

# Competition Alert

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## Exchanging customer credit information - what to look out for

*The economic downturn will inevitably give rise to instances of businesses struggling to make payments on debts to their suppliers. If suppliers exchange credit information with their competitors to evaluate the credit risk of customers, they may risk breaching the Commerce Act 1986. This Alert highlights the dangers and considers some practical ways of minimising those risks.*

### Arrangements to protect historical debt exposure

In today's economic environment suppliers are becoming increasingly concerned that the debt owed to them by particular customers may not be paid - especially if the ongoing viability of that particular customer is looking increasingly shaky. In such a situation it may be considered advantageous for competing suppliers to reach an arrangement that both suppliers will:

- » agree a payment schedule so that a customer can trade out of trouble, to jointly aid the future viability of that customer;
- » provide discounted product for a certain time, similarly to allow the customer to continue to trade; or
- » only provide product on restricted credit terms, to limit further exposure to credit risk.

While these initiatives may sound sensible, there are competition pitfalls that suppliers need to be aware of when considering this type of arrangement.

To begin with, section 30 of the Commerce Act makes it illegal for competitors to reach an arrangement that fixes, controls or maintains price in relation to customers. In the US, courts have stated that:

...credit terms must be characterised as an inseparable part of the price. An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing.

It is essential, therefore, that suppliers, if they might be regarded as competitors, do not agree upon future credit terms to any customer. In addition, if supplier A and supplier B agree that they will each supply a particular customer only on a COD basis, as well as breaching section 30, it might also be an exclusionary provision if the suppliers also compete downstream with the customer (ie the supplier might have its own retail outlet).

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### So what can suppliers do?

An exchange of information between competitors who are suppliers to the same customer regarding that customer's credit-worthiness is likely to be permissible under the Commerce Act, provided that in exchanging this information the following guidelines are adhered to.

*"The information shared should only be the minimum information necessary to assist each supplier to be able to consider unilaterally how to deal with customers."*

- » The information shared should only be the minimum information necessary to assist each supplier to be able to consider **unilaterally** how to deal with customers;
- » If the information to be shared is more detailed than either simply the fact that the customer has defaulted or aggregated information on total current indebtedness, then the information should be provided to a third party agent for collation and reporting;
- » Participation in the information sharing arrangement should be entirely voluntary and should not exclude participation by any other supplier;
- » There should be no discussion between the parties to the arrangement regarding:
  - Conclusions that an individual company draws from the information;
  - Actions that will be taken as a result of that information, ie any response must be an **individual** response rather than a joint response;
  - Pricing, discounts, rebates or other terms of **future** supply to any customer;
  - The underlying costs of supplying the relevant products;
- The likely fate of the customer in the absence of any arrangements;
- Other competing suppliers;
- Specific business strategy about how each competing supplier sees the market developing in New Zealand.
- » Each supplier must retain its freedom to sell to “delinquent” debtors on such conditions as it sees fit; and
- » Prior to any exchange of information, each supplier must ensure that disclosure of the intended information is not restricted by the Privacy Act and/or confidentiality obligations to the customer contained in the terms and conditions of trade or other dealings with the customer.

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