

What you need to know about competition law during a pandemic

What is cartel conduct?

Cartel conduct is where there is a contract, arrangement or understanding between competitors that has the purpose, effect or likely effect of:



Fixing prices including any component of price



Restricting output



Allocating customers or markets

What are the consequences?

For individuals:

- Up to 7 years imprisonment
- Fines up to \$500,000
- Management bans
- Your employer is prohibited from paying your personal penalties

For businesses:

- Fines up to the greater of:
 - \$10 million
 - 3x commercial gain from the offending
 - 10% of turnover

Does competition law apply during COVID-19?

- The law is the law, even during a pandemic
- NZCC expected to take a pragmatic approach to enforcement
- The NZCC has reaffirmed it will not "tolerate unscrupulous businesses using COVID-19 as an opportunity for non-essential collusion between competitors or anti-competitive behaviour"

What if I need to collaborate with my competitor?

Collaborations are lawful where all of the following criteria are met:



Competitors are combining their businesses, assets or operations in some way



The cartel provision is objectively reasonably necessary to achieve the purpose



The dominant purpose of the collaboration is not to lessen competition



It does not otherwise substantially lessen competition in a market

How do I ensure my collaboration does not go too far?



Be clear on the purpose & scope of your collaboration



Have protocols in place to govern the collaboration



Keep arrangements under review

Can the NZCC approve my collaboration?

Businesses that would like greater certainty about the legitimacy of their collaborations may:



Informally engage with the NZCC

Does not provide legal comfort but can be a useful stress test



Apply for collaborative activities clearance

Provides legal confirmation that the collaboration benefits from the collaborative activities exception



Apply for authorisation

Legally permits a collaboration on the basis that the public benefits outweigh any loss of competition

Can I increase my prices during lockdowns?

NZ competition law does not generally prohibit excessive pricing. However, be aware that...



If a reason for a price increase is given, it must not be false, misleading or deceptive



Price gouging may amount to unconscionable conduct which will be illegal under the Fair Trading Act 1986 from 16 August 2022

Any questions? Talk to one of our experts



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