

(the Mondiale Agreement), from no later than August 2014 until October 2018; and

- 5.2 an arrangement or understanding with Oceanbridge Shipping Limited (Oceanbridge) that Oceanbridge would not compete for customers to whom Go Logistics was supplying retail freight forwarding services (the Oceanbridge Agreement), from around May 2015 until around December 2019;

(together, the Agreements).

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 Go Logistics.

The Commission's view

7. As set out above, the Commission considers that Go Logistics:
- 7.1 likely entered into the alleged Mondiale Agreement on a date unknown to the Commission, but not later than August 2014, which continued until October 2018; and
- 7.2 likely entered into the alleged Oceanbridge Agreement on a date unknown to the Commission, but no later than May 2015, which continued until around December 2019.

We note that the periods pre-date 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 and Oceanbridge supplied wholesale freight forwarding services to Go Logistics. Go Logistics, Mondiale and Oceanbridge also supply retail freight forwarding services to importers and exporters.
12. Over the course of obtaining wholesale freight forwarding services from Mondiale and Oceanbridge, the Commission considers it likely that Go Logistics entered into the alleged Agreements with Mondiale and Oceanbridge. The alleged Agreements appear to have related to the full range of freight forwarding services for airfreight and sea freight, and imports and exports. However, the alleged Agreements did not affect tenders.
13. The Commission considers that the alleged Agreements likely went wider than what was necessary to address any perceived concerns about Mondiale's and Oceanbridge's status as both a supplier to Go Logistics as a wholesale freight forwarder, and a competitor of Go Logistics as a retail freight forwarder. These perceived concerns related to confidentiality and conflicts of interest. In the Commission's opinion, the alleged Agreements were not a lawful way to address those concerns. The concerns also do not appear to have any link to Go Logistics not competing for Mondiale's customers.
14. After weighing up the factors set out in the Commission's Enforcement Response Guidelines¹ and Go Logistics' letter of 20 June 2022, the Commission has exercised its enforcement discretion and decided to issue a warning to Go Logistics rather than issuing legal proceedings against Go Logistics.
15. While the Commission does not intend to take any further action against Go Logistics, the Commission has brought and concluded civil proceedings against Mondiale, Oceanbridge 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 Agreements 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 Go 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.

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

Relevant provisions of the Act

18. The alleged anti-competitive conduct relates to potential breaches by Go 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:
 - 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).² 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

² 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>.

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.³

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:

23.1 Go Logistics and Mondiale; and

23.2 Go Logistics and Oceanbridge,

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

24. The Commission considers it likely that Go Logistics entered into and gave effect to:

24.1 the alleged Mondiale Agreement in breach of section 27 via former section 30 of the Act, and later in breach of amended section 30 of the Act,⁴ from no later than August 2014 until October 2018; and

24.2 the alleged Oceanbridge Agreement in breach of section 27 via section 30 of the Act and in breach of amended section 30 of the Act, from no later than May 2015 until around December 2019.

This conduct included both price fixing and market allocating.

Price fixing

25. The Commission considers it likely that the alleged Agreements contained provisions that had the purpose, effect or likely effect of fixing, controlling or maintaining the price of retail freight forwarding services that:

25.1 Go Logistics and Mondiale; and

25.2 Go Logistics and Oceanbridge,

offered to their customers in competition with each other. This is because the provisions restrained a freedom that Mondiale, Oceanbridge and Go Logistics would have otherwise had to price customers, and customers lost the opportunity to be

³ *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]).

⁴ See [20] and above n 2.

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 Agreements contained provisions that allocated customers of retail freight forwarding services between Go Logistics and each of Mondiale and Oceanbridge. Go Logistics and Mondiale, and Go Logistics and Oceanbridge, supplied retail freight forwarding services in competition with each other.
- 27.1 Specifically, the provisions in the alleged Mondiale Agreement provided that:
 - 27.1.1 customers that already used Go Logistics' retail freight forwarding services would be allocated to Go Logistics, and Mondiale would not compete for those customers; and
 - 27.1.2 customers that already used Mondiale's retail freight forwarding services would be allocated to Mondiale, and Go Logistics would not compete for those customers.
 - 27.2 The provisions in the alleged Oceanbridge Agreement provided that customers that already used Go Logistics' retail freight forwarding services would be allocated to Go Logistics, and Oceanbridge would not compete for those customers.
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 Go Logistics gave effect to the alleged Mondiale Agreement in breach of the Act by:

