

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>Fixing / controlling / maintaining:</p> <ul style="list-style-type: none"> price, discount, allowance, rebate or credit for/in relation to goods or services supplied or acquired by 2 or more parties in competition. | <p>Preventing / restricting / limiting:</p> <ul style="list-style-type: none"> the (likely) production of goods; the (likely) capacity to supply services; the (likely) supply of goods/services; or the (likely) acquisition of goods/services supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other. | <p>Allocating between parties:</p> <ul style="list-style-type: none"> 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. |

[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"> the person and 1 or more other parties are involved in a collaborative activity, ie: <ul style="list-style-type: none"> enterprise, venture or other activity in trade carried on in cooperation by 2 or more persons not for the <i>dominant purpose of lessening competition</i> between 2 or more of the parties; and the cartel provision is <i>reasonably necessary</i> for the purpose of the collaborative activity. | <p>The cartel prohibition does not apply where a contract (but not an arrangement or understanding):</p> <ul style="list-style-type: none"> is between a (likely) supplier of goods or services and a (likely) customer of that supplier; and the cartel provision: <ul style="list-style-type: none"> relates to the (likely) supply of goods or services to the customer (including the maximum price of resupply); and does not have the <i>dominant purpose of lessening competition</i> between 2 or more parties to the contract. | <p>A provision in a CAU does not have the purpose, effect or likely effect of price fixing if the provision:</p> <ul style="list-style-type: none"> relates to collective acquisitions (direct or indirect); or provides for joint advertising of the collectively acquired goods / services; or provides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; or provides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU. |
| <p><i>In addition, the restrictive trade practice exceptions (eg for partnerships, exports and more) also apply.</i></p> | | |

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**.