COMMERCE COMMISSION

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# DECISION NO. 735

Determination under to the Commerce Act 1986 (the Act) in the matter of an application for authorisation of a restrictive trade practice involving the:

**REFRIGERANT LICENSE TRUST BOARD**

**The Commission:** Dr Mark Berry
Anita Mazzoleni
Dr Stephen Gale

**Summary of Application**: The Refrigerant License Trust Board has applied for authorisation of a proposed arrangement under which up to 100% of New Zealand refrigerant wholesalers (including any new refrigerant wholesalers who enter into the market) may agree to supply refrigerants only to customers who are trained and licensed or certified to safely handle refrigerants (Proposed Arrangement).

**Determination:** The Commerce Commission (Commission) is not satisfied that the Proposed Arrangement will result, or be likely to result, in a lessening of competition under section 61(6) and (6A) of the Act. Having found no likely lessening of competition, the Commission declines the application to authorise the Proposed Arrangement under section 58(1) and (2) of the Act.

The Commission is satisfied that the Proposed Arrangement contains an exclusionary provision under section 61(7) of the Act and that the Proposed Arrangement will result, or will be likely to result, in such a benefit to the public that it should be permitted. Therefore, the Commission grants an authorisation for the Proposed Arrangement under sections 58(5) and 58(6) of the Act.

**Date:** 25 November 2011

## SUMMARY OF APPLICATION

1. On 7 July 2011, the Commerce Commission (the Commission) registered an application under section 58 of the Commerce Act 1986 (the Act) from the Refrigerant License Trust Board (RLTB or the Applicant) for authorisation of a proposed arrangement.

2. Under the proposed arrangement, up to 100% of New Zealand refrigerant wholesalers (including any new refrigerant wholesalers who enter into the market), may agree to supply refrigerants only to customers who are trained and licensed or certified to safely handle refrigerants (the Proposed Arrangement).

3. In order to purchase refrigerants from a refrigerant wholesaler who is party to the Proposed Arrangement, purchasers would need to present:

   - a valid Refrigerant Licence, a licence to be introduced and issued by the RLTB; or
   - a valid Approved Handler test certificate currently issued under the authority of the Environmental Protection Authority (EPA); or
   - a valid Approved Filler test certificate currently issued under the authority of EPA certifying that the person is qualified to fill a compressed gas container with gases (including refrigerants).

## THE COMMISSION'S DECISION

4. Under section 61(6) of the Act, the Commission considers that the Proposed Arrangement would not be likely to result in a lessening of competition in the relevant market, namely that for refrigerants. This is because there is unlikely to be a material difference in respect of competition if the Proposed Arrangement is implemented, or not implemented. Having found no likely lessening of competition, the Commission declines the application to authorise the Proposed Arrangement under section 58(1) and (2) of the Act.

5. In respect of section 61(7) of the Act, the Commission considers that the Proposed Arrangement contains an exclusionary provision that may prevent some customers from purchasing refrigerants.

6. However, the Commission considers that the Proposed Arrangement is likely to lead to a net benefit to the public that outweighs any detriment (due to the exclusionary provision). This is because the Proposed Arrangement should lead to net benefits in the form of increased compliance with safety regulations and a reduction in the release of potentially hazardous substances into the atmosphere. On the other hand, the Commission found that no detriments would result from the Proposed Arrangement's exclusionary provision.

7. As there would be some benefits, but no detriments, the Commission's decision is to authorise the Proposed Arrangement under section 58(5) and (6) of the Act.

## COMMISSION PROCEDURES

8. On 30 September 2011, the Commission issued its Draft Determination on the Proposed Arrangement. The Draft Determination:

   - sought submissions from interested parties about the preliminary views reached in the Draft Determination; and

- asked interested parties to notify the Commission if they wished a conference to be held.

9. The Commission received one written submission from the Motor Trade Association (MTA). The MTA supported the Commission's preliminary views. The MTA considered that the Draft Determination took account of its concerns, which were the lack of regulatory support for the Proposed Arrangement and the voluntary nature of the scheme.

10. Section 62 of the Act provides that the Commission may determine to hold a conference prior to making a final determination of an application for authorisation of a restrictive trade practice. The Commission considered that it was unnecessary to hold a conference in this case and it did not receive any requests for a conference from either the Applicant or any interested party.

## RELEVANT BACKGROUND

### Parties

*Applicant*

11. The RLTB is a charitable trust established in April 2011 by the Climate Control Companies Association and the Institute of Refrigeration, Heating and Air Conditioning Engineers. The purpose of the RLTB is to:

- promote, educate, and train people in the safe handling, filling, recovery and management of refrigerants for the health and safety of all New Zealanders; and
- support the refrigeration and air conditioning industries to meet its legislative responsibilities under the Hazardous Substances and New Organisms Act 1996 (HSNO Act).

12. In order to achieve these aims, the RLTB is developing refrigerant license training courses which will be open to all refrigerant trades-people that meet a minimum trade qualification. Attendees who successfully complete a course would be issued with a Refrigerant Licence, valid for 30 months, an Approved Filler test certificate and/or an Approved Handler test certificate.

*Refrigerant Wholesalers*

13. Refrigerant wholesalers import refrigerants into New Zealand, and supply these products to a range of industries. Some wholesalers, including Heatcraft New Zealand Limited (Heatcraft), are solely importers and distributors of refrigerants and related products. Other wholesalers, such as Cowley Refrigeration Engineering Ltd (Cowley) are involved in the importation and wholesale supply of refrigerants, but also purchase refrigerants from other wholesalers for supply to customers.

