

Health series

# Setting your fees



This fact sheet is designed to help health professionals understand when and how setting their fees may raise concerns under the Commerce Act.

Agreements between competing health professionals that set the price of a good or service or interfere with how that price is reached are illegal under the Commerce Act. Such agreements are known as price fixing and are illegal, even if the agreements are informal and unwritten, and regardless of whether or not they are actually put into effect.

In an environment where collegiality and collaboration is encouraged, you may need to stop and think about who your competitors are and whether you are at risk of breaching the Commerce Act.

## Who are my competitors?

Your competitors are typically those practitioners who:

- work in different practices or partnerships from you
- and*
- can offer goods or services that your customers consider substitutes for your own goods or services.

For example, if you provide services that are similar to those provided by another practice across town, and your patients would readily go to either practice, then you are in competition with that other practice. Or, if a large health sector buyer is funding a contract that either you or another provider could profitably fulfil, then that other provider is your competitor.

Practitioners sharing premises should consider whether they are in business together or operating separate businesses. Unless a practice or business is structured as a single legal entity or a partnership of individuals, the individual practitioners within the practice who provide the same services will usually be considered to be in competition with each other. Partnerships are treated as single legal entities, as long as none of the partners is a company.

Your employment arrangements can also affect whether or not you are in competition with those you work with. Generally, you don't compete with your fellow employees. However, if you work on contract or on a fee-for-service basis, you would be considered to be in competition with others who provide the same services as you in the practice or hospital where you work.

In some cases, your funding agency may be considered your customer. In those cases, your competitors are those whose services could be substituted for yours by the funding agency.

If you are in doubt about whether you are "in competition" with fellow practitioners, and you are considering making an agreement with any of them that could affect your fees or prices, you should seek legal advice.



Any agreement between competitors that sets the price of a good or service or interferes with how that price is reached is illegal under the Commerce Act. This is known as price fixing.

## What kinds of agreements are considered price fixing?

Many different kinds of agreements can affect the prices of goods or services. Agreeing an actual fee with a competitor is the most obvious form of price fixing. But other less obvious types of agreements can also ultimately affect the price a patient pays. For example, it is illegal to **agree with your competitors** to:

- increase or maintain fees
- set a minimum fee
- eliminate or reduce discounts or rebates
- adopt a formula for calculating prices or fees
- co-ordinate bids so that a particular bidder will win a contract
- divide up the market, for example by allocating customers, territories, or specific types of goods or services
- restrict your output, for example the number of procedures you perform.

### EXAMPLES

Four eye surgeons agreed what price they would charge for publicly-funded services, and then negotiated a collective agreement with their District Health Board. The surgeons' agreement (to charge the same price rather than compete on price) could have resulted in higher prices in the area served by those surgeons. The surgeons admitted breaching the price fixing provisions of the Commerce Act and were ordered by the High Court to pay penalties and costs.

A group of anaesthetists sent a letter to the hospital they serviced stating that their post-operative fee was non-negotiable. They also collectively appointed an agent to negotiate their fees for in-theatre services with the hospital. The Commission warned the anaesthetists that both actions placed them at risk of illegal price fixing.

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🔗 You can read more about agreements that could affect prices in our general fact sheet *Price fixing and cartels* at [www.comcom.govt.nz/price-fixing-and-cartels](http://www.comcom.govt.nz/price-fixing-and-cartels)

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## Can I come to an agreement about fees with a practitioner in my own practice?

Assuming your practice is a single legal entity (or a partnership where none of the partners is a company), an agreement about fees is not considered an agreement between competitors – it is an internal management decision – and so is not illegal.

## Can I charge the same fees as practitioners in another practice?

Merely being aware what your competitors are charging is not illegal. Charging the same fees as your competitor, or price following, is not illegal either, providing you have not agreed to do so.

## Can I discuss fees with practitioners from different practices?

Discussing prices or fees or exchanging information about pricing with competitors is illegal if it interferes with how prices are set. As a result, this type of behaviour is risky as it may create the impression that you have reached, or are attempting to reach, a price-fixing agreement.



## Can I come to an agreement about fees with my fellow roster participants?

If you are operating a roster with colleagues in the same practice or partnership (that operates as a single legal entity), you can agree on fees as this is an internal business decision, not an agreement between competitors.

