IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-002638
[2015] NZHC 3361

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	RURAL LIVESTOCK LIMITED Defendant

Hearing: 11 December 2015

Counsel: J C L Dixon and L C A Farmer for Plaintiff
H McIntosh for Defendant

Judgment: 22 December 2015

JUDGMENT OF ASHER J

This judgment was delivered by me on Tuesday, 22 December 2015 at 11 am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Meredith Connell, Auckland.
H McIntosh, Wellington.

Introduction

[1] Following the introduction of the National Animal Identification and Tracing Act 2012, Rural Livestock Limited (Rural) was involved in the implementation of the regulatory changes required by the Act. In doing so Rural agreed to industry wide fee agreements that it now admits constituted price fixing under the Commerce Act 1986.

[2] The purpose of this judgment is to declare that in doing so Rural contravened the Commerce Act and to impose a penalty for those breaches. The assessment of penalty is on the basis of a detailed statement of facts agreed between the Commerce Commission (the Commission) and Rural for the purposes of this hearing. The Commission and Rural have agreed the appropriate quantum of penalty is in the range of $475,000, and have filed submissions in support.

[3] One other defendant, PGG Wrightson Ltd (PGW) has also pleaded guilty, and I have issued a penalty decision today in respect to it.[1] I heard Rural's case directly after hearing PGW's. Given that the background to the infringements is the same and the agreed statement of facts contains identical material, much of what I have said in each decision is the same, and I follow the same structure. However, there are significant differences between the position of each and the penalties imposed.

Background

The party to this proceeding

[4] Rural is a large privately owned New Zealand livestock company. It runs a range of services including running clearing sales, arranging grazing, livestock auctions and valuations. It also acts as an agent for farmers selling and purchasing livestock at saleyards. It has a 6.8 per cent share of the national market for the sale of cattle, and ownership interests in seven saleyards in the South Island, but only a major interest (in excess of 10 per cent) in one saleyard.

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1 *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360.

[5] For the financial year ending 30 June 2015 its annual revenue was [redacted] and its net profit was estimated before tax to be [redacted].

[6] Rural is one of the defendants to this proceeding, the majority of whom deny the allegations made by the Commission. The liability of the other defendants is not in issue in these proceedings.

The livestock industry

[7] The principal methods of trading cattle in New Zealand are by auction at saleyards, on farm auction, online auction, direct procurement for processing, private treaty between farmers, and direct to slaughter. Livestock companies work as agents for transactions between farmers relating to the sale and purchase of cattle, and these transactions often take place at saleyards. Livestock companies charge percentage-based commissions on these transactions as well as additional fees, some of which relate to their own costs and some of which relate to the costs associated with the use of a saleyard.

[8] Saleyards generally charge for the use of the saleyard through a yard fee that is typically charged (sometimes at different rates) to both the vendor and the purchaser of cattle sold through the saleyard. The yard fee is either charged directly to a farmer or, if a farmer is using a livestock operator (such as an agent) to purchase or sell cattle on their behalf, the agent pays the yard fee and passes the cost and a commission onto the farmer.

[9] There are a number of livestock companies and saleyard owners in New Zealand which compete to provide services. There is competition between saleyard owners, and livestock agents are in competition with each other to provide stock and station agents' services either nationally or in local areas.

[10] It is agreed that there are 12 relevant livestock companies and stock agents throughout New Zealand. The three largest competitors of Rural are PGW, Elders Rural Holdings Ltd and Allied Farmers Ltd. All of these companies and stock agents are represented by the New Zealand Stock and Station Agents' Association (NZSSAA), which has been operating for about 50 years.

National Animal Identification and Tracing Act 2012

[11] In 2010 following a lengthy period of consultation and review going back to 2004 the National Animal Identification and Tracing Bill was introduced into Parliament and it became law on 20 February 2012, coming into force on 1 July 2012.