*Refrigerant Purchasers*

14. Refrigerants are commonly used in refrigeration and air conditioning equipment in a wide range of industries, including the automotive air conditioning, household and industrial refrigeration and refrigerated transport industries. Purchasers are diverse and include refrigeration contractors, supermarket chains, air conditioning specialists and automotive workshops.

*Government Agencies*

15. Three government agencies have roles in relation to hazardous substances under the HSNO Act and associated regulations:

    - The Ministry for the Environment provides policy oversight of the HSNO Act;
    - The EPA regulates the use of hazardous substances under the HSNO Act. It is responsible for approving hazardous substances and for approving test certifiers (private individuals) who in turn provide Approved Handler and Approved Filler test certification; and
    - The Department of Labour enforces the HSNO Act in relation to the workplace, including the Health and Safety in Employment (Pressure Equipment, Cranes and Passenger Ropeways) Regulations, that are the main provisions dealing with refrigeration systems.

**Industry Overview**

*Refrigerants*

16. There are two main types of refrigerants; fluorocarbon refrigerants, such as chlorofluorocarbons and hydrofluorocarbons, and natural refrigerants, such as ammonia and carbon dioxide. Most refrigerants are gases and are stored in a compressed state.[1] As a consequence, refrigerants can be hazardous from a health and safety perspective. They can also be damaging to the environment.

*HSNO Act*

17. The HSNO Act controls the use and categorisation of a wide range of hazardous substances, including refrigerants. The HSNO Act provides for controls to be put in place to prevent or manage adverse effects of hazardous substances. Specifically, the HSNO Act and associated regulations provide for the certification of fillers of compressed gas containers and handlers of hazardous substances.

18. The Hazardous Substances (Compressed Gases) Regulations 2004 provide that a person must not charge a compressed gas container unless the person is an approved filler and sets out the requirements for certification as an approved filler.[2]

19. The Hazardous Substances (Classes 1 to 5 Controls) Regulations 2001 and Hazardous Substances (Classes 6, 8 and 9 Controls) Regulations 2001 provide that substances must be in the personal control of an approved handler when held in quantities exceeding thresholds specified in the Schedule 3 of the Regulations.[3] The Hazardous Substances and New Organisms (Personnel Qualifications) Regulations 2001 set out the requirements for approved handlers.

*Handler and Filler Certification*

20. The EPA approves independent test certifiers who may issue Approved Handler and Approved Filler test certificates. The EPA's website lists approximately 20 test certifiers capable of issuing Approved Filler test certificates, and approximately 50 test certifiers capable of issuing Approved Handler test certificates throughout New Zealand.

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[1] One exception to this is ammonia, which is sold and stored in a liquid, non pressurised state.
[2] Regulation 60.
[3] Regulation 56.

*Compliance Environment*

21. The Commission's investigation has found that compliance with the HSNO Act (and associated regulations) in the refrigeration industry is extremely low. The Applicant submitted that compliance is one percent or less. This has in part been attributed to a lack of awareness in parts of the industry of the HSNO Act and its associated obligations.

## HOW THE COMMISSION ASSESSES APPLICATIONS FOR AUTHORISATION OF RESTRICTIVE TRADE PRACTICES

22. Under section 58 of the Act a person may apply for, and the Commission may grant, an authorisation where the applicant considers that one or more of the restrictive trade practice provisions of the Act (with the exception of sections 36 and 36A) would or might apply to the proposed conduct. Therefore, a person's standing to apply for an authorisation under section 58 is governed by their own view as to the potential application of the restrictive trade practices provisions to their proposed conduct.

23. However, the Commission considers that the discretion conferred on it by section 61 of the Act to grant an authorisation or decline an application – even where the public benefits tests in sections 61(6) to (8) are met – enables the Commission to form its own view about whether the relevant provisions of the Act might apply to the proposed conduct.[4]

24. In the Commission's view, the power conferred on the Commission to grant an authorisation could not have been intended to be used in circumstances where there is no real risk of a restrictive trade practice provision applying to the proposed conduct. This conclusion is supported by the references in section 61 to the underlying restrictive trade practices at issue. For the purposes of the present application, the relevant references are to "the lessening in competition" mentioned in section 61(6) (to be read in conjunction with section 61(6A))[5], and to "the exclusionary provision" in section 61(7). Reference to these factors in section 61 presupposes their existence in fact, and suggests a need for the Commission to be satisfied that the proposed conduct risks being caught by the relevant restrictive trade practice provisions (being in this case sections 27 and 29 of the Act) before granting an authorisation.

25. The Commission will therefore only proceed to analysing benefits and detriments where it is satisfied that one or more of the relevant restrictive trade practice provisions of the Act might apply to the proposed conduct. Where this criterion is not met, the Commission will decline the application without weighing any benefits and detriments, on the basis that no competition issue arises.

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[4] This view of the Commission's discretion is consistent with the view expressed by the Australian Competition Tribunal, albeit in the context of the ACCC's discretion under the Australian authorisation regime in the Trade Practices Act 1974. See *Re Application by Medicines Australia Incorporated* {2007} Australian Competition Tribunal 4 (27 June 2007) at paras 122 and 128. To similar effect is *Jones v Australian Competition and Consumer Commission* (2002), FCA 1054 at para 50, where the Federal Court of Australia held that "{a}s a matter of basic principle, the power conferred on the ACCC to grant an authorisation could not have been intended to be used in circumstances where that body concluded that there was clearly no risk of any contravention..."

