

INDUSTRY ASSOCIATIONS AND THE COMMERCE ACT 1986

Industry and Trade Associations provide a valuable and important forum for members to discuss industry developments and proposed legislation regulating industry-wide issues.

However, as members of Industry Associations are generally competitors, an Association may provide the vehicle for anti-competitive activity. Such activity is regulated under the Commerce Act 1986, which aims to promote competition in markets.

This article highlights some of the issues for Industry Associations and their Members arising under the Act, and provides a brief overview of some of the steps that Associations and their Members can take to minimise the risk of engaging in unlawful anti-competitive behaviour.

WHAT ARE THE RISKS?

PRICE FIXING

The Commerce Act prohibits price fixing, which is when competitors agree to control, fix or maintain the prices for the goods or services that they supply.

This includes any kind of price manipulation, from an agreement on prices to be charged to arrangements concerning discounts, allowances, rebates and credits. There must be evidence of collusion between the competitors, but this need not be formal written evidence and may simply be a “nod and wink” type understanding. Although not conclusive by itself, circumstantial evidence such as similar pricing structures or movements, joint action and attendance at meetings can infer that a price fixing arrangement exists.

COLLECTIVE BOYCOTTS

It is illegal for competitors to enter into contracts amounting to a refusal to deal with a third party, or a group boycott, with the purpose of preventing, restricting, or limiting dealings with a particular person or class of persons (the target). A classic boycott is an effort by a group of traders to exclude or inhibit a competitor from entering or competing in their market either by themselves not dealing with the competitor or by coercing or inducing one or more suppliers or customers not to deal with him. Admission into and disciplining of Industry Association members frequently comes under scrutiny in light of this prohibition.

GENERAL PROHIBITION ON CERTAIN CONTRACTS, ARRANGEMENTS AND UNDERSTANDINGS

The Commerce Act also includes a broad prohibition on all contracts, arrangements or understandings which have the purpose, effect or likely effect of substantially lessening competition in the market. These can take many forms including market sharing (which is an agreement to split the market between competitors either geographically or by customer or product).

PENALTIES

The maximum penalty for a corporation is currently the greater of \$10,000,000 or three times the value of any commercial gain resulting from the contravention. The maximum penalty for an individual is \$500,000.

It's also worth noting that the Commerce Act includes a specific provision that deems all contracts or arrangements entered into, or understandings arrived at, by an Industry Association to have been entered into or arrived at by all the persons who are members of the Association.

MINIMISING THE RISK

Ideally every Industry Association should have a basic compliance programme to inform Members about the Commerce Act, identify the boundaries of permissible conduct, and encourage pro-competitive activities. Some practical ideas to minimise risk are set out below.

ARTICLES

MANAGING TRADE ASSOCIATION MEETINGS

Avoid discussing commercially sensitive topics such as pricing, costs, market allocation, production and market shares in meetings. Discussion of discounts, payment terms, business strategy and allocation of markets are also topics that should be avoided. Avoid making any decision which may limit Members' freedom to set their prices and compete independently of each other.

ASSOCIATION RULES

Association rules should be related to a legitimate purpose, be impartial and neither favour nor constrain the ability of particular market participants to compete in the market. Avoid rules or standards if they affect fees charged, advertising, permitted business structures or limit types and locations of business'.

WHAT INFORMATION CAN TRADE ASSOCIATION MEMBERS SHARE?

Finally, consider carefully before exchanging any commercially sensitive information between members, including pricing information, because this can create an inference that a price fixing arrangement exists. It is generally not advisable for Association members to exchange current or future pricing information. Historical pricing or other aggregated pricing trends, particularly where undertaken by an independent third party, usually do not give rise to competition concerns.

Anna Chartres

Lane Neave Lawyers, Level 15, 119 Armagh St, Christchurch 8011

Tel: +64 3 379 3720, Fax: +64 3 379 8370, www.laneneave.co.nz