[12] The National Animal Identification and Tracing Act 2012 (the NAIT Act) is intended to promote the interests of the New Zealand agricultural sector by establishing a scheme to track the movements of initially all cattle and deer throughout New Zealand. The overall scheme is known as NAIT and it is administered by an incorporated company NAIT Ltd. The NAIT Act requires every natural person in day to day charge of an animal to register its location with NAIT Ltd, to tag each animal at that location with a radio frequency identification device (RFID) and to report each animal's movements between NAIT locations.[2] Saleyards are required to facilitate the recording of this information.[3] The movement of untagged animals is an offence.[4]

[13] The NZSSAA, of which Rural is a member, elected a PGW representative to be a stock and station agent industry representative to assist with the transition to the new regime. PGW was chosen to help coordinate the new procedures as a leader in the industry. It received some limited remuneration for this service, although not full compensation for the time spent. There was a concern at the initial meetings of livestock companies as to how they and saleyard owners would finance the cost of complying with the NAIT Act. NAIT Ltd would not provide funding for the new regime, and left it to the industry to organise compliance. Industry members were encouraged to meet and work out between them complying uniform practices to meet the new regime.

[14] In the course of the discussions between Rural and the other livestock companies and saleyard owners, their concerns strayed into the area of pricing for NAIT-related services. These discussions between the livestock companies and

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2 National Animal Identification and Tracing Act 2012, ss 24–31.
3 Section 25(1)(a)(i).
4 Sections 30(2), 31(1), and 82(2).

saleyard owners led to three arrangements. All of these three arrangements are now accepted to have involved breaches of s 27 of the Commerce Act. They were contracts, arrangements or understandings substantially lessening competition, and specifically were price fixing arrangements under s 30 of the Commerce Act. I now set out a brief history of the three arrangements.

Tagging fee agreement

[15] Tagging fees were to be charged to livestock owners who supplied animals that were not correctly tagged. After meetings of 22 October 2010, 5 April 2011, 25 May 2011 and more informal discussions between April and September 2011, Rural and other members of NZSSAA agreed that saleyards would charge stock and station agents, and stock and station agents would pass on to their selling clients, a minimum tagging fee of:

(a) $25 per head for cattle; and

(b) $10 per head for calves.

[16] On 9 February 2012 there was some legal advice given by PGW's in-house counsel advising that the agreements could be price fixing and recommending that PGW set its own prices based on reasonable costs.

[17] On 16 April 2012 NZSSAA members, including representatives from Rural, confirmed the introduction at saleyards of a tagging fee of $25 for the tagging of any cattle and $10 for any calves. A recommendation promoting this charging regime was circulated to the relevant NZSSAA members. A draft letter from NZSSAA members was prepared for circulation and circulated as a draft letter. A senior livestock manager for Rural raised a question about how the arrangement would work, but did not question the process of price fixing.

[18] There were discussions in the months that followed where the tagging fee agreement which involved fixed prices was confirmed. In accordance with the tagging fee agreement, Rural implemented the agreed $25 per head of cattle and

$10 per head of calf at most saleyards, and six other companies gave effect to the same agreement.

[19] Without the tagging fee arrangement, fees may well have been set lower than those that were set, and so Rural potentially realised a greater commercial gain as a result of the tagging fee than it would have otherwise. The parties have not attempted to quantify the actual commercial gain, and consider it is not quantifiable. However, as at 30 June 2015 Canterbury Park, the saleyard in which Rural had a 50 per cent interest at all relevant times, derived total revenue of $8,405 from tagging fees and Rural on-charged tagging fees for the total revenue of $4,585.

Yard fee agreement

[20] A yard fee increase was designed to meet the costs of monitoring and recording tag results of tagged livestock that were in saleyards. The possibility of a yard fee increase to meet the NAIT requirements was first discussed at a NAIT livestock company seminar on 13 December 2011. On 16 April 2012 at a meeting of the NZSSAA attended by representatives from Rural and other companies there was a discussion about an increase of yard fees by $1.50 per head of cattle to be charged at 75 cents to each vendor and purchaser. PGW was to draft a letter for the NZSSAA to send to saleyards recommending this increase. A draft was duly prepared by the PGW representative. The yard fee increase was implemented on 1 July 2012.

[21] There was a clear potential for commercial gain from the yard fee agreement. The parties have not attempted to quantify the actual commercial gain and consider it to be not quantifiable. Rural estimates, however, that the fee increase generated extra income of $113,594 to 30 June 2015 from Canterbury Park. Rural says its associated costs with the NAIT Act have amounted to equal that revenue.