[5] Subsection (6A) states as follows: "For the purposes of subsection (6) of this section, a lessening in competition includes a lessening of competition that is not substantial.

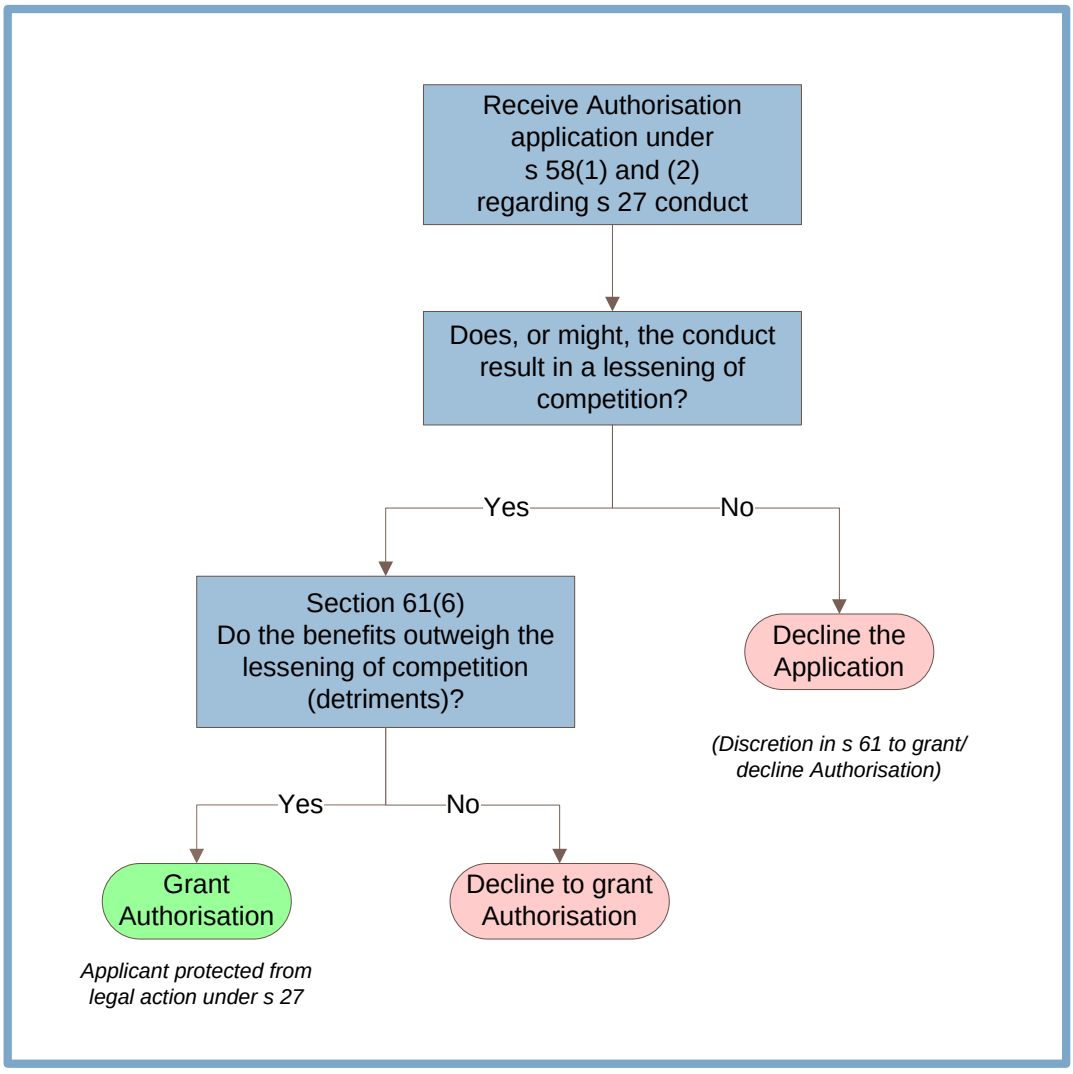
**Section 27**

26. Section 27 of the Act prohibits contracts, arrangements or understandings that have the purpose, effect, or likely effect, of substantially lessening competition in a market.

27. The Commission can authorise conduct that is potentially anti-competitive under section 27 of the Act. The Commission must be satisfied that the potentially anti-competitive conduct would result in such a benefit to the public that would outweigh the lessening of competition (i.e. detriments).

28. Diagram 1 sets out the Commission's approach to assessing an application for authorisation of potentially anti-competitive conduct to which section 27 would or might apply.

**Diagram 1 – Approach to Section 27**




29. In assessing the application, the Commission will first determine whether the conduct would or might reasonably result in a lessening of competition. Under section 61(6A) of the Act the lessening of competition need not be substantial. If this test is not met the Commission will decline the application. In that event, the Commission will not go on to consider whether the benefits of the conduct outweigh any lessening of competition.

30. However, if the Commission considers that a lessening of competition might occur, it will assess whether the conduct would, in all the circumstances, result, or be likely to result, in such a benefit to the public which would outweigh the lessening of competition.

