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International Information Exchange between Regulators & Third-Party Claimants

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Overview

This paper examines the issues arising from the success of cartel leniency policies in a global environment, where prosecution and follow-on actions may occur in numerous jurisdictions. It notes some practical issues, discusses cases where third party claimants have sought access to potentially helpful materials, and discusses potential ramifications of the Commerce (International Cooperation, and Fees) Amendment Act 2012. It discusses the Act's potential benefits, querying whether third-party claimants are now in a privileged position, and asks whether legislatively mandated international information-sharing risks disincentivising leniency applications.

Structure of this paper

This paper has 5 parts:

1. Context – "cartel busting" and the growth in follow-on actions.
2. Issues for the affected parties- applicant, agencies, other alleged cartelists.
3. The cases – a discussion of how the courts have treated those issues.
4. The history of the new law including the reasons for its implementation
5. Questions & issues raised.

1. Context – "cartel busting" and the growth in follow-on actions

1.1 Recent years have seen trade liberalisation and globalisation, greater collaboration between regulators and an increased focus on cartel enforcement. A core feature in cartel enforcement has been the use of leniency or amnesty programmes.

1.2 The OECD and International Competition Network (**ICN**) have been the drivers of much of this activity.

1.2.1 The OECD produced a number of reports and recommendations including the 1998 Recommendation[2] and a series of three reports on its implementation:

[1] The views expressed in this paper are the authors' and not necessarily their organisations. The paper is intended primarily as a starting-point for discussion, so comments may represent the views of only one author.

[2] Recommendation of the Council concerning "Effective Action against Hard Core Cartels."

the 2000 First Report on the Recommendation[3]; the 2002 Second Report;[4] and the 2005 Third Report.[5] There have been many other OECD reports, covering a range of topics including the means of ensuring effective sanctions, leniency programmes and the like.[6]

1.2.2 A Working Group on cartels was set up within the ICN in 2004. The working group presented its first work at the Annual ICN Conference in Bonn in June 2005,[7] which covered effective institutions for cartel fighting, effective penalties, effective investigation techniques and effective leniency programs.

1.3 It now seems widely accepted that information sharing between regulators assists in the "crusade" against cartels.

1.4 Similarly, at the governmental and agency level at least, it is now well-accepted that tougher penalties are a critical component in detecting and deterring cartels. In an IBA speech in Tokyo in April 2005, Graeme Samuel commented that:

> "Jim Griffin … told Commission staff … that in his 25 years of prosecuting cartels he had listened to many accused say that they would gladly pay a higher fine to avoid imprisonment but he had never once heard anyone offer to spend extra days in jail with an exchange for a lower penalty recommendation."[8]

1.5 The international trends can be summarised as follows:

1.5.1 Increased investigative powers

1.5.2 Increased penalties

1.5.3 International co-operation

1.5.4 Criminalisation

1.5.5 Adoption or revision of leniency (amnesty) policies

1.5.6 Private enforcement.

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3 "First Report to the Council on the Implementation of the Council Recommendation – "Implementation of the Council Recommendation concerning Effective Action against Hard Core Cartels: First Report by the Competition Committee" 1 January 2000 ("First Report" or "First OECD Report").

4 "Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws" DAFFE/COMP (2002) 7 (9 April 2002) ("Second Report").

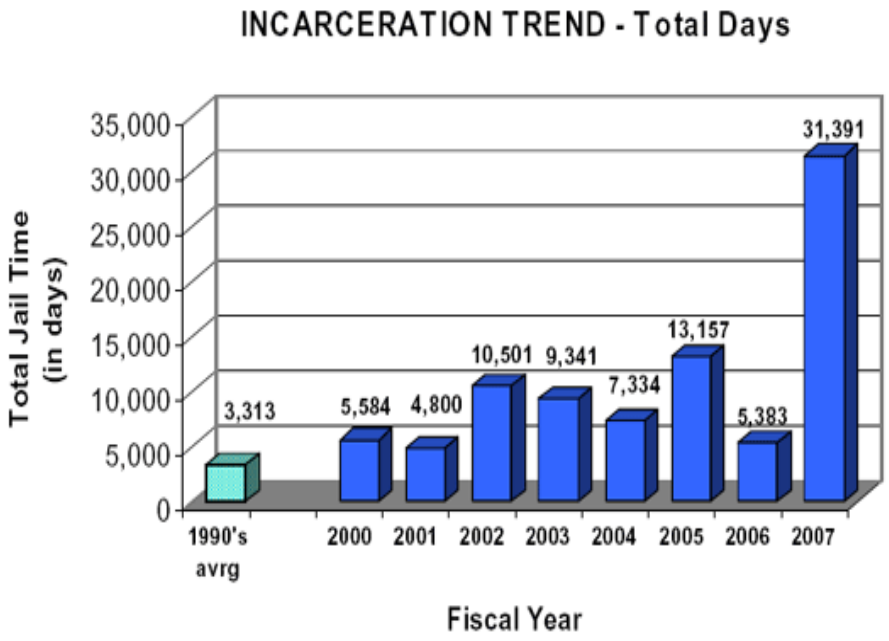
5 Third Report on the Implementation of 1998 Recommendation – 15 December 2005 ("Third Report").