The RFID administration fee agreement

[22] The RFID administration fee agreement related to the administration costs of reporting under the new NAIT processes. The possibility of this fee was first discussed at the NAIT livestock company seminar on 13 December 2011. PGW there disclosed its intended fees. There was a meeting on 16 April 2012 of the

NZSSAA attended by representatives from Rural and it was agreed that stock and station agents should impose a RFID fee of $1.50 per head of cattle for all livestock companies' transactions at saleyards, to be charged at 75 cents to each of the vendor and purchaser. PGW would draft a letter for NZSSAA to send to saleyards advising them of the recommended RFID administration fee for review by NZSSAA members.

[23] On 1 July 2012 Rural charged the agreed RFID fee as did some other NZSSAA members giving effect to the agreement. The parties as with the other two agreements have not quantified the commercial gain and do not believe it is quantifiable. Rural estimates that the RFID fee generated revenue of $211,174.50, but that its direct costs to meet its obligations under NAIT were $210,442.

Summary of breaches

[24] There were therefore three agreements that breached the Commerce Act: the tagging fee agreement, the yard fee agreement and the RFID fee agreement. Rural accepts that these agreements had the purpose effect or likely effect of fixing, controlling or maintaining prices for the supply, in competition with other livestock companies, of yard services in the yard services market, and stock and station agent services in the stock and station agents' services market.

Approach to penalties under the Commerce Act

[25] Under s 80 of the Commerce Act the Court may impose a penalty for a contravention of any of the provisions of Part 2, which include the prohibitions against anti-competitive behavior engaged here. Section 80(2A) requires the Court to determine an appropriate penalty, having regard to all relevant matters, including if any exemplary damages have been awarded and in the case of a body corporate, the nature and extent of any commercial gain.

[26] The maximum pecuniary penalty for each act or omission is set out in s 80(2B). For a body corporate the maximum is the greater of $10,000,000 or either:[5]

> 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
>
> if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all its interconnected bodies corporate (if any).

[27] "Turnover" is defined in s 2 as:

> the total gross revenues (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by that body corporate within New Zealand.

[28] "Accounting period" is defined as having the same meaning as in s 5 of the Financial Reporting Act 2013 and means a year ending on a balance date of the entity. "Balance date" itself is defined as the close of 31 March.[6] Although not specified, High Court has taken the accounting period to mean the most recent year.[7]

The relevance of settlement agreements

[29] It was confirmed by a Full Court of the High Court in *Commerce Commission v New Zealand Milk Corporation Ltd* that there can be no objection to the parties in submissions giving a joint view as to penalty.[8] Further, it is not problematical if such a view is reached as a result of negotiations, so that it represents what can be regarded as a settlement. Such settlements are in the interests of the parties and the community, for they enable litigation to be certain, quick, and cost effective. They encourage a realistic view of culpability and penalty. They can dispense with the need for a full hearing.[9]

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5 Commerce Act 1986, s 80(2B)(b)(ii)(A) and (B).

6 Financial Reporting Act 2013, s 41(1)(a).

7 *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2011] NZCCLR 19, (2011) 13 TCLR 270 (HC) at [47]; *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583, (2012) 13 TCLR 597 at [33].

8 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 733.

9 See also *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18] and *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097 at [34].

[30] I agree with the observation of Rodney Hansen J in *Commerce Commission v Alstom Holdings SA*[10] that the parties should not be deterred from a negotiated resolution by fears that a settlement will be rejected by a Court because the penalty does not precisely coincide with the penalty the Court might have imposed. If the proposed sentence that is put forward by the Commerce Commission and the defendant is within that range then the Court should accept that and not impose its own exact view of the appropriate penalty on the parties.

[31] Nevertheless, when a Court is presented by the parties with a proposed penalty, it is still essential that the Court perform its own assessment of the appropriate range of penalties. If the penalty is not within the proper range the Court must intervene and impose what it assesses as the appropriate penalty.

Factors relevant to penalty

[32] This is not a sentencing exercise in the orthodox criminal sense. As a civil penalty imposed by the Court following an application by the Commission, there are important differences between penalties under the Commerce Act and the sentences imposed under the Sentencing Act 2002. Importantly, the purposes of penalties imposed under the Commerce Act are to be assessed in light of the purpose of Act generally – to promote competition in markets for the long-term benefit of consumers in New Zealand.[11]

[33] The differences mean wholesale adoption of criminal sentencing methodology is inappropriate. Nevertheless, the sentencing principle that the penalty must be proportionate to the gravity of the offence and the degree of responsibility of the offender remains the hallmark in assessing the appropriate penalty. For that reason it is helpful to adopt the criminal sentencing methodology of first setting a starting point based on the assessed culpability of the infringing behaviour, and then second considering aggravating and mitigating factors relating to the defendant itself.[12] Indeed, such an approach which fixes a starting point and then

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10 *Commerce Commission v Alstom Holdings SA*, above n 2, at [19].