31. If the benefits outweigh the lessening of competition, the Commission may grant an authorisation. On the other hand, if the lessening of competition (i.e. detriments) outweighs the benefits, the Commission will decline to grant an authorisation.

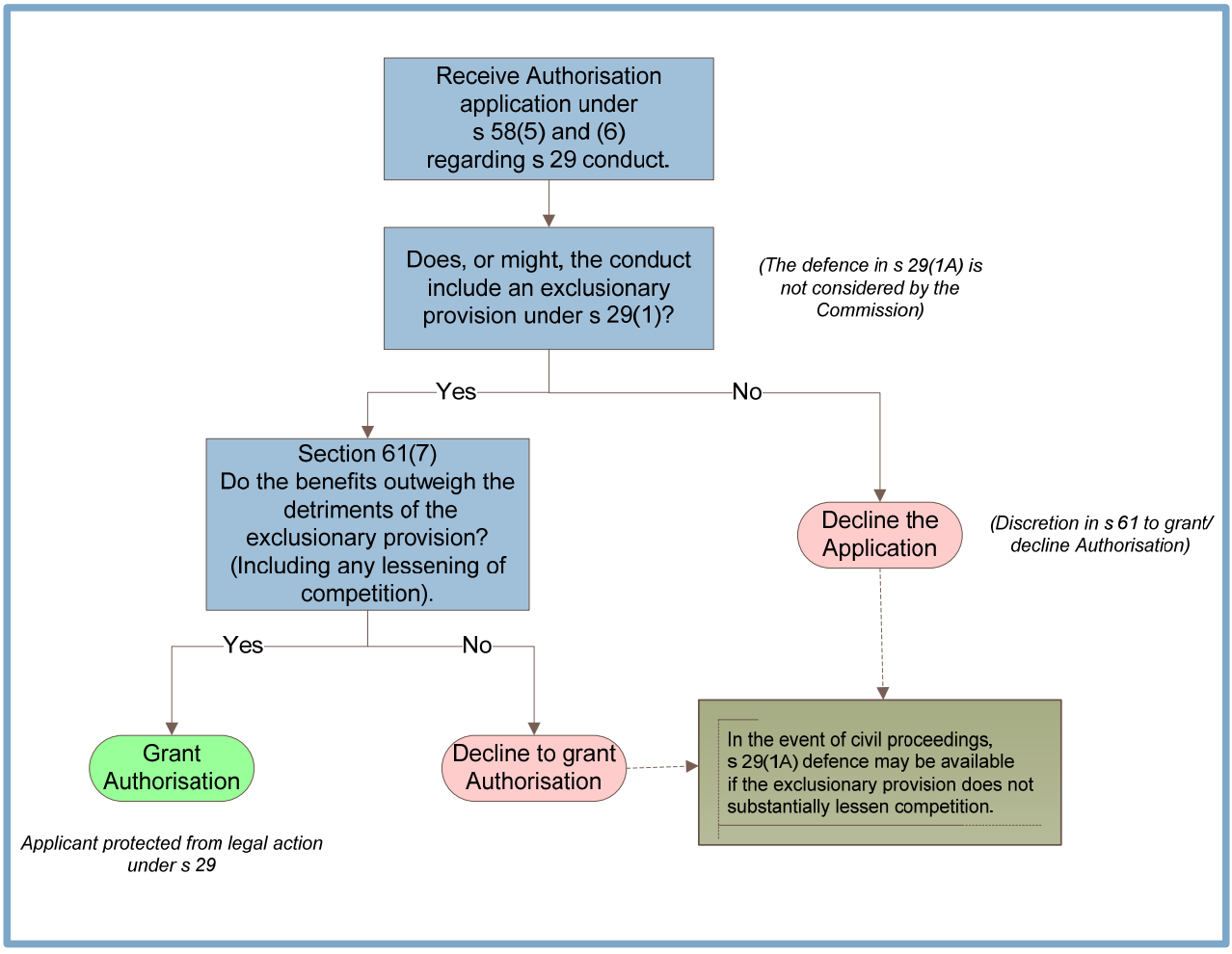
**Section 29**

32. Section 29 of the Act prohibits competitors from entering into or giving effect to agreements containing exclusionary provisions.

33. The Commission can authorise proposed conduct in respect of section 29 of the Act where it is satisfied that the conduct would in all the circumstances result in such a benefit to the public that it should be permitted.

34. Diagram 2 sets out the Commission's approach to assessing applications for authorisation of potentially anti-competitive conduct to which section 29 would or might apply.

**Diagram 2 – Approach to Section 29**



35. To assess applications under sections 58(5) and 58(6) of the Act, the Commission will first determine whether the arrangement contains, or may contain, an exclusionary provision under section 29(1) of the Act.

36. Under section 29(1) of the Act, an exclusionary provision will be found if:

- it is part of an arrangement between parties who are in competition with each other; and
- it has the purpose of preventing the supply of goods or services to a person who is also in competition with a party to the arrangement in relation to the supply or acquisition of those goods or services.

37. Where there is no real risk that section 29 will apply to the conduct, because there is no reasonable possibility that it involves an exclusionary provision under section 29(1), the Commission will decline the application made under sections 58(5) and 58(6). The Commission will not go on to consider whether the benefits of the conduct outweigh any lessening of competition.

38. However, if the Commission finds that there would or could be an exclusionary provision under section 29(1), it will then assess whether the conduct will in all the circumstances, result, or be likely to result, in such a benefit to the public that it should be permitted.

