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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from New Zealand

-- Session II --

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-- New Zealand --

1. Purpose

1. The purpose of this paper is to summarise the New Zealand Commerce Commission's (NZCC) experiences of international cooperation in cartel investigations.

2. Introduction

2. The paper considers various issues relating to international cooperation, following the OECD suggested topic headings:

- Existing tools for international cooperation
- Types of cooperation
- International vs regional cooperation
- Identifying gaps and improving the current frameworks
- Information sharing

3. Key points

- The NZCC has a number of tools for international cooperation. In our view it is best to have a mix of both formal and informal cooperation between agencies.
- We cooperate with other agencies in a number of ways. These include the exchange of information and ideas, and the provision of assistance with investigations and/or litigation.
- We have a high level of cooperation with the Australian Competition and Consumer Commission (ACCC), as Australia is our closest neighbour geographically.
- We have not had an instance where a cartel investigation could have benefited from information or cooperation from a foreign competition agency but we did not receive any assistance. However, there are some improvements that could be made to existing cooperation frameworks.
- The key issue in information sharing is the concern of the investigated party about its information getting into the public domain (and potentially being used against it in any litigation).

4. Existing tools for international cooperation

3. The NZCC has a number of tools for international cooperation, both formal and informal.

4. As the majority of our current cartel cases involve conduct by offshore participants (that has affected a market(s) in New Zealand), we actively seek out cooperation with other agencies worldwide. In particular we have a high level of cooperation with the ACCC.

5. In our view it is best to have a mix of both formal and informal cooperation between agencies, as is the case between the NZCC and the ACCC (detailed below).

6. Formal mechanisms can provide greater clarity of process and certainty. However, formal mechanisms may take longer or require a certain level of government hierarchy to become involved in any decision to give assistance.

7. In our experience, where there is good faith between agencies it is possible to have a mutually beneficial relationship based on informal communication. These relationships are often started and fostered at ICN or OECD cartel events.

8. Set out below are our main formal and informal tools.

4.1 Formal tools

4.1.1 Cooperation with Australia

9. New Zealand and Australia have a long history of cooperation. The two countries have been working together since 1983 to ensure harmonisation of our trade laws, including competition legislation.¹ Select Committees will take trans-Tasman harmonisation into account when reviewing Bills to be passed into law. The Courts will consider the trans-Tasman implications when interpreting legislation.

10. There are currently two formal agreements between New Zealand and Australian authorities:

- ACCC and NZCC Cooperation Agreement 2007
- Memorandum of Understanding between the Government of Australia and the Government of New Zealand on Coordination of Business Law

11. The 'ACCC and NZCC Cooperation Agreement 2007'² provides the framework for cooperation between the two agencies. The 2007 version replaces an earlier agreement signed in 1994.

12. Under that agreement:

- The NZCC and the ACCC have committed to "provide careful consideration to each other's important interests in the application of their competition, consumer and regulatory functions".
- The agencies agree that it is in their common interest to share information, evidence and documentation (including information on investigations).
- The exchange of general information such as research, speeches and compliance or education programmes is provided for, but not case specific information.

¹ Formalised in the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), more commonly known as Closer Economic Relations (CER) 1983

² Found at <http://www.comcom.govt.nz/international-relations/>

- Any confidential information must be protected, and “no information will be exchanged pursuant to this arrangement which would not be exchanged absent this arrangement.”
- There is provision for regular meetings between the agencies.
- Each agency will notify the other where an investigation is relevant to a particular agency, where one agency is proposing to seek information in the other agency’s jurisdiction, or where one agency is seeking to enforce remedies in that other agency’s jurisdiction.
- There is a framework for co-ordinating enforcement activities.

13. The ‘Memorandum of Understanding (MOU) between the Government of Australia and the Government of New Zealand on Coordination of Business Law’ provides for coordination between Australia and New Zealand on business law issues. It expressly recognises coordination and cooperation between the two countries in respect of competition laws enforced by the NZCC and the ACCC.³

14. There are also a number of legislative provisions that are relevant to the relationship between the NZCC and the ACCC:

- Mutual Assistance in Business Regulation Act 1992 (Cth) (MABRA)
- Section 155AAA Trade Practices Act 1974
- Mutual Assistance in Criminal Matters Act 1992 (MACMA)
- Trans Tasman Proceedings Act 2010

4.1.2 *Mutual Assistance in Business Regulation Act 1992 (Cth) (MABRA)*

15. This Act passed by the Australian Government allows business regulators (including the ACCC) to assist the NZCC with evidence gathering, such as enforcing production notices. However, it does not allow the business regulator to release information to us.

