

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV 2018-485-980
[2019] NZHC 231**

UNDER Sections 27 and 47 of the Commerce Act
1986

BETWEEN COMMERCE COMMISSION
Plaintiff

AND FIRST GAS LIMITED
Defendant

Hearing: 19 February 2019

Appearances: D A Laurenson and F J Cuncannon for Plaintiff
T D Smith and B K Reddington for Defendant

Judgment: 21 February 2019

JUDGMENT OF MALLON J

Introduction

[1] First Gas Limited (First Gas) provides reticulated gas transmission and gas distribution services in North Island cities and towns. In December 2016 First Gas entered into an agreement with GasNet Limited (GasNet) to acquire GasNet's gas distribution assets in the Papamoa area of the Bay of Plenty region (the Agreement).

First Gas accepts:

- (a) the acquisition had, or was likely to have, the effect of substantially lessening competition in a market in breach of s 47 of the Commerce Act 1986; and

- (b) a restraint of trade clause in the Agreement (the Restraint of Trade) had, or was likely to have, the effect of substantially lessening competition in a market in breach of s 27 of the Commerce Act.

[2] The Commerce Commission seeks that the Court impose a penalty of \$3.4 million on First Gas for these breaches, and that the Court issue an injunction to restrain First Gas from enforcing the Restraint of Trade.¹ First Gas has agreed with the Commission to recommend that this penalty be imposed for its admitted breaches. It has assured the Commission that it will not enforce the Restraint of Trade but agrees the Court should make the formal injunction sought.

[3] The established approach in such circumstances is for the Court to impose the penalty that has been agreed between the parties so long as it falls within an appropriate range.² This is because of the public interest and the interests of the parties in promoting a resolution, and thereby avoiding costly, time consuming and uncertain litigation.³

The facts

[4] The application before me proceeds on the basis of an Agreed Statement of Facts. The following is a summary of these facts.

Gas transmission and distribution

[5] Reticulated natural gas is distributed to residential dwellings and commercial premises in the North Island through a combination of high pressure gas transmission pipelines (transmission network) and lower pressure distribution pipelines (distribution networks). Distribution networks transport and distribute natural gas

¹ The penalty is sought under ss 80 and 83 of the Commerce Act. They relate, respectively, to pecuniary penalties for infringing restrictive trade practices and business acquisitions. The injunction is sought under s 81.

² See, for example: *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [37]-[38]; *Commerce Commissions v Air New Zealand Ltd* [2013] NZHC 1414 at [27]; and *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45].

³ See, for example: *Commerce Commissions v Alstom Holdings SA*, above n 2, at [18]; *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21]; *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 96 at [46].

from the end points on the transmission network (delivery points) to meters at the premises of consumers.

[6] Transmission and distribution networks are regulated by price-quality regulations imposed by the Commission under Part 4 of the Commerce Act. The effect of this is to prevent gas pipeline businesses from earning excessive returns.

[7] Gas distribution pipelines are generally laid in trenches. Pipelines may be installed to provide distribution services to existing residential or industrial areas or subdivisions or to new developments. New developments provide the most cost-effective opportunity to extend distribution networks because the pipelines can be laid in already open trenches dug by the developer for the simultaneous laying of all network utilities. Once the development is complete, the laying of new pipelines will involve disrupting roads, paths or berms. This is called retrofitting.

[8] When a developer chooses to offer reticulated gas to the new development, it contracts with a gas distributor to install a distribution network. The terms of the contract are subject to commercial negotiations. These negotiations may involve the timeframe within which the pipe lines will be laid, the gas distributor seeking a capital contribution towards the costs of installation, or the gas distributor offering incentives, such as free gas appliances, to encourage connection and the use of gas.

[9] Under the Part 4 regulations, a gas distribution business expects to earn, from consumers, the risk-adjusted cost of capital on the forecast capital costs of installing distribution assets in subdivisions. These costs are relevant to the revenue cap set by regulation that applies to the gas distributor's business as a whole, and therefore the prices charged by the distributor across its business.

[10] However, when a developer pays a contribution to the capital costs of installation, those contributions are excluded from the distributor's costs which go into the revenue cap calculation. In principle, therefore, gas consumers will pay a lower price over time when a developer has paid a contribution. However, developers have an incentive to pass on, to purchasers of subdivisions, the capital contribution it has made.