11 Commerce Act 1986, s 1A.

12 *R v Taueki* [2005] 3 NZLR 372, (2005) 31 CRNZ 769 (CA), *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23.

turns to factors specific to a defendant has been often adopted in recent cases imposing penalties under the Commerce Act.[13]

[34] In this context, general deterrence in the marketplace and specific deterrence of the infringer is central to the assessment of penalty under the Commerce Act. In *Telecom Corporation of New Zealand Ltd v Commerce Commission*, the Court of Appeal accepted the observations of the High Court that by increasing the available maximum penalties in 2001 Parliament sought to send a "much stronger signal … that the deterrence objective will only be served if anti-competitive behaviour is profitless".[14]

[35] That is not to say that other purposes and principles of sentencing, many of which are of the type set out in ss 7 and 8 of the Sentencing Act 2002, are irrelevant. Consistency between penalty levels in different cases, and parity between defendants, are relevant to the assessment of the starting point.[15] Other criminal sentencing concepts such as the consideration of aggravating factors such as premeditation and previous breaches, and mitigating factors such as an early acceptance of liability and remorse and previous good conduct, will also be relevant. Most of these are considered in the second stage of the analysis of factors specific to a defendant.

[36] More broadly, the concept of totality is relevant. Section 80 of the Commerce Act prescribes the maximum penalty in respect of "each act or omission". When a Court considers imposing penalties for two or more contravening acts or omissions, the overall penalty imposed should not be wholly out of proportion to the gravity of the overall offending.[16] Relevant to that is an assessment of whether the contravening acts or omissions should be treated together or separately.[17]

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13 See, for example, *Commerce Commission v Visy Board (NZ) Ltd*, above n 9, at [35].
14 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53], citing Commerce Amendment Bill 2001 (296-2) (select committee report) at 23.
15 Sentencing Act 2002, s 8(e).
16 Section 85(1).
17 Sections 83–84.

The appropriate penalty

[37] The Commerce Commission and Rural have proposed a starting point of $1,600,000 to $2,000,000. There are no aggravating or mitigating factors, save Rural's ability to pay a fine. It is agreed that Rural is entitled to a discount of 25 per cent for it accepting responsibility for the offending. The overall proposed sentence is said to be $475,000, having due regard to Rural's ability to pay.

[38] I now turn to make my own assessment of the correct sentencing range. I begin by considering the nature and extent of the commercial gain as referred to in s 80(2A)(b). The Act does not set out the other matters. There is some case law which is usefully summarised in *New Zealand Competition Law and Policy*.[18] I do not propose to consider every factor, as some overlap and others do not apply. Instead I propose to focus on Rural's role, the deliberateness of conduct, its duration, the harm to the market, and comparable case law.

The nature and extent of any commercial gain

[39] Rural's turnover within New Zealand in its most recent accounting period is approximately [redacted] including the turnover of a recently acquired real estate subsidiary. Applying s 80(2B)(b)(ii)(B) leads to some notional very high maximum penalties. I consider it more useful here to focus on the s 80(2B)(b)(ii)(A) formulation, which provides the maximum penalty to be three times the value of any commercial gain resulting from the contravention. Here the gain cannot be calculated with sufficient precision for s 80(2B)(b)(ii)(A) to exactly apply. The parties have not considered it possible to estimate the actual commercial gain from the infringing behavior. However, as noted previously the actual revenue generated by the infringing conduct came to approximately $328,000. That is a more relevant figure for the purposes of assessing the impact of the breaches on the market and the community.

[40] I recognise that the damage done in a market by price fixing can considerably exceed any particular pecuniary advantage to a party, because of the damage done to

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[18] Matt Sumpter and others *New Zealand Competition Law and Policy* (CCH New Zealand, Auckland, 2010) at [1705], fn 23 to 33.

the normal competition processes which work to the advantage of the consumer, such as developing better products or services. Nevertheless, I proceed to assess penalty from the perspective that despite Rural's moderately large turnover, the modest scale and quantum of this offending is not anything like the order of its total turnover.

