

The Commerce Act

## Case study

# The southern ophthalmologists

This case study looks at the Commerce Commission's case against the Ophthalmological Society and five ophthalmologists under section 27 of the Commerce Act.

Southland Health had a long waiting list for routine cataract surgery and received extra government funding to clear the backlog. At the time, there was only one specialist eye surgeon, or ophthalmologist, in the area. Initially, he was not prepared to do the surgery below his usual rate, so Southland Health entered into negotiations with two Australian ophthalmologists.

The local ophthalmologist objected to Southland Health hiring the two Australians, and claimed they would be placing his patients at risk by performing surgery, then leaving the country. He and a number of other South Island-based ophthalmologists came to an arrangement that they would not provide:

- pre- and post-operative care of the patients undergoing surgery
- the professional oversight needed by one of the surgeons.

As a result, the Australian ophthalmologists withdrew their proposal to carry out the surgery.

After an investigation, we prosecuted the Ophthalmological Society of New Zealand and five individual ophthalmologists under section 27 of the Commerce Act. We alleged that they had entered into and given effect to anti-competitive arrangements that were designed to prevent or hinder entry into the market.

### What was the market?

The market was defined as the market for cataract surgery in Southland.

### Was there a substantial lessening of competition in one or more markets?

The High Court found the defendants had reached an arrangement or understanding to oppose the Australian ophthalmologists undertaking the surgery in breach of section 27 of the Commerce Act. The purpose of the arrangement was to oppose entry by the Australian ophthalmologists and therefore to prevent competition from ophthalmologists outside the region who did not have the support of the local ophthalmologist.

This case study should be read alongside our fact sheet *Agreements that substantially lessen competition* at [www.comcom.govt.nz/slc-agreements](http://www.comcom.govt.nz/slc-agreements)

The Court found that the arrangement had the effect of substantially lessening competition in the market for cataract surgery in Southland. Prices for cataract surgery fell significantly with the prospect of competition. This showed that entry by either of the Australian ophthalmologists would have stimulated increased competition, with benefits to Southland Health's patients.

The arrangement created a barrier to entry that entrants who had the local ophthalmologist's support did not face. It prevented the Australian ophthalmologists from entering the market, and reduced competition relative to what would otherwise have occurred. The effect on competition was likely to last for 18-24 months and this was one of the reasons the Court considered a substantial lessening of competition had occurred.