First Gas

[11] First Gas is a relatively new entrant to the gas transmission and distribution markets. It entered the market by purchasing existing transmission and distribution networks. This included purchasing the non-Auckland assets of Vector Gas Limited (Vector), including its transmission network and its Bay of Plenty distribution network, on 20 April 2016.

[12] First Gas now owns and services one of New Zealand's largest gas networks. This includes owning and controlling the transmission network in the North Island and having gas distribution networks in more than 40 North Island towns and cities. It has more than 65,500 customers across the North Island. In the 12 months ending 30 September 2018 its total revenue was approximately \$157,600,000 of which approximately \$154,000,000 (around 97 per cent of total revenue) is regulated under Part 4.

GasNet's entry into the market

[13] GasNet is controlled by the Whanganui District Council. It operated a reticulated natural gas network and metering business in the Whanganui-Manawatu region and was looking to expand. During 2015 and 2016, GasNet identified the Bay of Plenty as providing an expansion opportunity. At this time, Vector owned the transmission network servicing this region and was the sole gas distributor in the area.

[14] On 27 January 2016 GasNet secured its first contract in the Bay of Plenty, securing exclusive rights to lay pipes in the open trenches of a development in Papamoa, on the basis of benefits to the developer concerning the capital contribution payment. It subsequently resolved to proceed with the extension of its network in the Papamoa area and continued to seek contracts with developers on the basis of benefits concerning the capital contributions payment.

[15] GasNet secured its second exclusive contract with a developer on 20 April 2016 (the day First Gas acquired the non-Auckland assets of Vector). GasNet advised First Gas that it was proceeding to construct a new distribution network in Papamoa.

By mid-May 2016 GasNet began to build this network. In June 2016 it was in negotiations with a third developer.

First Gas' response to GasNet's expansion

[16] In early July 2016 First Gas internally assessed the impact of GasNet's entry into Papamoa on First Gas's own plans for expansion. First Gas subsequently advised GasNet at a meeting held at GasNet's Whanganui office on 6 July 2016 that:

- (a) Tauranga was an important area to First Gas and one in which First Gas could beat GasNet on cost due to its lower overheads;
- (b) First Gas would compete with GasNet in Papamoa in the future;
- (c) First Gas would be happy to work together with GasNet in relation to services such as metering and operations and maintenance;
- (d) First Gas was prepared to buy GasNet out in Papamoa now for invested cost (the First Offer); and
- (e) That if First Gas were to buy out GasNet at a later date, GasNet would have assets that First Gas would not need.

[17] GasNet rejected First Gas's First Offer and advised that it did not want to sell its Bay of Plenty gas distribution assets. On 7 July 2016 GasNet signed an agreement with First Gas for interconnection to First Gas' transmission network, including at the Papamoa delivery point. GasNet anticipated its first connections to residential consumers from its Papamoa distribution network would be made in early 2017.

[18] First Gas developed plans to minimise GasNet's penetration. From early September 2016 First Gas commenced its expansion plans in Papamoa. This included:

- (a) advising developers and the Tauranga City Council that First Gas planned to retrofit gas distribution pipelines in Papamoa developments where GasNet had laid gas distribution pipelines;

- (b) corresponding and working with the Tauranga City Council to obtain access to roading corridors to install gas distribution pipelines, including by retrofitting; and
- (c) in October 2016, arranging a contractor to physically lay gas distribution pipelines, including by retrofitting.

[19] On 31 October 2016 First Gas again advised GasNet that First Gas was prepared to purchase GasNet's Papamoa assets, based on reimbursement of costs (Second Offer).

[20] On about 2 November 2016 First Gas called GasNet. It advised GasNet that it was going to lay distribution pipelines parallel to GasNet's network and service two developments GasNet had been intending to service, and that it would be able to supply those developments before GasNet. First Gas also tabled with the Tauranga City Council its work programme for retrofitting those developments, publicly announced its plans to retrofit in Papamoa and took steps to begin to do so by delivering pipes on-site.

[21] On about 11 November 2016 First Gas met with the third developer (referred to earlier) with which GasNet had been in negotiations. On 18 November 2016 GasNet made a revised offer to that developer. This included other benefits to houses in the subdivision as well as to the developer. GasNet was also in contact with a fourth developer around this time.

