

27 April 2021

Paul Swain  
[REDACTED]  
[REDACTED]  
[REDACTED]

Dear Mr Swain

### **Commerce Act 1986: Warning in respect of minimum fare**

1. As you are aware, the Commerce Commission (Commission) has completed its investigation into allegations of anti-competitive conduct in the Wellington taxi industry, in particular relating to price fixing with competitors.
2. We are issuing this letter to you after:
  - 2.1 our letter to you of 19 March 2021 setting out the Commission's view of your personal liability under the Commerce Act 1986 (Act) and that a warning is the appropriate enforcement outcome; and
  - 2.2 your email of 1 April 2021 where you accepted that a warning is the appropriate enforcement response.
3. This letter sets out the warning that the Commission is issuing to you. It also provides information relating to provisions of the Act to assist with future compliance.

### **The Commission's view**

4. In summary, the Commission considers that you are likely to have accessory liability under section 80(1)(e) of the Act for being knowingly concerned in the entry into and implementation of an agreement between Hutt and City Taxis Limited (Hutt & City) and its competitors to charge a \$25 minimum fare on taxi trips from the on-demand taxi rank at Wellington Airport (the Agreement), commencing on or about Monday 26 October 2020.

5. After weighing up the factors set out in our Enforcement Response Guidelines,<sup>1</sup> we have decided to conclude this investigation by issuing this warning to you.
6. A warning is not a finding of non-compliance; only a court can decide whether a breach of the law has occurred, and we have determined that we will not be commencing formal legal action against you at this time.

#### **Accessory liability under the Act**

7. Section 80(1)(e) of the Act provides that a person can be liable for pecuniary penalties if the person has been knowingly concerned in a contravention of section 30 of the Act.
8. Section 30 of the Act prohibits a person from:
  - 8.1 entering into a contract, arrangement or understanding (agreement) containing a cartel provision; or
  - 8.2 giving effect to a cartel provision.
9. Section 30A of the Act sets out that a cartel provision includes a provision in an agreement between two or more parties that has the purpose, effect or likely effect of fixing, controlling or maintaining the price for services that the parties supply in competition with each other.
10. The relevant parts of these provisions are set out in **Attachment A**.

#### **Basis for the Commission's view**

11. The Commission's view is that you were knowingly concerned in Hutt & City's entry into and giving effect to the Agreement.
12. The Commission considers that you had knowledge of:
  - 12.1 Hutt & City's and its competitors' operations at the on-demand taxi rank at Wellington Airport;
  - 12.2 the Agreement; and
  - 12.3 the likely effect of the Agreement.
13. The Commission considers that in your capacity as Director of Hutt & City you:
  - 13.1 had a legal duty to ensure that Hutt & City acted in a way that did not contravene the Act; and
  - 13.2 had the ability to prevent Hutt & City from entering into and giving effect to the Agreement but you deliberately refrained from doing so.

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<sup>1</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>.

## **Warning**

14. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter to you, rather than by issuing legal proceedings.
15. This warning represents our opinion that the conduct in which you have engaged is likely to have contravened the Act and that legal action remains available to the Commission in future if the conduct is repeated.
16. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against you.
17. This warning letter is public information and will be published on the case register on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

## **Penalties for contravening the Commerce Act**

18. Only the courts can decide if there has actually been a contravention of the Act. The court can impose penalties where it finds the law has been broken. An individual can be fined a maximum of \$500,000 and/or be prohibited from being a company director. A body corporate can be fined the greater of \$10 million or three times the commercial gain from the contravention (or, if this cannot be easily established, 10% of turnover). Every separate contravention of the Act may incur a penalty.
19. In addition, we would like to draw your attention to recent legislative changes to the Commerce Act 1986. From 8 April 2021, cartel conduct is subject to criminal sanctions, and individuals who are found to be in breach of the new cartel offence after 8 April 2021 may face up to 7 years imprisonment.
20. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

## **Commission guidance**

21. To avoid contravening the Act in the future, we recommend that you are mindful of the Act when interacting with competitors, particularly in circumstances where the conduct involved may interfere with any party's independent decision about a price, component of price, or any other matter relating to prices, such as a discount.

## **Further information**

22. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
23. You can also view the Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).

1. Thank you for your assistance with this investigation. Please contact [REDACTED] by email at [REDACTED] if you have any questions about this letter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'G. Chamberlain', with a stylized, cursive script.

Grant Chamberlain  
Cartels Manager

## Attachment A: Commerce Act 1986

### Part 2

#### Section 30 Prohibition on entering into or giving effect to cartel provision

No person may—

- (a) enter into a contract or arrangement, or arrive at an understanding, that contains a cartel provision;  
or
- (b) give effect to a cartel provision.

#### Section 30A Meaning of cartel provision and related terms

- (1) A **cartel provision** is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the supply or acquisition of goods or services in New Zealand:
  - (a) price fixing:
  - (b) restricting output:
  - (c) market allocating.
- (2) In this Act, price fixing means, as between the parties to a contract, arrangement, or understanding, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of,—
  - (a) the price for goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
  - (b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other.

### Part 6

#### Section 80 Pecuniary penalties relating to restrictive trade practices

- (1) If the court is satisfied on the application of the Commission that a person—
  - (a) has contravened any of the provisions of Part 2; or
  - (b) has attempted to contravene such a provision; or
  - (c) has aided, abetted, counselled, or procured any other person to contravene such a provision; or
  - (d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or
  - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or

- (f) has conspired with any other person to contravene such a provision,—
- the court may order the person to pay to the Crown such pecuniary penalty as the court determines to be appropriate.
- (2) The court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the court considers that there is good reason for not making that order.
- (2A) In determining an appropriate penalty under this section, the court must have regard to all relevant matters, in particular,—
- (a) any exemplary damages awarded under section 82A; and
  - (b) in the case of a body corporate, the nature and extent of any commercial gain.
- (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
- (a) in the case of an individual, \$500,000; or
  - (b) in any other case, the greater of the following:
    - (i) \$10 million:
    - (ii) either,—
      - (A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
      - (B) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.
- (2C) In proceedings relating to a contravention of section 30, if the defendant claims that an exception in section 31, 32, or 33 applies, it is for the defendant to prove, on the balance of probabilities, that the relevant exception applies.
- (5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced 10 years or more after the matter giving rise to the contravention.
- (6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part 2, proceedings may be instituted under this Act against that person in relation to the contravention of any 1 or more of the provisions; but no person shall be liable to more than 1 pecuniary penalty under this section in respect of the same conduct.