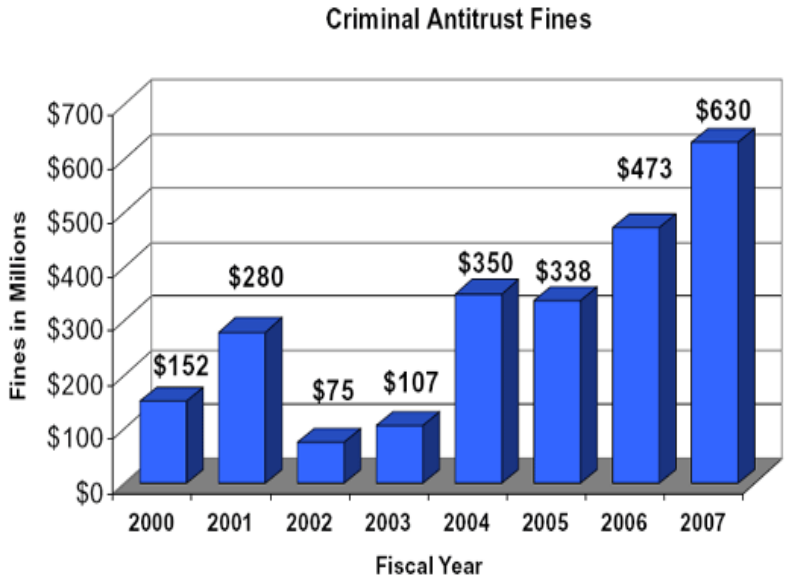
6 Other OECD reports and publications include: Round Table on "Prosecuting Cartels Without Direct Evidence of Agreement" – DAF/COMP/GF/WD (2006) 12-15 December 2005; OECD Competition Committee – "Best Practices for the Formal Exchange of Information between Competition Authorities and Hard Core Cartel Investigations" – October 2005; "Cartels: Sanctions Against Individuals" – DAF/COMP (2004) 39-10 January 2005; "Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Policies" – OECD – this includes the 2001 Competition Committee "Report on Leniency Programs to Fight Hard Core Cartels" and the 2002 "Report on the Nature and Impact of Hard Core Cartels and the Sanctions under National Competition Laws"; Report on "Leniency Programs to Fight Hard Core Cartels" – DAFFE/CLP (2001) 13-27 April 2001 – "Using Leniency to Crack Hard-Core Cartels".

7 ICN, "Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties", Building Blocks for Effective Anti-Cartel Regimes, VOL.1 – Report prepared by the ICN Working Group on Cartels – ICN 4th Annual Conference – Bonn, Germany – 6-8 June 2005, Vol 1, p9 (including footnote 3), www.internationalcompetitionnetwork.org.

8 Graeme Samuel, Chairman, ACCC, IBA International Competition Enforcement Conference, Tokyo, 21 April 2005.

1.6 By way of example, see US Department of Justice (Antitrust Division) statistics as at 2007:





Sources: http://www.usdoj.gov/atr/public/speeches/232716.htm

1.7 It is unsurprising then that the ICN commented:

> "the ability of agencies to work together and exchange information should be substantially improved in order to strengthen their hand [when] faced with cartelists whose ability to exchange information is unhindered." [9]

[9] ICN Report at 6th Annual Conference, Moscow, May 2007

1.8 So in New Zealand we now have the Commerce (International Cooperation, and Fees) Amendment Act 2012 (**Act**) and the Commerce (Cartels and Other Matters) Amendment Bill (341-2) (13 May 2013) (**Cartel Bill**).[10]

1.9 Anecdotally, and in the writers' experience, New Zealand is now seeing a growth in third-party follow-on claims, or at least the threat of such claims to reach commercial settlement. Civil damages claims are increasingly being seen outside the United States. Plaintiffs naturally want to seek as much information "on the record" as they can get to build and develop their case. So plaintiffs are using increasingly aggressive techniques to obtain leniency material from enforcers or companies cooperating with them.