[22] On 25 November 2016 First Gas made an offer to the third developer. Like GasNet's offer, this included similar terms concerning benefits to be provided to the houses in the subdivision and to developers. First Gas also advised the developer that, if its offer was not accepted, it would lay the pipelines anyway and this retrofitting would cause considerable disruption.

[23] On the same day, 25 November 2016, First Gas emailed GasNet to outline a third offer to acquire GasNet's assets (Third Offer). The Third Offer included a mark-up on the costs of construction incurred by GasNet to reflect project management, site

supervision, design and goodwill, and money that First Gas would save in not retrofitting its own gas distribution pipelines alongside GasNet gas distribution pipelines. The mark-up was conditional on the assets not being commissioned prior to sale.

[24] GasNet responded to the Third Offer initially on 29 November 2016. It considered the offer did not represent fair value for GasNet's shareholder and did not reflect the true value that would accrue to First Gas. It said it would nonetheless take the Third Offer, or any revised offer, to its shareholder on 5 December 2016.

[25] On 2 December 2016 First Gas advised GasNet that it had won the contract with the third developer (referred to above). First Gas also set out reasons why it considered the Third Offer to be fair and reasonable, and advised that it was committed to investing in Papamoa and this would prevent GasNet from realising the expected value of its investment.

First Gas's acquisition of GasNet assets

[26] On 5 December 2016 the Whanganui District Council approved GasNet accepting the Third Offer. This was communicated by GasNet to First Gas on 6 December 2016. The Agreement was signed on 23 December 2016.

[27] Under the Agreement, First Gas acquired GasNet's assets. These comprised 10.2 km of pipelines made up of 6.4 km of arterial pipelines (from the transmission network delivery point) and 3.8 km of pipelines installed for the first two developments for which GasNet had secured contracts.

[28] The purchase price was made up First Gas's estimate of the construction costs of GasNet's assets (this was the major component of the price), a mark-up on those costs (to reflect project management, site supervision, design and goodwill, and money that First Gas would save in not retrofitting its own gas distribution pipelines alongside GasNet) less an amount (reflecting foregone revenue under the interconnection agreement).

[29] The Agreement included the Restraint of Trade. This prohibited GasNet from engaging in the provision of gas distribution services in the Bay of Plenty region for a period of five years. The value of the Restraint of Trade to First Gas was included in the mark-up applied to GasNet's construction costs.

[30] The Agreement was not conditional on obtaining clearance or authorisation for the acquisition from the Commission.⁴ First Gas was aware of the Commerce Act and had previously engaged with the Commission on possible competition implications of other proposed mergers. It did not appreciate there were competition implications, despite the Part 4 regulation, with the acquisition of GasNet and did not take legal advice about it.

[31] First Gas and GasNet did, however, jointly write to the Commission on 23 December 2016 to inform the Commission of the acquisition. It said the acquisition would have implications for the Commission's upcoming reset of the default price-quality paths for regulated gas pipeline businesses.

[32] The Agreement became unconditional on 1 February 2017.

[33] On 8 February 2017 the Commission contacted First Gas and GasNet requesting information so it could consider whether the acquisition would contravene s 47 of the Act. First Gas asked GasNet if it would extend the date for completing the transaction in light of the contact from the Commission. However, GasNet advised First Gas that it would be exercising its right to proceed with final completion in accordance with the terms of the Agreement.

[34] The acquisition was completed on 13 February 2017.

[35] Consistent with the Restraint of Trade, GasNet has not re-entered or engaged in the market.

⁴ Commerce Act 1986, ss 66 and 67.

The anticompetitive conduct

The market

[36] Papamoa is expected to see significant growth of residential developments in coming years. There are commercial opportunities for gas distributors to expand their network. The last three years have seen significant demand in the Papamoa area for the construction of distribution networks in new subdivisions or developments and, once constructed and connected, for reticulating gas to consumers.

[37] The parties agree the relevant market(s) is the construction of distribution networks in new subdivisions in one or more of the following areas: the areas served by the Papamoa 2 delivery point; the areas served by all delivery points in Papamoa and Mt Maunganui; the Bay of Plenty.