[41] Of course, the actual commercial gain is less than $328,000. In one exchange of emails in the early stage before agreement a competitor was contemplating charging at one-third less than PGW before the price fixing, so as to undercut PGW. Indeed, in the absence of price fixing there might have been even more significant differentials in charges as individual parties endeavoured to attract custom, although this is speculation. What can be said is that it seems unlikely that for the period of the offending the extra gains to Rural resulting from the price fixing exceeded $100,000, and the figure could have been considerably less. If that were so, the maximum penalty would be $300,000, but I recognise that this is not a definite figure, or one adopted by either party.

Deliberateness of the conduct

[42] The circumstances are unusual because Rural got together with the other companies on the initiation of NAIT Ltd, which was tasked with executing the transition to the new animal identification and tracing regime. These competing entities, all members of NZSSAA, were acting in response to a new regulatory environment. They had to work out cost structures to respond to the new NAIT requirements as NAIT Ltd would not pay for or subsidise the set-up and ongoing costs of compliance with the Act. Agreeing to NAIT procedures led, it would seem almost incidentally, to decisions on the appropriate fees.

[43] The deliberateness of Rural's conduct is to be assessed with regard to the seniority of its staff involved (and their number) in the implementation of the agreements. At least two Rural employees were involved, one of whom was a director of the company. Nevertheless, I accept that they were not specialists in competition matters, and they were working through a new and difficult regime. It is

an indication of the lack of a conscious decision to infringe the Act that the actions taken by Rural were not covert or hidden.

[44] I conclude that there was an element of deliberateness in the price fixing arrangements. However, there was no conscious planning to infringe from the outset and consequent stealth in action. Rural drifted into infringement as a consequence of the complex regulatory scheme with which it endeavoured to comply, rather than through making a knowing decision to price fix at the outset.

Rural's role

[45] A ringleader or initiator of infringing behaviour can expect a heavier penalty than those who had a lesser role. In this situation Rural was not a leader, and has a lesser stake in the market compared to PGW. It attended the relevant meetings at which agreements were reached or affirmed, and implemented the fees in accordance with those agreements, but it did not undertake a key role.

The duration of the contravening conduct

[46] The infringing conduct began in about April 2012, was implemented from approximately 1 July 2012 and was conducted until shortly after the filing of these proceedings in August 2015, although there were differences in the implementation dates of the three types of fees. The offending had therefore an approximate three year duration.

Harm to the market

[47] I have already commented on how it is difficult to assess with precision Rural's commercial gain, but I consider it to be less in total than $100,000. As I have also already observed, there would have been some more general damage to usual competitive processes that would have been at work in the relevant markets. Overall the damage would have been much less than minimal, but it was far from the most serious order.

Comparable cases

[48] I have been referred to a number of other sentencing decisions by the parties. Given the very considerable number of variable factors that will arise in any sentencing, comparisons are of limited help. I note the outcomes of the decisions in *Commerce Commission v Carter Holt Harvey Building Products Group Ltd*,[19] where the starting point was $2,800,000 to $3,200,000 and the final penalty $1,850,000; *Commerce Commission v Visy Board (NZ) Ltd*,[20] where the starting point was $4,500,000 to $5,700,000, and the final penalty was $3,600,000; and *Commerce Commission v Whirlpool SA*,[21] where the starting point was $4,500,000 and the final penalty was $3,000,000. All involved very different facts and certainly in the latter two cases the offending could be seen as more serious.

[49] I did get some benefit from the comparison to the decision in *Commerce Commission v Kuehne + Nagel International AG*.[22] That was a freight forwarder case where to meet new security measures at airports there was agreement reached between freight forwarders as to the amounts to be charged for integrating their computer systems to incorporate the new security measures. The case thus had some similarities to the present in that the defendant with others in the industry was endeavouring to comply with a new regime, which involved some extra expense. The conduct was seen at the serious end of the spectrum as it was a sustained course of conduct that gave effect to a covert hardcore arrangement.[23] There was a senior employee involved and the commercial gain could not be readily ascertained. The starting point was fixed at between $3,500,000 to $4,000,000. The final penalty was $3,100,000.

