

Introduction

1. Good evening and thank you for inviting me to speak with you today.
2. Last year the Commission marked the twenty year anniversary of the Commerce Act and Fair Trading Act. It was an opportunity for us to reflect on New Zealand's competition law, how it has developed in the last twenty years, and how it might develop in the future.
3. The Commerce Commission is unashamedly pro-market, because of the benefits competition brings. A free market economy is the best way to allocate a country's precious resources, and delivers lower prices, innovative products and more choice.
4. To deliver those benefits, markets need rules; they cannot function without them. With effective competition law, businesses can freely compete on their merits, but they can not collude with each other, exploit a monopoly position or deceive their customers. It is those market rules that ensure New Zealanders can reap the benefits of their market economy.
5. The debate that emerged in the 1980s about the need for competition law is no longer heard. There will always be discussion about how the Acts are implemented by the Commission and interpreted by the Courts, and how they should evolve. But there are few in New Zealand, today, who would question that both the Commerce Act and Fair Trading Act are a necessary and valuable part of our commercial environment.

Commission's recent Commerce Act actions

6. In the twenty years since the Commerce Act was substantially revised, the enforcement landscape has certainly changed. The Commission prosecuted its first price-fixing case in 1990, and it resulted in five dollar fines for the 14 vegetable growers involved.
7. Last year the Courts fined the Koppers Arch and Osmose companies over \$5 million for participating in a cartel in the wood preservatives industry: as the scale of offending has increased, so has the response of the Courts.
8. Without going into too much detail, I'd like to briefly note some of our most recent actions under key provisions of the Commerce Act.

9. Section 27 of the Act prohibits persons from entering into arrangements that substantially lessen competition. We warned a safety equipment company in July for attempting to reach an arrangement with its suppliers - its employees emailed the suppliers urging them not to deal with a new entrant competitor.
10. As I mentioned, 2006 saw a record fine for cartel behaviour in the wood chemicals industry. Fines totaling more than five million dollars have now been imposed on the Koppers Arch and Osmose companies in relation to breaches of section 30 of the Act, which prohibits price fixing, market sharing and bid rigging. A number of company executives were also prosecuted, with one Australian-based executive receiving a record individual penalty of \$100,000.
11. Individuals and companies in the cartel were also found to have misled the Commission in the course of its investigation, and were found guilty on criminal charges under section 103 of the Act.
12. Section 47 of the Commerce Act prohibits persons from acquiring assets of a business or shares if that acquisition would substantially lessen competition. In July last year the High Court stopped New Zealand Bus Limited from acquiring shares in Mana Coach Services because the acquisition would have substantially lessened competition. Last month the company faced fines and costs totaling over a million dollars.
13. One of the provisions of the Act was used for the first time last year, when the Commission successfully sought a Cease and Desist order in relation to cargo marshalling services at Northport. The use of a Cease and Desist Order for the first time established that these powers are a useful tool for effecting immediate Commerce Act compliance where there is ongoing harm to the competitive landscape.
14. So the prohibitions of the Commerce Act are not academic. Both large and small New Zealand companies are breaching the Commerce Act, some intentionally, others unwittingly. The result is a distortion of the competitive process which will ultimately harm competitors, consumers and the New Zealand economy.
15. While the Commission continues to pursue prosecutions across a range of Commerce Act areas, we have identified priority areas to focus our enforcement activity. Our priorities are targeting cartels, and investigating breaches of section 36 relating to the use of market power.

Today's presentation

16. Today, I will be focusing on cartels, and the impact they can have on your business.

17. I will discuss some of the steps you can take as managers to increase understanding of the Commerce Act and promote compliance in your organisation.
18. There are some practical ways to detect cartel behaviour in your own company, or among your suppliers, and I will talk a little about detecting and preventing anti-competitive behaviour.
19. And finally, I will tell you about a judgment the Commission received from the High Court last Friday that has far-reaching consequences for our ability to pursue cartel participants who live overseas.

The harm caused by cartels

20. It is generally accepted that cartels are the worst form of anti-competitive behaviour. They harm competitors, consumers and the New Zealand economy by keeping prices high and insulating their members from competitive pressure.
21. No wonder cartels are attractive to their members. A cartel that has cornered the market becomes, in effect, a monopoly. As such it can charge inefficiently high prices, while feeling little pressure to deliver quality products or services. Membership in a cartel removes the stress and uncertainty of operating in a competitive market – members can sit back and relax, knowing that their cartel profits are not dependent on the normal ingredients of business success.
22. Cartel behaviour is opposed to the public interest, but it is not always easy for the public to understand how cartel activity affects them. This is because cartels often exist in industries that do not sell directly to the end consumer.
23. They are most commonly found in industries that supply commodity or undifferentiated type products to a manageable number of manufacturers or service providers. People sometimes talk about the “three ‘c’s”, the industries within which overseas cartels have widely been found: concrete, construction, and chemicals.
24. Cartels are an international problem, and overseas competition agencies have prioritized cartel work, resulting in record penalties and a steep rise in the number of prosecutions taken.
25. Last year the US Department of Justice obtained the largest fine ever for a purely domestic anti-trust investigation; \$29 million for a company which fixed the price of concrete in the Indianapolis area. In the D-RAM case, the Department of Justice also obtained the second highest ever criminal antitrust fine in US history, a fine of \$300 million on Samsung and its US Subsidiary. This brings the total fines imposed in that case to over \$646 million, and several executives, including non-US citizens, have been sentenced to jail terms.