The breaches

[38] The parties are agreed the acquisition breached s 47 because:

- (a) The competition in the market arising from GasNet's entry changed the terms offered to property developers. Both First Gas and GasNet began offering benefits to developers that had not been previously offered.
- (b) When First Gas purchased the as-yet uncommissioned assets of GasNet it restored the pre-entry market structure. Since the acquisition such benefits have not been offered to developers.
- (c) First Gas accepts that the acquisition had the effect and/or likely effect of substantially lessening competition in the market because it:
 - (i) eliminated competition between First Gas and GasNet;
 - (ii) lessened any motivation for First Gas around capital contributions negotiations or otherwise to provide competitive offerings to developers and ultimate consumers additional to the laying of gas distribution pipelines; and

- (iii) irrespective of the Restraint of Trade, reduced the potential for future competition between First Gas and GasNet in the Bay of Plenty.

[39] The parties are agreed the Agreement breached s 27 because:

- (a) the Restraint of Trade prevents GasNet competing with First Gas in the Bay of Plenty region for a period of five years; and
- (b) the Restraint of Trade:
 - (i) removed potential future competition between First Gas and GasNet in the market for at least the period of the restraint; and
 - (ii) had the purpose, effect or likely effect of removing current competition in the market between First Gas and GasNet and of preventing future competition between First Gas and GasNet for at least the period of the restraint.

The likely effects

[40] The parties are agreed the conduct is likely to have the following effects:

- (a) removing existing and future competition in the market;
- (b) First Gas charging developers capital contributions above those that were observed to be charged when First Gas and GasNet were competing for developments;
- (c) developers paying higher capital contributions, which developers will have an incentive to pass through to purchasers of the developed properties, whether those residing in the properties utilise reticulated gas in their homes or not;

- (d) the possibility that increased capital contributions might cause developers to stop seeking to provide reticulated gas services in their developments; and
- (e) the potential for a reduction in the quality of services associated with the construction of gas distribution services in the market.

The recommended penalty

[41] The recommended penalty has been arrived at by:

- (a) determining the maximum penalty for the s 47 and s 27 breaches;
- (b) taking the s 47 breach as the lead one and setting a starting point for that breach to achieve the objective of deterrence and in light of the relevant factors;
- (c) uplifting that starting point for the s 27 breach in light of the relevant factors; and
- (d) adjusting the starting point for any considerations specific to First Gas.

[42] The maximum penalty for the s 47 breach is \$5 million.⁵ The parties propose a starting point of in the range of \$3.5 million to \$3.8 million for this breach.

[43] The maximum penalty for the s 27 breach is \$15.76 million. This based on 10 per cent of First Gas' relevant turnover, the parties being agreed the commercial gain is not readily ascertainable.⁶ The parties propose an uplift of \$800,000 to \$1.1 million for the s 27 breach.

[44] To the overall starting point of \$4.3 million to \$4.9 million the parties propose a discount of 25 per cent to reflect First Gas' cooperation with the Commission and the early resolution of his matter. This results in a penalty in the range of \$3.2 million

⁵ Section 83.

⁶ Section 80. Ten per cent of the turnover exceeds \$10 million and so is the maximum penalty.

to \$3.6 million. The agreed recommended penalty is the midpoint of this range: \$3.4 million.

My assessment

[45] While the ultimate enquiry is whether the final figure satisfies the objectives of the Commerce Act and the circumstances of the case,⁷ I agree with the approach the parties have taken in arriving at the recommended agreed penalty. It is consistent with the authorities and is fair to First Gas in that it avoids double counting aggravating features of the two breaches.⁸ I also agree that the s 47 breach is the lead one. It is that breach that has led to the continuing effect on competition in the market.

[46] As the parties have submitted, the key objective of imposing a penalty is general and specific deterrence. This objective will only be served if anti-competitive behaviour is profitless.⁹ In order to deter a defendant, the penalty must take into account their size and resources.¹⁰ An order can be made to divest assets or shares acquired in breach of s 47.¹¹ Such an order, if made, goes towards serving general deterrence aims. In this case, for reasons it has explained, the Commission considers divestment would be unlikely to restore competition and it does not therefore seek it.¹²

[47] The starting point for the s 47 breach is around three-quarters of the maximum penalty. That is proposed as appropriate here because this was a serious breach of s 47 by a large and well-resourced defendant. I accept this because:

- (a) First Gas personnel at a senior level engaged in a concerted effort on a reluctant seller to remove a competitor. First Gas was successful in its

⁷ See, for example: *Commerce Commission v Geologistics International (Bermuda) Ltd*, above n 2; *Commerce Commission v New Zealand Diagnostic Group Ltd*, above n 2; and *Commerce Commission v Air New Zealand*, above n 2.