1.10 This raises a number of questions, such as:

1.10.1 What are the existing incentives and concerns of the parties?

1.10.2 How have those concerns played out in litigation and "behind the scenes"?

1.10.3 What are the new issues arising from the Act?

1.10.4 How could those be affected by the Cartel Bill?

1.11 In this paper we seek to develop the issues and provide guidance, if not the answers, to some of those questions.

2. Issues for affected parties arising from leniency programs

2.1 The dilemma is now well established:

2.1.1 Plaintiffs want "access" to the "paper trail".

2.1.2 Anyone "in the gun" wants access denied.

2.1.3 The agency:

(a) Fears prejudicing its reputation, investigative effectiveness and ending up breaching confidentiality commitments it has made.

(b) Sees its dilemma as corresponding to that of the leniency applicant. Leniency applicants should not wind up worse off than non-cooperating defendants, for example:

EU Commission pleading in *National Grid* litigation, 2011:

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[10] http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL11153_1/commerce-cartels-and-other-matters-amendment-bill <accessed 20 July 2013>

> "The Commission's policy [is] that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members that refuse any cooperation."

2.1.4 But: worryingly – recent decisions in Europe and Australia, especially, signal that enforcement agencies might be impaired in guaranteeing confidentiality.

What documents will third party claimants be seeking access to?

2.2 There is potentially quite a detailed paper trail resulting from a leniency application:

2.2.1 Primary documents evidencing illegal conduct (business records: emails, calendars, diary records etc).

2.2.2 Leniency proffer, and perhaps internal company investigation report.

2.2.3 Agency records of proffer.

2.2.4 Agency records of interviews, discussions and other forms of information provided to it (file notes, memos, transcripts etc).

2.2.5 Internal agency deliberative materials.

2.2.6 Witness statements and drafts.

2.2.7 Agreed facts or other settlement materials.

What are the agencies' traditional concerns?

2.3 The traditional concerns for the agency have been that, if third parties obtain access to these materials through the agency (or even indirectly as a result of the application) then this could:

2.3.1 Compromise current or ongoing investigations.

2.3.2 Compromise future investigations.

2.3.3 Lead to a breach of its confidentiality obligations.

2.3.4 Threaten to undermine incentives to seek leniency.

2.4 Yet there is a tension here between encouraging leniency applications to detect, punish and deter cartels, and third parties' rights to be compensated for any harm they have suffered. Agencies do not want to be seen as inhibiting the ability of affected third parties to formulate their case, but do not want to prejudice the highly effective leniency mechanism.

2.5 Equally many agencies are seeking to encourage private action to foster even greater effectiveness of antitrust. The EU White Paper (April '08) *Damages actions for*

breach of the EC antitrust rules stated that the goal was encourage private enforcement to increase compliance, commenting that "Full compensation is .. the first and foremost guiding principle".

2.6 The previous ACCC Chair acknowledged this tension, but expressed strongly his priority as follows:

> "While we do try to help third party actions where we can, our first priority must be to get a satisfactory outcome in court. While penalties have strengthened in recent legislative changes, we need to ensure that the incentives to confess remain so strongly tipped in our favour that the risk/ benefit equation becomes a no-brainer for cartel members…."[11]

2.7 This mirrored comments made by the Commission's former General Counsel at this conference in 2007:

> "The Commission will, under the Official Information Act or in Court proceedings, take steps to prevent the release of information from the leniency applicant. While it is important that private actions for compensation can proceed, the Commission considers that this must not be allowed to undermine leniency, and the benefits that flow from public important of the act. The Commission will take steps to ensure that, as far as the law of privilege and public interest immunity allows, communications between the Commission and applicants are not disclosed."[12]

What are the leniency applicants' traditional concerns?

2.8 The majority of leniency applications in New Zealand to date have been in relation to the New Zealand aspects of an international cartel. As such, leniency applicants have been sensitive to the potential impacts of leniency not just in New Zealand, but globally.

2.9 In such situations, the applicant will need to consider whether it should "go in everywhere" or just in the major jurisdictions. In making this decision, the applicant has a number of factors to consider, including:

2.9.1 <u>Logistics:</u> Does the applicant, or its coordinating international counsel, have the resources to seek a marker and/or make a proffer in all jurisdictions? Or should it simply prioritise the key jurisdictions?