26. In January 2006, the Canadian Superior Court of Justice imposed a record Canadian fine of \$12.5 million for each of the parties to a cartel in the carbonless paper market. In addition, key personnel were removed from positions in the participating companies.
27. And last month, competition regulators in the European Union imposed their biggest fine ever for cartel behaviour, imposing nearly a billion euros in penalties on lift makers Otis, Schindler, ThyssenKrupp and Kone.
28. The total penalties of 992 million euros were imposed for rigging bids for procurement contracts, fixing prices, sharing out projects, carving up markets and exchanging sensitive information. The authority noted that the effects of the cartel would be felt for the next fifty years, as long-term maintenance contracts are a major part of the lift industry's business model.
29. So, cartel work is an international priority, but it is particularly important for a small economy like New Zealand's, where we are highly dependent on imports and exports, relative to other countries. Most of the cartels coming to the Commission's attention are international cartels. This means New Zealand producers can be facing cartel prices for key inputs in their production process, but may have to compete with overseas companies who do not face similar cartel prices for key inputs. As a result, New Zealand companies may be less competitive internationally.
30. New Zealand's small economy is particularly vulnerable to the effects of international cartels, and makes it even more important that the Commission works with our fellow agencies overseas to find and break these international cartels.
31. But domestic cartels do exist in New Zealand: the Commission is currently investigating nine alleged cartels that are purely New Zealand based.

What managers can do

32. Now I would like to turn to the role of managers, and the part you can play in ensuring your organisation complies with the Commerce Act.
33. The New Zealand Institute of Management's own code of ethics notes that managers need to maintain high standards of performance, integrity and ethical and moral behaviour.
34. It is good to see that your members must accept the code of ethics to join the New Zealand Institute of Management, and I note that a number of the statements in your code are directly relevant to the matters I am discussing today.

35. Among other commitments, NZIM members agree to:
- discharge responsibilities as a manager with integrity, not misuse authority or office;
 - have regard for the interests of society in acting loyally and honestly in carrying out the policies of the organisation; and
 - comply with the laws of New Zealand.
36. These are important commitments, and it is safe to say that as long as you adhere to your own code of ethics, you will have nothing to fear from the Commission.
37. The NZIM has a leadership role in the business community, and your members are leaders in their own organisations.
38. With that in mind, the Institute and its members are well placed to champion a compliance culture.
39. Rather than seeing compliance as a cost of doing business that brings no other benefits, I hope that today's managers recognise that best practice compliance will keep their organisation on track, and help it to compete and prosper.
40. It is worth noting some particular risks that managers should bear in mind when considering the implications of anti-competitive behaviour.
41. It is sometimes the case that managers are pressured to "do the dirty work" on others' behalf, and you may be encouraged by your board or company director to get involved in collusive conduct.
42. Managers should understand that they are exposed as individuals if they participate in collusive behaviour. You do not need to be an owner or director to be prosecuted as an individual under the Commerce Act.
43. Managers should also be aware that it is possible to create conditions in their company that inadvertently encourage collusive behaviour. I will discuss this in more detail later on, but it is worth noting that unrealistic expectations can drive underhand behaviour. Staff should not be put in the position where they need to cheat to meet their targets.
44. I would also emphasise that you do not need to be involved in a cartel the whole way through, to be liable. Cartel participants have told us "I wasn't involved at the start" or "I got out after a few years" but that doesn't make a difference in the eyes of the law. Any collusive conduct will breach the Commerce Act, whether or not you were in the cartel for the long haul.

Complying with the Commerce Act

45. For responsible companies that wish to avoid the consequences of breaching the Commerce Act, there are a few simple steps to take to promote compliance.
46. You can establish internal compliance programmes to educate staff. The Commerce Commission does not run or endorse company compliance programmes itself – to do so would risk compromising our independence. But many law firms do help businesses develop compliance programmes, and seeking legal advice is a good place to start.
47. Industry bodies are a valuable way of sharing information on compliance – but they are also an opportunity for people to break the law as they share information with competitors and make connections that can result in collusion. We recommend that you have independent advisers at meetings where competitors are present. They can intervene if the discussion goes off course.
48. It is particularly important to monitor your company's behaviour if it has a substantial degree of market power, or if you operate in a relatively concentrated market with just a handful of major players. These are the conditions that are conducive to anti-competitive behaviour.

