

COMMERCE ACT COMPLIANCE GUIDE

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The aim of the Commerce Act 1986 is to promote competition in markets for the long-term benefit of New Zealand consumers. You can compete vigorously for customers, however, you and your company will face significant penalties if you “overstep the mark” by acting anti-competitively.

This card will assist you in understanding what you can and cannot do under the Commerce Act. It will also assist you in keeping your competition honest.

Generally

DO	DO NOT
<ul style="list-style-type: none"> • Compete vigorously for customers on the basis of price, service, and quality. • Establish a ‘compliance culture’ in your company. • Establish good record-keeping procedures – record discussions with competitors as a diary note to rebut any accusations of anti-competitive collusion. • Speak to your manager if you have concerns about whether your actions are anti-competitive. • Treat email with caution. Email is easily forwarded and “deleted” emails are easily recovered. • Ensure any information about competitors is obtained from independent sources. Diary note how you obtained the information. 	<ul style="list-style-type: none"> • Appear to be too closely associated with your competitors. If you cannot avoid mixing with the competition, ensure that you do not discuss prices or pricing policies. • Attend meetings with competitors unless these cannot be avoided. (Industry meetings are often necessary to discuss health and safety, resource management, new technology and other generic industry issues.) • Formulate plans with others, which have the purpose of harming the competitive process or imposing artificial structural barriers to workable and effective competition.

Pricing

DO	DO NOT
<ul style="list-style-type: none"> • Seek to stop discussion of prices/discounts/margins etc, at any meeting with competitors. If it continues, leave the room. 	<ul style="list-style-type: none"> • Arrive at a formal or informal (includes ‘winks and nods’) agreement, arrangement, or understanding (an “Arrangement”) with a competitor about: <ul style="list-style-type: none"> – prices, discounts, benefits or concessions; – timing of price changes; – credit terms or extending credit; or – profits or profit margins. • Exchange price lists, or other price information with a competitor.

Collective boycotts

DO	DO NOT
<ul style="list-style-type: none"> • Seek to stop discussions about boycotting competitors. If it continues, leave the room. • Speak to your manager if you have any concerns. 	<ul style="list-style-type: none"> • Enter into an Arrangement with a competitor that has the purpose of restricting, limiting, or preventing a competitor’s access to customers or suppliers. • NB: It is a defence if the Arrangement does not substantially lessen competition. However, this may be difficult to prove and the obligation rests with the parties involved.

Recommending prices

DO	DO NOT
<ul style="list-style-type: none"> Print a price on your product so long as it is preceded by the words “recommended price”. Recommend a resale price so long as your customers are informed in writing that they are free to charge a lower price. Speak to your manager (and not your customer) if you have any concerns with a customer’s resale pricing. 	<ul style="list-style-type: none"> Tell resellers of your goods what prices they can charge on resale. Refuse to supply or “punish” a reseller if they do not price goods at or above a minimum level. Offer benefits to resellers for pricing goods at or above a minimum level.

Misuse of market power

The Commerce Act prohibits certain conduct by firms with a “substantial degree of power in a market”. Whether your firm has a substantial degree of power in a market is a complex legal and economic question. A large market share is an indicator but not conclusive. If you think your company can persistently behave in a manner different from the behaviour a competitive market would enforce, then:

DO	DO NOT
<ul style="list-style-type: none"> Compete vigorously in the same manner as firms without a substantial degree of power in a market would do. 	<ul style="list-style-type: none"> Prevent new players coming into the market. Squeeze competitors out of the market. Take action aimed at deterring competitors from competing.

Other anti-competitive arrangements

The Commerce Act also prohibits other Arrangements with the purpose, effect or likely effect of lessening competition in a market in a real way.

For practical purposes, this may occur if, as a result:

- competitors are likely to be eliminated from the market;
- new competitors are deterred from setting up; or
- customers or suppliers are forced to accept much less advantageous terms or entry or expansion will be more difficult.

Business acquisitions

DO	DO NOT
<ul style="list-style-type: none"> Seek legal advice on acquisitions. 	<ul style="list-style-type: none"> Acquire the assets of a business or shares if the acquisition has the effect or likely effect of lessening competition in a market in a real way.

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