*Section 29(1A) defence does not change the approach*

39. Section 29(1A) of the Act provides that a provision that satisfies the definition of an exclusionary provision under section 29(1) of the Act, is not an exclusionary provision if it is proved that the provision does not have the purpose, effect, or likely effect, of substantially lessening competition in a market. Section 29(1A) was inserted into the Act on 26 May 2001. This is the first authorisation application under sections 58(5) and 58(6) since the addition of the defence in section 29(1A). The question therefore arises as to whether the defence in section 29(1A) should be taken into account by the Commission in determining, as a threshold matter, whether the proposed conduct could or might involve an exclusionary provision.

40. The Commission does not consider that the insertion of section 29(1A) necessitates a departure from the Commission's approach to authorisation applications prior to the amendment to section 29 of the Act.[6] The reasoning is as follows.

41. First, the articulation of the benefits test under section 61(7) of the Act appears aligned with the per se nature of section 29(1) and does not contain language reflective of the analysis that might be required under section 29(1A). Thus, in contrast to sections 61(6) and 61(6A), section 61(7) does not refer to weighing the benefits of the conduct against a lessening of competition, substantial or otherwise. This remains so even after the insertion of subsection (1A) into section 29 of the Act. A specific reference in section 61(7) to a lessening of competition as a factor to weigh against benefits might have been expected if Parliament intended that the defence in section 29(1A) be the subject of threshold evaluation by the

[6] See Decision No. 273 *Re Weddel NZ Ltd CC* dated 02 February 1995 and Decision No. 356, *Newcall Communications Limited and others* dated 17 May 1999, which were decided before subsection (1A) was inserted into the Act.

Commission.[7] An approach that requires a finding by the Commission that the defence in section 29(1A) is not available to an applicant, before proceeding to analyse benefits and detriments under 61(7), would also be inconsistent with the lower jurisdictional threshold established by Parliament for conduct under section 27 when it inserted section 61(6A) into the Act.

42. Secondly, if the Commission engaged in a section 29(1A) analysis as a threshold matter, it would have to satisfy itself about the extent, or substantiality, of any lessening of competition arising from the exclusionary provision. Such an onus on the Commission in the authorisation context, simply to establish whether it should continue onto a benefits analysis, is not warranted given that section 29(1A) is intended to be a matter of proof for a defendant in the context of proceedings before the courts. Rather, the extent of any lessening of competition arising from conduct that is caught by section 29(1) will be considered by the Commission in its detriments analysis.

43. Thirdly, the Commission considers that its interpretation of sections 29 and 61(7) supports and reflects the important policy preference that applicants are not denied the intended protections of authorisation where justified. Given the presumptive illegality of conduct that falls within section 29(1), and the commensurate risk to applicants of third party litigation arising from such conduct, there are sound policy reasons for not applying too high a threshold for considering authorisation applications under section 61(7), and providing the protection of an authorisation where this is warranted by public benefits. Setting a threshold that denied authorisation to applicants where their section 29(1) conduct lessened competition, but not substantially, would leave those applicants vulnerable to costly reverse-onus litigation in which arguments about public benefits arising from the conduct are not available.

44. Accordingly, in the context of considering an application for authorisation under sections 58(5) and 58(6), the Commission considers that the relevant threshold enquiry continues to be focussed on whether the proposed conduct risks being caught under section 29(1), without reference to the defence available under section 29(1A).

## SHOULD THE COMMISSION AUTHORISE THE PROPOSED ARRANGEMENT?

45. The Applicant has applied for authorisation of the Proposed Arrangement in respect of conduct to which sections 27 and 29 of the Act might apply under:

- sections 58(1) and 58(2) of the Act to the extent (if any) that section 27 would or might apply to the entering into and giving effect to the Proposed Arrangement; and
- sections 58(5) and 58(6) of the Act to the extent (if any) that section 29 would or might apply to the entering into and giving effect to the Proposed Arrangement.

[7] This view is consistent with the commentary expressed in Gault that a lessening of competition is not mentioned as a detriment in section 61(7) "because this is not required to be shown for a contravention of s 29". See Gault on Commercial Law CA61.04(3).

**Market Definition**

46. When the Commission considers an application for authorisation of a potential restrictive trade practice it is required to assess the effect of the behaviour in respect of the relevant markets.

47. The Act defines the term "market" as being a market in New Zealand for goods or services as well as for other goods or services that, as a matter of fact and commercial commonsense, are substitutable for them.

48. The Applicant submits that the relevant market is the national market for the importation and wholesale supply of all refrigerants in New Zealand (the refrigerants market).

49. Refrigerants are sold to refrigerant technicians and engineers who are engaged by clients to fill air conditioning or refrigeration systems. Refrigerants are also sold directly to end users who then engage a refrigerant technician or engineer to undertake the activity. In addition, some importers of refrigerants sell refrigerants to other wholesalers, who in turn supply end users.

50. For the purposes of assessing section 27 and section 29, the Commission accepts the Applicant's market definition.

51. In addition, the Commission considers that the Proposed Arrangement might affect downstream markets. The Commission has defined these downstream markets as the supply and installation of refrigeration and air conditioning systems; and the service and maintenance of refrigeration and air conditioning systems.

