IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-2957
[2026] NZHC 492

UNDER	the Commerce Act 1986
BETWEEN	TE KOMIHANA TAUHOKOHOKO | COMMERCE COMMISSION Plaintiff
AND	ALDERSON LOGISTICS LIMITED First Defendant
	SUPA SHAVINGS (2022) LIMITED Second Defendant

Hearing:	3 February 2026
Appearances:	S Ladd KC / P Comrie-Thomson for the Plaintiff V Fowler / L Wright for the Defendants
Judgment:	6 March 2026

JUDGMENT OF GARDINER J

This judgment was delivered by me on 6 March 2026 at 3.00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Counsel/Solicitors:
Cuncannon, Auckland
Shortland Chambers, Auckland
Webb Henderson, Auckland

Introduction

[1] Alderson Logistics Limited (ALL) and Supa Shavings (2022) Limited (SS2022) (together, Defendants) are part of the Alderson group of companies (the ALL Group). The ALL Group specialises in supplying transportation and related logistics to New Zealand's poultry industry.

[2] In May 2022, ALL and SS2022 acquired the assets of ABS Carriers Limited (Mooreys) and Supa Shavings Limited (Supa Shavings). These businesses supplied wood shavings for bedding to chicken and goat farmers in the Waikato region.

[3] Before the acquisitions, Mooreys and Supa Shavings were the two largest suppliers of bulk wood shavings in the Waikato region and were each other's closest competitor. They had a combined market share of at least 70 to 80 per cent. The acquisitions had the effect of eliminating the competition that had existed between them, which would otherwise have continued.

[4] After Te Komihana Tauhokohoko | the Commerce Commission (Commission) investigated, the Defendants accepted that they had contravened the Commerce Act 1986 (Act) because the acquisitions had, and were likely to have, the effect of substantially lessening competition in the relevant markets. The Defendants undertook to divest the Supa Shavings business. Ultimately, after a formal two-year marketing and sale process, divestment proved unfeasible.

[5] The Commission and the Defendants have agreed to recommend to the Court the imposition of a final penalty of $420,000 under s 83 of the Act. The Commission supports that penalty, but notes that, for the Defendants' co-operation and divestment efforts, a higher penalty would have been justified.

[6] In this judgment, I accept that the recommended penalty falls within the appropriate range. I also express my views on the relevance of certain factors to the penalty assessment.

The agreed facts

The ALL Group

[7] The ALL Group is owned by Andrew and Susan Alderson. At all material times, ALL and SS2022 were interconnected persons and bodies for the purposes of ss 2(7) and 47(2) of the Act.

[8] Mr and Mrs Alderson own other companies (including Alderson Poultry Transport Limited) which provide transport and logistics services to the poultry industry, but which are not interconnected bodies corporate for the purposes of the Act.

The supply of wood shavings for use as animal bedding

[9] Wood shavings are usually produced as a by-product of processing timber. The shavings are used by farmers as bedding for animals such as poultry, goats, dairy cows and horses. Chicken and goat farmers use wood shavings as an important input to keep chickens and goats dry, warm and healthy, which positively affects the yield and profitability a farmer achieves. Wood shavings used for chickens and goats must be dried and untreated (i.e. free of chemicals).

[10] The use of wood shavings meets animal welfare requirements for animal bedding imposed by the Ministry for Primary Industries | Manatū Ahu Matua and the Royal New Zealand Society for the Prevention of Cruelty to Animals. Poultry processors often require chicken farmers to use wood shavings for animal bedding, including requirements to use wood shavings that can be tracked back to their source and satisfy strict biosecurity measures.

[11] While other products can be used as animal bedding, there are no perfect substitutes for wood shavings for use as animal bedding for chickens and goats.

[12] Suppliers of wood shavings collect shavings from timber mills. Wood shavings are then supplied to farmers or directly to poultry businesses for use as animal bedding either in bulk form (by a supplier to a farmer in large quantities by truck or trailer) or in baled form (through a retailer). Suppliers of wood shavings in bulk form

require storage facilities because farmer demand does not necessarily align with timber mill supply.

[13] As a result of transport, handling and storage costs, it is more economic for suppliers of wood shavings in bulk form to deliver wood shavings to farmers located closer to timber mills and/or storage facilities.

[14] For these reasons, the supply of wood shavings in bulk form requires careful logistical management to coordinate the availability of shavings from timber mills and the supply of shavings to farmers.

The acquisitions of the Mooreys and Supa Shavings assets

[15] Prior to September 2021, the ALL Group was involved in poultry transportation but was not involved in the supply of wood shavings.

[16] In September 2021, ALL acquired that part of the business of R.L.S Transport Limited relating to the distribution of wood shavings to chicken farmers (which it then operated through a newly incorporated company, A1 Shavings Limited (A1 Shavings)). This was ALL's first step into supplying wood shavings.