16. Under MABRA the NZCC makes a formal request for assistance, which is then considered by the ACCC and referred to the Australian Government. The Attorney General will then authorise the assistance if it is in Australia’s best interests and consistent with international law and comity. The available assistance can include compelling the production of documents and requiring a person to give oral evidence.⁴

4.1.3 *Section 155AAA Trade Practices Act 1974*⁵

17. The Australian “Trade Practices Act 1974”⁶ was amended in 2007 to give the ACCC discretionary powers to share information (with few barriers) with any international enforcement agency, including the NZCC.

³ Available online at: http://www.med.govt.nz/templates/MultipageDocumentTOC___43982.aspx

⁴ Reciprocal legislation to the MABRA is currently before the New Zealand Parliament, the Commerce Commission (International Cooperation and Fees) Bill 2008; which is discussed further below.

⁵ Inserted into the then Trade Practices Act 1974 in 2007

18. The amendment remedies what happened in the 2005 Koppers Arch wood chemicals cartel case, in which the NZCC and the ACCC brought parallel proceedings. In that case, some ad hoc assistance was given by the ACCC and the NZCC to each other's investigation, but issues of confidentiality stopped us from being able to share anything meaningful or assist each other with information gathering. Some witnesses agreed to waive confidentiality so that the agencies could transfer information, but the agencies' enabling arrangements did not then permit it.

19. Section 155AAA has been utilised on several occasions by the NZCC. A recent example of this was in an Air Ambulance cartel investigation in late 2010. Both countries had begun similar investigations, and the NZCC was interested in obtaining the confidential interview transcripts of some common witnesses.

20. The NZCC officially requested and obtained the transcripts under s 155AAA. The ACCC specified conditions on the disclosure of any information from these transcripts during our investigation, which the NZCC agreed to in the form of a signed undertaking.

4.1.4 *Mutual Assistance in Criminal Matters Act 1992 (MACMA)* ⁷

21. This Act enables the New Zealand Government to authorise the NZCC to take steps in support of enforcing criminal investigations on behalf of overseas agencies. Steps taken may be such things as locating persons, taking evidence or obtaining document production orders. While New Zealand currently does not have criminal sanctions for cartels, the Act allows us to provide assistance to those jurisdictions that do.⁸

4.1.5 *Trans Tasman Proceedings Act 2010*

22. In relation to enforcement, in 2008 Australia and New Zealand signed a treaty (the Trans Tasman Treaty on Court Proceedings and Regulatory Enforcement) under which both countries committed to introducing legislation to minimise impediments to trans-Tasman enforcement. In line with the Treaty, the New Zealand Parliament has now enacted the Trans Tasman Proceedings Act 2010. When an Order in Council is made bringing this Act into force, the Act will allow for the enforcement in Australia of New Zealand-ordered injunctions and civil pecuniary penalty orders (which are currently imposed on cartels), and for the service in Australia of civil proceedings initiated in New Zealand.⁹

4.1.6 *Cooperation with other countries*

23. New Zealand, together with Australia, also has formal agreements for cooperation with Canada, the UK and Taiwan.¹⁰ These formal cooperation agreements provide for:

⁶ Now the Competition and Consumer Act 2010.

⁷ Australia has a reciprocal Mutual Assistance in Criminal Matters Act 1987.

⁸ Legislation has been introduced to criminalise cartel conduct in New Zealand – see the Commerce (Cartels and other matters) Amendment Bill 2011.

⁹ This is also reciprocated in accordance with the Australian Foreign Judgments Act 1991 (Cth), with some limitations.

¹⁰ The ACCC, NZCC, and Taiwan Fair Trade Commission- Cooperation Arrangement 2002, the ACCC, NZCC, and OFT - Cooperation Arrangement: Application of Competition and Consumer Laws 2003, and the Canadian Competition Commissioner, ACCC and NZCC – Cooperation Arrangement: Application of

- exchange of information, documents, research and guidance
- an agreement to keep information confidential, as far as possible
- exchange of staff
- regular meetings to discuss enforcement activity and to exchange information and ideas.

24. These agreements are based on the cooperation agreement between the ACCC and the NZCC. They provide for general information exchange but do not allow New Zealand to disclose compulsorily acquired information or any information that is confidential.

25. New Zealand's Parliament is shortly expected to enact legislation which will enable the NZCC to use its powers on behalf of other international agencies. This is discussed in more detail at paragraphs 55 to 61 below.

