

31 October 2022

Kerry Logistics (Oceania) Limited  
40-44 Airpark Drive  
Mangere, Auckland  
2022

c/o [ ]

By email only: [ ]  
Copy to: [ ]

Dear Sir/Madam

### **Commerce Act 1986: Warning in respect of anti-competitive agreement relating to freight forwarding services**

1. As you are aware, the Commerce Commission (Commission) has been investigating allegations of anti-competitive conduct in New Zealand's international freight forwarding industry.
2. We have now completed our investigation and are writing to alert Kerry Logistics (Oceania) Limited (Kerry Logistics) of our concerns and issue you with a formal warning.
3. We are issuing this letter to Kerry Logistics following:
  - 3.1 our letter to you of 24 May 2022 setting out the Commission's preliminary view that Kerry Logistics is likely to have breached the Commerce Act 1986 (the Act) and that a warning is the appropriate enforcement outcome; and
  - 3.2 Kerry Logistics' response to our letter dated 14 June 2022.
4. This letter sets out the warning that the Commission is issuing to Kerry Logistics. It also provides information relating to provisions of the Act to assist with future compliance.
5. We are issuing you with this warning letter because in our view Kerry Logistics is likely to have breached section 27 via former section 30 and amended section 30 of the Act by entering into and giving effect to an agreement with Mondiale Freight Services Limited (Mondiale) that Kerry Logistics and Mondiale would each not

compete for customers to whom the other was supplying retail freight forwarding services (the Agreement).

6. A warning is not a finding of non-compliance and does not mean that a breach of the law has been proven. Only a court can decide whether a breach of the law has occurred, and we have determined that we will not bring legal proceedings against Kerry Logistics.

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

7. The Commission considers that Kerry Logistics likely entered into the alleged Agreement (being either an arrangement or an understanding) from around April 2011, but by no later than 31 August 2015, until October 2018. We note that the period pre-dates both the COVID pandemic and associated supply chain disruptions, and the criminalisation of cartel conduct (ie, the warning relates to a likely civil contravention of the Act, and not a criminal contravention).
8. The international freight industry involves all aspects of the logistical arrangements necessary for the international movement of goods, by air or sea, from origin to destination. Freight forwarders in the international freight industry compete with each other to supply some or all of a range of services to exporters and importers.
9. Freight forwarders can supply either or both retail freight forwarding services, or wholesale freight forwarding services. Retail freight forwarding services are those supplied directly to exporters and importers, and wholesale freight forwarding services are those supplied to other freight forwarders.
10. Sea freight container services are supplied on either a full container load basis or a less than container load basis. Wholesale freight forwarders often seek to combine freight (especially less than container load freight) from different customers and from retail freight forwarders. This can allow them to provide a more economical and regular freight services, with containers able to be filled and shipped on a regular and scheduled basis.
11. Mondiale supplies wholesale freight forwarding services to Kerry Logistics. Kerry Logistics and Mondiale also both supply retail freight forwarding services to importers and exporters.
12. Over the course of obtaining wholesale freight forwarding services from Mondiale, the Commission considers it likely that Kerry Logistics entered into the alleged Agreement with Mondiale that they would not compete for each other's retail customers. The alleged Agreement appears to have related to the full range of freight forwarding services for airfreight and sea freight, and imports and exports. However, the alleged Agreement did not affect tenders.
13. The Commission considers that the alleged Agreement likely went wider than what was necessary to address any perceived concerns about Mondiale's status as both a

supplier to Kerry Logistics as a wholesale freight forwarder, and a competitor of Kerry Logistics as a retail freight forwarder. These perceived concerns related to confidentiality and conflicts of interest. In the Commission's opinion, the alleged Agreement was not a lawful way to address those concerns. The concerns also do not appear to have any link to Kerry Logistics not competing for Mondiale's customers.

14. After weighing up the factors set out in the Commission's Enforcement Response Guidelines<sup>1</sup> and Kerry Logistics' letter of 14 June 2022, the Commission has exercised its enforcement discretion and decided to issue a warning to Kerry Logistics rather than issuing legal proceedings against Kerry Logistics.
15. While the Commission does not intend to take any further action against Kerry Logistics, the Commission has brought and concluded civil proceedings against Mondiale, Oceanbridge Shipping Limited and individuals associated with the companies as a result of the Commission's investigation. The proceedings alleged each company entered into and gave effect to cartel agreements with various other freight forwarders (but not with each other), including the alleged Agreement between Mondiale and Kerry Logistics to which this warning relates. Those proceedings were resolved with admissions by the defendants that the conduct breached the Act and the imposition of jointly recommended penalties totalling \$9.795 million.
16. For the avoidance of doubt, the Commission has not relied on admissions made by the defendants to those proceedings in reaching its view that Kerry Logistics is likely to have breached the Act and that a public warning is the appropriate enforcement response.
17. The Commission is also issuing warnings to seven other freight forwarders for conduct that formed part of the same investigation.

