

22 December 2015

Allied Farmers Limited
201 Broadway
Stratford 4332
Attn: Steve Morrison

By email: steve.morrison@nzfarmerslivestock.co.nz
Copy: k.burkhart@kennedys-law.co.nz

Dear Mr Morrison,

Commerce Act 1986: warning

1. I refer to our letter of 22 May 2015 concerning the conclusion of our investigation into allegations that certain livestock companies and saleyard owners, including Allied Farmers Limited (**Allied Farmers**¹), reached agreements on fees for cattle sales at saleyards following the introduction of the National Animal Identification and Tracing Act 2012 (**NAIT Act**).

Commission's view

2. The Commission considers Allied Farmers is likely to have breached the price fixing prohibitions in the Commerce Act 1986 (the Act) by entering into an agreement with its competitors (in its capacity as both a saleyard owner and agent) to introduce a tagging fee of \$25 per un-tagged cattle beast at New Zealand saleyards from 1 July 2012 (the **Tagging Fee Agreement**).
3. The Commission does not consider it has sufficient evidence to show that Allied Farmers was party to agreements to:
 - 3.1 charge farmers a RFID administration fee of \$1.50 per head of cattle (split equally between the vendor and purchaser), in relation to the increased costs of registering saleyard-based cattle movements; or
 - 3.2 that saleyards would increase existing yard fees by \$1.50 per head of cattle (split equally between the vendor and purchaser), to recover costs arising from compliance with the NAIT Act.
4. The Commission has exercised its enforcement discretion to issue a warning to Allied Farmers rather than to commence proceedings. In making a decision to warn, we have taken into account the extent of Allied Farmers' involvement in the conduct and the fact that Allied Farmers did not attend some of the meetings at which the Tagging Fee Agreement was discussed.

¹ In 2011, Allied sold its livestock business to NZ Farmers Livestock Limited (**NZFL**). Allied's wholly owned subsidiary, Allied Farmers Rural Limited, owns 68% of NZFL.

Price fixing conduct prohibited by the Commerce Act

5. Section 27 via section 30 of the Commerce Act (**Act**) prohibits contracts, arrangements or understandings between competitors containing provisions that have the purpose or effect of fixing, controlling or maintaining the prices charged for goods or services.
6. A contract, arrangement, or understanding need not be formal, written, or signed. All that is required is for the parties to reach a consensus and a mutual expectation as to how at least one of them will act, or not act.

Basis for the Commission's view

7. The Commission is of the view that Allied Farmers entered into the Tagging Fee Agreement with its competitors.
8. The terms of that agreement included Allied Farmers and its competitors:
 - 8.1 imposing or procuring the imposition of the agreed tagging fee at saleyards they own (in part or in full); and
 - 8.2 passing on to farmers the agreed tagging fee in their capacity as agents.
9. The agreement appears to have evolved over the course of industry meetings in 2011 (in particular, the "NAIT Saleyard Selling Agents' Forum" on 5 April 2011 and a meeting of the NZSSAA on 25 May 2011). The agreement was further recorded in the NZSSAA meeting minutes of 16 April 2012.
10. Allied Farmers representatives attended a NZSSAA meeting on 25 May 2011 at which it was agreed the NZSSAA and its members (including Allied Farmers) would endorse a submission to MAF that vendors would be charged \$25 for tagging undertaken at saleyards.
11. We are aware that Allied Farmers did not attend the NAIT Saleyards Agents' Forum on 5 April 2011 or the NZSSAA meeting on 16 April 2012 at which the Tagging Fee Agreement was reaffirmed and minuted because Allied Farmers' NZSSAA membership was in transition to New Zealand Farmers Livestock at the time. However, Allied Farmers received numerous communications from the NZSSAA and PGW that reference the agreement to impose tagging fees at saleyards.
12. In our view, the Tagging Fee Agreement fixed, controlled or maintained the price of yard services and stock and station agent services provided by the participating livestock companies and saleyard owners.
13. Data provided to the Commission indicates that Allied Farmers gave effect to the Tagging Fee Agreement by imposing and passing on the agreed tagging fees as its saleyards and to farmers from 1 July 2012.

Associated legal proceedings

14. The Commission regards price fixing as serious conduct. As previously advised, the Commission decided to issue legal proceedings against PGG Wrightson Limited (**PGW**), Elders Rural Holdings Limited (**Elders**), Rural Livestock Limited (**Rural**) and five individuals for entering into agreements concerning saleyard-based fees that breached the price fixing prohibition in the Act.
15. The individuals involved are all current or former employees of PGW and Elders. PGW and Rural have both admitted that they engaged in conduct in breach of the Act and settled with the Commission on this basis. Penalty judgments against both parties have been handed down by the High Court today. Proceedings against Elders and the five individuals remain before the Court.

Commission guidance

16. Competition between firms typically derives from rivalry on price, quality, service, choice and other offerings. Conduct which fixes, controls, or maintains prices reduces competition and can be detrimental to consumers.
17. To avoid breaching the Act in future, we recommend that Allied Farmers employees are mindful of the Act when attending meetings and/or otherwise interacting with competitors, particularly in circumstances where the conduct involved may interfere with any party's independent decision about a price, component of price, or any other matter relating to prices, such as a discount. This same care is required when attending industry or professional association meetings where competitors or potential competitors are involved.
18. If in doubt, you should seek legal advice from a lawyer experienced in dealing with the Act.


Further action by the Commission and other parties

19. Only the courts can decide whether the Act has been breached or not. This warning letter does not represent a ruling of law.
20. 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.
21. While the Commission does not intend to take any further action against Allied Farmers for this conduct, you should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking a private action for damages under section 82 of the Act.
22. We may draw this warning to the attention of a court in any future proceedings brought by the Commission against Allied Farmers for other conduct in breach of the

Act. Previous warnings may be considered an aggravating factor in sentencing by the court for any future conduct.

23. This warning letter to Allied Farmers will be published on our website. We also intend to refer to this warning letter in a media release that will be published today.

Regards,


Ritchie Hutton
Head of Investigations
Commerce Commission