What to look for

49. Collusive anti-competitive conduct is difficult for the Commission to detect, and it may be almost as difficult for you to discover it in your own company, let alone among your suppliers.
50. In our recent experience, key players in collusive arrangements include Chief Executives, General Managers and sales management. Pricing and tender preparation specialists in business-to-business markets can also be involved.
51. So what are the warning signs that people in your business are breaking the law, or to look at it another way, what activities might seem suspicious to an outside agency like the Commerce Commission?
52. A cosy relationship with your competitors can be one sign that collusive activity is occurring. Do you or your managers regularly meet competitors when they attend industry meetings and industry conferences? Do you have lunch with a competitor, or play golf at the same club?
53. In the car wash cartel we successfully prosecuted, the initial agreement was reached between oil company executives who met because their children attended the same kindergarten.
54. In a small country like New Zealand, it is more than likely that you will meet competitors in a social setting. You should be aware that what starts out as an

apparently harmless conversation with a competitor can be the first step towards collusive behaviour.

55. International meetings can also be breeding grounds for collusion. One alleged cartel we are currently investigating started at an international industry forum, and was maintained through that forum for over a decade.
56. Another suspicious sign is when the good news about company performance really is too good to be true. You may want to look more closely if your company consistently achieves what some may call unrealistic sales targets, and staff always collect their target bonus.
57. Do your sales people always manage to win some contracts, put prices up and maintain market share? Or do you notice that sales and market share are maintained at a steady level, but not growing? If your staff has high and unattainable targets and performance-dependent pay, they may feel they “need” to break the law just to maintain their income levels.
58. Another question worth asking is, do your operational people think there is something funny going on?
59. Does your sales staff feel they could win key contracts if only they were allowed to compete vigorously? Does it sometimes seem that competitive bids they develop are being blocked by someone higher up the management ladder? Your staff need to know that it is ok to raise these issues, and that they can be raised outside the normal management chain.
60. It is crucial to encourage a culture of openness and ensure that staff knows how to blow the whistle. You should undertake compliance training and ask for staff to sign a form stating that they have completed the training and will reveal any untoward activity. We are currently investigating one cartel that came to light through this approach.

Leniency and cooperation

61. So what happens if you do discover the worst, and find out that someone in your organisation is involved in anti-competitive behaviour?
62. The first thing to consider is that the company or individual may be eligible for leniency or cooperation.
63. Leniency offers immunity to the first cartel member to break ranks and advise us of a cartel. Cooperation means that those who assist our investigations can be treated more leniently than those who refuse to cooperate.

64. International research shows that most cartel members know their conduct is unlawful and will go to great lengths to keep their agreement secret. A leniency and cooperation programme creates incentives for cartel members to break ranks and admit their behaviour, and is one of the best ways to discover these secret arrangements.
65. When the Commission introduced its leniency and cooperation policies in late 2004, some business commentators said that New Zealand did not have a cartel problem. The fact that two leniency applications were received the day after the policy's introduction suggests otherwise, and New Zealand businesses no longer say that cartels are not a problem here.
66. The leniency programme has resulted in eight applications to date, and we expect a number of cartel matters currently being investigated by the Commission will become public in the coming year. The revised cooperation policy, which was announced at the same time, has also significantly increased the number of parties coming to us.
67. When those matters are made public, we believe the businesses community will gain an even better understanding of why attacking cartels is important for New Zealand's economic well being.

Cooperating with the Commission

68. The difference between leniency and cooperation is simple: if the conduct discovered is not already the subject of a Commission investigation, an application for leniency can be made. If an investigation is already underway, then leniency is not an option, but a cooperation agreement may be sought under our Cooperation Policy.
69. The opportunity to cooperate with the Commission is available to all parties involved in an investigation and more than one cooperation agreement can be entered into if appropriate.
70. Full, free, and frank information is the key to satisfying any agreements sought under the leniency and cooperation policies. Those parties who do not fulfill their obligations risk their agreements being revoked, and their information used in proceedings against them.
71. Regardless of how a matter has come to the Commission's attention, or whether parties have been granted leniency or entered cooperation, there is no question that complying with a Commission investigation takes time.
72. If the Commission is investigating your company, or you come forward, you should allow for a considerable amount of management time to be able to respond properly to the Commission's investigation. We often find that, if sufficient time

is not given to provide information early on, even more company time and resources will be required further down the track.