#### **Relevant provisions of the Act**

18. The alleged anti-competitive conduct relates to potential breaches by Kerry Logistics of Part 2 of the Act.
19. The Act prohibits agreements between competitors about how they set prices (price fixing), how much they will produce or purchase (restricting output), and which customers or markets they will compete for (market allocating). Businesses must make decisions of those types on their own.
20. The relevant legislation has been amended over the course of the conduct. The relevant provisions of the Act include:

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

20.1 section 27 via former section 30 of the Act:

20.1.1 section 27 of the Act prohibits entry into a contract, arrangement or understanding (which we refer to as an agreement) containing a provision that has the purpose, effect or likely effect of substantially lessening competition in a market, and also prohibits giving effect to such a provision in an agreement;

20.1.2 until amended by the Commerce (Cartels and Other Matters) Amendment Act 2017, former section 30 deemed a provision in an agreement between competitors that has the purpose, effect, or likely effect of fixing, controlling, or maintaining prices or components of prices (price fixing) to substantially lessen competition in a market for the purposes of section 27 of the Act; and

20.2 section 30 of the Act, as amended by the Commerce (Cartels and Other Matters) Amendment Act 2017 (amended section 30).<sup>2</sup> Amended section 30 prohibits competitors (including potential competitors) from entering into agreements containing cartel provisions, or giving effect to cartel provisions in agreements. A cartel is where two or more businesses agree not to compete with each other, and this includes agreements relating to prices or components of prices (price fixing), restricting output and market allocating (customer sharing).

21. For the purposes of the Act, an arrangement or understanding exists where two competing parties reach a consensus involving a commitment from one or more of the parties to act or refrain from acting in a certain way, and the commitment gives rise to an expectation on the part of the other party/parties that those who made the commitment will act or refrain from acting in that way.<sup>3</sup>

22. The relevant parts of these provisions are set out in **Attachment A**.

### **How this conduct can break the law**

23. The Commission considers that Kerry Logistics and Mondiale were in competition with each other to supply retail freight forwarding services to customers in New Zealand, in a market or markets for the provision of retail freight forwarding services

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<sup>2</sup> Section 30 of the Act was amended on 15 August 2017 by the Commerce (Cartels and Other Matters) Amendment Act 2017. The Commerce (Cartels and Other Matters) Amendment Act also provided for a 9-month transitional period. Under the transitional period, conduct to give effect to a cartel provision in an agreement that was entered into before 15 August 2017 continued to be subject to former section 30 (as though it had not been amended) until 14 May 2018. Section 30 was further amended on 8 April 2021 by the Commerce (Criminalisation of Cartels) Amendment Act 2019. References to the “amended section 30” in this letter are to section 30 as amended by the Commerce (Cartels and Other Matters) Amendment Act, but before it was amended by the Commerce (Criminalisation of Cartels) Amendment Act 2019: see <https://legislation.govt.nz/act/public/1986/0005/76.0/DLM88271.html>.

<sup>3</sup> *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25, (2020) 15 TCLR 553 at [58]. The Supreme Court left open the possibility that something less might be required for an understanding (at [30]).

from overseas locations to New Zealand and/or from New Zealand to overseas locations.

24. The Commission considers it likely that Kerry Logistics entered into and gave effect to the alleged Agreement with Mondiale in breach of section 27 via former section 30 of the Act, and later in breach of amended section 30 of the Act,<sup>4</sup> from around April 2011 but by no later than 31 August 2015, until October 2018. This included both price fixing and market allocating.

*Price fixing*

25. The Commission considers it likely that the alleged Agreement contained provisions that had the purpose, effect or likely effect of fixing, controlling or maintaining the price of retail freight forwarding services that Kerry Logistics and/or Mondiale offered to their customers in competition with each other. This is because the provisions restrained a freedom that Mondiale and Kerry Logistics would have otherwise had to price customers, and customers lost the opportunity to be offered a price that had been set by a freight forwarder operating in response to working competitive market forces.
26. Accordingly, the Commission is of the view that those provisions:
- 26.1 were likely deemed to substantially lessen competition under sections 27(1) and (2) of the Act, via former section 30 of the Act; and
- 26.2 were likely cartel provisions (specifically, price fixing provisions) under amended section 30A(1) and 30A(2) of the Act.

