

6 May 2024

Lightwire Limited  
[REDACTED]  
[REDACTED]  
[REDACTED]

By email: [REDACTED]

Copy: [REDACTED]

Dear [REDACTED]

### **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 Lightwire Limited (Lightwire) and Mike Cook relating to auctions for radio frequency licenses in rural areas.
2. We are issuing this letter to Lightwire and Mr Cook following:
  - 2.1 Our interview with Mr Cook in his capacity as Head of Rural at Lightwire;
  - 2.2 Our letter to Lightwire of 25 March 2024 setting out the Commission's preliminary view that Lightwire had likely breached section 30 of the Commerce Act 1986 (the Act) and our preliminary view that a warning was the appropriate enforcement response; and
  - 2.3 Lightwire's response of 16 April 2024 to the Commission's preliminary view. We note that you indicated that this was also the response of Mr Cook.
3. This letter sets out the warning that the Commission is issuing to Lightwire and Mr Cook. In this letter we also respond to the points raised by you in your letter of 16 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 Lightwire and Mr Cook are likely to have breached the Act by entering into, and giving effect to, an agreement<sup>1</sup> not to compete with a competitor in several auctions for 3.30 – 3.34 GHz radio frequency licenses relating to six Territorial Land Authorities (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,<sup>2</sup> and the Solicitor General's Guidelines for the use of Warnings,<sup>3</sup> we have decided to exercise our enforcement discretion by issuing this warning to both Lightwire and Mr Cook.
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 Lightwire or Mr Cook.

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

8. The Commission is of the view that Lightwire and Mr Cook 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 Mr Cook and Lightwire likely breached the Act through communications between Mr Cook, in his capacity as Head of Rural for Lightwire, and a competitor. The evidence we have gathered (including communications with a competitor, and our interview with Mr Cook) shows the following relevant facts:
  - 9.1 Lightwire communicated with a competitor about the auctions, and which TLAs Lightwire was planning to bid on and which specific auctions that competitor would withdraw from and/or not compete in;
  - 9.2 Lightwire and its competitor withdrew bids from certain auctions following these communications;

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<sup>1</sup> In this letter, all references to an 'agreement' are references to a contract, arrangement or understanding as set out in section 30 of the Act.

<sup>2</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf)

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

9.3 For example, Lightwire stated to its competitor:

9.3.1 “Be good if can remove your [TLA] bids? What about [other TLA]?”

9.4 the competitor replied:

9.4.1 “I’ll see if I can remove them. Same for [other TLA] don’t need it.”

10. In reaching its view, the Commission has carefully considered Lightwire’s response of 16 April 2024 to our 25 March 2024 letter setting out our preliminary view. We note Lightwire’s:

10.1 submissions that it did not intend to breach the Act;

10.2 comments about the limited scope of the auctions and their unusual nature; and

10.3 cooperation with the Commission’s investigation.

11. Having considered all the available evidence in this matter, including statements made at interview and your letter of 16 April 2024, the Commission remains of the view that Lightwire’s conduct likely amounts to an agreement containing a cartel provision. 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.<sup>4</sup>

## Warning

12. 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.

13. In reaching this view we have had regard to:

13.1 the seriousness of the conduct;

13.2 the extent of the detriment of the conduct;

13.3 the degree of public interest in bringing proceedings; and

13.4 Lightwire’s cooperation with the Commission’s investigation.

14. 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.

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<sup>4</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf)

15. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against you.
16. 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**

17. Section 30 of the Act prohibits persons from entering into an agreement that contains a cartel provision, or giving effect to, 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 the following in relation to the supply or acquisition of goods or services in New Zealand:
  - 17.1 price fixing;
  - 17.2 restricting output; and
  - 17.3 market allocating.
18. Under section 80 of the Act, a person who contravenes section 30 of the Act is liable to pay a pecuniary penalty.
19. The relevant parts of these provisions are set out in **Attachment A**.
20. 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 anticompetitive conduct and companies and individuals can also be liable to criminal penalties, including jail for individuals.

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

21. 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**

22. 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.

23. If ever in doubt, Lightwire and/or Mr Cook should seek legal advice from an experienced competition lawyer before entering into discussions with a competitor.
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 recommend that you visit our website to better understand your obligations and the Commission's role in enforcing the Act.
25. You can also search and 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.

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.