RUSSELL McVEAGH

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The Commission's Revised Leniency Policy: Changing the Rules of the Rat Race

*The Commerce Commission ("**Commission**") is considering changes to its leniency policy for parties that expose cartel conduct ("**Draft Revised Policy**"). The key changes are the establishment of a 'marker' system and the adoption of the 'Amnesty Plus' process. This Alert considers those proposals. In particular, we query whether the Commission needs to go further to assure parties how the information provided will be used and whether it will be shared with overseas regulators.*

The Current Leniency and Cooperation Policies

The Commission's current Leniency Policy grants immunity from Commission-initiated proceedings to the first member of a cartel who formally approaches the Commission with information regarding the cartel. The Commission must be unaware of the particular cartel at the time for immunity to apply. Such immunity is conditional upon the applicant cooperating fully with the Commission throughout any investigation and related proceedings ("**Conditional Immunity**"). Where immunity is granted to a company, it may extend to any current or former director, officer, or employee of that company. Immunity granted by the Commission cannot exclude claims for compensatory or exemplary damages by third parties who may have suffered loss as a result of the activities of the cartel.

As the Leniency Policy only applies to the first member of a cartel that formally approaches the Commission with information, cartel members that are not the first to apply for leniency cannot receive immunity. However, subsequent cartel members that approach the Commission with information may be eligible for the Commission's general cooperation policy ("**Cooperation Policy**"). Cooperation agreements are informal, but the earlier the company approaches the Commission, the more likely benefits of this policy will be available.

Under the Cooperation Policy, the Commission may take a lower level of enforcement action against an individual or business in exchange for information, and full, continuing and complete cooperation. This may include an out-of-court settlement, or an agreed settlement of proceedings incorporating a reduction in penalty, together with a submission made by the Commission to the court in support of the agreed penalty. In exceptional cases, cooperation may even result in no action being taken, in a de facto grant of leniency. Reductions in penalty for early cooperation can be as high as 50 per cent of the total penalty that would otherwise be imposed.

The Commission considers that the existing Leniency Policy has been very successful. It notes it received thirteen leniency applications since the policy was implemented in 2000. The Commission stated that the Draft Revised Policy takes into account the Commission's experiences in administering the policy and introduces innovations that have been successful overseas in order to further enhance the effectiveness of the policy.

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Marker System

In a move following competition authorities in Australia, USA, Canada, UK, Europe and Japan, the Commission is proposing to introduce a 'marker system' in its Draft Revised Policy. A marker system permits a 'first in' applicant to receive the security of a place holder while it compiles sufficient evidence necessary to secure immunity. This system is designed to encourage firms to come forward as early as possible in order to preserve the possibility of Conditional Immunity.

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Once a marker has been granted, the applicant must present a 'proffer' to the Commission, including detailed information and supporting evidence of cartel activities, and the connection of the cartel with New Zealand if it is a cartel based overseas. The marker lasts for 28 calendar days (as in Australia), or a longer period if an extension is granted by the Commission.

Once the proffer has been given, the marker is 'perfected' and the applicant is immune from Commission-issued proceedings.

The Commission has also taken the opportunity to confirm and formalise the existing practice, that lawyers for cartel participants can approach the Commission on a hypothetical basis to enquire whether immunity is still available in a particular industry. In those circumstances, the Commission has undertaken not to use any information gathered in the course of a hypothetical inquiry against the enquirer, and not to share information gathered with other regulators, despite its information sharing protocols.

One matter on which there remains some uncertainty is how information will be dealt with if companies lose their place in line. For example, can the information then be used against the applicant, or can it then be provided to overseas regulators? The Commission's template leniency agreement would suggest that the Commission would be able to use information as it sees fit once immunity is lost. This leads us to question whether it is not also incumbent on the Commission to formalise its processes for resolving the benefit of conditional immunity, including a 'marker' protection, given the serious consequences of such loss of protection in order to assure international and local applicants that due process will be observed in respect of their highly sensitive and valuable information.