*Market allocating*

27. The Commission also considers it likely that the alleged Agreement contained provisions that allocated customers of retail freight forwarding services between Kerry Logistics and Mondiale. Kerry Logistics and Mondiale supplied retail freight forwarding services in competition with each other. Specifically, the provisions of the alleged Agreement provided that:
- 27.1 customers that already used Kerry Logistics' retail freight forwarding services would be allocated to Kerry Logistics, and Mondiale would not compete for those customers; and
- 27.2 customers that already used Mondiale's retail freight forwarding services would be allocated to Mondiale and Kerry Logistics would not compete for those customers.

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<sup>4</sup> See [20] and above n 2.

28. The Commission is of the view that those provisions were likely cartel provisions (specifically, market allocating provisions) under amended section 30A(1) and section 30A(4) of the Act.

*The conduct that may have broken the law*

29. Businesses must make their own decisions about what prices they will offer and which customers they will compete for. If they agree these matters with their competitors, they risk breaching the Act.
30. The Commission considers it likely that Kerry Logistics gave effect to the alleged Agreement in breach of the Act by:
- 30.1 not approaching customers to whom Mondiale was supplying retail freight forwarding services, declining to quote those customers and/or otherwise not competing for those customers;
  - 30.2 communicating with Mondiale regarding whether either Mondiale or Kerry Logistics was supplying retail freight forwarding services to specific customers, to determine whether those customers could be competed for;
  - 30.3 in order to avoid competing against each other, discussing with Mondiale how to address instances when one party had been asked to provide services to or had started taking steps to compete for a customer to whom the other party was supplying retail freight forwarding services. This included discussing the amount that one party should quote to a customer to ensure that the price would not be competitive vis-à-vis the other party (cover pricing); and
  - 30.4 thanking Mondiale for not competing for one of Kerry Logistics' customers.
31. The Act includes some exceptions from the prohibition against cartel conduct and the former prohibition against price fixing. However, the Commission is of the view that none of those exceptions are likely to have applied to the alleged Agreement.

**Kerry Logistics' response**

32. Kerry Logistics responded to the Commission's letter of 24 May 2022 outlining its preliminary view and intended enforcement outcome by stating that they expressed no view on:
- 32.1 the preliminary view reached by the Commission, adding that they did not wish to supply any additional information over and above what had already been provided; and
  - 32.2 the suggestion by the Commission that the appropriate enforcement outcome under the Enforcement Response Guidelines was the issuing of a public warning.

## **Warning**

33. 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. As previously noted, it is not a finding of non-compliance and does not mean that a breach of the law has been proven. Only a court can decide whether a whether a breach of the law has occurred.
34. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against you.
35. 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**

36. If a court finds that there has been a breach of the Act it can impose penalties or make other orders 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. Other orders that a court can make include declarations of a breach of the Act and orders for damages.
37. In addition, we would like to draw your attention to recent legislative changes to the Commerce Act 1986. Since 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 seven years imprisonment. This warning relates to conduct that pre-dates the criminalisation of cartel conduct.
38. 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**

39. 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:
  - 39.1 the conduct may interfere with any party's independent decision about a price (or component of a price) or a party's decision about which customers/markets they may choose to compete for; or
  - 39.2 you are dealing with a supplier that is also one of your competitors.
40. It is particularly important to be cognisant of potential cartel conduct in situations where you may have a supplier/customer relationship or other commercial arrangement with one of your competitors or potential competitors (ie, where you

are likely to compete in the same market). Vertical agreements which involve an agreement between competitors will be subject to the cartel provision. Section 31 of the Act contains an exception for collaborative activities, and section 32 of the Act contains an exception for certain vertical supply contracts. However, it is up to the person relying on the exception to show to the relevant standard if an exception applies.<sup>5</sup>

41. If in doubt, you should seek legal advice from a lawyer experienced in dealing with the Act. This letter is not a substitute for legal advice.

#### **Further information**

42. 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.
43. You can also view the Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
44. Thank you for your assistance with this investigation. Please contact [ ] by email at [ ] if you have any questions about this letter.

Yours sincerely

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Grant Chamberlain  
Cartels Manager  
Competition Branch

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<sup>5</sup> See our Competitor Collaboration Guidelines (January 2018) at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0036/89856/Competitor-Collaboration-guidelines.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf). These Guidelines also include information about other exceptions, such as joint buying.



## Attachment A: Commerce Act 1986 – relevant provisions

### Part 2

#### Section 27 Contracts, arrangements, or understandings substantially lessening competition prohibited

- (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (3) Subsection (2) applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.
- (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

#### 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.

**Former section 30 Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition**

- (1) Without limiting the generality of section 27, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—
  - (a) supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
  - (b) resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.
- (2) The reference in subsection (1)(a) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.