⁸ Relevant factors are set out in ss 80 and 83. It is accepted that, despite amendments made to s 80 in 2001, the relevant factors set out in s 83 are also relevant factors for s 80, see, for example: *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 851 (HC); and *Commerce Commission v New Zealand Diagnostic Group Ltd*, above n 2. The approach is broadly that taken in criminal sentencing.

⁹ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53].

¹⁰ At [54].

¹¹ Section 85.

¹² GasNet does not seek to re-acquire the assets, the Commission is not aware of any other firm that would be likely to enter, and the assets have been physically integrated into First Gas's network.

effort, and the effect on the market is on-going and is potentially permanent. The conduct has removed existing competition and is likely to have removed future competition in the market for the foreseeable future.

- (b) Although serious, it is not a breach at the most serious end because it was unintentional – First Gas did not appreciate there were Commerce Act implications despite the regulatory regime to which it is subject – and First Gas was open with the Commission about the acquisition and proposed to GasNet that it not proceed once alerted to the Commission’s concerns. Further, the breach affects a relatively limited number of developers and consumers in a particular region, and the harm is limited because most of First Gas’ revenue is subject to regulation and aspects of that regulation may offset some of the potential harm.
- (c) First Gas is a large company.¹³ It is within the top five per cent of New Zealand companies.¹⁴ It is a sophisticated company and has the resources to put in place effective processes for ensuring compliance with its legal obligations, including under the Act.
- (d) The starting point compares with a \$2 million starting point adopted in *New Zealand Bus*, the only case to date in which a penalty has been imposed for a breach of s 47.¹⁵ I accept that case is less serious than the present one because of the unusual circumstances in which it came about and because the acquisition did not proceed.¹⁶

¹³ Financial Reporting Act 2013, s 45.

¹⁴ 95 per cent of New Zealand companies are “small to medium”.

¹⁵ *Commerce Commission v New Zealand Bus Ltd (No 2)* (2006) 3 NZCCLR 854 (HC). A comparison with *Australian Competition and Consumer Commission v Pioneer International Limited and Pioneer Building Products (Qld) Pty Ltd* (20 December 1996) ACCC Journal Legal Notes [19978] AUCCJ 14 (a case note prepared by the ACCC at the time says that no written decision was given by the Court), the only Australian case counsel for the Commission is aware of, is more difficult but does not appear to be out of line with what is proposed here.

¹⁶ *Commerce Commission v New Zealand Bus (No 2)*, above, at [10] and [59].

[48] I therefore accept the starting point is within the available range for the s 47 conduct in this case and the circumstances of First Gas.

[49] The starting point for the s 27 breach is appropriately proposed well below the maximum penalty for that breach. In my view the proposed starting point is towards the upper range of what is appropriate in the circumstances. This is because:

- (a) While on a stand-alone basis a significant penalty would be appropriate, it occurred as part of the s 47 conduct for which a significant penalty is already to be imposed. When combined with the starting point for the s 47 breach, the overall starting point is higher than a number of cases that have come before the court in recent times (but noting they concern different conduct and differently sized and resourced defendants so comparisons are not straightforward).¹⁷
- (b) Restraints of trade are permissible under the Act providing it is solely to protect the goodwill in the business purchased.¹⁸ The issue here was that the restraint of trade went further than was necessary for this purpose because it purported to prevent GasNet from entering anywhere in the Bay of Plenty (not just the area serviced by the Papamoa delivery point) and for a period of five years.
- (c) The Restraint of Trade will have no on-going impact. First Gas have assured the Commission it will not enforce it and have agreed a formal injunction is appropriate.
- (d) The proposed starting point compares with the starting point of \$1.5 million imposed in *Koppers* for exclusionary conduct (added to a

¹⁷ See: Chris Noonan *Competition Law in New Zealand* (Thompson Reuters, Wellington, 2017) at 1102-1113. However, there are a number of cases where higher starting point penalty ranges have been adopted. For example, in the real estate price fixing cases the starting point for the leader offender was \$1.8 million to \$2.25 million; in the air cargo cartel cases the starting point ranges adopted for Cargoplus Airlines International SA was \$8.5 million to \$14.5 million and was \$13 million for Qantas Airways Ltd; in the wood chemical price fixing cases the starting point was \$5.6 million for the lead offender; and, in the freight forwarding cartel cases, a starting point range of \$4.45 million to \$6 million was taken for one of the offenders.