(a) There is a tension here between minimising risk and "overkill", particularly given the costs and logistics in dealing with multiple lawyers and regulators (which may involve translation and travel costs).

(b) There may be corporate politics and cultural issues at play as well. We are aware of instances where leniency has been sought and obtained, but then the Commission did not pursue the case. This caused internal issues for the corporate counsel who had instructed that the

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11 G Samuel, "The Relationship between Private and Public Enforcement in Deterring Cartels" International Class Action Conference (Sydney, 25-26 October 2007).

12 Peter Taylor, CLPINZ 2007, "Issues Arising From The Application Of The Leniency Policy" p8, noting at the footnote that there is also a potential application of s69 of the Evidence Act 2006

application should be sought – that may no longer be an issue with the revised leniency programme (ie now that an application is effectively the first proffer). Other times there may be a corporate mantra that it is corporate policy to proactively co-operate.

(c) Against that some lawyers are conscious of the risks should they not seek leniency everywhere – if another party "gets in first" could co-ordinating counsel be exposed to negligence claims, especially with the trend to follow on claims?

2.9.2 Relative risk: The applicant will be considering both the evidence available about likely breach of cartel law in various jurisdictions and the sanctions available. A key part of this will be arguments about jurisdiction and "effects" as played out in the air cargo litigation.

2.9.3 Third-party exposure: Whether seeking leniency may enhance the prospect of third party action in that jurisdiction and elsewhere. The potential exists for forum-shopping based on regimes of document availability. Leniency might be resisted where an agency is considered unable to provide reassurances assurances of confidentiality. Related issues will include the availability of "paperless" processes, discovery and privilege rules, exposure in other jurisdictions

(a) Note: in ACCC case *Prysmian* the Court took a dim view of the ACCC submission that a basis for withholding access to file records was that the whistle-blower might as a result face proceedings in other jurisdictions: international jeopardy was not a 'public interest' in Australia that should be weighed in the mix.[13]

(b) But this is a narrow assessment of 'public interest': if whistle-blowers fear global liability, there is possible prejudice to the leniency policy.

2.9.4 Gaming / first mover advantage: Whether another party is or may seek leniency in the jurisdiction, including whether there is *"information asymmetry"* between the cartelists (eg does my former/ current co-conspirator know more than I do about the cartel and its effects in New Zealand?)

2.9.5 Perceived priorities and efficacy of the agency, including :

(a) different approaches regarding paperless applications etc;

(b) views on the level of protection given;

(c) complexities about level of information and timing for perfection of leniency: including non-first-in and issues when priority differs by country.

[13] *ACCC v Prysmian & Ors* [2011] FCA 938 at [240].

2.9.6 The level of co-operation by the agency with other agencies (notably international information sharing).

2.9.7 The exposure of individuals: Factors here include corporate culture, whether the transgressors are still significant to the organisation, cultural norms on criminal exposure and possible conflicts between the individual and company.

2.10 The costs of not applying: The risk of civil penalties and criminal sanctions. (A leniency applicant may also suffer less adverse publicity.)

3. Cases regarding access to the record and/or pleadings

Australian cases - significant access given

3.1 Following the EU trend, the Australian courts are opening wider the files to third-party applicants.

3.2 In *Cadbury-Schweppes* in 2008 the ACCC's claim to withhold access to its records on grounds of public interest immunity failed. The request was in respect of 6 witness statements and 11 witness proofs that were filed and served. The Judge could not see how granting access could compromise the leniency policy.[14]

3.3 Gordon J in that case also strongly indicated that it was "misguided" of the ACCC to assert immunity or privilege, and that rather than "judicial tinkering" there should be legislative reform.[15]

3.4 Following that, the law was amended to expressly empower the ACCC not to release "protected cartel information", meaning information given to it in confidence and which relates to a breach or possible breach of the cartel provisions.[16]

3.5 In the *Prysmian* case 2011 the ACCC had stated, before an interview, that 'public interest immunity was likely to be available should a 3rd-party seek to access any record of the interview.' The Australian Federal Court overrode this assertion of PII, and said that the ACCC had "a heavy burden" to establish that real detriment to the public interest would follow from the disclosure.[17] The Court rejected extending legal privilege to the records of interviews taken under the Act, and also for finalised briefs served but not used in the proceeding.

3.6 The position could well be different for drafts of witness statements, and records of interviews with immunity witnesses responding in accordance with their cooperation terms and with an expectation of confidence.

