

Civil Contractors New Zealand

Cartels - what they are, why they matter, and how to stay clear of them

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What we will cover today?

- Who is the Commission and what we do
- Competition and the Commerce Act
- What is a cartel – what is an agreement and what does it do
- What are the sanctions
- How to steer clear of cartels
- What to do if you see one
- If you have been involved – leniency / immunity / cooperation
- Q and A and Guidance Resources

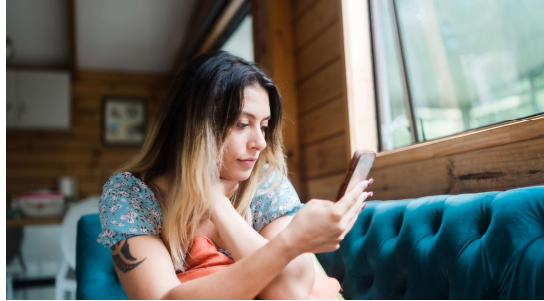


Who is the Commission and what do we do?



Consumer and Competition

- Fair Trading
- Consumer Credit
- Product Safety
- Mergers and acquisitions
- Business competition



Regulation

- Electricity
- Gas
- Airports
- Telco
- Dairy
- Groceries



Cartels – in Consumer and Competition

Activities

- Outreach and advocacy
- Investigations
- Prosecutions



Commerce Act - promoting competition



Not just about price - but price is an important signal



What is a cartel?

Not this...



This...



Cartel agreements



- Between competitors
 - Must involve communication between at least two parties
 - Results in a shared expectation about how at least one of them will act or refrain from acting (meeting of the minds).
 - Can be very informal e.g. a verbal understanding
- Selling and buying markets
- Per se illegal, entering into and giving effect (s30)
- Attempts are also illegal (involving preparatory steps)
- Third-party liability - e.g. aiding and abetting, facilitating, a “hub and spoke” between competitors



What does it do – types of cartel conduct



Price fixing

Two or more businesses agree relating to prices they will charge - to avoid having to compete with each other



Warning – giving and using a “**cover price**” is cartel behaviour



Bid rigging

Agreement between some or all of bidders about who should win a bid. May involve potential bidders not bidding to support the proposed winner, or bidders may agree the prices that each party will bid. Can involve 1 or up to all 3 of the types of cartel prohibition (agreement)



Market allocation

Businesses agree to carve up markets and not compete for certain customers.

Restricting output

Two or more competing buyers or sellers agree to prevent, restrict, or limit the volume of goods or services they are buying or selling



Cartels – example video 1



Found at: <https://www.youtube.com/watch?v=0xGYVszPL1Y>

Cartels – example video 2



Competitor collaborations

Some competitor agreements may help to increase competition or not be harmful.

• NOTE: all exceptions are subject to Substantial Lessening of Competition test (section 27) Eg:

- **S31 Collaborative activities** (e.g. Joint Ventures, some rosters) parties can self assess or seek clearance for certainty
- **S33 Joint buying** exception – self assess

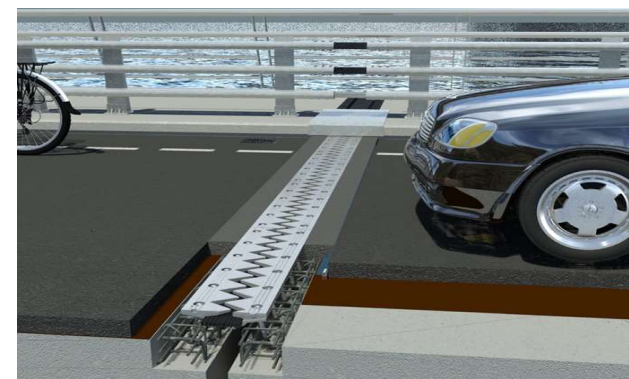
For exceptions:

- Purpose is important, early legal advice is recommended
- If genuine, activity should be transparent
- Correct processes must be followed exactly – ComCom guidance available



Enforcement - what are the sanctions

- Deceptive harmful conduct means serious consequences
- Court proceedings and significant \$ penalties (often up to millions)
- If criminally prosecuted – individuals up to \$500k and 7 years in jail
- Cartels in public procurement will be treated very harshly
- First Criminal Prosecution - laid in 2023
 - Bid rigging in tenders for two road bridge jointing contracts in Auckland, one NZTA and one AT - price lifts
 - Home detention and more + large fine for first defendants
 - Intense and sustained publicity





How to steer clear of cartels

- Knowledge is power - know the key points and take it seriously
- Have processes to help your business safely interact with competitors
 - eg site meetings, subcontracting, associations
- Make decisions about prices, customers and output **independently** of your competitors
- Collaboration with competitors can be legal but extreme care required
- Legal advice - especially to avoid trouble, not when already in trouble



What to do if you see one – report it



- Harmful deceptive behaviour, don't allow it to happen
- Report cartel attempts (or it may come back to bite you)
- Any cartels in your own procurement are deceiving you and making you less competitive

General concerns: <https://comcom.govt.nz/report-a-concern>

If sensitive - Anonymous Reporting Tool

<https://report.whistleb.com/en/comcom>



Leniency, immunity and cooperation



- Made a mistake - you can apply for leniency / immunity
- To help put things right and save your business (individuals too)
- Must very carefully follow the process
- If leniency not available, formal cooperation is still possible
 - By telephone: +64 (0) 4 924 3720
 - By email: gm.competition@comcom.govt.nz



Q & A

Guidance Resources

- The Commerce Commission has a significant amount of guidance resources available on our website www.comcom.govt.nz
- These are designed to explain and help increase knowledge. They are not a substitute for legal advice.
- A list of resources (links) and some further information follows.



Resources -



Key reading for cartels

- [What is a competitor page](#)
- [What is a cartel page](#) (includes more short videos)
- [Commerce Act Exceptions factsheet](#)
- [Competitor Collaboration Guidelines](#)
- [Trade Association Guidelines](#)
- [Cartel Leniency / Immunity](#)
- [First criminal cartel prosecution](#)
- [How to recognise and deter bid rigging - fact sheet](#)

Other reading and resources

- [Contact the Commission](#)
- [Competition Assessment Guidelines](#)
- [Investigation Guidelines](#)
- [Enforcement Response Guidelines](#)

For other anti-competitive conduct and the [Fair Trading Act](#)- see slide 18



Anti-collusion clauses

- These clauses help to deter, and protect your from purchasing and procurement from cartels. The Commission has some suggested clauses based on an OECD model. If it can be proved an anti-collusion clause declaration was false, various actions may be possible against the maker including for civil contractual breaches, as well as criminal enforcement by an agency.
- Anti-collusion clauses also help to inform suppliers and give them fair warning their bid or quote needs to be independent and not involve any communication with competitors - unless there is some genuine competitor collaboration involved which must be declared.
- The Commission's suggested clauses are found in our [How to recognise and deter bid rigging - fact sheet](#) at page 10. These clauses are intended are a guide only, and you may need to seek legal advice including about how to use them and adapt them for your situation.



Other areas of the Commerce Act and the Fair Trading Act to note

- Agreements that substantially lessen competition (s27)
- Taking advantage of market power (s36)
- Mergers and Acquisitions (including s47 investigations)
- Retail Price Maintenance (s37)
- **Key concept - substantial lessening of competition in a market (SLC)**
- Fair Trading Act 1986 – see our [website](#) for more information



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Ngā mihi

<https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel>

comcom.govt.nz

Call: 0800 943 600

Email: contact@comcom.govt.nz

Website: comcom.govt.nz