

COMMUNIQUE



NZBL to Pay \$1.1 Million for Anti-competitive Acquisition of Mana Coach Shares

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In September 2006, New Zealand Bus Limited was fined \$500,000 and ordered to pay around \$600,000 in costs to the Commerce Commission after it breached section 47 of the Commerce Act when it acquired shares in Mana Coach Services.

Section 47 of the Commerce Act prohibits acquisitions that are likely to substantially lessen competition.

The vendors of the shares, Ian Waddell and Kerry Waddell, were also found guilty of being accessories to the transaction.

Had the acquisition gone ahead, a single company would have owned almost all of Wellington's bus services.

Commerce Commission General Manager Geoff Thorn said the significant penalty imposed on NZBL showed that the voluntary clearance regime, administered by the Commerce Commission, was robust.

"The stakes are high for companies planning acquisitions and mergers," Mr Thorn said.

"In commercial transactions, parties are likely to carefully weigh up the risks and benefits and there must be a credible threat that penalties for prohibited mergers will be imposed."

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Under the voluntary merger clearance regime, companies can apply to the Commission for a clearance to merge which gives them reassurance the merger is legal.

In January 2006 NZBL applied for clearance to purchase the 74 per cent share of Mana Coach that it did not already own. In March it withdrew the application and planned to proceed with the acquisition without clearance.

The June and September judgements on liability and penalty respectively are both under appeal.

List of Terms/Abbreviations

| | |
|---|------------------------|
| Commerce Commission | Commission |
| Legislation Enforced by the Commerce Commission | |
| Commerce Act 1986 | Commerce Act |
| Credit Contracts and Consumer Finance Act 2003 | CCCF Act |
| Dairy Industry Restructuring Act 2001 | DIR Act |
| Electricity Industry Reform Act 1998 | EIR Act |
| Fair Trading Act 1986 | Fair Trading Act |
| Telecommunications Act 2001 | Telecommunications Act |

Energy Online

The Court found that the overall impression created by the price freeze offer was that prices would not go up at all, and this impression was misleading.

A “price freeze” that didn’t freeze prices has cost electricity retailer Energy Online a million dollars in fines and refunds.

In October the District Court in Napier found that Energy Online broke the law when it claimed Hawke’s Bay and Waitemata customers were on a “price freeze,” but still increased prices.

Energy Online was found guilty of ten charges of breaching the Fair Trading Act, and fined \$140,000. A total of \$860,981 has been refunded to Energy Online customers, and costs bring Energy Online’s total payout to just over a million dollars.

During 2003 and 2004, Energy Online marketed a price freeze to potential customers. It told them that the ‘energy portion’ of their bill would not go up during the period of the freeze. But the company later did increase customers’ bills during the price freeze period. Part of the increases were to pass on increased electricity distribution charges, and Energy Online also increased its own overhead charges to Hawke’s Bay customers by 70 per cent during the so-called ‘freeze’.

The Court found that the overall impression created by the price freeze offer was that prices would not go up at all, and this impression was misleading.

Judge Rea commented that Energy Online had misrepresented the nature of the offer to try and get as many new customers as possible, and had not properly explained to customers exactly what the price freeze would mean.

Price Fixing by Credit Card Schemes

New Zealand Visa and MasterCard transactions totalled around \$19 billion in 2004, making this one of the Commission's most significant legal actions.

In November the Commerce Commission issued civil proceedings against Visa, MasterCard and 10 financial institutions for alleged price-fixing in relation to interchange fees. With transactions on New Zealand Visa cards and MasterCard cards totalling around \$19 billion in 2004, the volume of commerce affected makes this one of the Commission's most wide-reaching and significant legal actions.

Interchange fees are charged by credit card companies. They are paid by retailers as part of the fees they pay to banks. The fee is up to 1.8 per cent of each credit card transaction. Retailers are not permitted to charge customers extra to use credit cards, and so recover the fees by increasing prices, regardless of whether customers pay by credit, cash or EFTPOS.