¹⁸ Section 47(1)(d).

higher starting point of \$5.6 million for price fixing, the lead contravening conduct in that case).¹⁹ The Koppers exclusionary conduct was more serious because of its covert nature. It also compares with the starting point of \$1.45 for exclusionary conduct by the two Osmose companies in proceedings related to Koppers (added to a starting point of \$2.15 million for price fixing).²⁰ I consider the starting point for the restraint of trade here should be materially lower than these examples.

[50] From the combined starting point I accept a 25 per cent discount is appropriate. Although First Gas has not previously contravened the Act nor been warned on compliance issues, it is a relatively new entrant to the market and so its history is limited. Once alerted to the Commission's concerns First Gas was entirely cooperative and this has led to an early and agreed resolution to the matter. There are examples where higher discounts have been given.²¹ Following the Supreme Court's decision in *Hessell*, 25 per cent is the usual approach in criminal cases where early guilty pleas are entered and it is also within the range that has commonly been accepted as appropriate in Commerce Act pecuniary penalty cases.²²

[51] Standing back and assessing the end penalty overall, I am satisfied that the recommended penalty of \$3.4 million meets the objectives of the Act in this case. It exceeds the purchase price paid by First Gas. That purchase price, which included a

¹⁹ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 8, at [58].

²⁰ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV 2005-404-2080, 4 October 2006 at [88].

²¹ For example, 50 per cent discounts were applied in all of the wood chemicals price fixing cases, such as in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 19 and n 20; 40-50 per cent discounts were given to the parties in the real estate price fixing cases that made their admissions early and cooperated with the Commission by providing witnesses and other evidence (see, for example, *Commerce Commission v Lugton's Ltd* [2016] NZHC 3315); whereas 25-35 per cent discounts were given to parties whose admission came relatively late in time, who cooperated to a lesser extent, or who were ringleaders in the conduct (see, for example, *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681 and *Commerce Commission v Barfoot & Thompson Ltd* [2016] NZHC 3111). See also, the discussion at Matt Sumpter (ed) *New Zealand Competition Law and Policy Commentary* (online ed, CCH Wolters Kluwer) at [170-070].

²² *Hessell v R* [2011] NZSC 135, [2011] 1 NZLR 607. See also, other penalty cases under the Commerce Act where a 25 per cent discount has been applied, such as in the stock yards price fixing cases of: *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360 and *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361 where there was admission so as to allow a penalties discussion to occur but not further active cooperation.

mark-up on the assets, provides some indication of what First Gas was prepared to pay to remove GasNet from the market (even though it does not necessarily reflect the expected gain to First Gas from removing GasNet). The penalty together with the purchase price mean that the assets acquired will not be profitable over their life time. In the context of a business which is almost entirely regulated, this means First Gas will incur a material loss from the acquisition. The general and specific deterrent objective is therefore met by the penalty. There is also the stigma associated with the imposition of a pecuniary penalty.

Other matters

[52] The Commission seeks, and First Gas agrees to, an order restraining First Gas from enforcing the Restraint of Trade.²³ I accept that order is appropriate.

[53] First Gas seeks confidentiality orders over some information on the Court's file. The Commission does not oppose the orders. The information for which confidentiality is sought is consistent with redactions made to the statement of claim in response to an Official Information Act request. The information covers: the purchase price details; the specific terms offered to developers; the names of the developers; and the investment the Whanganui District Council approved for GasNet and its projected internal rate of return. First Gas has provided redacted versions of the statement of claim, the Agreed Statement of Facts and the Commission's written submissions identifying the specific information that falls within these topics for which confidentiality is sought. I am satisfied the confidentiality claims are appropriately made and outweigh open justice considerations in those particular and confined respects.

[54] The parties agree that costs are to lie where they fall.

Orders

[55] I make the following orders:

- (a) First Gas is to pay a pecuniary penalty of \$3.4 million;

²³ Commerce Act 1986, s 81.

- (b) First Gas is restrained from enforcing the Restraint of Trade;
- (c) confidential versions of the following documents on the Court file shall not be disclosed, searched or inspected without the leave of the Court: the statement of claim; the Agreed Statement of Facts; and the plaintiff's submissions; and
- (d) costs lie where they fall.

Mallon J