence, whether to employees of competitors or within your own workplace. Remember that the NZCC has the power to demand copies of all such correspondence including emails.	☒ 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.
✓ 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).	☒ Signal price changes to competitors. Again, this extends to any information relating to pricing.
✓ 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.	

[14] *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010).

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

68. 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.

69. 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		

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

71. 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.[15]

72. 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* • 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	• 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 • does not have the ***dominant purpose of lessening competition*** between 2 or more of the parties	• **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 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

73. **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".

74. **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

[15] For detailed commentary on the Cartels 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.

exemption clarifies / resolves the issue for suppliers setting maximum prices where they also compete. Resale price maintenance would remain *per se* illegal.

75. **Joint buying & promotion**: The proposed exemption for *joint buying & 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.

76. At the time of writing this paper, the Cartels Bill was sitting at number 29 on the Parliamentary Order Paper. There has been no clear guidance on when the Cartels Bill will ultimately be passed into law.

IV. Procurement

77. **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.

78. 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:

- "**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;
- "**bid rotation**", where usual tenderers appear to take turns in submitting (and the other parties take measures to ensure the right party "wins"); and
- "**bid withdrawal**", where a winning bid is withdrawn to allow another bidder to win instead.

79. 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.

PRACTICAL TIPS: PROCUREMENT

- Refuse to engage with other bidders in relation to "tactics" or pricing.
- Take care when considering making a joint bid, including where the party running the tender has asked you to do so.
- Organisations in industries that are susceptible to bid rigging (eg construction) should take extra care. All bids should be independently considered and submitted.

80. The NZCC 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/.

81. The NZCC's **Guidelines for Procurers: How to Recognise and Deter Bid Rigging** are available here: http://www.comcom.govt.nz/business-competition/guidelines-2/how-to-recognise-and-deter-bid-rigging-guidelines-for-procurers/.

Example: "The Christchurch bus cartel"[16]
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.

[16] Source: NZCC, Guidelines for procurers – How to recognise and deter bid rigging, September 2010, page 3.

V. Compliance & immunity

82. An effective competition compliance regime can help raise awareness of competition (and fair trading) 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 NZCC 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. The NZCC has published excellent guidelines on its website which are both user-friendly and informative.

Leniency (conditional immunity): The benefits of whistleblowing

83. "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.

84. The NZCC'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.

85. The leniency policy has two main parts:[17]

> "***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."*

86. 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 NZCC 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 NZCC and request a "marker". This allows the cartel member to gather the information necessary to perfect the marker and be granted immunity.

87. The conditions for conditional immunity are:[18]

- the applicant is the first to apply for a marker or conditional immunity in respect of a cartel that (1) the NZCC is not aware of; or (2) the NZCC is aware of but does not yet have evidence that is likely to warrant issuing proceedings;
- the applicant is or was a participant in the cartel;
- the applicant admits that it participated in conduct that may constitute a contravention of the cartel prohibition;
- the applicant has ceased involvement in the cartel or otherwise acts as directed by the NZCC;
- the applicant has not coerced others to participate in the cartel;
- in the case of applications by companies, the admissions by the company must relate to genuine corporate acts (not those taken by individuals); and
- the applicant agrees to full and continuing cooperation with the NZCC's investigation and any subsequent proceedings.

[17] NZCC, Cartel Leniency Policy and Process Guidelines, para 1.07 and para 1.04 respectively.
[18] NZCC, Cartel Leniency Policy and Process Guidelines, para 3.06.

88. The first party to lodge a leniency application receives full immunity from NZCC-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 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.

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

90. Cartelists (or potential cartelists) or their lawyer can make a "hypothetical" or "off the record" inquiry to the NZCC to see if leniency is available. This usually only requires disclosing to the NZCC the general industry involved and establishing that no NZCC 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.

91. Where an investigation was commenced on the NZCC's own accord (for example from an anonymous tip-off where none of the cartel members had sought leniency), the NZCC 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.

92. 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 NZCC of a separate cartel.

PRACTICAL TIPS: 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 suspect that your employer/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 employer/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.

VI. Confidentiality & the OIA

93. Any information that is supplied to the NZCC (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, organisations may decide not to voluntarily submit or provide information.

94. 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 organisations to whom official information relates.[19]

95. The NZCC 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 between Regulators & Third-Party Claimants* (Matthews & Borrowdale, 2013)[20] and the international relations section of the NZCC's website.[21]

[19] See: http://www.ombudsman.parliament.nz/resources-and-publications/guides/official-information-legislation-guides.
[20] See: http://www.matthewslaw.co.nz/wp-content/uploads/2013/08/International-Information-Exchange-between-Regulators-Third-Party-Applicants-M-Borrowdale-A-Matthews.pdf.
[21] See: http://www.comcom.govt.nz/the-commission/about-us/international-relations/.

VII. A quick note on the Fair Trading Act

96. The Fair Trading Act 1896 (**FTA**) and the Commerce Act have many similarities, including the fact that both can (unfortunately) be relatively easy to breach and provide for substantial penalties. This, and the fact that both pieces of legislation are enforced by the NZCC, reinforce the fact that they should form part of any good compliance programme. It is important to ensure that all sales and marketing teams have a good understanding of the law in this area, especially with the rise of digital interaction between businesses and their customers – including on social media!

97. The FTA's purpose is to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. Among other things, the FTA prohibits unfair conduct, including:

- **misleading and deceptive conduct** in trade;
- **unsubstantiated representations** (when a person making a representation in trade does not have reasonable grounds for doing so, at the time the representation is made);
- **false representations**;
- **unfair practices** (for example, bait advertising, pyramid selling schemes);
- **unfair contract terms** in standard form consumer contracts.

98. The FTA also provides for rules around **consumer information standards**, **product safety**, and **consumer transactions & auctions** (including layby sales, uninvited direct sales, extended warranties, and auctions – all of which were brought within the scope of the FTA by virtue of the Consumer Law Reform Bill).

99. Maximum fines under the FTA are significant:

- For companies – up to **$600,000**.
- For individuals – up to **$200,000**.

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