

3 October 2022

Rebecca Percasky
Director
The Better Packaging Co. Limited
501-35 High Street
Auckland Central
Auckland 1010

[REDACTED]

By email: [REDACTED]

Dear Ms Percasky,

Commerce Act 1986: Warning for attempted cartel agreement

1. As you are aware, the Commerce Commission (Commission) has completed its investigation into allegations of anti-competitive conduct by The Better Packaging Co. Limited (Better Packaging) in the sustainable packaging market.
2. We are issuing this letter to you following:
 - 2.1 our interview with you;
 - 2.2 our letter to Better Packaging of 4 May 2022 setting out the Commission's preliminary view that you and Better Packaging had likely breached s 30 of the Commerce Act 1986 (Act) and our preliminary view that a warning was the appropriate enforcement response; and
 - 2.2 Better Packaging's response of 27 May 2022 to the Commission's preliminary view.
3. This letter sets out the warning that the Commission is issuing to Better Packaging and yourself. In this letter we also respond to the points raised by you in your letter of 27 May 2022. Finally, we provide information relating to provisions of the Act to assist with future compliance.

The Commission's view

4. The Commission considers that both you and Better Packaging are likely to have breached the Act by way of an attempt, under the civil prohibition under section 80(1)(b), to contravene section 30 of the Act. Section 30 of the Act contains a prohibition on entering into, or giving effect to, an agreement containing a cartel provision. Section 80 provides for civil pecuniary penalties for breaches of s 30 and prohibits attempts to contravene section 30.
5. After weighing up the factors set out in our Enforcement Response Guidelines,¹ and the Solicitor General's Guidelines for the use of Warnings,² we have decided to exercise our enforcement discretion by issuing this warning to you and Better Packaging.
6. A warning is not a finding of a breach of the Act; only a court can decide whether a breach of the law has occurred, and we have determined that at this time we will not be commencing legal action against you or Better Packaging.

Basis for the Commission's view

7. The Commission is of the view that you and Better Packaging both have likely breached the Act by attempting to enter into an agreement with a competitor to allocate customers between Better Packaging and the competitor, which likely amounts to civil contravention of section 30 of the Act.
8. The Commission considers that both you and Better Packaging likely breached the Act through email communications sent by you to a competitor. The evidence we have gathered (including the emails to the competitor, internal communications at Better Packaging, and our interview with you) show the following relevant facts:
 - 8.1 Better Packaging learned of a competitor's approach to an existing Better Packaging customer. You considered that negative and untrue statements had been made about Better Packaging by the competitor as part of its approach to the existing Better Packaging customer;
 - 8.2 you emailed the competitor complaining about those statements;
 - 8.3 however, you also made statements in that email that:
 - 8.3.1 "there is enough business for all of us without having to insinuate falsely or aggressively or go after customers";
 - 8.3.2 Better Packaging had never "actively gone after your [the competitor's] customers"; and

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

² <https://www.crownlaw.govt.nz/assets/Uploads/GuidlinesProtocolsArticles/Solicitor-Generals-Guidelines-for-Warnings.PDF>

- 8.3.3 concluded “I’d love to hear back from you as I am sure its not what you meant. No one wins if we get into a bidding war, aggressively go after each other’s customers and all drop our prices”.
- 8.4 We note that in further communications with the competitor, pricing and customers were discussed but, in our view, no agreement was reached.
9. In reaching its view, the Commission has carefully considered your lawyer’s response of 27 May to our letter setting out our preliminary view. We note that you and Better Packaging:
- 9.1 do not admit to breaching the Act;
- 9.2 deny having any intention, purpose, or motive to enter into an illegal market allocation agreement but rather intended to dissuade the competitor from making untrue comments about Better Packaging;
- 9.3 have advised the Commission it has made various errors of law in reaching its view a breach occurred; and
- 9.4 made arguments why the Commission ought not issue a warning.
10. Having considered all the available evidence in this matter, including relevant internal communications between Better Packaging staff, and statements made at interview, the Commission remains of the view that your conduct likely amounts to an attempt to enter into an agreement containing a cartel provision.
11. We acknowledge that a likely purpose and intention of your emails was to dissuade your competitor from making what you believed to be negative insinuations about your company. Such conduct alone is unlikely to be unlawful. However, we consider the communications went beyond what is lawful by also raising: (1) not going after each other’s customers; (2) avoiding a bidding war; (3) not dropping prices; and (4) inviting a response from the competitor.
12. We have also considered contemporaneous internal Better Packaging emails which show competition for customers by the competitor and the competitor’s pricing were a concern for Better Packaging. In our view, it is likely your emails with your competitor also had the purpose and intention of attempting to reach an agreement containing a cartel provision.
13. We have further considered the legal matters you have raised. The Commission remains of the view that a breach of the Act likely occurred on the evidence before us. The Commission is also of the view that it is entitled to issue warnings and that a warning is the appropriate enforcement response in this case for the reasons set out below.³

³ Also refer to footnote 7 of the Commerce Commission’s Enforcement Response Guidelines; https://comcom.govt.nz/__data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf

Warning

14. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings against you and Better Packaging.
15. In reaching this view we have had regard to:
 - 15.1 the degree of public interest in bringing proceedings;
 - 15.2 the circumstances of the attempt;
 - 15.3 the absence of any prior enforcement action by the Commission regarding you or Better Packaging; and
 - 15.4 your and Better Packaging's cooperation.
16. In addition to warning Better Packaging, we are warning you personally because:
 - 16.1 you personally engaged in the conduct;
 - 16.2 your seniority as a director of Better Packaging means you had a responsibility to ensure compliance with applicable laws; and
 - 16.3 your substantial shareholding means you would have likely benefitted personally from any unlawful agreement, had one been reached.
17. This warning represents our opinion that the conduct in which you and Better Packaging has engaged in is likely to have breached the Act and that legal action remains available to the Commission in future if the conduct is repeated.
18. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against you or Better Packaging.
19. 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.
20. We have considered your request that there are special circumstances that mean this warning should not be published. We do not consider any of the matters raised will mean publication will result in consequences that are unduly harmful or disproportionate to being warned.

