



Restraints, exclusivity & other key competition & consumer law contracts issues

8 August 2025

Cleaning company escapes much bigger fine for cartel conduct

Freight forwarders fined almost \$10m over competition deal

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Techtronic slapped with record \$15m fine for resale price maintenance

By [Business News Australia](#) 1 December 2023

The truth about service station ice creams: Beloved Australian brand Peters is slapped with a \$12MILLION fine over a shady plot

- Peters had been blocking other brands distributing ice creams for five years
- The beloved Australian brand had bought PFD Food Services in 2014
- The company couldn't sell ice creams from other brands without permission

By PHOEBE LOOMES FOR AUSTRALIAN ASSOCIATED PRESS
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Court grants declarations that Moola's Google Ads agreements breached Commerce Act

Published 20 Dec 2021

Issues

What is covered in these slides

- The law:
 - Restraints of trade
 - Contracts, arrangements understandings that lessen competition
 - Cartel provisions
 - Fair Trading Act – unconscionability / UCT
- Red flags:
 - Exclusivity
 - Contracts between competitors
 - Pricing issues (MFNs / price parity clauses, RRP)
- Regulator priorities
- Consequences/penalties

Restraints of trade

A recap

- **Restraints of trade (ROT)** are meant to protect a party's commercial / proprietary interests.
- They usually prevent parties (eg a vendor or employee) from carrying out related activities during the agreement and for a period after a business sale or termination of employment.
- Under the **common law** a restraint is prima facie *unenforceable* **unless** it can be established that the restraint is reasonable (to protect legitimate proprietary interests such as goodwill, knowhow, IP and commercial information etc).
- Common law doctrine on restraints is preserved by section 7 of the Commerce Act (**CA**)

Commerce Act 1986

Part II & III prohibitions

- Section 27 prohibits provisions of contracts, arrangements or understandings (**CAU**) that have the purpose, effect or likely effect of substantially lessening competition (**SLC**) in a market.
- Section 30 prohibits CAU and covenants (**CAUc**) between actual / potential competitors that contain a “**cartel provision**” (**CP**), namely a CAUc with the purpose, effect or likely effect of:
 - “**Price fixing**”;
 - “**Restricting output**”
 - “**Market allocating**” as (broadly) defined
- Section 37 prohibits resale price maintenance (**RPM**).
- Section 47 prohibits business acquisitions that have the effect or likely effect of SLC.

The “*cartel provision*” prohibition

Smoke-filled room not required

No person may enter into (or give effect to) a contract, arrangement or understanding (**CAU**) or give a land covenant (**CAUc**) containing a **cartel provision (CP)**. A CP is a provision with the purpose or (likely) effect of:

PRICE FIXING	OUTPUT RESTRICTING	MARKET ALLOCATING
<p><i>Fixing / controlling / maintaining:</i></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><i>Preventing / restricting / limiting:</i></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><i>Allocating between any 2 or more parties:</i></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.
<p>Or where the provision “provides for” any of the above.</p>		

The cartel prohibition is **very broad** – most arrangements between actual or *potential* competitors risks being caught.

Fair Trading Act (FTA) – unconscionability / UCT

- Section 7 prohibits *unconscionable conduct*.
- Section 8 lists factors which a court may consider when determining if a party's conduct was unconscionable.
- Section 26A–B prohibits *unfair contract terms* in consumer, small business & grocery supply agreements.
- A term will be considered unfair (section 46L) if it:
 - Creates asymmetries between the contracting parties' rights and obligations;
 - Is not reasonably necessary to protect legitimate interests; and
 - Would cause detriment if applied, enforced or relied on.
- Section 46M sets out a non-exhaustive list of unfair contract terms.

Red flags

What to look out for in drafting or reviewing contracts

- **Product exclusivity** – any clause which restricts the supply of a product to parties outside the contract.
- **Geographical restrictions** – any clause restricting any party from carrying out relevant activities (eg business or employment) within a certain area.
- **Non-competes/restraints of trade** – any clause preventing a party (usually a vendor or employee) from engaging in a similar business following the sale of the business or termination of employment.
- **Non-poaching / solicitation** – any clause preventing a party (usually a vendor or employee) from poaching the business' employees (independent contractors), suppliers and/or clients.

