

21 June 2022

Stewart Fowler  
Managing Director  
Panasonic New Zealand Limited  
Private Bag 14911, Panmure  
Auckland 1741

c/o Bell Gully

By email: [ ]

Dear Mr Fowler,

## **Commerce Act 1986: Warning for Resale Price Maintenance**

1. As you are aware, the Commerce Commission (Commission) has completed its investigation into allegations of anti-competitive conduct in consumer electronic and computer product markets.
2. We are issuing this letter to you following:
  - 2.1 our letter to Panasonic New Zealand Limited (Panasonic) of 26 November 2021 setting out the Commission's preliminary view that Panasonic's conduct contravened the Commerce Act 1986 (Act); and
  - 2.2 Panasonic's response of 9 December 2021 to the Commission's preliminary view.
3. This letter sets out the warning that the Commission is issuing to Panasonic. It also provides information relating to provisions of the Act to assist with future compliance.

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

4. The Commission considers that Panasonic is likely to have breached the resale price maintenance (RPM) provisions in section 37 of the Act.

5. After weighing up the factors set out in our Enforcement Response Guidelines,<sup>1</sup> we have decided to exercise our enforcement discretion by issuing this warning to Panasonic.
6. A warning is not a finding of non-compliance; only the court can decide whether a breach of the law has occurred, and we have determined that at this time we will not be commencing formal legal action against Panasonic.

#### **Basis for the Commission's view**

7. The Commission is of the view that Panasonic engaged in RPM towards several retailers in breach of section 37 of the Act.
8. The Commission considers that Panasonic likely breached the Act as follows:
  - 8.1 RPM relating to withholding supply of consumer TVs to two retailers (during 2017 and 2019) likely in breach of s37(3)(d)(ii); and
  - 8.2 RPM relating to supplying consumer TVs to a retailer (during 2019) on less favourable terms than other retailers likely in breach of s37(3)(d)(ii).
9. The conduct above involved independent and/or smaller retailers at times offering Panasonic TVs at a price less than the price specified by Panasonic, over the 2017 to 2019 period.
9. RPM is illegal because it prevents retailers from setting their prices independently, in order to attract more customers and sell more products. We consider this behaviour can be harmful to competition, and to consumers, because it interferes with the competitive determination of price and may result in consumers paying higher prices for goods than they would without the conduct.

#### **Warning**

10. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings against Panasonic.
11. This warning represents our opinion that the conduct in which Panasonic has engaged is likely to have breached the Act and that legal action remains available to the Commission in future if the conduct is repeated.
12. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Panasonic.
13. 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.

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

### **RPM under the Act**

14. Section 37 of the Act prohibits a person from enforcing or trying to enforce, a minimum price at which the reseller must on-sell those goods.
15. RPM can involve inducements to set retail price at levels stipulated by suppliers and threats and actions such as withdrawing supply, increasing wholesale prices or reducing benefits such as price support, to retailers who are offering discounted retail prices. RPM prevents resellers from setting their prices independently and can lead to increased prices for consumers.
16. The relevant parts of these provisions are set out in **Attachment A**.

### **Penalties for breaching the Commerce Act**

17. Only the courts can decide if there has actually 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). Every separate breach of the Act may incur a penalty.
18. Panasonic 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**

19. To avoid breaching the Act in the future, we recommend that Panasonic is mindful of the Act when interacting with retailers, particularly in circumstances where the conduct may interfere with any retailer's independent decision relating to their retail prices.
20. To avoid the risk of breaching section 37 of the Act, Panasonic should take care to ensure it does not seek to stipulate or control the prices set by retailers for Panasonic products.
21. Panasonic can suggest or recommend retail prices including promotional prices, but it should not specify or have retailers agree to, fixed or minimum retail prices.<sup>2</sup> Retailers should be free to independently decide their own retail pricing.
22. In conclusion, Panasonic should ensure that its employees are mindful of the Act when communicating with other businesses about retail prices, and that retailers are genuinely free to choose what prices they will sell Panasonic products for.
23. If ever in doubt, Panasonic should seek legal advice from a lawyer experienced in dealing with the Act.

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<sup>2</sup> Setting maximum prices is however permissible.

**Further information**

24. 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.
25. You can also view the Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
26. 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

## Attachment A: Commerce Act 1986

### 37 Resale price maintenance by suppliers prohibited

- (1) No person shall engage in the practice of resale price maintenance.
- (2) For the purposes of this section, a person engages in the practice of *resale price maintenance* if that person (in this section referred to as the supplier) does any of the acts referred to in subsection (3).
- (3) The acts referred to for the purposes of subsection (2) are—
- (a) the supplier making it known to another person that the supplier will not supply goods to the other person unless the other person agrees not to sell those goods at a price less than a price specified by the supplier:
  - (b) the supplier inducing, or attempting to induce, another person not to sell, at a price less than a price specified by the supplier, goods supplied to the other person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier:
  - (c) the supplier entering or offering to enter into an agreement, for the supply of goods to another person, where one of the terms is or would be that the other person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier:
  - (d) the supplier withholding the supply of goods to another person for the reason that the other person—
    - (i) has not agreed to the condition mentioned in paragraph (a); or
    - (ii) has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold:
  - (e) the supplier withholding the supply of goods to another person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the other person—
    - (i) has not agreed not to sell those goods at a price less than a price specified by the supplier; or
    - (ii) has sold or is likely to sell goods supplied or to be supplied to that third person, by the other person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold.
- (4) For the purposes of subsection (3),
- (a) where the supplier makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier:
  - (b) where a set form, method, or formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that set form, method, or formula, that price shall be deemed to have been specified by the supplier:
  - (c) where the supplier makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price ascertained by calculation from or by reference to a set form, method, or formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier:

- (d) where the supplier makes a statement to another person of a price that is likely to be understood by that person as the price below which goods are not to be sold, that price shall be deemed to have been specified by the supplier as the price below which the goods are not to be sold:
  - (e) anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.
- (5) For the purposes of this section, *sale* includes advertise for sale, display for sale, and offer for sale, and *sell*, *selling*, and *sold* have corresponding meanings.