



# Restraints, Exclusivity and Other Key Competition & Consumer Issues in Contracts: Keeping You & Your Clients Out of Jail

Legalwise – Contract Law Conference

Alicia Murray

**18 March 2025**

# Agenda

*What we will cover in this seminar*

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

# Restraints of Trade

*A recap*

- **Restraints of trade** are clauses that are designed to protect the commercial / proprietary interests of a party.
- This usually involves preventing parties (eg a vendor or employee) from carrying out related activities during the agreement and for a period after the sale of a business 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 of restraints specifically preserved by section 7 of the Commerce Act

# Commerce Act 1986

## *Part II & III prohibitions*

- Section 27 prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.
- Section 30 prohibits contracts, arrangements or understandings between competitors that contain a cartel provision (being a provision which has the purpose, effect or likely effect of:
  - Price-fixing;
  - Restricting output; or
  - Market allocating)
- Section 37 prohibits resale price maintenance.
- Section 47 prohibits business acquisitions that have the purpose, effect or likely effect of substantially lessening competition.

# Cartel prohibition

*Smoke-filled room not required*

No person may enter into a contract, arrangement or understanding (**CAU**) or give a land covenant (**CAUc**) that contains a **cartel provision (CP)** (or otherwise give effect to a 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"> <li>price, discount, allowance, rebate or credit</li> <li>for/in relation to goods or services</li> <li>supplied or acquired by 2 or more parties in competition.</li> </ul>	<p><i>Preventing / restricting / limiting:</i></p> <ul style="list-style-type: none"> <li>the (likely) production of goods;</li> <li>the (likely) capacity to supply services;</li> <li>the (likely) supply of goods/services; or</li> <li>the (likely) acquisition of goods/services</li> <li>supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other.</li> </ul>	<p><i>Allocating between any 2 or more parties:</i></p> <ul style="list-style-type: none"> <li>the persons or classes of persons to/from whom the parties supply/acquire goods/services; or</li> <li>the geographic areas in which the parties supply/acquire goods/services</li> <li>in competition with each other.</li> </ul>
<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 – unconscionability / UCT

- Section 7 prohibits unconscionable conduct.
- Section 8 lists factors which a court may consider when determining whether a party's conduct was unconscionable.
- Section 26A–B prohibits unfair contract terms (in consumer and small business contracts).
- 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 in the contract, consider seeking expert competition advice.
- Consider:
  - Are the parties to the contract competitors or potential competitors?
  - Is the provision a possible cartel provision?
  - 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

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

- 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 the commercial rationale/legitimate commercial and/or proprietary interests being 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 is a criminal offence with a maximum penalty of 7 years in jail
- Every separate breach of the Act (even if done by the same person) may incur a penalty

## Cleaning company escapes much bigger fine for cartel conduct

### Freight forwarders fined almost \$10m over competition deal

3:10 pm on 17 June 2022

Share this     

## BUSINESS First Gas ordered to pay \$3.4m for anti-competitive conduct

Australia: Federal Court imposes a \$350,000 penalty on FE Sports for resale price maintenance

### 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  
PUBLISHED: 15:03 AEDT, 25 March 2022 | UPDATED: 18:20 AEDT, 25 March 2022

## Court grants declarations that Moola's Google Ads agreements breached Commerce Act

Published 20 Dec 2021

Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY



## Example – *First Gas*

*Where a restraint of trade went too far*

- First Gas and GasNet accepted in the High Court proceedings that the Agreement breached section 27 because:
  - (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.

# Questions?



**Alicia Murray**

**Partner**

**p** +64 9 972 3753

**m** +64 21 899 630

**e** [alicia.murray@matthewslaw.co.nz](mailto:alicia.murray@matthewslaw.co.nz)

Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY