

22 December 2015

Peter Walsh & Associates Limited  
C/- Timpany Walton Lawyers  
By email: [tonys@timpanywalton.co.nz](mailto:tonys@timpanywalton.co.nz)

Attn: Tony Shaw

Dear Mr Shaw

**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 Peter Walsh & Associates (**PWA**), 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 PWA is likely to have breached the price fixing prohibitions in the Commerce Act 1986 (**the Act**) by entering into two agreements with its competitors (in its capacity as both a saleyard owner and agent) that:
  - 2.1 where agents provide services at saleyards, they would charge farmers a radio frequency identification device (RFID) administration fee of \$1.50 per head of cattle (split equally between the vendor and purchaser), in relation to the increased costs of registrations saleyard based cattle movements (**RFID Fee Agreement**); and
  - 2.2 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 (**Yard Fee Agreement**).
3. The Commission does not consider it has sufficient evidence to show that PWA was party to an agreement to introduce a tagging fee of \$25 per un-tagged cattle beast at its New Zealand saleyards from 1 July 2012.
4. The Commission has exercised its enforcement discretion to issue a warning to PWA rather than to commence proceedings. In making a decision to warn, we have taken into account the extent of PWA's involvement in the conduct.

### **Price fixing conduct prohibited by the Commerce Act**

5. Section 27 via section 30 of the 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**

#### *RFID Fee Agreement*

7. The Commission is of the view that PWA entered into the RFID Fee Agreement with its competitors.
8. PWA received the agenda for the key New Zealand Stock and Station Agents Association (**NZSSAA**) meeting on 16 April 2012, but did not attend. It received a letter from the NZSSAA referencing to the RFID Fee Agreement. PWA was also a signatory to a letter sent to the owners of the Temuka saleyards in response to a complaint about the proposed fees, noting a "common agreed understanding amongst selling companies" that RFID fees were "justified". Data provided to the Commission indicates that PWA subsequently gave effect to the agreement by introducing RFID fees across its business at \$1.50 on 1 July 2012.
9. In our view, the RFID Fee Agreement fixed, controlled or maintained price of stock and station agent services provided by the participating livestock companies.

#### *Yard Fee Agreement*

10. The Commission is also of the view that PWA entered into the Yard Fee Agreement with its competitors.
11. As noted above, PWA received the agenda for a NZSSAA meeting on 16 April 2012, but did not attend. It received a letter from the NZSSAA referencing the Yard Fee Agreement. As also noted above, PWA was a signatory to a letter sent to the owners of the Temuka saleyards in response to a complaint about the proposed fees, explaining NAIT charges "...have been agreed in principle between selling companies and saleyard entities that it is justifiable for saleyard entities to a (sic) apply NAIT charges to both the vendor and purchaser of cattle to recover costs associated with new NAIT-related electronic scanning equipment and associated infrastructure, and for this revenue to be retained by saleyard entities."
12. However, we recognize that the Coalgate saleyards (PWA 50%, Hazlett 50%) did not increase yard fees by the agreed \$1.50.
13. In our view, the Yard Fee Agreement fixed, controlled or maintained price of yard services provided by the participating saleyard owners.

### **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 PWA 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 PWA 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 PWA 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 PWA 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