

6 May 2024

Brett Hobbs
General Manager
26i William Pickering Drive
Albany, Auckland 0632
New Zealand

By email: [REDACTED]

Dear Mr Hobbs,

Commerce Act 1986: Warning for cartel agreement

1. As you are aware, the Commerce Commission (Commission) has completed its investigation into allegations of anti-competitive conduct by you and StrataNet Limited (StrataNet) relating to auctions for radio frequency licenses in rural areas.
2. We are issuing this letter to you following:
 - 2.1 our interview with you in your capacity as General Manager of StrataNet;
 - 2.2 our letter to you of 25 March 2024 setting out the Commission's preliminary views that you had likely breached section 30 of the Commerce Act 1986 (the Act) and that a warning was the appropriate enforcement response; and
 - 2.3 your response of 12 April 2024 to the Commission's preliminary view and the Commission's further communications with you on the matter.
3. This letter sets out the warning that the Commission is issuing to you. In this letter we also respond to the points raised by you in your email of 12 April 2024. 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 StrataNet are likely to have breached section 30 of the Act by entering into, and giving effect to, an agreement¹ not to compete with a competitor in the two auctions for 3.30 - 3.34 GHz radio frequency licenses relating to one Territorial Land Authority (TLA) (the Auctions). The Auctions were part of those carried out in April and May 2023 by the Radio Spectrum Management Unit (RSM) of the Ministry of Business, Innovation and Employment.
5. Section 30 of the Act contains a prohibition on entering into, or giving effect to, a contract, arrangement or understanding containing a cartel provision. Section 80 provides for civil pecuniary penalties for breaches of section 30.
6. After weighing up the factors set out in our Enforcement Response Guidelines,² and the Solicitor General's Guidelines for the use of Warnings,³ we have decided to exercise our enforcement discretion by issuing this warning to both you and StrataNet.
7. 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 StrataNet.

Basis for the Commission's view

8. The Commission is of the view that you have breached the Act by entering into, and giving effect to an agreement not to compete with a competitor in the Auctions, which likely amounts to civil contravention of section 30 of the Act.
9. The Commission considers that you and StrataNet likely breached the Act through email communications, sent in your capacity as General Manager of StrataNet, to a competitor. The evidence we have gathered (including the emails to the competitor, and our interview with you) shows the following relevant facts:
 - 9.1 you emailed the competitor in relation to the Auctions and enquired into whether they intended to bid, and expressed that StrataNet was interested in a specific sector covered by the Auctions;
 - 9.2 in this email chain with your competitor, you also made statements that you:
 - 9.2.1 "Didn't want to start a bidding war with you [your competitor] if you are interested and we can work something out between us".

¹ In this letter, all references to an agreement refer to a contract, arrangement or understanding as set out in section 30 of the Act.

² https://comcom.govt.nz/data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf

³ <https://www.crownlaw.govt.nz/assets/Uploads/GuidelinesProtocolsArticles/Solicitor-Generals-Guidelines-for-Warnings.PDF>

