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## Discussions on costs of livestock cartage costs

### Purpose

The purpose of this Advisory is to raise awareness of the risks that operators may expose themselves to when discussing transport costs with other transport operators and share some recent advice in this regard from our legal adviser.

### Limitations imposed by the Commerce Act 1986 (the Act)

There are serious consequences associated with the new criminal cartel provisions of the Act (including price-fixing) and if there is **any suggestion** that:

- any two transport operators who are in competition with each other are party to an agreement as to price at which cartage services will be provided to a common customer; and/or
- an industry body (la Ara Aotearoa Transporting New Zealand or anybody else) is involved in negotiations as to price with their members' common customer;

then, those operators and/or that industry body would need to be extremely clear about their legal position.

The basic requirements taken from the Commerce Act 1986 include:

- section 27 prohibits entering into a contract, arrangement or understanding that has the purpose, or is likely to have the effect of substantially lessening competition in a market
- section 30 prohibits the entering into a contract **arrangement or understanding** (ie less than an agreement) containing a cartel provision
- section 30A defines a cartel provision as having the purpose effect or likely effect of price-fixing between two competitors and doesn't have to have the element of substantially lessening competition in the market (as per s27) - so the test is lower
- section 31 contains a carveout for "collaborative activity"
- section 82 provides for severe penalties (\$500k or up to seven years prison for an individual) and ratios of income and or gain for companies
- section 2(8) provides a contract or arrangement entered into by an association is deemed to be entered into by all its members
- collective bargaining for members of an association that includes price (and meets the requirements of a cartel provision (above)) can be granted a clearance by the Commission or be authorised, but that needs to occur before the activity.

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If all an operator is doing is providing information about industry issues then that is unlikely to be a breach however, if that provision of information carries with any expectation that a common customer will agree to pay a particular price for members' services, or restrict competition in another way, then that activity may contravene the Act.

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