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14 *Cadbury Schweppes Pty Ltd v ACCC* [2008] ATPR 42-218.

15 Ibid at [46-7].

16 Competition & Consumer Act 2010 (Cth), s157C.

17 *ACCC v Prysmian & Ors* [2011] FCA 938 at [180].

3.7 Much depends on timing where interviews are concerned: if they are purely investigative, before proceedings are anticipated, they are unlikely to be privileged.[18]

3.8 The *Prysmian* case raises the interesting question of to what extent the ACCC can give immunity applicants meaningful assurances about the disclosure of proffers and other information.[19] In New Zealand – so far – the landscape is a little less complicated and uncertain.

New Zealand - Schenker – High Court and Court of Appeal

3.9 No New Zealand legislation enshrines special protections for cartel records.

3.10 Three routes exists for access-seekers:

3.10.1 OIA application (only available to New Zealanders);

3.10.2 non-party discovery application, if the Commission is not a party; or

3.10.3 seek Court files under High Court Rules.

3.11 All involve a balancing exercise, whether by the Commission or a Court. Sometimes applicants use a combination of these methods.

3.12 Schenker was a freight forwarder that alleged it may have suffered loss as a result of the international air cargo cartel. It filed an application with the High Court seeking access to the pleadings, minutes, issues lists, submissions, affidavits, agreed bundle of documents, and agreed statements of fact and schedules. These latter were compiled by lengthy agreement of the parties to the air cargo case, for the specific purpose of expediting the 'stage one' market hearing.

3.13 Schenker's application failed, at High Court and Court of Appeal levels. It significantly hampered the company that the full articulation of its reasons for seeking access was that 'it might have suffered loss.' The Courts required that an applicant explain with specificity how access will assist in contemplated proceedings. The Courts were also persuaded by the possibility of causing jeopardy to the leniency programme, and related forms of cooperation, if access were granted.

3.14 It is hard to avoid the conclusion that a much narrower, more targeted request, might have found favour with the parties and the Court.

Access to the records by agreement

3.15 Usually there is enough public information accessible for a plaintiff to formulate its case, refining it later following discovery.

3.16 Agreement is often able to resolve such requests:

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[18] K Stellios & C Cavallaro "Immunity: A dilemma for both whistleblowers and the ACCC" (2011) 19 AJCCL 163, 170.

[19] M Hansen, L Crocco, S Kennedy "New Fault Lines in International Cartel Enforcement and Administration of Leniency Programs – Disclosure of Immunity Applicant Statements" ABA International Cartel Workshop, 1-3 February 2012 at 13, available online at http://www.lw.com/presentations

3.16.1 Broad access claims, such as in *Schenker*, can be narrowed to bounds that the agency and other parties find acceptable. Confidentiality commitments can also be offered, including counsel-only viewing of more sensitive records.

3.16.2 In the *Koppers* wood chemicals cartel, excluded new entrant TimTech sought access to Court pleadings both from the Court and from the Commission under the OIA. The Commission offered to supply its core pleadings, but not briefs of evidence. This level of disclosure was sufficient for TimTech to formulate a claim and later achieve settlement.

3.17 In New Zealand, as long as a claim is not a groundless fishing expedition, the best process will usually be to formulate and file a claim, and seek discovery to flesh out with particulars/ evidence. The taint of 'fishing' hung over *Schenker*, as did the obvious submission that *Schenker* was out of time to take any proceedings. Against this backdrop, the courts naturally inclined against ordering disclosure.

Some comments on private actions in New Zealand

3.18 Private actions for damages, whether as "follow-on" claims (brought after the Commission has prosecuted a case to establish liability) or "stand-alone" (brought without a prior finding), have been relatively rare in New Zealand to date.

3.19 The cases that have been brought have settled before reaching a final hearing, with the terms of settlement confidential to the parties and the outcomes in terms of damages paid (if any) generally unknown.

3.20 The absence of law on this issue is unsurprising- per *Enron Coal* (English CA):

3.20.1 The claimant cannot rely on an infringement decision to establish causation and loss.

3.20.2 The claimant must prove that "but for" the infringement a different outcome would have resulted in which the claimant would not have suffered loss (or would have suffered lesser loss).

3.21 Also Woodhouse J in the *Siemens* decision canvassed the issue of "remoteness" holding that, even if Siemens had responded to budget enquiries on the basis of agreed budget enquiry price lists, this conduct would not have constituted the fixing of a yet-to-be-determined price.