**Section 27 – Is there a lessening of competition?**

52. In reaching a conclusion about whether the Proposed Arrangement would lead to a lessening of competition in a market, the Commission makes a with and without comparison rather than a before and after comparison. The comparison is between two hypothetical future situations, one with the Proposed Arrangement (the factual) and one without (the counterfactual). The difference in competition between these two scenarios is then attributed to the Proposed Arrangement.

53. The Applicant considers that the Proposed Arrangement may result in a lessening of competition (albeit minimal) because the conduct:

- is an agreement between competitors that has the potential to restrict the supply of refrigerants to unlicensed or non-certified purchasers of those products; and
- imposes an extra cost on any purchasers of refrigerants who do not already comply with current certification requirements (including those purchasers that are not obliged to comply under the existing HSNO legislation and regulations).

*The Counterfactual (without the Proposed Arrangement)*

54. The Commission concludes that if the Proposed Arrangement is not implemented, the level of regulatory compliance would likely remain at the current low level.

55. The Applicant stated that in the absence of the Proposed Arrangement, most (if not all) of those that buy refrigerants and currently do not comply with HSNO legislation and regulations, would continue to not comply.

56. This view is supported by Commission discussions with the Department of Labour, which has described compliance as "patchy", and with several refrigerant wholesalers, who commented that compliance amongst customers is limited.

57. The Ministry for the Environment and the Department of Labour advised the Commission that no changes are proposed to the current regulation of the supply of refrigerants.

*Factual (with the Proposed Arrangement)*

58. If the Proposed Arrangement is implemented, refrigerant wholesalers voluntarily entering the Proposed Arrangement would supply refrigerants only to those customers who can present either a Refrigerant License, or an Approved Handler or Filler certificate.

59. Some wholesalers spoken to by the Commission indicated a willingness to enter the Proposed Arrangement subject to the Commission's approval. These include [ ] and [ ].

60. However, one major refrigerant wholesaler, [ ], advised the Commission that it does not wish to participate in the scheme at this stage. This is because the company considers it already has processes in place that address safety concerns regarding the supply of refrigerants. Another refrigerant wholesaler [ ] has also expressed a reluctance to join.

61. Further, the [ ] advised the Commission that it has withdrawn its support from the Proposed Arrangement in its current form. It stated:

> We consider that based on the above proposed workings of the scheme it will be unsuccessful in improving practices and compliance in the [ ] As a result of this situation there will be little benefit to our members from further involvement in the scheme.

62. The reasons advanced for individual companies not wishing to participate in the Proposed Arrangement are that the Proposed Arrangement may have a detrimental impact on company sales, and the Proposed Arrangement lacks compulsion and any regulatory enforcement. [ ], who expressed an interest in participating in the Proposed Arrangement, indicated that it would review continued involvement if it were disadvantaged by the arrangement.

63. On the basis of available information, the Commission remains unsure of the likely level of participation in the Proposed Arrangement. This is because:

- at this point in time it is unlikely that all wholesalers of refrigerants would participate in the Proposed Arrangement; and
- it is possible that refrigerant wholesalers who initially join may withdraw later.

*Overall conclusion on a lessening of competition*

64. The Commission considers that the Proposed Arrangement would not be likely to result in a lessening of competition in the refrigerants market. There is unlikely to be a material difference between the factual and counterfactual.

65. Further, the Commission considers there would be no lessening of competition whether there would be 100% participation, or partial participation, in the Proposed Arrangement. The Commission has reached this view for the following reasons:

- Purchasers who are already certified under the HSNO Act would have access to all suppliers;
- Purchasers who are not certified under the HSNO Act, but should be certified, will incur some training costs in retaining access to all suppliers, but these costs will not affect prices in the refrigerants market or in downstream markets; and

- Purchasers who are not certified and are required to do so under the HSNO Act are not likely to face price discrimination or be excluded from the market as the costs of obtaining certification are low, and it may be possible for these purchasers to buy refrigerants from other compliant customers to avoid undertaking the training (e.g. arbitrage is possible).

**Section 29 - Does the Proposed Arrangement contain an exclusionary provision?**

66. As discussed above, the Commission first determines whether there is, or may be an exclusionary provision. This assessment involves a consideration of whether the relevant arrangement is, or may be an exclusionary provision under section 29(1). If there is clearly no exclusionary provision the Commission will decline the application without weighing the benefits and detriments.

67. In the Commission's view, the Proposed Arrangement would or may contain an exclusionary provision that satisfies the definition in section 29(1). The Commission considers that the requirements of section 29(1) are met because:

- there would clearly be an arrangement between competing refrigerant wholesalers who sign a Memorandum of Understanding to enter into the Proposed Arrangement;
- the agreement to restrict the supply of refrigerants is an arrangement that has the purpose of preventing the supply of refrigerants to purchasers who do not hold the necessary certification or licensing; and
- there are likely to be purchasers of refrigerants that compete with one or more wholesalers who are parties to the arrangement, for example, [ ].[8]

68. Having found that there may be an exclusionary provision the Commission will consider whether the benefits of the Proposed Arrangement outweigh any detriments arising from the exclusionary provision.

**Do the benefits of the Proposed Arrangement outweigh the detriments?**

69. The Commission's view is that the giving effect to the Proposed Arrangement would in all the circumstances result, or be likely to result, in such a benefit to the public that the Proposed Arrangement should be authorised in relation to section 29 of the Act.