4.2 Informal tools

26. The NZCC also has informal tools to discuss cartel investigations and litigation between agencies.

27. 28. Investigators have their own contacts in other agencies and will contact these on an ad hoc basis.

29. 30. In addition, we have informal arrangements with different agencies for regular telephone conferences with officials of the Australian, Singaporean, Canadian, European and US agencies.

4.2.1 OECD and ICN

31. In our view, both the OECD and ICN play an important role in international cooperation. As noted above, we find participation in OECD and ICN events useful for fostering good relationships with other agencies.

32. We find OECD papers and publications to be extremely useful. In particular they enable us to avoid "reinventing the wheel" when creating process guidelines and carrying out cartel investigations. In our cooperation agreements with other agencies, the NZCC and other parties acknowledge the OECD recommendations and guidelines.¹¹

33. The NZCC follows international best practice in cartel enforcement wherever possible, with reference to OECD and ICN resources. For example the current proposed Bill to criminalise cartels adopts the OECD definitions of "hard core cartel" offences. We also recently updated our leniency policy to take into account international best practice, such as having a marker system.

Competition and Consumer Laws. Copies of these agreements listed below can be found at: <http://www.comcom.govt.nz/international-relations/>

¹¹ For example, see Cooperation Agreement between ACCC and NZ CC 2007 Found at <http://www.comcom.govt.nz/international-relations/>

5. Types of Cooperation

34. Cooperation between the NZCC and other agencies usually takes place by telephone and email. Face to face meetings are unlikely given the distance of New Zealand from most agencies.

35. The types of cooperation that the NZCC requests from other agencies are:

- Assistance with investigations – information gathering, interviewing witnesses and coordinated search warrants.
- Exchange of information and ideas, either formally or informally. This may involve discussions of the theory of the case in a particular investigation or at the litigation stage. It may also involve intelligence sharing about potential investigations.
- Provision of information, whether compulsorily or voluntarily supplied.
- Assistance with enforcement of civil penalties in other jurisdictions.

36. We have requested information or assistance at various stages of an investigation or litigation. We generally receive the assistance requested, unless that particular agency's country does not have enabling legislation allowing it to share certain information. For example, not all countries allow the release of compulsorily acquired information, although many do.

37. Many investigation teams have semi-regular conversations with other agencies about specific investigations. And, as stated above, we have regular informal catch ups with various agencies about general matters.

38. Even at the litigation stage, the NZCC receives helpful cooperation from other agencies. An example is one international cartel case, where the NZ CC 's investigators were in close contact with the US Department of Justice (DOJ) as the agencies shared a mutual immunity applicant and had prioritised the same potential defendants. The DOJ and the NZCC took part in fortnightly discussions about the agencies' approaches to settlement and the way each was calculating commercial gain in order to determine penalty. Both the DOJ and NZCC filed at the same time with the courts in their respective jurisdictions and settled with the same parties at the same time.

39. We consider that co-ordination of litigation has been very successful. In particular it has been useful to assist with determining the theory of the case in a particularly complex investigation.

40. On the other hand, the exchange of information is sometimes problematic. Some agencies can be reluctant to release confidential leniency information because it may later be subject to the discovery process, exposing the leniency applicant to third party litigation overseas.

6. International vs regional cooperation

41. The NZCC cooperates most often with the ACCC, as Australia is our closest neighbour geographically. This is followed by the Canadian Competition Bureau, the Competition Commission of Singapore, the European Commission (EC) and the DOJ.

42. Conference calls are held monthly with the ACCC, every two months with Singapore, and quarterly with Canada. The EC and DOJ are contacted on a case by case basis. We also have occasional contact with the Japan Fair Trade Commission, Bundeskartellamt, and the Brazilian and Chilean agencies.

43. We are not part of any formal regional network but have an informal network with Singapore and Australia, with who we are in regular contact.

44. The NZCC often cooperates with multiple agencies in relation to one cartel investigation. For example, in the Air Cargo case, the NZCC was assisted by the ACCC, the Canadian Competition Bureau, the South African Competition Commission, the EC and the DOJ.

7. Identifying gaps and improving the current frameworks

45. The NZCC is pleased to report that we have not yet had an instance where a cartel investigation could have benefited from information or cooperation from a foreign competition agency but we did not receive any assistance.