[17] Mooreys, trading as "Animal Bedding Supplies" and "Moorey Animal Bedding", and Supa Shavings supplied bulk and baled wood shavings for animal bedding to chicken and goat farmers in the Waikato region and adjacent locations. They were each other's closest competitor in these markets.

[18] Between January and April 2021, representatives of the ALL Group engaged in negotiations with Supa Shavings regarding acquiring the Supa Shavings business, but no agreement was reached at that time.

[19] Between November 2021 and April 2022, representatives of the ALL Group engaged in negotiations with Mooreys and on 1 April 2022, ALL and Mooreys entered into a sale and purchase agreement for the purchase of the assets of the Mooreys business (Mooreys Acquisition).

[20] In November 2021, discussions between representatives of the ALL Group and Supa Shavings resumed and on 4 May 2022, SS2022 and Supa Shavings entered into a sale and purchase agreement for the purchase of the assets of the Supa Shavings business (Supa Shavings Acquisition).

[21] The Mooreys Acquisition became unconditional on 22 April 2022 and the Supa Shavings Acquisition became unconditional on 20 May 2022 (together, Acquisitions). Both Acquisitions completed on 27 May 2022.

[22] Neither ALL nor SS2022 sought clearance under s 66 or authorisation under s 67 of the Act for the Acquisitions.

[23] Following the completion of the Acquisitions, from around August 2022, SS2022 materially raised its prices for the supply of bulk wood shavings in the markets.

[24] The Defendants rationalised their businesses so that:

(a) the Mooreys business supplies bulk wood shavings;

(b) the Supa Shavings business supplies baled wood shavings; and

(c) ALL supplies wood shavings to both businesses.

[25] In September 2022, the Commission received a complaint in relation to the Acquisitions. The Commission notified the Defendants that it was making inquiries on 30 September 2022, and it formally opened an investigation into the Acquisitions on 18 January 2023.

Supply shock from June 2023

[26] From around June 2023, there was a decline in the availability of wood shavings for use as animal bedding from timber mills in the Waikato region and areas adjacent to the Waikato region because of:

(a) a slowdown in timber processing; and

(b) an increase in the demand for wood shavings from an unrelated company, to manufacture wood pellets sold as a heating fuel.

[27] This "supply shock" negatively affected the supply of wood shavings to ALL and SS2022.

[28] Consequently, from June 2023, ALL Group:

(a) pulled back its supply to customers to only chicken growers, given their reliance on wood shavings from a regulatory compliance perspective; and

(b) only supplied other customers (primarily goat customers) on an ad hoc basis as supply permitted.

[29] Although other products are regarding as inferior for goats and are not preferred by goat farmers, they were used by goat farmers in place of wood shavings after June 2023 when the prices of wood shavings increased. Chicken farmers continued to use wood shavings despite the price increases.

[30] The Defendants say that there has been a continued decline in the availability of wood shavings, which has increased the cost of wood shavings for ALL. ALL says it has passed on part of the increased cost to its poultry customers and absorbed part of the increased costs.

[31] Since approximately November 2024, there are new suppliers supplying wood shavings to chicken growers. In November 2024, a major customer of ALL transitioned a proportion of its demand for wood shavings from ALL to alternative suppliers. In September 2025, another major customer informed ALL that it will shift a proportion of its demand for wood shavings from ALL to an alternative supplier.

[32] Following (and because of) the loss of demand from those customers, the ALL Group has recently increased supply to other customers, including goat and dairy customers.

The anti-competitive conduct

[33] At all material times, there were markets for the bulk supply of wood shavings for use as animal bedding to:

(a) chicken farmers in the Waikato region and adjacent locations (Chicken Bedding Market); and

(b) goat farmers in the Waikato region and adjacent locations (Goat Bedding Market),

(together, the Markets).

[34] ALL and SS2022 accept that the Acquisitions had, and were likely to have, the effect of substantially lessening competition in the Markets.

[35] They accept that the Acquisitions had, and were likely to have, the effect of substantially lessening competition in the Markets because:

(a) prior to the Acquisitions, Mooreys and Supa Shavings were the largest suppliers in the Markets, with a combined market share of at least 70 to 80 per cent;

(b) prior to the Acquisitions, Mooreys and Supa Shavings were each other's closest competitor in the Markets;

(c) the Acquisitions eliminated the competition that had existed between Mooreys and Supa Shavings in the Markets;

(d) competition would have continued between Mooreys and Supa Shavings in the Markets absent the Acquisitions;

(e) at least until around November 2024, other suppliers in the Markets supplied on an ad hoc basis only, had small market share, and did not constrain the Defendants in the Markets, including from increasing prices above competitive levels;

(f) suppliers of baled wood shavings and alternative animal bedding products did not constrain the Defendants in the Markets at the time of the Acquisitions and, in the case of chickens, did not constrain the Defendants after the Acquisitions;

(g) new entry or expansion, or the threat of new entry or expansion, did not constrain the Defendants in the Markets (at least until November 2024), including as a result of challenges existing and potential industry participants face in:

(i) securing access to a sufficient supply of wood shavings from timber mills; and

(ii) matching the timing of that supply of wood shavings with demand for those wood shavings.

[36] Accordingly, the Defendants admit two contraventions of s 47(1) of the Act in the Chicken Bedding Market and in the Goat Bedding Market.

The Court's approach to recommended penalties

[37] Since 1994 in *Commerce Commission v New Zealand Milk Corporation Ltd*, and in numerous subsequent cases (including in cases under s 47 of the Act), the Court has acknowledged that agreed penalty proposals are in the interests of both the parties and the community, in that they enable early disposal of proceedings to avoid potentially complex and lengthy litigation.[1]

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1 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 733. See also *Commerce Commission v First Gas Ltd* [2019] NZHC 231 [*First Gas*] at [3] and *Commerce Commission v GEA Milfos International Ltd* [2019] NZHC 1426 at [11].

[38] Nevertheless, the Court must be satisfied that the final figure proposed for its approval is within the appropriate range, having regard to the objectives of the Act and the circumstances of the case before it.[2] It is not necessary that each step of the parties' proposed methodology is accepted by the Court. Rather, as is the case with sentence appeals in the criminal context, it is the Court's assessment of the final figure that matters.[3]

The Court's framework for penalty assessment

[39] Section 47 of the Act prohibits a person from acquiring assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

[40] Section 83 provides for the court to order pecuniary penalties for contraventions of s 47. Section 83(2) requires the court to have regard to relevant matters, including:

> (a) the nature and extent of the act or omission;
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> (b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission;
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> (c) the circumstances in which the act or omission took place; and
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> (d) whether or not the person has previously been found by the court in proceedings under this Part to have engaged in any similar conduct.

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2 If not so satisfied, the Court will decline to impose the agreed penalty and will impose the penalty it considers appropriate. See for example *Commerce Commission v Prices Pharmacy 2011 Ltd* [2020] NZHC 1176.

3 *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45], citing *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285 and *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd* (2004) ATPR 48,848 at 48,855. See also, for example, *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) [*Alstom Holdings*] at [18]; *Commerce Commission v Mondiale Freight Services Ltd* [2022] NZHC 1370 at [29]; *Commerce Commission v Objective Corporation Ltd* [2022] NZHC 1864 [*Objective Corp*] at [5]; and *First Gas*, above n 1, at [45].

[41] The Court has confirmed that the proper approach in setting pecuniary penalties is broadly to follow the established approach for criminal sentencing,[4] but recognising that the primary objective of penalties for breaches of the Act is specific and general deterrence, whereas in the criminal jurisdiction, deterrence is one objective of sentencing and not necessarily the dominant consideration.[5]

[42] The approach to setting penalties for breach of s 47 is:[6]

(a) determine the maximum penalty;

(b) establish an appropriate starting point for the offending that will achieve the objective of general and specific deterrence, in light of the relevant factors;

(c) adjust the starting point to discount or increase the penalty on the basis of any considerations specific to the defendant;

(d) review the totality of the penalty to confirm it is proportionate to the offending.

Maximum penalty

[43] On 5 May 2022, the maximum penalty for a breach of s 47 increased under s 83(3). The maximum penalty for a company must not exceed the greater of $10 million or either:

(a) if the court is satisfied the contravention occurred in the course of producing a commercial gain, and the value of commercial gain can be readily ascertained, three times the value of the commercial gain resulting from the contravention; or

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4 See for example, *First Gas*, above n 1, at [8]; *Alstom Holdings*, above n 3, at [14]; *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011 at [16]; and *Commerce Commission v New Zealand Diagnostic Group*, above n 3, at [14].

5 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [12]-[14].

6 *First Gas*, above n 1, at [41]; *Objective Corp*, above n 3, at [7].

(b) if the commercial gain cannot be readily ascertained, 10 per cent of the turnover of the person and its interconnected bodies corporate in each accounting period in which the contravention occurred.

[44] In this case, relevant conduct occurred both before and after the increase to the maximum penalty. The second acquisition went unconditional and both Acquisitions completed after 5 May 2022, which was the point at which the Defendants could give effect to the Acquisitions and the consequences of the Acquisitions began to be felt in the Markets. Accordingly, this case falls under the current s 83(3) maximum penalty provisions.

[45] The parties agree that the commercial gain (which would involve comparing a hypothetical counterfactual in which competition continued after May 2022 and the supply shock occurred from June 2023) cannot be accurately quantified in this case. The ALL Group's annual turnover in the accounting period in which the contraventions occurred is less than $10 million. Accordingly, the maximum penalty for each act or omission is $10 million.

Divestment

[46] Under s 85 the Court may order disposal (i.e. divestment) of assets or shares (depending on type of acquisition) where it is satisfied that any person has contravened s 47 of the Act. Divestment is intended to try to restore competition and goes towards serving general deterrence aims.