[50] Although it is really a matter of impression, I see Rural's offending as warranting a much lower starting point than in the *Kuehne* case.

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19 *Commerce Commission v Carter Holt Harvey Building Products Group Ltd* (2000) 9 TCLR 636 (HC).
20 *Commerce Commission v Visy Board (NZ) Ltd*, above n 9.
21 *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011.
22 *Commission v Kuehne + Nagel International AG* [2014] NZHC 705.
23 At [29].

Conclusion on starting point

[51] Taking all these factors into account, I recognise that Rural is a significant firm and these were significant infringements involving substantial amounts of money and some gain to Rural. However, in assessing the culpability of that conduct I take into account the way in which Rural drifted into infringement, did not act in any covert way, and that ultimately the benefits it enjoyed are likely to have been no more than $100,000.

[52] Taking those factors into account, I accept the starting point parameters agreed by the parties of $1,600,000 to $2,000,000 as appropriate.

Factors personal to Rural

[53] Rural has no previous penalties. I am informed that as soon as the proceedings were filed, Rural accepted that it had infringed. It has put in place procedures to ensure that the price fixing has ended and price henceforth will be on a competitive basis.

[54] While Rural has not provided active co-operation of the kind that would entitle it to a significant separate co-operation discount, its actions in accepting responsibility and promptly ending the price fixing warrant a significant discount. The discount agreed between the parties of 25 per cent is entirely within the range.

Conclusion as to penalty

[55] I consider that a single penalty should be assessed rather than multiple penalties for the various acts or transactions. Although the offending was over a period of time and related to three different types of conduct, the conduct was all related and arising out of the new NAIT regime. Applying the totality principle, and having regard to all the factors, the final penalty range could be said to be in the proposed range of $1,200,000 to $1,500,000.

[56] However, in addition there must be a further deduction to make the penalty realistic and to accord with Rural's means to pay, so as not to put it out of business. Rural has provided information to the Commission that indicates the maximum

sustainable penalty that Rural is able to pay is $475,000. This is confirmed in the confidential affidavits filed. The Commission has reviewed the financial information and accepts that Rural would be unable to pay a penalty in the range of $1,200,000 to $1,500,000.

[57] Mr Dixon for the Commission submits that the Court may take into account Rural's financial means in setting a penalty at a level below that which would otherwise be appropriate for the conduct and the other defendant specific factors. The tension is between applying a level of penalty that promotes deterrence, against the need to ensure the result of the penalty does not inhibit the ongoing commercial viability of the defendant. Both Mr Dixon and Mr McIntosh for Rural accepted that while there could be cases where penalties would be imposed that would inhibit the ongoing commercial viability of a defendant, where the conduct is not so egregious such a result can be undesirable.

[58] As was stated in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*:[24]

> … the financial circumstances of a defendant engaging in anti-competitive behaviour, including their resources, are a factor to be taken into account in setting penalty levels. Despite that, it is noteworthy that there is authority for the proposition that the quantum of penalties imposed for anti-competitive behaviour may, in egregious circumstances, be such that payment may put that defendant out of business (*ACCC v Leahy Petroleum (No 3)* (2005) 215 ALR 301; (2005) ATPR 42-642, para 66).

[59] The Commission accepts that Rural's conduct in this case has not been so egregious as to justify a response that would put it out of business. Rural was to some extent just following along and reacting to new circumstances. It was not a leader. A significant penalty is required as a deterrence to others, and the penalty will be significant to Rural in the circumstances, but a reduction is warranted to ensure that the sentence is not so onerous as to put Rural out of business. I am satisfied, like the Commission, that a penalty of $475,000 is within, and at the maximum, of Rural's financial means. In those unusual circumstances I will impose such a reduced penalty.

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24 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [34].

Result

[60] I declare that Rural contravened ss 27(1) and (2), and ss 27(1) and (2) via the deeming provision of s 30 of the Commerce Act 1986, by entering into the three agreements referred to in the statement of claim.

[61] I impose a pecuniary penalty of $475,000 for that offending. I record that by agreement between the Commission and Rural, Rural will pay the penalty in the following instalments:

(a) $175,000 by 28 February 2016;

(b) $150,000 within 12 months of the first payment; and

(c) $150,000 within 24 months of the first payment.

No interest is to be payable on any part of the penalty.

[62] There is no order as to costs.

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Asher J