

22 December 2015

New Zealand Stock and Station Agents Association
Attn: Terry Cairns, President

By email: south.stock@xtra.co.nz
Copy: siatkins@xtra.co.nz

Dear Mr Cairns

Commerce Act 1986: warning

1. I refer to our letter of 22 May 2015 concerning the conclusion of our investigation into allegations that certain livestock companies and saleyard owners, reached agreements on fees for cattle sales at saleyards following the introduction of the National Animal Identification and Tracing Act 2012 (**NAIT Act**).

Commission's view

2. The Commission considers the New Zealand Stock and Station Agents Association (**NZSSAA**) is likely to have breached the price fixing prohibitions in the Commerce Act 1986 (**the Act**) by directly or indirectly, being knowingly concerned in the collusive agreements reached by the livestock companies that:
 - 2.1 saleyards would introduce a tagging fee of \$25 per un-tagged cattle beast at New Zealand saleyards from 1 July 2012 (**Tagging Fee Agreement**);
 - 2.2 where agents provided services at saleyards, they would charge farmers a radio frequency identification device (RFID) administration fee of \$1.50 per head of cattle (split equally between the vendor and purchaser), in relation to the increased costs of registering saleyard-based cattle movements (**RFID Fee Agreement**); and
 - 2.3 saleyards would increase existing yard fees by \$1.50 per head of cattle (split equally between the vendor and purchaser), to recover costs arising from compliance with the NAIT Act (**Yard Fee Agreement**).
3. The Commission has exercised its enforcement discretion to issue a warning to NZSSAA rather than to commence proceedings. In making a decision to warn, we have taken into account the financial standing of the association as an independent entity and the fact that we are taking action against a number of the NZSSAA's members.

Price fixing conduct prohibited by the Commerce Act

4. Section 27 via section 30 of the Act prohibits contracts, arrangements or understandings between competitors containing provisions that have the purpose or effect of fixing, controlling or maintaining the prices charged for goods or services.
5. A contract, arrangement, or understanding need not be formal, written, or signed. All that is required is for the parties to reach a consensus and a mutual expectation as to how at least one of them will act, or not act.

Basis for the Commission's view

Tagging Fee Agreement

6. The Commission is of the view that the NZSSAA was directly or indirectly, knowingly concerned in the Tagging Fee Agreement.
7. The terms of that agreement included livestock companies, as competitors:
 - 7.1 imposing or procuring the imposition of the agreed tagging fee at saleyards they own (in part or in full); and
 - 7.2 passing on to farmers the agreed tagging fee in their capacity as agents.
8. The agreement appears to have evolved over the course of industry meetings in 2011 (in particular, the "NAIT Saleyard Selling Agents' Forum" on 5 April 2011 and a meeting of the NZSSAA on 25 May 2011). The agreement was further recorded in the NZSSAA meeting minutes of 16 April 2012.
9. NZSSAA representatives [] were present at the "NAIT Saleyards Agents' Forum" on 5 April 2011 (where we consider the Tagging Fee Agreement was entered into), attended the NZSSAA meeting on 16 April 2012 at which the Tagging Fee Agreement was reaffirmed, and were involved in transmitting a variety of communications from the NZSSAA to its members that referenced the Tagging Fee Agreement.
10. In our view, the Tagging Fee Agreement fixed, controlled or maintained price of yard services and stock and station agent services provided by the participating livestock companies and saleyard owners.

RFID Fee Agreement

11. The Commission is also of the view that the NZSSAA was directly or indirectly, knowingly concerned in the RFID Fee Agreement.
12. The NZSSAA issued the agenda containing "yard fees" as an item for discussion at the NZSSAA meeting on 16 April 2012, where we consider the RFID Fee Agreement was entered into. It also circulated a draft letter containing a reference to the RFID Fee Agreement to its members. On 27 August 2012, Mr Cairns, as the NZSSAA president, stated in a media article that the NZSSAA had issued a recommendation that livestock companies charge a \$1.50 RFID fee.

13. In our view, the RFID Fee Agreement fixed, controlled or maintained price of stock and station agent services provided by the participating livestock companies.

Yard Fee Agreement

14. The Commission is also of the view that the NZSSAA was directly or indirectly, knowingly concerned in the Yard Fee Agreement.
15. The NZSSAA issued the agenda containing “yard fees” as an item for discussion at the NZSSAA meeting on 16 April 2012 where we consider the Yard Fee Agreement was entered into. It also subsequently circulated a draft letter to its members containing a reference to the Yard Fee Agreement.
16. In our view, the Yard Fee Agreement fixed, controlled or maintained price of yard services provided by the participating saleyard owners.

Associated legal proceedings

17. The Commission regards price fixing as serious conduct. As previously advised, the Commission decided to issue legal proceedings against PGG Wrightson Limited (**PGW**), Elders Rural Holdings Limited (**Elders**), Rural Livestock Limited (**Rural**) and five individuals for entering into agreements concerning saleyard-based fees that breached the price fixing prohibition in the Act.
18. The individuals involved are all current or former employees of PGW and Elders. PGW and Rural have both admitted that they engaged in conduct in breach of the Act and settled with the Commission on this basis. Penalty judgments against both parties have been handed down by the High Court today. Proceedings against Elders and the five individuals remain before the Court.

Commission guidance

19. Competition between firms typically derives from rivalry on price, quality, service, choice and other offerings. Conduct which fixes, controls, or maintains prices reduces competition and can be detrimental to consumers.
20. To avoid breaching the Act in future, we recommend that the NZSSAA remain mindful of the Act when organising meetings that involve interactions between competitors. It should take particular care in circumstances where discussions at NZSSAA meetings may interfere with any party’s independent decision about a price, component of price, or any other matter relating to prices, such as a discount.
21. If in doubt, you should seek legal advice from a lawyer experienced in dealing with the Act.

Further action by the Commission and other parties

22. Only the courts can decide whether the Act has been breached or not. This warning letter does not represent a ruling of law.

23. 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 or a manager of a company. A body corporate can be fined the greater of \$10 million, or three times the commercial gain from the breach (if this cannot be easily established, 10% of turnover). Every separate breach of the Act may incur a penalty.
24. While the Commission does not intend to take any further action against the NZSSAA for this conduct, you should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking a private action for damages under section 82 of the Act.
25. We may draw this warning to the attention of a court in any future proceedings brought by the Commission against the NZSSAA for other conduct in breach of the Act. Previous warnings may be considered an aggravating factor in sentencing by the court for any future conduct.
26. This warning letter to the NZSSAA will be published on our website. We also intend to refer to this warning letter in a media release that will be published today.

Regards,

Ritchie Hutton
Head of Investigations
Commerce Commission