Red flags cont'd

What to look out for in drafting or reviewing contracts

- **MFNs / Price parity clauses** – a clause which promises that a party offers the best terms of supply (usually price) or at least the same deal as other competitors.
- **RRPs** – While specifying maximum and recommended retail prices are generally okay, specifying minimum prices or the exact price of resupply can breach both cartel and RPM laws (noting no anti-overlap means you can be liable for both).
- **Pay-for-delay agreements** – typically in settlements of IP disputes, an agreement that in consideration of the settlement or receipt of payment, a party will not enter a market or provide a particular product or service.

Then what?

- If any of these types of restraints are present, consider seeking expert competition advice.
- Consider:
 - Are the parties to the contract competitors or potential competitors?
 - Is the provision a possible CP?
 - What effect does the provision have on competition?
 - Does an exception apply?
 - Vertical supply
 - Collective acquisition
 - Collaborative activities
 - Protection of goodwill in relation to the sale of the assets of a business (limited)

Cartel exceptions

Disapplying the prohibition

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 tradecarried on in cooperation by 2 or more personsnot for the dominant purpose of lessening competition between 2 or more of the parties; andthe cartel provision is reasonably necessary 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; andthe 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); anddoes not have the dominant purpose of lessening competition 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); orprovides for joint advertising of the collectively acquired goods / services; orprovides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; orprovides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU.

- Even if an exception applies, cartel provisions are still subject to the SLC test
- Collaborative activity **clearance** but see *Anytime Fitness*
- **Authorisation** also an option but net public benefits test

Practical tips

Is the restraint or restriction reasonably necessary? Why?

- Make sure any restraints are not broad or overly restrictive
- Specify a reasonable time period to restraints
- Ensure the restraints relate only to the subject matter of the contract
- Document commercial rationale, legitimate commercial or proprietary interests protected
- Consider briefing the Commission or applying for clearance or authorisation

Consequences

- If the courts find an individual or body corporate has breached the Commerce Act, penalties can be heavy:
 - for an individual, a maximum of \$500,000
 - for a body corporate, the greater of:
 - \$10 million, or
 - three times the commercial gain, or
 - if this cannot be easily established, 10% of turnover
- **Cartel conduct** (ie entering or giving effect to CPs) can be a **criminal offence** with a maximum penalty of 7 years in jail
- Every separate breach (even by the same person) may incur a penalty

Example – *First Gas*

Where a restraint of trade went too far

- First Gas and GasNet accepted in High Court proceedings that an agreement breached section 27 :
 - (a) *the Restraint of Trade prevents GasNet competing with First Gas in the Bay of Plenty region for a period of five years; and*
 - (b) *the Restraint of Trade:*
 - (i) *removed potential future competition between First Gas and GasNet in the market for at least the period of the restraint; and*
 - (ii) *had the purpose, effect or likely effect of removing current competition in the market between First Gas and GasNet and of preventing future competition between First Gas and GasNet for at least the period of the restraint.*
- The Court commented at [49]:
 - b) *Restraints of trade are permissible under the Act providing it is **solely to protect the goodwill** in the business purchased. The issue here was that **the restraint of trade went further than was necessary** for this purpose because it purported to prevent GasNet from entering anywhere in the Bay of Plenty (not just the area serviced by the Papamoa delivery point) and for a period of five years.*

Regulator priorities

What do international regulators and the NZCC think?

- Restraints and exclusivity clauses are being prioritised by NZCC under its [2024/25 Enforcement Priorities](#):
 - **Non-compete agreements** are a specific priority with the NZCC stating that it will prioritise action where non-competes are impacting competition.
 - **Cartels** (price fixing, bid rigging and market allocation) are both an enduring and specific priority for the NZCC in 2024/25.
 - **Anti-competitive conduct** is a long-term enduring priority for the NZCC with renewed commitment to prioritising enforcement action against any misuse of market power or anti-competitive agreements that cause competition harms.
- Also a priority in other jurisdictions including Australia and the US.

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