[47] In this case, ALL and the Commission made significant efforts to explore the possibility of a divestment over more than a year, but divestment has not been possible to achieve. This involved ALL engaging an investment bank to assess the feasibility of divestment and, if feasible, to advise and assist ALL to separate the Supa Shavings business from ALL and run a sale process.

[48] In about August 2024, after ALL and the Commission had concluded that divestment was feasible, the parties negotiated a divestment undertaking. The divestment undertaking was executed by ALL and accepted by the Commission under s 74A(1) of the Act on 25 September 2024 (Divestment Undertaking).

[49] From October 2024, the investment bank ran a formal sale process. While one interested party proceeded to the due diligence stage, there were obstacles to the sale which could not be overcome. Consequently, on 5 November 2025, the Commission released ALL from the Divestment Undertaking. The Commission considers that the careful and sustained divestment process over 20 months properly established that divestment is not feasible in this case.

Starting point: approach and other relevant factors

Deterrence

[50] The courts have consistently held that the paramount concern in imposing a civil pecuniary penalty is general and specific deterrence. In *Telecom Corporation of New Zealand Ltd v Commerce Commission* (*Data Tails (CA)*), for example, the Court of Appeal said that penalties must not be a "licence fee" and that "the deterrence objective will only be served if anti-competitive behaviour is profitless".[7] This concern applies equally to contraventions of s 47 and was acknowledged as the starting point by this Court in *Commerce Commission v First Gas Ltd* (*First Gas*) and *Commerce Commission v Objective Corporation Ltd* (*Objective*).[8]

Other relevant factors

[51] In setting the starting point, the Court will take into account a range of factors, including those identified at ss 83(2)(a) to 83(2)(c):[9]

(a) the importance and type of market;

(b) the nature and seriousness of the contravening conduct;[10]

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7 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 [*Data Tails (CA)*] at [15] and [53] (referring to the Commerce Amendment Bill 2001 (296-2) (select committee report) at 23). In the s 83 context, see *First Gas*, above n 1, at [46]; and *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 [*NZ Bus (CA)*] at [197].

8 *Objective Corp*, above n 3, at [14]; and *First Gas*, above n 1, at [46]. See also *Commerce Commission v New Zealand Bus (No 2)* (2006) 3 NZCCLR 854 (HC) [*NZ Bus (HC) (No 2)*] at [30].

9 *Objective Corp*, above n 3, at [15].

10 In 83(2)(a): "the nature and extent of the act or omission"; and in s 83(2)(c): "the circumstances in which the act or omission took place".

(c) whether the conduct was deliberate or not;

(d) the duration of the contravening conduct;

(e) the seniority of the employees or officers involved in the contravention;

(f) the extent of any benefit derived from the contravening conduct;

(g) the extent of any loss or damage suffered by any person as a result of the contravening conduct;[11]

(h) the market share/degree of market power held by the defendant;

(i) the role of the defendant in the impugned conduct; and

(j) the size and resources of the defendant.

Consideration of relevant factors

Importance and type of market

[52] The parties agree that the Markets are regionally important. The Waikato is an important region for chicken farming and the use of wood shavings is an important input for chicken and goat farming. In the case of chickens, the use of wood shavings is required to meet animal welfare requirements imposed by the Ministry for Primary Industries and the Royal New Zealand Society for the Prevention of Cruelty to Animals and is often required by large poultry processors. There is the potential for effects on national downstream supply chains for chicken meat and dairy from goats.

[53] The Defendants point out that due to the continued decline in the availability of wood shavings from June 2023, the significance and size of the Markets has decreased since then, particularly the Goat Bedding Market, where substitution with alternative products has been greater.

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[11] In 83(2)(b): "the nature and extent of any loss or damage suffered by any person as a result of the act or omission".

The nature and seriousness of the conduct

[54] The parties agree that the conduct was serious. The Acquisitions gave ALL and SS2022 a high market share which they recognised in advance and regarded as a material benefit flowing from the Acquisitions.

[55] The Defendants accept that they should have appreciated from their recognition of the high market share that the Acquisitions could have the effect of lessening competition in the Markets.

[56] The Defendants did not seek clearance or authorisation under the Act as they should have.

[57] The Defendants submit that there is a significant mitigating feature which is that they engaged a lawyer and an accountant to facilitate the Acquisitions and received funding from a major bank (which included providing a business case). No advisor alerted the Defendants to any competition law issues.

[58] The Commission submits that the engagement of lawyers is neutral rather than a mitigating factor in this case, including because the Defendants were aware of the high market share that would result from the Acquisitions but did not ask their lawyers to consider the potential competition implications.

[59] I agree with the Commission. In setting the starting point, the focus is on the nature and seriousness of the contravening conduct. The content of any legal advice received may be relevant to assessing the deliberateness or otherwise of the breach, but the absence of legal advice identifying an issue it not an independent mitigating factor.

Deliberateness of the contravening conduct

[60] The Defendants intended to acquire a high market share by acquiring the assets of the two companies, and so the contravening conduct was deliberate in that sense. However, the Defendants did not intend to breach the Act. The Commission accepts that the Defendants were unaware that the Act was engaged.