- 30.1 communicating with Mondiale regarding whether either Mondiale or Go Logistics was supplying retail freight forwarding services to specific customers, to determine whether those customers could be competed for;
 - 30.2 discussing with Mondiale how to address instances when Go Logistics had been approached, provided quotes to, and/or otherwise competed for, a customer to whom Mondiale was supplying retail freight forwarding services;
 - 30.3 not approaching customers to whom Mondiale was supplying retail freight forwarding services, declining to quote those customers, withdrawing quotes provided by Go Logistics to those customers, and/or otherwise not competing for those customers;
 - 30.4 apologising to Mondiale when Go Logistics approached a customer to whom Mondiale was supplying retail freight forwarding services;
 - 30.5 providing assurances to Mondiale that Go Logistics would not compete for customers to whom Mondiale was supplying retail freight forwarding services; and
 - 30.6 advising Mondiale of occasions where Go Logistics had refrained from or was going to refrain from approaching, providing quotes to, and/or otherwise competing for customers to whom Mondiale was supplying retail freight forwarding services.
31. The Commission considers it likely that Go Logistics gave effect to the alleged Oceanbridge Agreement in breach of the Act by advising Oceanbridge that Go Logistics was aware that Oceanbridge had quoted a specific customer to whom Go Logistics was supplying retail freight forwarding services, and/or enquiring with Oceanbridge about whether it had quoted a specific customer to whom Go Logistics was supplying retail freight forwarding services. This included:
- 31.1 expressing disappointment or dissatisfaction that Oceanbridge had quoted one of Go Logistics' customers; and
 - 31.2 seeking assurances that Oceanbridge would, in future, avoid quoting Go Logistics' customers.
32. 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 Agreements.
- Go Logistics' response**
33. Go Logistics responded to the Commission's letter of 24 May 2022 outlining its preliminary view and intended enforcement outcome by:

- 33.1 acknowledging that the alleged Agreements are likely to have breached the Act; and
 - 33.2 noting that while any enforcement decision such as issuing a public warning, is for the Commission and accepting that a public warning is likely an appropriate outcome, it considers that the Commission's enforcement objectives may have already been met through the civil proceedings mentioned at [15] above and the extensive investigation involving multiple parties.
34. In addition, Go Logistics wished to draw the Commission's attention to the following matters relating to the conduct:
- 34.1 Go Logistics has fully cooperated with the Commission's investigation, including by providing information and attending voluntary interviews.
 - 34.2 The conduct did not involve a formal agreement, but arose from a pragmatic desire to protect confidential information and avoid commercial conflict.
 - 34.3 Go Logistics did not have an anti-competitive purpose, and saw the agreements as having a lawful purpose to protect its ability to participate and compete in the retail market. There may be practical difficulties monitoring and enforcing confidentiality provisions. However, ultimately, Go Logistics accepts that the agreements went beyond Go Logistics' purpose or that confidentiality restrictions should have been used to achieve that purpose instead.
 - 34.4 Go Logistics also wanted to ensure it had good commercial relationships with its suppliers Mondiale and Oceanbridge, and had significantly less market and negotiating power in its dealings with them.
 - 34.5 The conduct has ceased and Go Logistics did not always give effect to its agreement with Mondiale.
35. We have considered Go Logistics' response and consider it remains appropriate to proceed with a public warning to Go Logistics for the conduct outlined above. In particular, the factors that Go Logistics has pointed to do not alter the Commission's views about whether the conduct was likely to breach the Act and that the issue of a public warning to Go Logistics remains consistent with the relevant factors for warnings outlined in the Commission's Enforcement Response Guidelines.

Warning

36. 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.

37. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against you.
38. 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

39. 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.
40. 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.
41. 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

42. 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:
 - 42.1 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
 - 42.2 you are dealing with a supplier that is also one of your competitors.
43. 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.⁵

44. 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

45. 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.
46. You can also view the Act and other legislation at www.legislation.co.nz.
47. Thank you for your assistance with this investigation. Please contact [] by email at [] if you have any questions about this letter.

Yours sincerely

[]

Grant Chamberlain
Cartels Manager
Competition Branch

⁵ See our Competitor Collaboration Guidelines (January 2018) at 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.