The Commission alleges that the following companies have been involved in anti-competitive arrangements relating to the fees: Cards NZ Ltd, Visa International, MasterCard International Inc, ASB, BNZ, Westpac Banking Corporation, Westpac NZ Ltd, ANZ, TSB, Kiwibank, NZ Post, The Warehouse Financial Services Ltd and GE Finance and Insurance.

The Commerce Act's penalties for price-fixing are up to \$10 million per breach, or three times the commercial gain resulting from the breach, or 10 per cent of a company's turnover.

The Commission does not allege any collusion between Visa and MasterCard. The alleged price-fixing is between Visa and its shareholder financial institutions, and between MasterCard and its member financial institutions.

Cease and Desist Order

In August the Cease and Desist provisions of the Commerce Act were used for the first time when an order was issued to restore competition to the cargo marshalling market at Marsden Point port in Whangarei.

The port's owner, Northport, and their joint venture marshalling company Northport Services Limited, consented to the order, which required other marshalling companies be allowed to marshal cargo at the port. Marsden Point port is used to export wood veneer to Japan from the Juken Nissho factory in Kaitaia.

The Commission investigated after International Stevedoring Operations Limited complained that Northport had granted an exclusive licence to its own joint venture port services company Northport Services Limited and was making it uneconomic for other companies to marshal cargo at the port.

The order was issued by Cease and Desist Commissioner Terrence Stapleton on Friday 11 August. The Commissioner may use such an order to stop behaviour that is a prima facie breach of the Commerce Act, provided it is necessary to act urgently.

Commerce Commission Chair Paula Rebstock said that Northport had attempted to use its monopoly power as the owner of the port to prevent competition in the general cargo marshalling services market.

"Northport attempted to leverage its monopoly power as the port owner to exclude competition in the downstream market for port services," said Paula Rebstock, "but section 36 of the Commerce Act prohibits companies from using their market power in this way."

Rugby Authorisation

The Commission analysed four years of viewing figures and found that closely contested games were not necessarily more popular with the public.

In June the Commerce Commission told the New Zealand Rugby Union that it could impose a salary cap to limit the amount each provincial union can spend on players. The New Zealand Rugby Union had applied for the salary cap to stop the richest unions from 'buying' all the best players. The Commission may authorise anti-competitive arrangements if it decides the benefit to New Zealanders outweighs the detriment to competition.

The Rugby Union submitted that the salary cap would create a more even spread of players, resulting in closely contested matches that would attract bigger television audiences and earn more money.

The Commission analysed four years of viewing figures and found that closely contested games were not necessarily more popular with the public.

However, the Commission found that the quality of players in a match did affect the match's popularity. The Commission concluded that, by encouraging a more even spread of good rugby players, the salary cap could increase the quality of play, and hence the popularity of rugby and the income to be earned from it.

"This decision is based on finely balanced judgements," says Commerce Commission Chair Paula Rebstock. "The net benefits are modest and rely on the salary cap being correctly implemented and rigorously enforced."

In December 2006 the Rugby Union applied for the authorisation to be varied, on the basis that the need to release players for the 2007 Rugby World Cup, and the associated conditioning programme, warrants relief from the salary cap in 2007. The Commission will shortly issue a draft determination on the variation, and issue a final determination after seeking the views of interested parties.

Carter Holt Harvey Fined \$900,000 for Misleading Labelling on Timber

The company's internal report showed that since 2001 it knew its timber was not consistently meeting the grade.

Carter Holt Harvey pleaded guilty in October 2006 to breaching the Fair Trading Act by selling timber that did not meet the grade stated on labelling. The company was fined \$900,000 for 20 breaches of the Fair Trading Act. The Commission is also prosecuting six former or current Carter Holt Harvey employees.

Between July 2001 and November 2003 Carter Holt Harvey sold timber labelled as MGP10 when it knew the timber did not consistently meet that grade.

MGP10 is a high-strength timber used for trusses and framing in homes and buildings. It was marketed by Carter Holt Harvey as a superior and premium product. It is estimated that around 20,000 new houses were built with Laserframe MGP10 supplied by Carter Holt Harvey during the period.

“The Commission considers that this is one of the most important and most serious Fair Trading cases we have dealt with,” said Commerce Commission Chair Paula Rebstock.

“It is very concerning that a large corporation like Carter Holt Harvey would choose to deliberately mislead its customers.”

The Commission investigated after concerns were raised by the New Zealand Timber Industry Federation. After testing the timber and finding some did not make the grade, the Commission searched the company's premises and seized documents proving Carter Holt Harvey had known about the problem since 2001.

“Carter Holt Harvey's own internal report showed that since 2001 the company knew its timber was not consistently meeting the grade, yet they continued to sell it as high-grade MGP10,” said Paula Rebstock.

Ms Rebstock said the Commission had been told that use of the timber was not likely to lead to any safety issues.

“The Commission has been advised that houses built with the timber may suffer performance defects such as deflections in the roof and squeaky floors,” said Ms Rebstock.

Record Settlement Returns \$3.3 Million to Telecom Customers

“Customers may not notice small errors in their bill, but this case shows how small amounts can add up to very large sums over time”.

An out-of-court settlement reached with the Commerce Commission in October 2006 required Telecom to return around \$3.3 million to customers after a billing fault saw them charged twice.

The settlement was the largest ever out-of-court settlement under the Fair Trading Act.

A fault in Telecom’s system meant that when customers changed call plans on their landline or mobile, they were sometimes charged under both plans on the day they swapped over.

Telecom accepted that it breached the Fair Trading Act when it charged customers twice. The over-charging occurred between 1 January 1989 and 30 May 2006.

Affected residential customers were due to receive an average refund of \$1.25, while the average business customers would receive \$2.45.

Commerce Commission General Manager Geoff Thorn said the settlement should remind businesses how important it was for them to monitor their systems and ensure they were working properly.

“Companies need to check and double check to make sure they are charging customers correctly,” said Mr Thorn.

“Customers may not notice small errors in their bill, but this case shows how small amounts can add up to very large sums over time”.

“Customers must be able to trust that their bills are correct, and companies are 100 per cent responsible for ensuring that their systems are working and their billing is accurate.”

Mr Thorn said in this instance an out-of-court settlement was appropriate because Telecom had identified the issue before the Commission began investigating, had worked hard to uncover the full extent of the problem, and were prepared to put things right.

“Telecom co-operated fully with the Commission’s investigation and we commend the company for taking responsibility, working to resolve the problem, and compensating consumers,” said Mr Thorn.

In the settlement, Telecom agreed to apologise to affected customers and refund the money they were overcharged. Once customers have been paid back, any money remaining in the settlement fund will be donated to a consumer organisation. Telecom also agreed to conduct an internal review and present a report to the Commission in July 2007 showing how it has fixed the problem and ensured it won’t happen again.

Landmark Penalties for Cartel Companies and Executive

Breaking a cartel in the wood chemicals industry was one of the Commerce Commission's most important achievements in 2006. More than \$5 million of fines have already been imposed, and two individuals have received criminal convictions for misleading the Commission's investigators. Further proceedings are ongoing against some companies and individuals involved.

The cartel operated in New Zealand's wood preservative chemicals industry from 1998 to 2002. The affected part of the industry was worth an estimated \$35 million in 2002, and included the iconic 'Tanalised' timber brand.

In April, the High Court imposed \$3.6 million in penalties on Koppers Arch Wood Protection (NZ) Limited and its Australian parent company, Koppers Arch Investments Pty Limited. This is more than double the previous highest penalty for cartel behaviour in New Zealand.

“Koppers’ illegal gains came at the expense of ordinary New Zealanders – farmers paying more for their fence posts or home-owners paying more for their decking timber,” said Commerce Commission Chair Paula Rebstock.

In October, Osmose New Zealand and Osmose Australia were fined a total of \$1.8 million for their participation in the cartel. Osmose's former General Manager Mark Greenacre was fined \$100,000 after he admitted extensive involvement in the cartel.

The Commission is pleased that the Court has imposed high penalties for cartel behaviour. “Cartels are hard to find, hard to break and hard to prosecute. It is highly preferable to deter cartels from forming and the Commission will continue to seek high, deterrent penalties in cartel cases,” said Paula Rebstock.

In addition to the civil charges brought against the Koppers and Osmose companies, the case also resulted in a number of criminal convictions for misleading the Commission or hampering its investigation.

In August Osmose New Zealand pleaded guilty to a charge of failing to comply with section 98 notices requiring the provision of documents to the Commission, and was fined \$13,000. The maximum penalty is \$30,000. The document not provided was a non-public price list Osmose had obtained from fellow cartel member Koppers Arch. Judge Boucher described the price list as a “particularly pertinent document which was not provided under the notices and should have been.”

Also in August, Australian-based executive Mark Greenacre admitted he lied to Commission investigators when they investigated the cartel. In particular, Greenacre had denied having meetings with his competitors and sharing pricing information, but has now admitted that collusion. Greenacre was fined \$7,000. The maximum penalty is \$10,000.

Paula Rebstock said that while the cartel behaviour itself was being addressed in the ongoing civil proceedings, the criminal prosecutions for hindering the Commission's investigation were important.

“Cartels are by definition secretive and dishonest, which makes uncovering them extremely difficult,” said Ms Rebstock. “These fines and criminal convictions show how seriously the Court views any attempt to hinder a Commission investigation.” She noted that in sentencing Osmose and Greenacre on the criminal charges, Judge Boucher had commented that hindering Commission investigations was “a matter Parliament intended to be taken seriously.”

Mobile Market Review and Investigation

The Commission announced in October 2006 that it has considered barriers to entry to the cellular mobile services market and will investigate possible changes to the regulatory framework.

Under Schedule 3 of the Telecommunications Act, the Commerce Commission can decide to investigate a telecommunications market if it considers that a lack of competition may be disadvantaging consumers.

Telecommunications Commissioner Douglas Webb said the Commission has been concerned for some time that New Zealanders are paying too much for mobile voice calls, and that New Zealand has low mobile usage when compared to other OECD countries.

“Existing competition does not appear to have increased mobile usage, and we haven’t seen significant new entry into the mobile market,” said Mr Webb.

“The Commission considers the current regulatory settings may not be creating sufficient incentives for that entry to occur.”

Mr Webb said that more competition should bring lower prices and more innovative deals for customers.

“The Commission will now investigate the market to determine whether these issues can be addressed by some form of regulation,” said Mr Webb.

The Commission has decided that there are reasonable grounds to use its powers to investigate:

- » amending the terms of the national roaming service;
- » moving the national roaming service from a specified to a designated service; and
- » moving the co-location service from a specified to a designated service (the Commission does not set price terms for specified services, but does for designated services).

ISSUES PAPER RELEASED – ROAMING AND CO-LOCATION SERVICES

The Commerce Commission released an issues paper in December 2006 to begin public consultation on whether or not to amend the roaming and co-location services.

The issues paper sought input from interested parties on the likely costs and benefits that would result from amending the services. The paper also sought views and comments on how the services should be defined and the pricing principles that should apply if designation is recommended.

Submissions on the issues paper are due on 9 March 2007.

On 22 December 2006, the Telecommunications Amendment Act (no 2) 2006 came into force. The Act sets up a transitional mechanism for Schedule 3 investigations already commenced but not completed. The Act has an undertakings regime which is a mechanism for an access provider to supply a service to all access seekers:

- (a) on a voluntary basis that avoids the need for regulation; and
- (b) on terms and conditions agreed between the access provider and the Commission.

The Commission has the option either to complete the investigation under the old process or under the amended Schedule 3 process. The Commission decided to undertake the investigations into amendments to the roaming and co-location services using the new Schedule 3 process in the Act, and informed the relevant access providers of this decision.

The Commission received an application for an undertaking from Vodafone, and written submissions from interested parties on the undertaking were due in March.

From the Courts

FAIR TRADING ACT LITIGATION UPDATE: CRIMINAL PROSECUTIONS RESOLVED OVER THE PERIOD OCTOBER TO DECEMBER 2006

| CASE | DESCRIPTION | RESOLUTION |
|---|---|--|
| Qantas Airways Limited | Breaches of Fair Trading Act for falsely advertising airfares that consumers were unable to obtain for the advertised headline price, and for falsely representing the nature of CAA and insurance charges. | Qantas pleaded guilty to 122 charges of breaching the Fair Trading Act and fined \$380,000 and ordered to pay \$15,860 in costs. |
| Energy Online Limited | Breaches of the Fair Trading Act by making a misleading representation in respect of the price of electricity it supplied. | Energy Online Limited was fined \$140,000 and ordered to pay court costs of \$1,300 and to refund \$860,981 to customers. |
| SINS prosecutions - J's Cars Ltd | Non display of Supplier Information Notice (SIN) cards as required by regulations. | Fined \$3,300 and with court costs of \$130. |
| SINS prosecutions - Paragon Motors Ltd | Non display of SIN cards as required by regulations. | Fined \$2,000 and with court costs of \$1,300. |
| SINS prosecutions - Robmac Holdings Ltd | Non display of SIN cards as required by regulations. | Fined \$1,400 and with court costs of \$300. |
| SINS prosecutions - Urban Enhancement Ltd | Non display of SIN cards as required by regulations. | Fined \$1,200 and with court costs of \$780. |
| SINS prosecution - Auto Kingdom Ltd | Non display of SIN cards as required by regulations. | Fined \$1,000 and with court costs of \$130. |
| SINS prosecutions - Trademark Autos | Non display of SIN cards as required by regulations. | Fined \$800 and with court costs of \$130. |

CIVIL PROSECUTIONS RESOLVED OVER THE PERIOD OCTOBER TO DECEMBER 2006

| CASE | DESCRIPTION | RESOLUTION |
|-------------------------------|--|---|
| FAIR TRADING ACT | | |
| Telecom Mobile (Door to Door) | Alleging that Telecom Mobile misrepresented to consumers their rights under the Door to Door Sales Act 1967. | Court orders declared that TML is not entitled to enforce agreements as they failed to comply with the requirements of s6 of the Door to Door Sales Act pursuant to s5 of that Act. Judgment by consent was sealed on 06.12.06. |

Commission Settlements and Warnings

The Commission entered into settlements with one business and issued warnings to 28 businesses for alleged breaches of the Fair Trading Act over the three month period from October to December 2006.

TELECOMMUNICATIONS

- » Telecom New Zealand Ltd for admitting that it wrongly billed customers twice for the day on which they changed service plans – Telecom to reimburse \$3.3 million to consumers.
- » Nathan's Marketing Limited for allegedly failing to state that cost of a SIM card was not included in the price of a phone.

HEALTH AND NUTRITION

- » Ceres Enterprises Ltd for allegedly falsely representing products were organic when testing had shown the presence of pesticides.
- » Response Direct Publishing Limited for an alleged false or misleading representation that a weight loss patch would burn excess fats and cholesterol.
- » Boxfresh Limited for an alleged misleading representation that meat sold by the trader was organic.

TOTAL PRICE ADVERTISING

- » Coastal Contacts Incorporation for allegedly misrepresenting the price of a contact lens by not including other charges in the headline price.
- » Gulliver's Travel Limited and Zuji for allegedly failing to disclose charges on airfares. Fuel charges were included in taxes and but not included in the headline price.
- » Destinations Unlimited for alleged failure to disclose, or inadequate disclosure of, fees on airfares advertised on website.
- » Ravens Fire & Security Limited for alleged misleading advertising that the price in the Yellow Pages excluded GST.

IMMIGRANT BUSINESS STRATEGY

The Commission entered into one settlement and issued 37 warnings, many to businesses operated by immigrant traders, for alleged breaches of the Consumer Information Standards for country of origin, care and fibre content labelling.

Adjudication Update

MARKET STRUCTURE CLEARANCES DECIDED OVER THE PERIOD OCTOBER TO DECEMBER 2006

| DECISION NO. | DATE REGISTERED | PARTIES/DESCRIPTION | DECISION DATE |
|---|-------------------|---|------------------|
| GRANTED | | | |
| 590 | 6 September 2006 | Toll Owens Limited / John Ray Limited | 11 October 2006 |
| 592 | 21 September 2006 | Solid Energy New Zealand Limited / Newvale Coal Co. Limited | 10 October 2006 |
| 594 | 20 September 2006 | Johnson & Johnson / Pfizer Consumer Healthcare | 8 December 2006 |
| 595 | 24 October 2006 | Fulton Hogan Limited / GJ Beynon Contracting Limited | 19 December 2006 |
| 596 | 17 November 2006 | Owens Corning / Compagnie de Saint-Gobain | 20 December 2006 |
| GRANTED - WITH DIVESTMENT UNDERTAKINGS | | | |
| 589 | 30 August 2006 | CRBF Limited / Carter Holt Harvey Limited | 5 October 2006 |

Media Update

MEDIA RELEASES PUBLISHED OVER THE PERIOD OCTOBER TO DECEMBER 2006

| | |
|---|----------------|
| NZBL to pay \$1.1 million for Mana Coach share acquisition | 2 October 06 |
| Johnson and Johnson applies for clearance to acquire Pfizer Inc | 5 October 06 |
| CRBF Limited cleared to acquire the forestry assets of Carter Holt Harvey Ltd | 5 October 06 |
| Osmose fined \$1.8 million in NZ's biggest cartel case | 6 October 06 |
| Commerce Commission to investigate mobile market | 10 October 06 |
| Qantas fined \$380,000 over misleading adverts | 10 October 06 |
| Toll cleared to acquire John Ray's marshalling assets | 11 October 06 |
| Record settlement returns \$3.3 million to Telecom customers | 12 October 06 |
| Commission approves TCF Draft Code | 12 October 06 |
| Carter Holt Harvey fined \$900,000 for falsely labelling timber | 12 October 06 |
| Vector proposes settlement and agrees to rebalance prices | 13 October 06 |
| Energy Online pays \$1 million for misleading price freeze | 16 October 06 |
| Commission approves updated price for wholesale bitstream access service | 20 October 06 |
| Fulton Hogan Limited applies for clearance to acquire G J Beynon Contracting Limited | 24 October 06 |
| Home insulation must meet claim on label, warns Commission | 27 October 06 |
| Telecommunications Act: Commerce Commission releases revised draft TSO cost calculation | 8 November 06 |
| Consultation begins on Unison administrative settlement | 9 November 06 |
| Commission alleges price-fixing in credit card interchange fees | 10 November 06 |

| | |
|---|----------------|
| Solid Energy cleared to acquire Newvale Coal | 10 November 06 |
| Successful first prosecution under CCCF Act | 15 November 06 |
| Schedule 3 Investigations into amending the Roaming and Co-location Services | 16 November 06 |
| Owens Corning applies for clearance to acquire Compagnie de Saint-Gobain | 20 November 06 |
| Transpower proposes new prices | 4 December 06 |
| Elite Truck Rentals applies for clearance to acquire ORIX Truck Rental | 6 December 06 |
| Commission approves Industry Co-location Code | 7 December 06 |
| Johnson & Johnson cleared to acquire Pfizer Consumer Healthcare | 8 December 06 |
| The Mill Liquorsave fined \$10,000 for misleading flyer | 12 December 06 |
| Commission receives application for bitstream reconsideration from ihug | 12 December 06 |
| Replacement member appointed to Cost of Capital panel | 12 December 06 |
| Commission releases issues paper for mobile market investigation | 15 December 06 |
| Commission receives application for bitstream reconsideration from CallPlus | 18 December 06 |
| Trader fined for clothes without proper labelling | 19 December 06 |
| Draft Determination on cost of relay service for the hearing impaired | 19 December 06 |
| Fulton Hogan cleared to acquire G J Beynon | 19 December 06 |
| TradeMe car dealer fined for lack of SINS | 20 December 06 |
| Owens Corning cleared to acquire Saint-Gobain Vetrotex | 20 December 06 |
| Car finance provider to refund \$12,000 | 21 December 06 |
| Commission receives application for EIR Act exemption from Top Energy Limited | 21 December 06 |
| Foodstuffs applies for clearance to acquire The Warehouse | 21 December 06 |
| Commission to reconsider bitstream decision | 22 December 06 |
| Commission considers variation of Rugby Union decision | 22 December 06 |

Commission media releases are available on the Commission's website at www.comcom.govt.nz

Credit Contracts and Consumer Finance Act Investigations and Compliance Activity Update

The documents Senate Finance provided were, in some instances, so distorted that they were impossible to read.

SENATE FINANCE LIMITED FINED \$59,000 FOR GIVING CUSTOMERS ILLEGIBLE CONTRACT DOCUMENTS

In the December 2005 issue of Communique, the Commission set out its areas of concern regarding the credit industry's compliance with the Credit Contracts and Consumer Finance Act (CCCF Act), which came into force on 1 April 2005.

The first prosecution under the CCCF Act, against Senate Finance Limited, illustrates one particular area of concern – the quality of information provided to consumers about their credit – and the action the Commission will pursue where it finds non-compliance.

Senate Finance Limited, a company providing finance to car buyers, was fined \$59,000 in November 2006 for giving its customers terms and conditions they could not read. The company pleaded guilty to 17 breaches of the CCCF Act, for not adequately disclosing the terms and conditions of its loans.

Seventeen customers who bought cars from one South Auckland car yard were found to have received illegible documents from Senate between the period 25 April 2005 and 2 November 2005. These affected customers were also awarded a total of \$13,700 in statutory damages.

Failing to properly disclose the terms and conditions meant the contracts were unenforceable, and Senate Finance also pleaded guilty to a further eight charges of breaching the Fair Trading Act when it told a customer the contracts were enforceable.

“A car salesman told a customer to ‘use a magnifying glass’ if he was having trouble reading the document”.

Commerce Commission General Manager Geoff Thorn welcomed the penalties and said that ensuring consumer finance companies provide adequate disclosure had been an important focus for the Commission since it started enforcing the CCCF Act in May 2005.

“With no limits on the interest that can be charged, it is essential that consumers understand what they are committing to when entering any credit agreement, which is why the disclosure requirements are written into the legislation. The right to cancel their contract is a key part of the disclosure requirements,” said Mr Thorn, “and if there is a lack of transparency around this right, the relationship between lenders and borrowers is jeopardised.”

The Auckland District Court found that documents Senate Finance provided had been faxed and photocopied, and in some instances were so distorted that they were impossible to read. In one instance, a car salesman at the car yard told a customer to “use a magnifying glass” if he was having trouble reading the document.

“The penalties handed down by the Courts in this prosecution send a very clear signal to all finance companies that, to meet the disclosure requirements of the Act, documents must be legible,” said Mr Thorn. “If the customer cannot read the disclosure, the contract may not be enforceable and any claims that the contract is enforceable, such as sending default notices or taking repossession action, can be a breach of the Fair Trading Act.

“The Fair Trading Act and the CCCF Act set high expectations of standards of behaviour for lenders and the Commission will actively pursue any breaches of these standards,” said Mr Thorn. “This first successful prosecution should leave the credit industry in no doubt as to its obligations to consumers in this area.”

CAR FINANCE PROVIDER TO REFUND \$12,000 TO 143 CUSTOMERS

Failing to provide the correct contract information to consumers, then attempting to enforce some contracts, cost another car finance company \$12,000 in an out-of-court settlement with the Commission.

Falcon Advances Limited will refund over \$12,000 to 143 customers who bought vehicles from Auckland car yards between April 2005 and February 2006.

The company admitted it breached the Credit Contracts and Consumer Finance Act by not giving key information to 951 borrowers, not calculating interest properly, and overcharging those who wished to repay their loans early.

Falcon Advances also admits breaching the Fair Trading Act by telling customers it could enforce the contracts, and taking collection action against 93 people, including repossessing 26 vehicles. In fact, the contracts were unenforceable, because they did not meet the requirements of the CCCF Act.

In the settlement, Falcon Advances agreed to refund all default and collection fees to affected debtors. It has also agreed not to pursue debtors who still owed money after their cars were repossessed and sold. Normally, debtors would have to pay the difference between the amount of their loan, and what the repossessed car was sold for.

“Where contracts don’t meet the legal requirements, credit providers can’t repossess property or call in debt collectors – so there are very strong incentives for credit providers to get it right,” said Commerce Commission’s General Manager, Geoff Thorn.

Mr Thorn said that an out-of-court settlement was appropriate in this case as Falcon Advances had moved to correct the breaches and make refunds to all affected customers. The company has undertaken to provide the correct disclosure to all customers in the future.

CCCF ACT COMPLIANCE ACTIVITY IN 2007

The Commission continues to take action against credit providers where there is evidence of non-compliance with the CCCF Act. In November 2006, the Commission published a newsletter to industry which focused on specific areas of non-compliance, some of which are set out below.

The Commission has 30 active CCCF Act investigations underway. Non-compliance issues raised by current investigations include:

- » Failing to comply with the disclosure requirements of the CCCF Act remains a focus of investigations with a number of active investigations into possible breaches of the CCCF Act for failing to provide any disclosure documents to customers, failing to correctly disclose information, and incorrectly recording information on disclosure documents.
- » Under the CCCF Act any establishment or other credit fee charged must be reasonable.
- » Creditors must ensure that they clearly disclose what a fee is for, and when it is payable.
- » Creditors must not unreasonably require debtors to take out credit related insurance. Debtors should be given a choice as to whether to take out a particular insurance product.

With a wide range of CCCF Act breaches being found in the credit industry, the Commission would welcome complaints about creditors failing to comply with any aspect of the CCCF Act.

2006 in Review

2006 was a busy year for the Commerce Commission with a number of high-profile cases attracting record penalties from the Courts, as well as record levels of media and public interest. At the end of the year, the *New Zealand Herald* named Commerce Commission Chair Paula Rebstock its joint New Zealander of the Year in recognition of the year's achievements.

March. \$10 million of refunds for credit card fees. The ANZ National Bank was fined a record \$1.35 million and agreed to pay \$10 million in compensation after customers paid hidden fees on foreign currency transactions. The BNZ and Westpac were also fined over the fees and agreed to refund customers. Proceedings are ongoing against Kiwibank, ASB, TSB, American Express, Diners Club and The Warehouse Financial Services.

April. Wood chemicals cartel. A record \$3.6 million in fines was imposed on the Koppers Arch companies for participating in a cartel in the wood preservative chemicals industry. Later in the year, the Osmose companies were fined \$1.8 million for their role, and an executive involved in the cartel received criminal convictions for lying to the Commission's investigators.

May. Fake organics cost butcher. Jason Arthars was the first butcher in New Zealand to be fined for falsely labelling meat as organic. He paid \$10,000 for labelling goods as "organic" and "allergy free" when he knew the claims were false. The judge noted that fake claims could harm other businesses by undermining confidence in the organics industry.

June. Rugby salary cap. The Commission authorised a salary cap for rugby players in the Air New Zealand Cup Competition (formerly known as the NPC). The salary cap limits the amount each provincial union can pay in salaries, encouraging a better spread of good players throughout all the competing unions. The Commission allowed the cap as it considered the benefits to the public justified the anti-competitive arrangement.

August. Trans Tasman merger protocol. The Commission signed an agreement with its Australian counterpart, the ACCC, to streamline merger applications, which increasingly involve companies and markets on both sides of the Tasman.

October. Fine for unauthorised merger. New Zealand Bus Limited was fined \$500,000 and ordered to pay around \$600,000 in costs after it acquired shares in Mana Coach Services without clearance from the Commission. The Court found the acquisition was anti-competitive.

October. Mobile market review. The Commission announced it would investigate possible changes to the regulatory framework for mobile telecommunications. Telecommunications Commissioner Douglas Webb said the Commission was concerned about the price of mobile calls and considered competition should bring lower prices.

December. Telecommunications Act (No 2). The Act came into effect on 22 December and substantially changed the way the telecommunications industry is regulated, introducing new responsibilities for the Commission.

CONTACT DETAILS

To contact the Commission with information about unfair or misleading trading practices, or anti-competitive behaviour by businesses:

- » Call the Contact Centre on 0800 94 3600;
- » Write to Contact Centre, Commerce Commission, PO Box 2351, Wellington; or
- » Email contact@comcom.govt.nz

For media releases, Commission adjudication decisions, submissions, annual reports, statements of intent, publications and more, visit the Commission's website at www.comcom.govt.nz