Seniority of employees or officers involved in the contravention

[61] The Defendants admit that the conduct that led to the contravention was carried out by the directors and shareholders of the companies in the ALL Group, and other senior employees.

Commercial gain and harm suffered

[62] The parties agree that there was a commercial gain to the Defendants, and a consequent harm to consumers, for around 13 months until the supply shock in June 2023. They also agree that the commercial gain realised, and harm caused to consumers, cannot be accurately quantified in this case.

[63] They have different views on the likely effect since then. The Commission considers that the effect of the Acquisitions was longer than the Defendants consider, because the consequence of the supply shock was not immediate or absolute.

[64] The Defendants point to several factors which have meant that they have not been able to leverage their position to achieve profitability in any year since 2023. The entities in the ALL Group involved in the supply of wood shavings have reported a net loss for the 2023, 2024 and 2025 financial years and are forecasting a net loss for the 2026 financial year.

[65] First, since the Acquisitions, they have faced materially increased costs due to the decline in the availability of wood shavings, driven by external market factors. As a result, the Defendants have had to absorb higher input costs and pass on some costs to customers.

[66] Second, they have lost significant portions of their business to new competitors. This demonstrates that the effect of the Acquisitions was not significant enough to prevent new entrants from successfully competing for the Defendants' business.

[67] Third, they have paid considerable fees to lawyers and other professionals associated with their attempt to divest the Supa Shaver business.

[68] As such, the Defendants submit that any benefit from the contravening conduct has been offset by significant operational and financial challenges due to market developments and the costs of the divestment attempt. There has not been any long-lasting substantial harm in the Markets which are competitive now with three market participants, replicating the position prior to the Acquisitions.

[69] The Commission responds that the re-entry of competition into the market from November 2024 is irrelevant to the effect on the Markets of the breach from May 2022 to sometime beyond June 2023. Further, that the Defendants' lack of profitability is irrelevant, other than with respect to their potential impecuniosity.

[70] I agree with the Commission that the matters raised by the Defendants are not relevant to the factor being considered here: the benefit to the Defendants and the harm to consumers *from the contravening conduct*. The Defendants have agreed that they gained from the Acquisitions for at least 13 months until the supply shock in June 2023, which affected their profitability from that date. They have also agreed that until around November 2024, other suppliers in the Markets supplied on an ad hoc basis only, had small market share and did not constrain the Defendants in the Markets, including from increasing prices above competitive levels. The recommended penalty is sought based on these agreed facts. The Defendants cannot point to their lack of profitability to establish that they have not gained from the Acquisitions without undertaking a counterfactual analysis of what their profit would have been had the Acquisitions not occurred and competition continued.

The size and resources of the Defendants

[71] The size and resources of the defendant are relevant to both the starting point and the defendant-specific factors.[12] In the usual way, the size and resources of the defendant are relevant to specific deterrence.[13] The size and resources of the defendant are also relevant to general deterrence because the penalty must be sufficiently severe to incentivise others to take their obligations seriously.[14]

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12 See discussion in *Commerce Commission v One New Zealand Group Ltd* [2025] NZHC 3635 at [63]-[76].

13 *Data Tails (CA)*, above n 7, at [54]-[55]; and *One New Zealand Group,* above n 12, at [72].

14 *Commerce Commission v One New Zealand Group Ltd,* above n 12, at [63]-[76].

The size and resources of the defendant can also inform the assessment of market power and the effect of the conduct.

[72] The Commission submits that while the ALL Group has operated at losses, it remains a substantial business with significant annual turnover.

[73] It is also relevant that the ALL Group's shareholders, Mr and Mrs Alderson, own other companies (including Alderson Poultry Transport Limited) which provide transport and logistics services. Although these are not interconnected bodies corporate, the Commission submits they have some relevance because the broader group can leverage its experience of the poultry industry and group resources to support the Defendants' businesses.

[74] The Defendants submit that any penalty imposed should reflect the relatively modest size of the business and the difficult financial position in which it currently finds itself.

[75] I agree that the moderate size of the business together with its poor financial position is a relevant consideration, to which I return at the end of this analysis.

Market share/degree of market power held by the defendant

[76] The Defendants submit that their market share and degree of market power is not an aggravating factor in this case. While the Acquisitions resulted in them holding high market shares in the Markets at the time of the Acquisitions, that this position has not persisted. Since 2024, the Defendants' market share has significantly declined due to the entry of new suppliers, showing that the Markets are now characterised by effective competition.

[77] I accept that the re-entry of competitors in November 2024 is relevant as indicating that the effect of the Acquisitions on the Markets has not been permanent, although it is unknown whether any residual effect remains.

Other cases

[78] There have only been three previous cases under s 83: *Commerce Commission v New Zealand Bus* (*New Zealand Bus*),[15] *First Gas,*[16] and *Objective*.[17] The penalty in *New Zealand Bus* followed a defended trial, whereas *First Gas* and *Objective* involved agreed penalties following settlement.