- 9.3 Your competitor replied stating that they were interested in different sectors in the relevant TLA and that they did not see an issue with StrataNet's intended proposal.
- 9.4 you replied and sought confirmation from your competitor, stating:
 - 9.4.1 "So should I leave you to bid to not increase prices under the understanding that we could locate a radio there should you be successful?"
- 9.5 Your competitor responded to your proposal in the affirmative.
10. In reaching its view, the Commission has carefully considered your response of 12 April 2024 to our 25 March 2024 letter setting out our preliminary view and our subsequent communications. We note that you:
 - 10.1 submitted that you did not intend to engage in a cartel or fix the Auctions;
 - 10.2 expressed the view that the agreement did not limit other competitors from bidding in the Auctions; and
 - 10.3 neither StrataNet nor your competitor won the Auctions.
11. Having considered all the available evidence in this matter, including the email communications detailed above, statements made at interview and your email of 12 April 2024, the Commission remains of the view that your conduct likely amounts to entering into, and giving effect to, an agreement containing a cartel provision.
12. We note your comments that you did not intend to engage in unlawful conduct and were not aware that the above conduct could be unlawful. However, the focus of assessing a civil breach of section 30 is on the purpose of the cartel provision and not the intention of the person entering into the agreement. We consider the communications went beyond what is lawful. In particular by:
 - 12.1 communicating StrataNet's intention to not bid against the competitor in the Auctions;
 - 12.2 seeking agreement that, should the competitor win the Auctions, StrataNet could locate a radio in a specific sector of the TLA;
 - 12.3 raising the prospect of avoiding a bidding war and increasing prices;
 - 12.4 inviting the competitor to confirm StrataNet's understanding that it should not bid;
 - 12.5 receiving confirmation of this understanding from the competitor; and
 - 12.6 StrataNet not bidding on the Auctions.

13. We acknowledge your submission that other competitors were still able to bid in the Auctions, and that neither you nor your competitor won the Auctions. However, cartel conduct is a *per se* offence. This means that an examination of the effect of the conduct is not required to prove a breach of section 30: it is sufficient that two or more competitors entered into and/or gave effect to an agreement that contains a cartel provision.
14. The Commission therefore 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.⁴

Warning

15. 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.
16. In reaching this view we have had regard to:
 - 16.1 the seriousness of the conduct;
 - 16.2 the extent of the detriment of the conduct;
 - 16.3 the degree of public interest in bringing proceedings; and
 - 16.4 your cooperation.
17. 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 the 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.
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 making comments to the media.

Cartel agreements under the Act

20. Section 30 of the Act prohibits persons from entering into, or giving effect to, an agreement that contains a cartel provision. Under section 30A of the Act, a cartel provision is a provision, contained in a contract, arrangement, or understanding between competitors, that has the purpose, effect, or likely effect of one or more of

⁴ https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf

the following in relation to the supply or acquisition of goods or services in New Zealand:

- 20.1 price fixing;
 - 20.2 restricting output; and
 - 20.3 market allocating.
21. Under section 80 of the Act, a person who contravenes section 30 of the Act is liable to pay a pecuniary penalty.
 22. The relevant parts of these provisions are set out in **Attachment A**.
 23. Cartel conduct is illegal because it deprives New Zealand consumers of the benefits of competition, 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 companies and individuals can also be liable to criminal penalties, including jail for individuals.

Penalties for breaching the Commerce Act

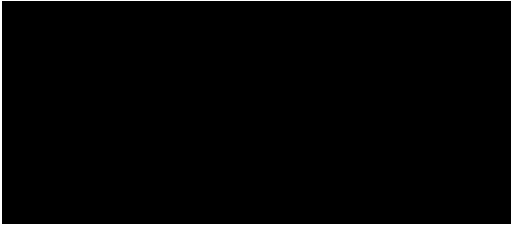
24. Only the courts can decide if there has been a breach of the Act. The court can impose penalties where it finds the law has been broken. Where it is tried as a civil matter, an individual can be fined a maximum of \$500,000 and/or be prohibited from being a company director. A body corporate can be fined the greater of \$10 million, or three times the commercial gain from the breach (or, if this cannot be readily ascertained, 10% of turnover for each year the agreement lasted). Every separate breach of the Act may incur a penalty.

Further information

25. 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. This includes future spectrum auctions.
26. If ever in doubt, StrataNet should seek legal advice from an experienced competition lawyer before entering into discussions with a competitor.
27. 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 recommend that you visit our website to better understand your obligations and the Commission's role in enforcing the Act.
28. You can also search and view the Act and other legislation at www.legislation.co.nz.

29. Thank you for your assistance with this investigation.

Yours sincerely



Grant Chamberlain
Head of Cartels

Encl.

Attachment A: Commerce Act 1986

Part 2

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.

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.