*The Public Benefit Test*

70. In making such a determination, the Commission identifies and weighs the likely benefits and detriments flowing from the Proposed Arrangement. If it is satisfied that the benefits outweigh the detriments, then conduct may be authorised. The Commission considers that a public benefit is any gain, and a detriment is any loss, to the public of New Zealand.

71. The Commission states in its Guidelines for the Analysis of Public Benefits and Detriments[9] that for restrictive trade practice authorisations the Commission should quantify the benefits and detriments where possible. The Commission is mindful of the observations of Richardson J in *Telecom Corporation of New Zealand Ltd v*

[8] The Commission defines the downstream markets that could be potentially affected by exclusionary provision as: the market for supply and installation of refrigeration and air conditioning systems; and the market for the service and maintenance of refrigeration and air conditioning systems.
[9] Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments*, 1997, p6.

*Commerce Commission*,[10] on the Commission's responsibility to attempt to quantify benefits and detriments to the extent that it is feasible, rather than rely on purely intuitive judgement. This is not to say that only those gains and losses which can be measured in dollar terms are to be included in the assessment; those of an intangible nature, which are not readily measured in monetary terms, must also be assessed.

72. Overall, the Commission regards quantification as simply a tool that enhances the Commission's final qualitative judgement. The Commission does not rely on a rigid balancing of the quantified detriments and benefits without applying a wider qualitative analysis.

73. The Commission has carefully considered the extent to which the benefits and detriments are quantifiable in respect of the Application. The Commission concludes that this is an unusual case where only a qualitative assessment of the benefits and detriments is required due to the intangible nature of the benefits.

**Benefits**

74. The Commission has identified the primary benefit of the proposed arrangement as increased compliance, which could lead to the safer handling of potentially hazardous substances. A further benefit would be a reduction in the release of potentially hazardous and environmentally damaging substances into the atmosphere.

75. The Applicant submitted that the primary benefit of the Proposed Arrangement is that purchasers of refrigerants would be trained in how to safely store, and in some cases safely recover, refrigerants from systems. The Applicant also submitted that the Proposed Arrangement would result in the following benefits:

- purchasers of refrigerants would be more aware of their obligations under the HSNO Act and associated regulations;
- improved training in the refrigerant industry may prevent another incident like the Tamahere coldstore explosion;[11]and
- a reduction in the release of potentially hazardous substances into the atmosphere.

76. The following sections discuss how the Commission has reached its conclusion in respect of the benefits.

*Increased compliance*

77. Increased compliance with the law is intrinsically a public benefit because it can be assumed that legislation is enacted in order to provide a net benefit to New Zealanders. In the case of the HSNO Act, increased compliance can lead to increased public safety, and a reduction in harm to the environment via a reduction in the release of potentially hazardous substances into the atmosphere.

78. The EPA told the Commission that handler and filler certification under the HSNO Act has the following benefits.

79. It provides independent confirmation that an approved handler has:

[10] {1992} 3 NZLR 429.

[11] On 5 April 2008, an explosion and subsequent fire occurred at the Icepak Coolstore facility in Tamahere near Hamilton. This was caused by the ignition of a propane-based refrigerant.

- knowledge of the hazardous substances they are working with;
- knowledge of the relevant legislation; and
- a working knowledge of the relevant operating equipment.

80. For approved fillers, certification provides independent confirmation that the filler:
    - understands the gases they are working with;
    - understands the containers used for those gases; and
    - can safely fill compressed gas containers.

81. The Commission considers that increased compliance with the HSNO Act and associated regulations would potentially deliver the following benefits:
    - safer handling of potentially hazardous substances reducing the likelihood of accidents; and
    - reduction in the amount of ozone depleting refrigerants released into the environment.[12]

*Costs associated with achieving benefits*

82. The Commission's Guidelines for the Analysis of Public Benefits and Detriments stipulates that gains are to be measured on a net basis.[13] This means that in considering the benefit created by the proposed arrangement, the Commission must also consider the cost of achieving the benefit.

83. It can be assumed that legislation that is enacted creates a net benefit for New Zealanders. In the case of the HSNO Act the Commission can therefore assume that the benefits associated with the legislation outweigh wholesaler[14] and purchaser compliance costs. Purchaser compliance costs that have been taken into account when enacting legislation would include the cost to those people who are required by law to have either an Approved Handler certificate or an Approved Filler certificate to undertake the required training.

84. Any person who purchases refrigerants, but is not required by the HSNO Act and associated regulations to have an Approved Handler or Approved Filler certificate, would potentially incur costs as a result of the Proposed Arrangement. The costs would be the cost of an approved course, with the RLTB's course estimated to cost between $350 and $450, and one day off work every five years.[15] This cost is considered an additional cost for the purposes of the Commission's analysis because it is a cost which does not presently have to be incurred according to the law.

85. The Commission has been unable to establish the extent of this category of people. The Applicant acknowledges that there may be some heat pump installers and repairers who purchase refrigerants in such small quantities that they do not need an Approved Handler certificate and therefore do not require an Approved Filler

[12] A number of industry participants advised the Commission that safer handling of refrigerants would prevent the release of hazardous substances.
[13] Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments*, 1997, p12.
[14] Wholesalers intending to enter into the arrangement advised the Commission that they plan to put in place a system to check if a prospective refrigerant purchaser has either a valid refrigerant licence, handler certificate, or a filler certificate.
[15] While the RLTB licence is valid for 30 months, handler and filler certificates are valid for five years.

certificate. The Commission's enquiries have also established that in larger companies a purchasing officer may order refrigerants but would not be required by the HSNO Act and associated regulations to have any handler or filler certification.