73. When an investigation is underway, the interests of individuals and of the organisation may not be identical. Executives and/or managers may require their own independent legal advice due to their potential personal exposure to Commerce Act proceedings. You should not try to discourage or prevent this from happening.
74. Another important factor to consider is whether an internal investigation is really the most appropriate way of uncovering anti-competitive behaviour. It may be a better strategy to bring in external, independent investigators.
75. In one cartel the Commission is investigating, some parties brought in external investigators who discovered the full extent of wrongdoing within the company. Others ran internal investigations, which have discovered no evidence of collusion. It is worth considering that an internal investigation may result in cartel members being asked to investigate the cartel they are involved in, a process unlikely to deliver credible results.
76. Of course, you may also want to get in touch with the Commission if you feel your company is the victim of anti-competitive conduct. In this instance, contact the Commission through our contact centre or directly contact our General Manager Geoff Thorn.
77. There are some ways to protect your company from being subject to cartel behaviour by suppliers. If you are a buyer, you could copy a trend that has emerged in the United States, and specify that tenders should be certified to state that the bidder has not colluded in the preparation of the tender.
78. You should also pay special attention to bids that come directly from the company's overseas head office, without input from their New Zealand office. Our experience is that these kinds of bids are more likely to be subject to bid rigging or price fixing. We are investigating cartels in which this has been the practice.

Building a compliance culture

79. I have spoken about how to detect anti-competitive behaviour and what to do if it is discovered. But there are a number of proactive ways that you can develop a compliance culture in the organisations you lead. In the case of anti-competitive conduct, prevention is definitely better than the "cure" of legal action.

80. One of the simplest ways to build a compliance culture is to introduce or revitalise a whistle-blowers policy. Not only does this make you more likely to discover illegal behaviour if it occurs, it also has a deterrent effect, and sends a clear message about your organisation's values.
81. You can keep a watching brief on cases taken by the Commission, and share the lessons with your organisation. The Commission publishes a large amount of information each year on its activities, from our Annual Report and newsletter *Communique*, to the decisions and media releases posted on our website. I encourage you to familiarise yourself with our work to better protect your company from the risk of non-compliance.

Recent judgment on jurisdiction

82. I mentioned earlier that the Commission has just received an important judgment from the High Court that will assist with our cartel prosecutions in the future.
83. Justice Williams has ruled that the Commerce Commission can proceed with its penalty action against three defendants in the wood chemicals cartel case. The defendants had sought to escape the Commission's case, on the basis that they lived overseas and had not engaged in illegal conduct in this country.
84. The High Court set aside the protests of all defendants and held that people who enter into cartel agreements overseas, but which are aimed at a New Zealand market, can be pursued in the New Zealand courts.
85. The decision confirms that the Commerce Act applies not just to companies and individuals in New Zealand, but also to overseas residents who conspire to breach the Act and communicate with people in New Zealand, or have people in New Zealand acting on the conspiracy.
86. This ruling is an important one for the Commission, and sends a clear message that those who would break New Zealand laws cannot hide behind their location overseas.
87. This is particularly important in an increasingly globalised business environment, where businesses operating in New Zealand are very likely to be based abroad, or have interests overseas, particularly in Australia.
88. Companies and individuals involved in – or contemplating – anti-competitive conduct will now be aware that operating from a Sydney office, or moving to a villa in Tuscany, will not offer protection from the jurisdiction of New Zealand courts, where there is good arguable evidence of a breach.

89. The High Court's finding should further undermine the confidence of those involved in collusive behaviour.

Conclusion

90. In conclusion, cartels and anti-competitive conduct are harmful to businesses, consumers, and the economy.
91. Fortunately there is a growing awareness of the harm caused by collusive behaviour, and the steps that can be taken to prevent it.
92. Managers are well placed to raise the level of compliance with business law in New Zealand.
93. There are a number of ways you can build a compliance culture in the organisations you work in.
94. You can implement compliance training and whistle-blower policies. You can build your own understanding of Commerce Act compliance and urge others to develop their own understanding. And, should your company ever break the law or be involved in an investigation, you can advise on how best to cooperate with the Commission.
95. Those are specific actions that can improve compliance. But perhaps more important is the role of managers in ensuring that everyone in the organisation understands not only the risks of non-compliance, but also the benefits of compliance.
96. There is more to compliance than avoiding legal risk. A strong compliance culture means your organisation is doing the right thing by its customers, is a good corporate citizen, and is making its profits through innovation and efficiency, and meeting your customers' needs, not through anti-competitive conduct.
97. To put it simply, a strong compliance culture is the sign of a healthy business, well equipped to face the challenges of a competitive marketplace.
98. Thank you for your time today, and I am happy to take any questions or comments on any aspect the Commission's work.