3.22 But there are signs that private actions, or at least claims, are on the rise. The writers are aware of some recent successful claims where the private action proceeds in tandem with the public case (for example the Interchange case, which was never formally consolidated as between the Commission action and the retailers', but was to be heard together).

3.23 Proceeding in tandem will not always work or be suitable, and requires the private party to be "as ready" as the Crown, but may offer the private litigant the advantage of being privy to the full case against the defendant, arguably increasing chances of settlement.

3.24 Factors encouraging settlement will include reducing international exposure – a New Zealand trial could result in additional facts/ evidence coming to light which could be adverse when used in other jurisdictions. It may also be seen as "doing the right thing" and, critically, preserve important on-going supplier/ customer relationships.

4. The Commerce (International Cooperation, and Fees) Amendment Act 2012

The context - a brief history

4.1 The 1983 Australia/New Zealand Closer Economic Relations - Trade Agreement (ANZCERTA ie CER) was signed to develop economic relations through removing trade impediments and developing trade through free competition. Given that the *Commerce Act 1986* was largely based on the Trade Practice Act 1974, it was recognised that *"the effective starting point in the competition law area can be said to be one of significant harmonisation"*.[20] By 1990 the CER Steering Committee even contemplated a trans-Tasman competition authority.[21]

4.2 In 2004 the Australian Productivity Commission was tasked with reviewing these issues. It concluded that full harmonisation and integration were not necessary. However, the report recognised that there could be real value in greater information sharing between the Australian and New Zealand agencies. The Australian Productivity Commission report[22] developed two models by which Australian and New Zealand regulatory bodies could cooperate in information gathering:[23]

4.2.1 Model 1: the local regulator directly requisitions information from a person in another jurisdiction, amending section 155A of the Trade Practices Act 1974 and section 98H of the Commerce Act 1986 accordingly. This naturally raised concerns over accountability of the regulator's exercise of information gathering, and what rights of appeal there would be over the regulator's information gathering powers.

4.2.2 Model 2: based on investigative assistance, whereby a foreign regulator requests a local regulator to requisition information on behalf of the foreign regulator. The local regulator would retain discretion to assist the foreign regulator and may impose conditions to safeguard the use and disclosure of the information. Accountability for information gathering would rest with the local regulator and there would be a degree of ministerial oversight in each case. It was thought that this model would require little if any adjustment to current accountability and governance arrangements as it would rely on existing law.

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20 1990 CER Steering Committee Report, p14

21 New Zealand Prime Minister (1990 Commonwealth Law Conference) Capital Letter Vol. 13, No. 14, p2

22 See http://www.pc.gov.au (On 29 June 2004 the Treasurer and the New Zealand Minister for Commerce announced a reference to the Productivity Commission ("PC") for a 'research study examining the potential for greater cooperation, coordination and integration of the general competition and consumer regimes in Australia and New Zealand', see Hon Peter Costello, 'Another Step Taken towards Single Economic Market', Media Statement 057, 29 June 2004)

23 Productivity Commission Research Report, "Australian and New Zealand Competition and Consumer Protection Regimes", 16 December 2004, at p. 99.

4.3 The Commerce Commission and ACCC then agreed to facilitate cooperation - the agencies commenced annual meetings *"to discuss the strategic relationship and issues of mutual interest in the competition, consumer protection and regulatory areas*".[24] Their first meeting was in July 2006. That month the regulators signed a cooperation protocol to coordinate and streamline trans-Tasman merger applications.[25]

4.4 Australia enacted legislation in June 2007 amending the Trade Practices Act 1974[26] to insert 155AAA (Protection of certain information):

> "so as to allow closer co-operation between the regulatory and securities agencies of Australia and New Zealand. Specifically, the federal government has introduced amendments so that in limited circumstances "protected information" may be disclosed by an ACCC official in relation to Ministers, Secretaries of Departments, Royal Commissions and others in Australia and New Zealand."[27]

4.5 Other developments included cross-appointments. On 23 November 2010 it was announced that Commerce Commission chair Dr Mark Berry had been appointed an associate member of the ACCC and that ACCC member Dr Jill Walker would join the Commerce Commission as an associate member.[28] These were described as one of the key outcomes under the Single Economic Market Outcomes Framework, supporting convergence in the approach to similar issues under competition and consumer laws.[29]

Commerce Commission (International Co-operation, and Fees) Bill

4.6 The Commerce Commission (International Co-operation, and Fees) Bill was introduced into Parliament on 9 September 2008.[30] Despite bipartisan support,[31] it took four years until the bill became law, in the process being split into four different Acts (including additional powers in relation to telecommunications).