86. While the Commission has not established the extent of this group, it considers that it is likely to be a small number. This is because discussions with industry participants have identified people falling into this category as exceptions.

*Overall net benefits with partial sign up to the Proposed Arrangement*

87. The Commission considers that only some wholesalers are likely to participate in the Proposed Arrangement. It follows then that with only a small number of wholesalers entering into the arrangement, there will likely also be only a small number of additional people in the refrigeration industry that will undertake training to become compliant. This in turn suggests a small benefit in terms of safety and emissions resulting from the Proposed Arrangement.

88. Compliance costs are also dependent on the number of refrigerant wholesalers entering the Proposed Arrangement. If the percentage of wholesalers who agree to participate in the Proposed Arrangement is small, the compliance costs of those purchasers not covered by the HSNO Act are likely to be small because they can easily avoid the costs of certification. The compliance costs under this scenario are therefore likely to be very small.

89. Accordingly, the Commission considers that in the event that less than 100% of wholesalers sign up to the Proposed Arrangement, there would be some increase in compliance and low additional compliance costs. Therefore the Proposed Arrangement would be likely to result in some net benefit to the public of New Zealand.

*Overall net benefits with 100% sign up*

90. The Commission has also considered the extent of the benefits in the event that all wholesalers sign up to the proposed arrangement, for completeness. If 100% of refrigerant wholesalers agree to the Proposed Arrangement, the customers of those wholesalers would be likely to undertake some level of training[16] relating to the safe handling of hazardous substances. Under this scenario the Commission considers it is likely that a substantial proportion of the engineers, technicians and related professionals working in the refrigeration industry would undertake some level of certification, given that current compliance is low.[17]

91. However, under the scenario of all wholesalers signing up to the Proposed Arrangement, there are likely to be some purchasers of refrigerants who would continue to avoid compliance with the HSNO Act and associated regulations. Interviews with industry participants established that it is possible that small purchasers of refrigerants, such as owner-operated vehicle workshops or independent auto air conditioning repairers may purchase refrigerants from other compliant customers to avoid undertaking the training.

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[16] Customers would have the choice of taking one of the Applicant's courses, which are tailored to the refrigeration industry, or taking one of the more generic fillers or handlers courses presently available to a wide spectrum of industries.

[17] Competenz estimates that there are 5,500 such persons working in the refrigeration industry. Additionally, the Motor Trade Association estimates that there are likely to be another 500 in the automotive trades that work with refrigerants.

92. Despite this, the Commission considers that the hypothetical scenario of 100% of wholesalers agreeing to the Proposed Arrangement would be likely to promote a higher level of compliance with the HSNO Act by purchasers of refrigerants than is currently the case.

93. While this scenario would increase the compliance costs of purchasers not covered by the HSNO Act, the total of these costs is likely to be low because the number of purchasers not covered by the HSNO Act is likely to be small.

94. Accordingly, regardless of the extent of the sign-up by wholesalers to the Proposed Arrangement, the Commission is of the view that the Proposed Arrangement would be likely to result in a net benefit.

**Detriments**

95. The Applicant submits and the Commission agrees, that by restricting the supply of refrigerants only to purchasers presenting a valid certificate or license, the Proposed Arrangement may result in some detriment. Specifically, the Proposed Arrangement may potentially restrict competition by limiting customer choice and increasing participation costs.

96. However, in this instance, the Commission is of the view that there would not be any competitive detriment arising from the Proposed Arrangement. For the same reasons set out under the section 27 analysis, the exclusionary provision is unlikely to have any material effect on the refrigerant market or downstream markets because:

- Purchasers who are already certified under the HSNO Act will have access to all suppliers;
- Purchasers who are not certified under the HSNO Act, but should be certified, will incur some training costs in retaining access to all suppliers, but these costs will not affect prices in the refrigerants market or in downstream markets; and
- Purchasers who are not certified and are required to do so under the HSNO Act are not likely to face price discrimination or be excluded from the market as the costs of obtaining certification are low, and it may be possible for these purchasers to buy refrigerants from other compliant customers to avoid undertaking the training (e.g. arbitrage is possible).

**Balancing of Benefits and Detriments**

97. The determination of the Application involves a balancing of the public benefits and detriments which would, or would be likely to result, from the Proposed Arrangement. The Commission can only grant an authorisation if it satisfied that there is a net positive public benefit from the Proposed Arrangement.

98. The Commission concludes that, on the basis of available information, the Proposed Arrangement is likely to lead to a benefit to the public and there are no competitive detriments.

**DETERMINATION**

99. The Commerce Commission (Commission) is not satisfied that the Proposed Arrangement will result, or be likely to result, in a lessening of competition under section 61(6) and (6A) of the Act. Having found no likely lessening of competition, the Commission declines the application to authorise the Proposed Arrangement under section 58(1) and (2) of the Act.

100. The Commission is satisfied that the Proposed Arrangement contains an exclusionary provision under section 61(7) of the Act, and that the Proposed Arrangement will result, or will be likely to result, in such a benefit to the public that it should be permitted. Therefore, the Commission grants an authorisation for the Proposed Arrangement under sections 58(5) and 58(6) of the Act.

Dated this 25th day of November 2011

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Dr M N Berry

Division Chair