

## Summary of the cartel prohibition & exceptions

**Prohibition:** No person may enter into a contract, arrangement or understanding (**CAU**), or give a land covenant, that contains a **cartel provision**, or otherwise give effect to a **cartel provision**. To be caught a provision does not have to be in a contract; a CAU can be a “wink and nod” type agreement. A cartel provision is a provision in a CAU or covenant that has the purpose, effect or likely effect of:

PRICE FIXING	RESTRICTING OUTPUT	MARKET ALLOCATING
<p><b>Fixing / controlling / maintaining:</b></p> <ul style="list-style-type: none"> <li>price, discount, allowance, rebate or credit</li> <li>for/in relation to goods or services</li> <li>supplied or acquired by 2 or more parties in competition.</li> </ul>	<p><b>Preventing / restricting / limiting:</b></p> <ul style="list-style-type: none"> <li>the (likely) production of goods;</li> <li>the (likely) capacity to supply services;</li> <li>the (likely) supply of goods/services; or</li> <li>the (likely) acquisition of goods/services</li> <li>supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other.</li> </ul>	<p><b>Allocating between parties:</b></p> <ul style="list-style-type: none"> <li>the persons or classes of persons to/from whom the parties supply/acquire goods/services; or</li> <li>the geographic areas in which the parties supply/acquire goods/services</li> <li>in competition with each other.</li> </ul>

[1] Or where the provision “provides for” any of the above.

[2] References to parties being “in competition” includes likely competitors & those whom “but for” a cartel provision would, or would be likely to, be in competition in relation to the supply or acquisition of those goods / services.

**Exceptions:** The main exceptions are below. There are also specific exceptions (eg for partnerships, exports, corporate groups).

COLLABORATIVE ACTIVITY	VERTICAL SUPPLY CONTRACTS	JOINT BUYING & PROMOTION
<p>The cartel prohibition does not apply if, at the time of entering into / arriving at or giving effect to the cartel provision:</p> <ul style="list-style-type: none"> <li>the person and 1 or more other parties are involved in a collaborative activity, ie:                             <ul style="list-style-type: none"> <li>enterprise, venture or other activity in trade</li> <li>carried on in cooperation by 2 or more persons</li> <li>not for the <i>dominant purpose of lessening competition</i> between 2 or more of the parties; and</li> </ul> </li> <li>the cartel provision is <i>reasonably necessary</i> for the purpose of the collaborative activity.</li> </ul>	<p>The cartel prohibition does not apply where a contract (but <b>not</b> an arrangement or understanding):</p> <ul style="list-style-type: none"> <li>is between a (likely) supplier of goods or services and a (likely) customer of that supplier; and</li> <li>the cartel provision:                             <ul style="list-style-type: none"> <li>relates to the (likely) supply of goods or services to the customer (including the maximum price of resupply); and</li> </ul> </li> <li>does not have the <i>dominant purpose of lessening competition</i> between 2 or more parties to the contract.</li> </ul>	<p>A provision in a CAU does not have the purpose, effect or likely effect of <b>price fixing</b> if the provision:</p> <ul style="list-style-type: none"> <li>relates to collective acquisitions (direct or indirect); or</li> <li>provides for joint advertising of the collectively acquired goods / services; or</li> <li>provides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; or</li> <li>provides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU.</li> </ul>

*In addition, the restrictive trade practice exceptions (eg for partnerships, exports and more) also apply.*

**Anti-competitive “arrangements” are also illegal:** Even if a cartel exception applies, provisions of a CAU or covenant are still prohibited if they have the purpose or (likely) effect of substantially lessening competition. Examples of CAU which *may* fall within the prohibition include *exclusive or long-term supply agreements and price discrimination*.

**Penalties:** Non-individuals (eg bodies corporate) face penalties of up to the greater of: \$10M; or three times any commercial gain (or 10% of NZ group turnover if the gain is not known). Individuals face penalties of up to \$0.5M per contravention. In the case of cartels, courts can order that an individual not be a director promotor, manager of a body corporate for up to 5 years.

**Criminalisation:** Since **8 April 2021** it is a **criminal offence** to intend, at the time of entering / giving effect to the alleged cartel provision (**the relevant time**), to engage in price fixing, restricting output or market allocating. It will be a **defence** if, at the relevant time, the defendant believed on reasonable grounds that an exception applied. Defendants will face significant fines, and individuals may also face up to **7 years’ imprisonment**.