4.7 The Bill received seven written submissions and two oral.[32] Written submissions were from:

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24 Paula Rebstock, "Speech to Trans-Tasman Business Circle", 4 September 2006, www.comcom.govt.nz/MediaCentre/Speeches/speechtotranstasmanbusinesscircle.aspx/

25 The protocol proposed that the regulators should cooperate in gathering evidence by coordinating requests for additional information, conferences and hold joint meetings with merging parties and experts. The merging parties would be encouraged to grant broad confidentiality waivers to facilitate the exchange of information between the two regulators.

26 Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007 (Cwth)

27 stephens.com.au/Sites/2196/Images%20Files/Legal%20Updates/Recent%20developments%20in%20Trade%20Practices%20-%20January%202008.pdf

28 http://www.beehive.govt.nz/release/cross-appointments-between-nz-commerce-commission-and-australian-competition-and-consumer-co

29 See also NBR http://www.nbr.co.nz/article/cross-appointments-between-nz-aussie-regulators-133650

30 Press Release "Bill allows Commerce Commission to cooperate internationally" 9 September 2008, http://www.beehive.govt.nz/release/bill+allows+commerce+commission+cooperate+internationally

31 See the third readings in Hansard - http://www.parliament.nz/en-nz/pb/debates/debates/50HansD_20120927_00000028/third-readings-— and http://www.parliament.nz/en-nz/pb/debates/debates/50HansD_20121016_00000032/third-readings-—

32 Darien Fenton noted this stating that "the committee heard two submissions. So this was hardly controversial." Hansard and Journals – Hansard (debate), Third Readings – Sitting date: 16 October 2012. Volume: 684; Page: 5846

4.8 Meridian Energy – supporting the bill but suggesting greater safeguards to protect information.

4.9 Commerce Commission – seeking expansion in scope for telecommunications.

4.10 Meat Industry Association – which was *"not in favour"* of the Bill.

4.11 New Zealand Institute of Chartered Accountants – supporting the Bill.

4.12 Russell McVeagh – which suggested additional safeguards, including around when s98 notices should be issued.

4.13 Telecom New Zealand.

4.14 Vodafone – not supporting the Bill.[33]

4.15 The commentary to the Bill, as reported from the Commerce Committee,[34] made the following comments in relation to some of the key issues of concern:

4.15.1 Existing information - the definition of *"compulsorily acquired information"* was amended to cover information that *"had already been so acquired"*, explicitly overruling the usual *"presumption against retrospectivity"*.

4.15.2 Types of cooperation arrangements - the Bill was specifically amended to enable government-to-government and regulator-to-regulator arrangements, subject to ministerial approval. This was to provide maximum flexibility, particularly given that otherwise *"co-operation arrangements with Australia might become unduly complicated."*

4.15.3 Mutuality of information exchange and security of information – the committee rejected concerns about a lack of controls once information left New Zealand *"as we believe that New Zealand would not enter into a co-operation arrangement without reasonable confidence in the other parties provisions of these matters"*.

4.15.4 Providing compulsorily acquired information and investigative assistance - new subparagraphs were inserted to address situations *"where a request for assistance might raise a significant international trade concern"*. Under this amendment the Commission could consult with the Minister of Trade (after consultation with the Ministry of Foreign Affairs and Trade) and the Commission could then rely on a statement by the Minister about prejudice. The Commission would have to be satisfied that the information would not significantly prejudice New Zealand's international trade interests.

4.15.5 Conditions on providing compulsorily acquired information and investigative assistance- proposed new section 99I (2) was amended to maintain privilege against self-incrimination to the extent it was already provided for in the Act.

4.16 When introducing the legislation on behalf of the Minister of Commerce, the Hon Simon Bridges (Minister of Consumer Affairs) reiterated that the legislation

[33] http://www.parliament.nz/en-nz/pb/sc/documents/evidence/?custom=00dbhoh_bill8756_1

[34] 293-2

supported the single economic market objective.[35] (Virtually all speakers on the third reading made this point.) He said the legislation provided safeguards at two levels:

> "Firstly, it does so through requiring specific matters to be taken into account at a ministerial level. Such matters are broad, and include having regard to the legal framework in the overseas countries and the potential consequences to New Zealand businesses and consumers of a co-operation arrangement. Secondly, and separately, once a co-operation arrangement is in place, the legislation requires specific matters to be considered by the commission on a case-by-case basis. Providing safeguards at both levels is important in ensuring that appropriate consideration is given to public interest matters at different stages. It should also promote confidence in the integrity and implementation of co-operation arrangement under the legislation." [36]