New Zealand Bus

[79] In *New Zealand Bus*,[18] the contravention arose from New Zealand Bus Limited (NZ Bus) agreeing to acquire from the second defendants, the Waddell interests, the remaining 74 per cent interest in Mana Coach Services Limited it did not already own, which, had the transaction gone ahead, would have resulted in the combined entity holding 97 per cent by value of the contracts in the market. The Commission intervened and the transaction did not go ahead.

[80] The conduct by NZ Bus was serious, in that it involved a deliberate decision taken to withdraw a clearance application and to go ahead with the transaction without clearance or authorisation, with NZ Bus knowing the Commission might decline clearance and withdrawing at its own risk.

[81] In determining the penalty on NZ Bus, this Court adopted a $2 million starting point. This figure was the estimated unlawful gain which NZ Bus would have made had the transaction proceeded. The Court applied a 75 per cent discount to reflect the Commission's contribution to the breach (by inviting New Zealand Bus to consider withdrawing its clearance application), the absence of loss to any person (given the acquisition did not settle), the risk of error in the calculation of gains, and the stigma of finding a breach in absence of previous breaches. This gave a final penalty of $500,000 together with an order to contribute $100,000 towards the Commission's investigation and enforcement costs.

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15 *NZ Bus (HC) (No 2)*, above n 8; *NZ Bus (CA),* above n 7.
16 *First Gas,* above n 1.
17 *Objective Corp,* above n 3.
18 *NZ Bus (HC) (No 2)*, above n 8; *NZ Bus (CA),* above n 7.

[82] While the Court of Appeal considered the High Court Judge may have adopted an overly high starting point, it found that $500,000 was an appropriately deterrent pecuniary penalty in a marginal case.[19]

[83] With respect to the vendors, the Waddells, who the Court had found liable as accessories to NZ Bus's wrongdoing, the Court declined to impose a penalty. The Court was not persuaded that the Waddells would have earned any unlawful gain from the transaction, they knew nothing of the Commission's concerns and they reasonably relied on advice from NZ Bus that clearance was not required.

[84] The Commission submits that the approach in *New Zealand Bus,* an early penalty decision, is now somewhat out of line with *First Gas* and *Objective*.

[85] The Defendants submit that the present case should attract a similar level of penalty to *New Zealand Bus*. In *New Zealand Bu*s no actual loss resulted from the transaction, given the Commission's intervention prevented the transaction from settling.[20] Whilst it cannot be said that no actual loss has resulted from the present acquisitions, the evidence, namely developments in the market as set out above, demonstrate that any loss resulting from the acquisitions has not been long lasting. As in *New Zealand Bus*, the Defendants have also incurred public stigma attached to breaches of the Act, which was also treated as a mitigating factor. The Defendants submit that in other respects, *New Zealand Bus* is a more serious case, as the Defendants did not make the deliberate choice to sidestep the clearance process and the legal advice received did not alert them to the need for clearance.

[86] In my view, it is difficult to compare the cases. The starting point in *New Zealand Bus* was based on an estimate of the unlawful gains NZ Bus would have made had the acquisition gone ahead using alternative formulae applied to the Wellington bus market. In fact, there was no gain to NZ Bus and no loss to any other person because the transaction did not go ahead. In contrast, here there was some gain to the Defendants and therefore likely some loss to consumers, but those effects cannot be quantified. The conduct in *New Zealand Bus* was much more egregious than in this

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19 *NZ Bus (CA),* above n 7, at [210]-[211].
20 *NZ Bus (HC),* above n 8, at [56].

case, where the Defendants did not appreciate that the Act was engaged. However, a significant discount was given, partly because of the unusual fact that the Commission contributed to the breach, a factor not present here.

First Gas

[87] First Gas Limited (First Gas) entered into an agreement with GasNet Limited (GasNet) to acquire GasNet's gas distribution assets in the Papamoa area of the Bay of Plenty region (the s 47 breach).[21] The agreement also contained a restraint of trade that prohibited GasNet from engaging in the provision of gas distribution services in the Bay of Plenty for five years (the s 27 breach).

[88] The agreement eliminated competition between First Gas and GasNet and reduced the potential for any future competition (irrespective of the restraint of trade clause). It lessened any motivation for First Gas to provide competitive offerings to developers and consumers. It also had the effect of First Gas charging developers increased capital contributions and developers passing these on to purchasers or ceasing to provide reticulated gas services altogether.

[89] First Gas admitted that it had breached ss 27 and 47 of the Act. It was determined that divestment was not possible, and the parties approached the Court to approve an agreed penalty.

