



Competition

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Pricing and the Commerce Act – the risks you face as an individual

“Individuals involved in price fixing will face significant monetary penalties - and companies are now prohibited from indemnifying them.”

Following significant changes to the Commerce Act last year, price fixing now attracts greater personal risk for those involved.

In an important change courts are now required to impose a monetary penalty (of up to \$500,000) on an individual unless there is a good reason not to.

Other price fixing changes include:

- prohibiting companies from indemnifying a current or former director, employee or agent for penalties, or costs incurred in defending a breach (unless successful);
- providing for a court-imposed ban on individuals from involvement in the management or promotion of a company for up to 5 years; and

- increasing the maximum penalty for a company to the greater of:
 - \$10 million; or
 - 3 times the commercial gain resulting from the breach or (if the gain cannot be readily ascertained) 10% of the annual New Zealand Group turnover.

When are you at risk?

Price fixing occurs when competitors reach an arrangement that has the purpose, effect or likely effect of interfering with the free movement of price, discounts, allowances, rebates or credit. Informal (i.e. 'wink and nod') arrangements are also captured. Attempts to enter arrangements give rise to a breach.

Price fixing can occur in a large number of apparently innocent situations - it extends well beyond secret, late night meetings between executives of large corporations and includes controlling or maintaining price or material aspects of price. Benchmarking arrangements,

agreements and formulae for ascertaining price and arrangements regarding terms of credit all potentially give rise to price fixing if agreed to by competitors.

A breach occurs regardless of whether or not a price fixing arrangement is successful. Employees of small and large companies are equally at risk. Directors and senior executives who knowingly or recklessly engage in price fixing or condone it are likely to receive major penalties.

The Commerce Act welcomes competition on the basis of price, service and quality, but the personal risks to individuals who overstep the mark have risen significantly - there is a higher likelihood that participants (particularly senior management and directors) will face a material monetary penalty (in addition to that imposed on the company) and there is little companies can legally do to help them. Don't take the risk - speak to your manager or call a member of Bell Gully's Competition Law Team if you have any concerns.

For further information, please contact your usual Bell Gully adviser or:

AUCKLAND

Phil Taylor – phil.taylor@bellgully.com
Hayley Eustace – hayley.eustace@bellgully.com
Torrin Crowther – torrin.crowther@bellgully.com

Royal & SunAlliance Centre,
48 Shortland Street
PO Box 4199, Auckland, New Zealand, DX CP20509,
Telephone 64 9 916 8800, Facsimile 64 9 916 8801

WELLINGTON

Jill Mallon – jill.mallon@bellgully.com

IBM Centre,
171 Featherston Street
PO Box 1291, Wellington, New Zealand, DX SX11164,
Telephone 64 4 473 7777, Facsimile 64 4 473 3845