

27 April 2021

Sam Abraham and Tom Matte
Directors
Kiwi Cabs Limited
63 Hobart Street
Miramar
Wellington 6003

Dear Mr Abraham and Mr Matte

Commerce Act 1986: Warning relating to minimum fare agreement

1. As you are aware, the Commerce Commission (Commission) has completed its investigation concerning allegations of anti-competitive conduct in the Wellington taxi industry.
2. We are issuing this letter to you following:
 - 2.1 our letter to you of 17 February 2021 setting out the Commission's preliminary view that Kiwi Cabs Limited (Kiwi Cabs)'s conduct contravened the Commerce Act 1986 (Act); and
 - 2.2 [REDACTED] 4 March 2021 where Mr Abraham acknowledged that a warning letter was an appropriate outcome.
3. This letter sets out the warning that the Commission is issuing to Kiwi Cabs. It also provides information relating to provisions of the Act to assist with future compliance.

The Commission's view

Kiwi Cabs

4. The Commission considers that Kiwi Cabs is likely to have breached the price fixing prohibitions in section 30 of the Act by entering into and giving effect to an agreement with its competitors to charge a \$25 minimum fare on taxi trips from the on-demand taxi rank at Wellington Airport (the Agreement).

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

Kiwi Cabs' taxi drivers

7. The Commission also undertook a preliminary assessment as to whether Kiwi Cabs' taxi drivers, as independent contractors of Kiwi Cabs, likely breached:
 - 7.1 section 30 of the Act by giving effect to the Agreement; and
 - 7.2 section 80(1)(e) of the Act by being directly or indirectly knowingly concerned in the Agreement.
8. The Commission has decided that on balance further investigating the independent contractor taxi drivers' conduct is not a priority, and so the Commission will not be taking any further action against the independent contractor taxi drivers of Kiwi Cabs in respect of the possible conduct described at [8].

Price fixing under the Act

9. The Act prohibits certain agreements (contracts, arrangements or understandings) between competitors. In particular, section 30 of the Act prohibits entering into and/or giving effect to an agreement that contains a cartel provision.
10. Cartel provisions can take many forms, including price fixing, dividing up markets, rigging bids or restricting output of goods and services.
11. Price fixing is where two or more businesses agree on what prices they will charge, thereby avoiding competing with each other. Price fixing is not limited to agreements between competitors setting a specific price for goods or services – it also includes competitors agreeing to fix any part of a price, or to set price according to an agreed formula.
12. The relevant parts of these provisions are set out in **Attachment A**.

Basis for the Commission's view

13. The Commission is of the view that Kiwi Cabs entered into and gave effect to the Agreement, in breach of section 30 of the Act.

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

14. The Commission considers that Kiwi Cabs entered into the Agreement, which was to introduce a \$25 minimum fare on taxi trips from the on-demand taxi rank at Wellington Airport, in its correspondence with its competitors.
15. The Commission considers that Kiwi Cabs gave effect to the Agreement by announcing to Kiwi Cabs taxi drivers that the \$25 minimum fare would be introduced on 26 October 2020, by beginning to charge the minimum fare through Kiwi Cabs' taxi drivers, and by designing and distributing minimum fare stickers in respect of the same.
16. Kiwi Cabs ceased giving effect to the Agreement shortly after 28 October 2020 as Kiwi Cabs became aware, following contact from the Commission, that the conduct had the potential to raise concerns under the Act.

Warning

17. 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 rather than by issuing legal proceedings against Kiwi Cabs.
18. This warning represents our opinion that the conduct in which you have engaged is likely to have breached the Act and that legal action remains available to the Commission in future if the conduct is repeated.
19. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against you.
20. 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 breaching the Commerce Act

21. Only the courts can decide if there has actually been a breach 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 breach (or, if this cannot be easily established, 10% of turnover). Every separate breach of the Act may incur a penalty.
22. 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.
23. 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

24. To avoid breaching the Act in the future, we recommend that Kiwi Cabs is mindful of the Act when interacting with competitors, particularly in circumstances where the conduct may interfere with any party's independent decision about a price, component of price, or any other matter relating to prices.
25. If in doubt, you should seek legal advice from a lawyer experienced in dealing with the Act.

Further information

26. 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. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
27. You can also view the Act and other legislation at www.legislation.co.nz.
28. 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



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.