Cartel agreements under the Act

21. Section 30 of the Act prohibits persons from entering into, or giving effect to, cartel provision. A cartel provision is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of one or more of the following in relation to the supply or acquisition of goods or services in New Zealand:

- 21.1 price fixing;
 - 21.2 restricting output; and
 - 21.3 market allocating.
22. Section 80 of the Act provides for penalties for person who have attempted to contravene a provision in Part 2 of the Act (which includes section 30).
23. The relevant parts of these provisions are set out in **Attachment A**.
24. Cartel agreements between competitors are illegal because such agreements deprive New Zealand consumers of the benefits of competition in the market, such as lower prices and better quality. Such conduct also stifles innovation in the economy to the detriment of all New Zealanders. Cartel conduct is the most serious form of anti-competitive conduct and, as of 8 April 2021, cartel conduct may also be a criminal offence for both companies and individuals.

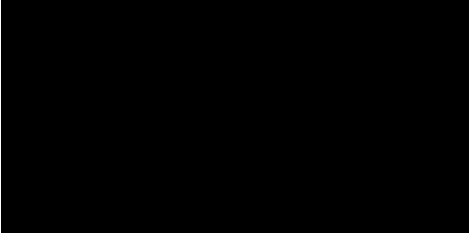
Penalties for breaching the Commerce Act

25. Only the courts can decide if there has been a breach of the Act. 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. 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 for each year the agreement lasted). Every separate breach of the Act may incur a penalty.

Further information

26. To avoid breaching the Act in the future, we recommend that you are mindful of the Act when interacting with competitors, particularly in circumstances where prices of competing products or service offerings (or any component of price, such as discounts or rebates) or competition for contestable customers is a topic of discussion.
27. If ever in doubt, Better Packaging should seek prior legal advice from a lawyer experienced in dealing with the Act.
28. 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 comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
29. You can also view the Act and other legislation at www.legislation.co.nz.
30. Thank you for your assistance with this investigation.

Yours sincerely



Grant Chamberlain
Cartels Manager

Attachment A: Commerce Act 1986

Section 30 Prohibition on entering into or giving effect to cartel provision

- (1) 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.
- (2) See section 80 for liability to a pecuniary penalty, and section 82B for criminal liability, for contravention of this section.

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.
- (3) In this Act, **restricting output** means preventing, restricting, or limiting, or providing for the prevention, restriction, or limitation of,—
 - (a) the production or likely production by any party to a contract, arrangement, or understanding of goods that any 2 or more of the parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
 - (b) the capacity or likely capacity of any party to a contract, arrangement, or understanding to supply services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
 - (c) the supply or likely supply of goods or services that any 2 or more parties to a contract, arrangement, or understanding supply in competition with each other; or

- (d) the acquisition or likely acquisition of goods or services that any 2 or more parties to a contract, arrangement, or understanding acquire in competition with each other.
- (4) In this Act, **market allocating** means allocating between any 2 or more parties to a contract, arrangement, or understanding, or providing for such an allocation of, either or both of the following:
- (a) the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other:
 - (b) the geographic areas in which the parties supply or acquire goods or services in competition with each other.

Section 80 Pecuniary penalties relating to restrictive trade practices

- (1) If the court is satisfied on the application of the Commission that a person—
- (a) has contravened any of the provisions of [Part 2](#); or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled, or procured any other person to contravene such a provision; or
 - (d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
 - (f) has conspired with any other person to contravene such a provision,—
- the court may order the person to pay to the Crown such pecuniary penalty as the court determines to be appropriate.
- (2) The court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the court considers that there is good reason for not making that order.
- (2A) In determining an appropriate penalty under this section, the court must have regard to all relevant matters, in particular,—
- (a) any exemplary damages awarded under [section 82A](#); and
 - (b) in the case of a body corporate, the nature and extent of any commercial gain.
- (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
- (a) in the case of an individual, \$500,000; or
 - (b) in any other case, the greater of the following:
 - (i) \$10 million:
 - (ii) either,—

- (A) 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
 - (B) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.
- (2C) In proceedings relating to a contravention of [section 30](#), if the defendant claims that an exception in [section 31](#), [32](#), or 33 applies, it is for the defendant to prove, on the balance of probabilities, that the relevant exception applies.
- (3) *[Repealed]*
- (4) *[Repealed]*
- (5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced 10 years or more after the matter giving rise to the contravention.
- (6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part 2, proceedings may be instituted under this Act against that person in relation to the contravention of any 1 or more of the provisions; but no person shall be liable to more than 1 pecuniary penalty under this section in respect of the same conduct.