46. However, the following improvements could be made to the existing frameworks:

- increased ability to obtain evidence from other jurisdictions
- more jurisdictions enacting reciprocal information sharing legislation and entering into treaties
- streamlined tools for cooperation

47. These suggested improvements are discussed in more detail below.

48. The NZCC's biggest challenge in investigating global cartels is our lack of ability to obtain evidence from a party overseas unless they cooperate. Any notice we send requiring information cannot be enforced overseas; therefore we are essentially requesting a voluntary reply. We often have to rely completely on a leniency applicant to provide full information. This could be mitigated if it were possible to obtain evidence from other jurisdictions.

49. The current international cooperation system for cartels could be improved by ensuring more jurisdictions enact reciprocal information sharing legislation, and enter into treaties which provide for such legislation.

50. Finally, international cooperation could be improved by streamlining tools for cooperation. For example, with international leniency applicants, a standard waiver letter used by all jurisdictions would be more efficient than agencies each having to negotiate the terms each time. Markers or immunity being granted on a multi-jurisdictional basis is another possibility, although this would also depend on each agency's prioritisation of investigations.

51. We note that although we have yet to encounter any issues, there is potential for conflict to arise due to the fact that in New Zealand the cartel offence still only attracts civil liability. If a criminal jurisdiction was requesting information or evidence from us in relation to a cartel investigation we would need to keep in mind the different evidential requirements, as well as certain privileges, such as the privilege against self-incrimination.

8. Information Sharing

52. The main barrier to information sharing that the NZCC has encountered when requesting information from another jurisdiction is concern from the party providing the information about how that information will be used in the future.

53. The key issue is that parties who provide information to agencies are typically unwilling to agree to further disclosure, as they are concerned about the information finding its way into the public domain (and potentially being used against them in any litigation). This can be addressed, at least in part, by the possibility of negotiating a ‘limited waiver’ which allows the other jurisdiction to control how the information is then used once received.

54. Once information is disclosed outside the initial agency a large measure of control is lost, even if the recipient agency agrees to treat the information as confidential. Different jurisdictions have different rules on disclosure and/or discovery. It may therefore be much easier for the owner of information to resist disclosure in some jurisdictions than others. Further, a person may be able to bring proceedings to prevent disclosure in New Zealand or make submissions on disclosure to the ombudsman, but this may not be an option or may be difficult in other jurisdictions. Therefore parties are often resistant to the NZCC sharing their information with overseas agencies.

55. The NZCC often requests waivers from a leniency applicant to receive information from other agencies that they have applied to. Waivers are an important part of any investigation as they streamline the information sharing process. We often have to negotiate extensively on the terms of the waiver, and ensure that the information is dealt with appropriately after it’s received.

56. The new Commerce Commission (International Cooperation and Fees) Bill 2008 (the Bill) described below, is intended to make it easier for NZCC to share information with other agencies and for agencies with which we have a cooperation agreement to share information with us.

57. The NZCC takes into account international trade concerns when disclosing information, and the Bill provides that we will consult with the New Zealand Ministry of Foreign Affairs and Trade in some circumstances, before responding to a request.

8.1 The Commerce Commission (International Cooperation and Fees) Bill 2008

58. New Zealand’s Parliament is shortly expected to enact legislation which will enable the NZCC to use its powers on behalf of other international agencies. The Bill authorises the Commerce Commission to assist and be assisted by “recognised overseas regulators” which are defined as agencies with which the NZCC has entered into a cooperation agreement.

59. This Bill has as its stated purpose:

... to authorise the Commerce Commission **to assist and be assisted** by equivalent overseas regulators.

60. The Bill’s primary focus is better information sharing across all jurisdictions, but it is likely that this will be used in relation to the ACCC most often.¹²

61. The Bill will give the NZCC a similar power to provide investigative assistance to overseas regulators, including carrying out search warrants and enforcing information notices. It will also enable us to share information sharing with recognised overseas agencies.

¹² The Bill and explanatory materials can be found on the internet at http://www.legislation.govt.nz/bill/government/2008/0293/latest/DLM3379900.html?search=ts_bill_Commerce_rese&p=1&sr=1

62. The Bill applies to compulsorily acquired information only (ie warrant, compulsory interview, notices). It will not affect our ability to share voluntarily provided or public information.

63. A “recognised overseas regulator” will be able to request any compulsorily acquired information that the Commission holds. Regulators that fall within that definition are overseas bodies that have competition law functions corresponding to those of the NZCC, and have a cooperation arrangement with the NZCC.

64. The Bill envisages that the conditions upon which the information is provided will be set out in each respective cooperation arrangement.