

7 October 2015

14923 / 2233748

Brian Mudford
Managing Director
Consolidated Alloys (N.Z.) Limited
55 Maurice Road
Penrose
Auckland

Dear Mr Mudford

Commerce Act 1986: Warning

1. The purpose of this letter is to warn Consolidated Alloys (N.Z.) Limited (CA) that it has likely breached section 27 of the Commerce Act 1986 (the Act) by entering into a Settlement Agreement with Edgings Systems (NZ) Limited (ESL) that contained an anti-competitive provision.
2. We reached this view after investigating the provisions of the Settlement Agreement which was entered into by the parties to resolve a dispute over the patent 290485 that was held by CA up to 10 August 2015.
3. The particular provision of concern was clause 8.
4. Clause 8 prevented ESL from selling any alternative soft-edge flashing products covered by the patent other than EZ-Edge until 14 June 2023. In our view this provision had the purpose and likely effect of substantially lessening competition in the national market for the sale of metal roof soft-edge flashing products and strip edge products (together the metal roof edge products markets) after the patent expired.
5. In making a decision to warn CA rather than take some other enforcement action, we have taken into account that CA and ESL have subsequently agreed that clause 8 will not be enforced and effectively expired after 10 August 2015.

Commission warning

6. Section 27 of the Act prohibits contracts, arrangements or understandings containing a provision that has the purpose, effect or likely effect of substantially lessening competition in a market in New Zealand.
7. A provision in an agreement can have multiple purposes, but only one of those purposes needs to be objectively regarded as anti-competitive to breach the Act. While we do not disagree with CA's assertion that clause 8 protected the collection of the royalty monies ESL agreed to pay for the sale of EZ-Edge, we consider the

parties sought to achieve this by agreeing in clause 8 that ESL would not sell any soft-edge flashing products other than EZ-Edge for a period of nearly eight years. An intended consequence of that clause was to exclude the only likely competitor from entering the market with another competing product. For this reason, in our view, clause 8 had the purpose of substantially lessening competition in the post-patent period.

8. While we are aware that CA subsequently advised ESL that it would not enforce clause 8 in the post-patent period, we also consider that if clause 8 had not effectively been removed, it would have had the likely effect of substantially lessening competition in the post-patent period.
9. There were some specific factors that in our view led to a breach of section 27.
 - 9.1 Our investigation found CA and ESL are presently the only likely competitors in the metal roof edge products markets.
 - 9.2 The duration of the restriction in clause 8 extended for a considerable period of time past the patent expiry date, nearly eight years.
 - 9.3 The introduction of the competing Vent Edge product by ESL demonstrated that competing products would be available in the market post-patent absent the restriction of clause 8.
 - 9.4 There were potentially other ways for CA to obtain the monies it was seeking from ESL that would not risk restricting ESL's ability to compete in the post-patent period.
10. We also considered whether clause 5 or clause 8 had the purpose or effect of fixing, controlling or maintaining the prices for goods or services in breach of section 27 via 30 of the Act. We considered that these clauses did not ultimately control or maintain the price of ESL's EZ-Edge product.

Commission guidance

11. Competition between firms typically derives from rivalry on price, quality, service, choice and other offerings. Conduct which substantially lessens competition can be detrimental to consumers.
12. To avoid breaching the Act in future, we recommend that CA is mindful of the Act when negotiating solutions to commercial disputes, particularly where competitors are involved. CA should carefully consider, before entering into such agreements, whether there are any provisions that may have the purpose, effect or likely effect of substantially lessening competition.

Further action by the Commission and other parties

13. Only the courts can decide whether the Act has been breached or not. This warning letter does not represent a ruling of law.
14. The Commission does not intend to take any further action against CA for this conduct. However, CA 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. We may draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against CA.
15. 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 or a manager of a company. A body corporate can be fined the greater of \$10 million, or three times the commercial gain from the breach (if this cannot be easily established, 10% of turnover). Every separate breach of the Act may incur a penalty.
16. This warning letter to CA will be published on our website along with a public (non-confidential) version of the investigation report. We also intend to issue a media release.

Yours sincerely



Ritchie Hutton
Head of Investigations
Commerce Commission