[90] The Court imposed a starting point for the s 47 breach which was around three quarters of the maximum penalty at the time: $3.5 million to $3.8 million. The Court said that the starting point was appropriate for a serious breach of s 47 by a large and sophisticated company (First Gas was within the top five per cent of New Zealand companies) which engaged, at a senior level, in a concerted effort on a reluctant seller to remove a competitor. The result was an on-going and potentially permanent effect on the market by removing competition in the market for the foreseeable future.[22]

[91] The Court accepted a 25 per cent discount was appropriate because First Gas had not previously contravened the Act nor been warned on compliance issues; and

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21 *First Gas,* above n 1.
22 At [47].

once it was alerted to the Commission's concerns it was entirely cooperative and attempted to delay the acquisition. This resulted in a final combined pecuniary penalty of $3.4 million for contraventions of both ss 47 and 27.

[92] The Court concluded:[23]

> The penalty together with the purchase price mean that the assets acquired will not be profitable over their life time. In the context of a business which is almost entirely regulated, this means First Gas will incur a material loss from the acquisition. The general and specific deterrent objective is therefore met by the penalty. There is also the stigma associated with the imposition of a pecuniary penalty.

[93] I accept the Defendants' submission that *First Gas* is distinguishable from their case because First Gas was a far larger, more sophisticated and more profitable business than ALL and SS2022 and the ALL Group. As an indication, First Gas' total revenue in the 12 months to September 2018 was approximately $157,600,000. Although apparently First Gas did not appreciate that there were Commerce Act implications, it engaged in a calculated and sustained effort to undermine GasNet as a competitor and force it to sell. Unlike in this case, the acquisition had a permanent effect on the market by removing competition altogether for the foreseeable future.

Objective

[94] Objective Corporation Limited (Objective) is a multinational software company, listed in Australia.[24] Objective acquired 100 per cent of the shares of Omega Group Holdings Limited and Alpha 88 Limited, which offered a specialised building consent software product called AlphaOne in the New Zealand market. A short time later, Objective entered a further agreement to purchase all the shares of Master Business Systems Ltd, which offered a competing specialised building consent software protect called GoGet, and a 50 per cent interest in a joint venture that supplied a related website portal. Objective admitted that given the first acquisition, the second acquisition contravened section 47.

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23 At [51].
24 *Objective Corp,* above n 3.

[95] The Commission determined that divestment was not viable, and the parties agreed to recommend a pecuniary penalty of $1.54 million. The starting point for the recommended pecuniary penalty was $2.2 million, within an appropriate range of $2 million to $2.5 million, with a 30 per cent discount then applied. The Court accepted this recommendation.

[96] In doing so, the Court highlighted that the market was important in an industry that is significant to New Zealand, the conduct was serious, being part of a considered and concerted commercial strategy pursued over at least a year, while Objective did not intend to breach the Act there were red flags which should have put its Chief Executive on notice, and Objective is a large a profitable global company.

[97] The Court accepted that the commercial gain realised, loss suffered, or harm caused could not be accurately quantified, but considered the size of the market and the total acquisition price to be relevant. The total acquisition price was $5.4 million and a material proportion of that was attributable to IT services.

[98] The Court also considered the size and resources of Objective to be relevant, with a global revenue of AUD70 million in 2020 financial year and revenue from building consent software in New Zealand to be around $3.8 million.

[99] Palmer J concluded:[25]

> I accept the unlawful acquisition here is more serious than that in *New Zealand Bus*, a transaction which was not completed. The conduct here is similar to that in *First Gas* in that it resulted in the removal of a key competitor, involved senior personnel, was unintentional, and divestment was not a viable option. The Commission submits the conduct in *First Gas* was more serious in there being a more complete and permanent elimination of competition, a reluctant seller, and a much larger defendant. I accept that.

[100] The Court considered a 30 per cent discount accounted for Objective's prompt admission of the breach and continued cooperation with the Commission.

[101] I accept the Defendants' submission that *Objective* is distinguishable due to the size and resources of Objective far exceeding those of the Defendants, the size and

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25 At [18].

significance of the market which was national rather than regional, and it being a sophisticated, global business which should have known better particularly given the red flags present.

Assessment

Starting point

[102] The Acquisitions in the present case resulted in the Defendants having a significant concentration of market power for a period. The Defendants recognised in advance that the Acquisitions would give them a high market share and regarded this as a material benefit of the Acquisitions. ALL Group should have realised that the Acquisitions could give rise to competition concerns and sought clearance or authorisation.

[103] At the same time, there is no suggestion that the Defendants were aware that the Act was engaged, and no one alerted them that there might be an issue. While not excusing their failure to seek clearance or authorisation, the ALL Group does not have the same degree of corporate sophistication as major companies like First Gas or Objective.

[104] The Defendants accept that there was some commercial gain to them and commensurate harm to consumers from the Acquisitions for around 13 months until the supply shock in June 2023. The parties have agreed that the gain/harm cannot be quantified. It is also difficult to assess the impact on competition in the Markets after the supply shock compared to the counterfactual in which the Acquisitions had not occurred. It is significant that competition was able to re-enter the market eventually, at least mitigating the harm to consumers from the Acquisitions.