4.17 Despite strongly supporting the legislation, political opponents highlighted general security risks with data and queried how effective the powers might be:

4.17.1 Dr Rajen Prasard, supporting the clarity of the safeguards around the sharing of information, still noted that *"for the member's Government this has been a bad week, with information that should have been well protected was actually made available accidentally" referring to "recent experiences that the Government has had around ACC and around the Ministry of Social Development just a few days ago about information".*

4.17.2 Hon Lianne Dalziel raised *"the question of whether the statutory powers of compulsion that the Commission has can be used only in relation to enforcement and adjudication within New Zealand, and there also being legal constraints on the provision to overseas regulators of confidential information compulsorily acquired information that is already held by the commission. I think that this does limit the willingness of those overseas regulators to provide assistance to the Commission…"*

5. Questions and issues

5.1 Questions:

5.1.1 Does the legislation really provide the protection indicated in section 99 G (c) by specifying how overseas regulators are to use and keep the information secure?

(a) It will be subject to future decisions of the courts?

(b) It could be used for multiple purposes?

(c) What is the policing mechanism? – That non-adherence to use/ storage requirements will mean subsequent requests are treated sceptically, or even rejected for want of confidence in the recipient.

[35] Hansard and Journals - Hansard (debates) – Third Readings – Sitting date: 27 September 2012. Volume: 684; Page 5788.

[36] Hansard and Journals - Hansard (debates) – Third Readings – Sitting date: 27 September 2012. Volume: 684; Page 5788.

5.1.2 Why doesn't the legislation provide for some ability to the parties to whom information relates being able to object or comment – section 99K provides notification afterwards? (But note: who is "the person to whom information relates"? The provider – perhaps, but not always. The subject of it? They will not always know yet that the Commission has the information, and investigation prejudice is possible.)

5.1.3 Is the trade protection just code for our legislatively protected mechanism for export cartels? If so will it work?

5.1.4 What benefit was so important that the legislature saw fit to provide for the dissemination of information gathered before enactment?

5.1.5 Is Lianne Dalziel correctly implying that the powers may not be as broad as thought given that the Commission can only compulsorily acquire information within the scope of its (New Zealand) duties?

5.1.6 What is the mechanism for when conditions change in offshore jurisdictions – for example an offshore regulator fails to adequately secure information, or is otherwise inadvertently released, or the law in those jurisdictions changes? Then by the will of the parties, the agreement changes. Nothing requires that an agreement must be in place with a particular overseas regulator.

5.1.7 Will New Zealand benefit from the principle of reciprocity?

5.2 Will the Act achieve its stated goals?

5.2.1 Early days, but we have some confidence to say that those goals are achievable. NZ is seen to be 'doing its part' internationally, in circumstances where some regulators – eg Canada – have for a long time been much freer to share information. The Commission has received one consumer information request from the ACCC. We anticipate entering shortly into further Arrangements with overseas agencies.

5.3 Less control over information once it is passed to the regulator?

5.3.1 Not for leniency/ cooperation information. That is not covered by the Act, so requires waivers etc before international sharing can occur. Yes, for compulsory information; but for that information, 'control' is not really the applicable concept once it has been seized – the question becomes one of what the agency is empowered to do with it.

5.3.2 The key feature of the Act is that it applies *only* to compulsorily-acquired information, compelled using our notice and search powers.

5.3.3 So, the Commission has to reach its own arrangements with cooperating parties, and the terms of those arrangements will dictate what 'investigative assistance' the Commission might supply under the Act.

5.4 Will the incentives to seek leniency in New Zealand change?

5.4.1 Will we get more info from overseas?

5.4.2 Will we get more or fewer applications?

5.5 Relevance in a world of criminalisation of cartel conduct?

Closing comments

The new legislation would clearly seem to help regulators to co-ordinate their cases and may lessen the ability to hide behind jurisdictional issues.

It may be a powerful incentive to seek leniency and voluntarily provide materials to the Commission.

But questions remain.

Was the legislature excessively focussed on Australia? Was it too blasé about the risks of disclosure to other jurisdictions, where agencies might have to then 'open their books' on information received from New Zealand? Did it sufficiently consider the rights of those people who had submitted to the Commission's wide-ranging powers under s98 prior to enactment?

Judging by the limited submissions, maybe not.