

31 October 2022

C. H. Robinson Worldwide (NZ) Limited  
63b Richard Pearse Drive  
Airport Oaks  
Mangere  
Auckland 2022

c/o [                    ]

By email only: [                    ]

Dear Sir/Madam

**Commerce Act 1986: Warning in respect of anti-competitive agreements 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 C. H. Robinson Worldwide (NZ) Limited (CH Robinson) of our concerns and issue you with a formal warning.
3. We are issuing this letter to CH Robinson following:
  - 3.1 our letter to you of 24 May 2022 setting out the Commission's preliminary view that CH Robinson is likely to have breached the Commerce Act 1986 (the Act) and that a warning is the appropriate enforcement outcome;
  - 3.2 your email response to our letter dated 13 June 2022; and
  - 3.3 your further email of 26 October 2022.
4. This letter sets out the warning that the Commission is issuing to CH Robinson. 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 CH Robinson is likely to have breached section 27 via former section 30 and amended section 30 of the Act by entering into or arriving at, and giving effect to:
  - 5.1 an arrangement or understanding with Oceanbridge Shipping Limited (Oceanbridge) that Oceanbridge would not compete for customers to whom CH Robinson was supplying retail freight forwarding services (the One-Way Non-Compete Agreement), from not later than August 2015; and
  - 5.2 subsequently, an arrangement or understanding with Oceanbridge that CH Robinson and Oceanbridge would each not compete for customers to whom the other was supplying retail freight forwarding services (the Two-Way Non-Compete Agreement), from not later than September 2016 until 13 June 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 whether a breach of the law has occurred, and we have determined that we will not bring legal proceedings against CH Robinson.

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

7. The Commission considers that CH Robinson likely entered into the alleged One-Way Non-Compete Agreement on a date unknown to the Commission but not later than August 2015. This later transitioned into an alleged Two-Way Non-Compete Agreement no later than in September 2016, which continued until 13 June 2019. We note that the alleged Agreements were entered into before the onset of the COVID pandemic and associated supply chain disruptions, and the conduct pre-dates 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. Oceanbridge supplies wholesale freight forwarding services to CH Robinson. CH Robinson and Oceanbridge also both supply retail freight forwarding services to importers and exporters.
12. Over the course of obtaining wholesale freight forwarding services from Oceanbridge, the Commission considers it likely that CH Robinson entered into the alleged Agreements with 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 Oceanbridge's status as both a supplier to CH Robinson as a wholesale freight forwarder, and a competitor of CH Robinson 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 CH Robinson not competing for Oceanbridge's customers.
14. After weighing up the factors set out in the Commission's Enforcement Response Guidelines<sup>1</sup> and CH Robinson's responses of 13 June 2022 and 26 October 2022, the Commission has exercised its enforcement discretion and decided to issue a warning to CH Robinson rather than issuing legal proceedings against CH Robinson.
15. While the Commission does not intend to take any further action against CH Robinson, the Commission has brought and concluded civil proceedings against Mondiale Freight Services Limited (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 between Oceanbridge and CH Robinson 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 CH Robinson is likely to have breached the Act and that a public warning is the appropriate enforcement response.

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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>.

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 CH Robinson 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).<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

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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>.

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 CH Robinson 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 CH Robinson entered into and gave effect to the alleged Agreements with Oceanbridge 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 no later than August 2015 until 13 June 2019. This 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 CH Robinson and/or Oceanbridge offered to their customers in competition with each other. This is because the provisions restrained a freedom that Oceanbridge and CH Robinson 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.

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<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]).

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

*Market allocating*

27. The Commission also considers it likely that the alleged Two-Way Non-Compete Agreement contained provisions that allocated customers of retail freight forwarding services between CH Robinson and Oceanbridge. CH Robinson and Oceanbridge supplied retail freight forwarding services in competition with each other. Specifically, the provisions of the alleged Two-Way Non-Compete Agreement provided that:
- 27.1 customers that already used CH Robinson's retail freight forwarding services would be allocated to CH Robinson, and Oceanbridge would not compete for those customers; and
  - 27.2 customers that already used Oceanbridge's retail freight forwarding services would be allocated to Oceanbridge, and CH Robinson 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 CH Robinson gave effect to the alleged Agreements in breach of the Act by:
- 30.1 not approaching customers to whom Oceanbridge was providing retail freight forwarding services, declining to quote those customers, withdrawing quotes provided by CH Robinson to those customers, and/or otherwise not competing for those customers (with respect to the alleged Two-Way Non-Compete Agreement only);
  - 30.2 communicating with Oceanbridge regarding whether CH Robinson was supplying retail freight forwarding services to specific customers, to either enable Oceanbridge to determine, or to advise Oceanbridge whether, Oceanbridge could compete for those customers;
  - 30.3 advising Oceanbridge that CH Robinson was aware that Oceanbridge had quoted a specific customer to whom CH Robinson was providing retail freight forwarding services, and/or enquiring with Oceanbridge about whether it had quoted a specific customer to whom CH Robinson was providing retail freight forwarding services; and
  - 30.4 thanking Oceanbridge for not competing for one of CH Robinson's 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 Agreements.

#### **CH Robinson's response**

32. CH Robinson responded to the Commission's letter of 24 May 2022 outlining its preliminary view and intended enforcement outcome by saying that:
- 32.1 it has taken on board the points raised and the Commission's views;
  - 32.2 it has already taken steps to address the Commission's concerns;
  - 32.3 it is intending to implement additional training for its New Zealand sales staff; and
  - 32.4 a public warning is not necessary, given the steps CH Robinson has already taken as described above and the educative function performed by the Commission's previous issue of a media release relating to the outcome of the Commission's proceedings against Mondiale and Oceanbridge.

#### **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 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).

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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.



44. 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

## 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.