[105] The markets are important, given that the use of wood shavings is an essential requirement for chicken farming especially. However, the Markets are small and regionally focussed, in contrast to *Objective* especially.

[106] The size and resources of the ALL Group are dramatically smaller than either *First Gas* or *Objective*. The Defendants have not been profitable in any year since the Acquisitions and are not projected to be profitable in the coming financial year.

[107] I am mindful that the maximum penalty has increased since the conduct in *First Gas* and *Objective,* signalling that Parliament intended penalties to increase (all other things being equal). In other circumstances, that might mean that the recommended starting point, at five to seven per cent of the maximum penalty, is inadequate. A penalty under s 83 should serve the objective of ensuring all business people, even of modest businesses, properly inform themselves about the merger control prohibitions in the Act and do not undertake acquisitions resulting in high market shares without consulting with, and as appropriate obtaining clearance from, the Commission.

[108] However, I accept that other factors have had a penalising effect on the Defendants, including the costs of the Commission's investigation, the divestment process, and the personal and financial costs to the Alderson family (who have injected significant capital to support the Defendants and made three senior roles redundant in what is a close-knit, family run business). These consequences go a long way to meeting the objective of specific deterrence in this case. While the objective of general deterrence might warrant a higher starting point, I accept that a higher starting point could be unduly punitive on these Defendants.

[109] Taking all these factors into consideration, I accept that the agreed starting point of $500,000 to $700,000 is within the appropriate range.

[110] A cross-check against recent cases under other provisions of the Act with similar statutory penalty maxima,[26] involving smaller companies engaged in conduct in regional markets, supports this starting point range:

(a) *Commerce Commission v NGB Properties Ltd*: $680,000-$750,000 starting point range for a contravention of s 28 of the Act;[27]

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[26] The maximum penalty provision of s 80(2B) was inserted on 15 August 2017; and the maximum penalty provision of s 83(3) was inserted on 5 May 2022.

[27] *Commerce Commission v NGB Properties Ltd* [2023] NZHC 2005, (2023) 16 TCLR 648.

(b) *Commerce Commission v Hutt and City Taxis Ltd*: $500,000-$600,000 starting point range for contraventions of s 30;[28] and

(c) *Commerce Commission v Ronovation Ltd*: $550,000-$650,000 starting point range for contraventions of s 30.[29]

Adjustment for defendant-specific factors

[111] Having identified the range of $500,000 to $700,000, it is necessary to adjust that range having regard to defendant-specific factors.

[112] The Defendants have not previously been found to have contravened the Act or been warned for conduct that the Commission considered likely to breach the Act.

[113] They have cooperated with the Commission throughout the investigation. The ALL Group provided relevant information voluntarily in response to requests from the Commission. Mr and Mrs Alderson and the two other senior employees in the ALL Group also attended voluntary interviews and proactively provided financial, customer and supplier information to the Commission.

[114] The Defendants made genuine efforts to divest the Supa Shavings business. Furthermore, the Defendants acknowledged they had contravened the Act at the earliest possible stage in this proceeding and agreed to settle the proceedings on terms acceptable to the Commission.

[115] In *Reserve Bank of New Zealand v TSB Bank Ltd*, the Court reviewed the discounts given for pecuniary penalties in breach of the Act. The Court observed that:[30]

> For pecuniary penalties for anti-competitive conduct in breach of the Commerce Act, discounts have been in the range of 25 per cent for early admissions of responsibility but no active cooperation, between 25 per cent and 30 per cent for early admission and full cooperation, and more where there has been additional assistance by giving evidence in proceedings against others.

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28 *Commerce Commission v Hutt and City Taxis Ltd* [2021] NZHC 2543, (2021) 16 TCLR 210.
29 *Commerce Commission v Ronovation Ltd* [2019] NZHC 2303.
30 *Reserve Bank of New Zealand v TSB Bank Ltd,* above n 2, at [49].

[116] Taking the defendant-specific factors into account, I am satisfied that a 30 per cent discount is appropriate.

[117] Applying a 30 per cent discount to the mid-point of the agreed range ($600,000) gives a final penalty of $420,000. The Commission and the Defendants agree and recommend to the Court final penalty of $420,000 (with no order as to costs).

[118] I am satisfied that a final penalty in this amount is appropriate, and no totality adjustment is required.

Other matters

[119] The Defendants seek confidentiality orders over confidential and commercially sensitive material in the agreed statement of facts, supplementary statement of facts and the written submissions. These orders are appropriate.

Result

[120] I declare that the first and second defendants contravened s 47(1) of the Commerce Act 1986 by acquiring ABS Carriers Limited and Supa Shavings Limited.

[121] I order the Defendants to pay a pecuniary penalty to the Commission of $420,000.

[122] I make a non-publication order in relation to all information within square brackets and highlighted yellow in the agreed statement of facts, supplementary agreed statement of facts and the submissions of the Commission and Defendants.

[123] I note that the parties have agreed that costs will lie where they fall.

Gardiner J