If you are operating a roster with competing practitioners, and jointly supplying services that none of you could or would supply without the cooperative structure of the roster agreement, then agreeing on fees for those services is unlikely to raise issues as you would usually either:

→ not be considered to be in competition with each other for the supply of those services

or

→ be exempt from the price fixing rule under an exemption for joint ventures.

Most after-hours clinics are examples of such lawful collaboration, and would be considered genuine joint ventures.

Genuine joint ventures provide additional or better services than those that could be provided by the individual parties to the joint venture. Joint ventures can be formal and incorporated, or unincorporated.

### EXAMPLE

Town B has no doctors' clinic. Three competing general practitioners from town A, 20 kilometres away, agree to open a clinic to provide services in town B, and to use a roster to staff it. They are in competition to supply services to patients from town B since those patients previously travelled to town A for medical treatment. However, any agreement on prices for services provided in town B is likely to be exempt from the price fixing rule under the joint venture exemption. The exemption would apply if the practitioners are supplying additional or better services than those they could or would have provided without the agreement.

However, an arrangement between competing practitioners to supply services they already supply at an agreed price is unlikely to be considered a genuine joint venture.

### EXAMPLE

Two practitioners who already provide services in town A decide to alternate days of work and agree on their fees for patients in order to avoid price competition. They will not be exempt under the joint venture exemption because they are not supplying additional or better services than those they could or would have supplied without the arrangement.

Anyone wishing to enter a joint venture should seek legal advice on their proposed arrangements; an evaluation of whether a joint venture is genuine will depend on the specific facts in each case. If you are collaborating to avoid competition, it is likely to be illegal.

🔗 You can read more about joint ventures in our factsheet *Exemptions under the Commerce Act* at [www.comcom.govt.nz/exemptions-under-the-commerce-act](http://www.comcom.govt.nz/exemptions-under-the-commerce-act)

### Can an agreement be exempt from the price fixing rule but still be illegal?

An agreement that is exempt from the price fixing rule may still be illegal if it would be likely to substantially lessen competition in the relevant market. When assessing whether the agreement is likely to substantially lessen competition, and therefore be illegal, we look at the overall effect of the agreement on competition.

🔗 You can read more in our fact sheet *Agreements that substantially lessen competition* at [www.comcom.govt.nz/slc-agreements](http://www.comcom.govt.nz/slc-agreements)



## What should I do if I get a price recommendation from my professional association?

Price recommendations are risky because any recommendation by a professional association is considered an agreement between all members of the association, and some of those members are likely to be competitors.

Since any agreement between competitors that interferes with how prices are set is considered price fixing, reaching an agreement on recommended prices is likely to be illegal. However, a price recommendation will be exempt from the price fixing rule where there are 50 or more parties to an agreement for a recommended price, and it is a genuine recommendation. In other words, everyone is free to depart from the recommendation and decide for themselves what they charge.

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🔗 You can read more about price recommendations in our guidelines *Trade associations* at [www.comcom.govt.nz/trade-associations](http://www.comcom.govt.nz/trade-associations)

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If you believe that an agreement, or part of an agreement, that your professional body has entered into is anti-competitive, you can avoid liability by:

- notifying your professional body in writing that you do not want to be party to that agreement
- and*
- not acting on the agreement.

## I received a national contract in the post – what do I need to consider, from a Commerce Act perspective, before signing it?

You should think carefully about whether the contract could restrict how you compete with other practitioners. For example, if you are prevented by the contract from discounting any aspect of your fees, that could have a negative effect on competition. If you disagree with a price element of the contract, you should be careful to bargain as an individual, rather than jointly with your fellow practitioners. Collective bargaining with competitors can interfere with prices and can amount to price fixing.



### Want to know more?

🔗 Our health series fact sheets cover a range of topics of particular interest to health professionals: [www.comcom.govt.nz/health](http://www.comcom.govt.nz/health)

🔗 We also have fact sheets for all businesses about their obligations under the Commerce, Fair Trading and Credit Contracts and Consumer Finance Acts: [www.comcom.govt.nz](http://www.comcom.govt.nz)

This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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