> *"The 'Amnesty Plus' scheme allows parties who are involved in a cartel, but who are otherwise not eligible for immunity for that particular cartel, to reduce the penalty for involvement in that cartel by informing the Commission of another separate cartel of which the Commission is unaware."*

'Amnesty Plus'

The Commission also proposes in its Draft Revised Policy to follow the ACCC's lead in introducing 'Amnesty Plus'. The 'Amnesty Plus' scheme allows parties who are involved in a cartel, but who are otherwise not eligible for immunity for that particular cartel, to reduce the penalty for involvement in that cartel by informing the Commission of another separate cartel of which the Commission is unaware. In return, the applicant will receive full conditional immunity for its involvement in the second cartel and a 'significant' discount on any penalty imposed as a result of its involvement in the first cartel.

The Commission has been cautious to state that the scheme would only apply to completely separate cartels, rather than separate limbs of the same original cartel, so an applicant would want to be very certain that the conduct spanned different markets before it handed over further incriminating evidence to the Commission.

The impact of developments in cartel criminalisation and international regulator cooperation

The most recent indications are that New Zealand may be far closer to implementing criminalisation of cartel conduct than previously thought.[1]

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The prospect of facing either criminal charges or immunity from criminal prosecution greatly increases the risks and rewards of obtaining leniency. As these risks and rewards become more significant so too do the obligations on the Commission to clearly and succinctly outline the requirements for obtaining leniency and to explain how the information will be used.

Even in the absence of criminal penalties in New Zealand, potential applicants based outside of New Zealand currently weigh-up the benefits of obtaining immunity from civil proceedings in New Zealand (where penalties are comparatively small by international standards) with the risk that such information will be used against them in other jurisdictions where criminal sanctions apply and civil penalties are much higher. A lack of clarity in respect of the Commission's treatment of confidential information provided by individuals may create the perception that the risks involved in making an application for leniency in New Zealand outweigh the benefits. These issues will become even more paramount in the minds of potential applicants, if the proposed legislation that is seeking to extend the scope of the Commission's powers of cooperation with other international competition regulators, namely the *Commerce Commission (International Co-operation and Fees) Bill* ("**Cooperation Bill**"), is enacted into law by Parliament.[2]

We consider that, where the Commission is receiving information from parties that are outside New Zealand, it needs to provide guidelines regarding the following:

- The requirements upon individual employees of the corporate entity that is seeking leniency where these individuals may face prosecution in another jurisdiction. The Commission might in practice, for example, not require any statement from an individual that may amount to an admission that

could be used against them by a regulator in a jurisdiction with criminal sanctions. Equally, the Commission may not require a corporate leniency applicant to force its employees to provide such a broad statement if criminal liability in another jurisdiction may follow; and

- The extent to which the Commission regards statements by leniency applicants as being documents that are available to be exchanged with or made available to:
  - other competition regulators pursuant to cooperation policies;
  - foreign courts to the extent that discovery orders may be made on the Commission; and
  - third parties in New Zealand pursuant to Official Information Act requests or discovery orders in third party litigation.

While, in our experience the Commission is cooperative in dealing with such matters as they arise, the lack of advance clarity from the perspective of international applicants may itself currently act as a disincentive from parties making applications for leniency in New Zealand.

Summary

While it is encouraging to see the Commission adopt two useful elements of leniency procedures from overseas, the Commission must recognise that the lack of clarity around the extent of its information sharing regime and information requirements, coupled with the prospect of jail-terms elsewhere, will make people based in the USA, UK or Australia very reluctant to provide incriminating evidence to the Commission. It would be desirable if the Commission dealt with the important issues identified above in order to give international applicants the security of knowing that:

- the Commission will seek only to focus on the New Zealand impact of any particular arrangement;
- the Commission will not require individuals to provide, or force companies to compel, statements of admission that risk subjecting individuals to criminal sanctions overseas;
- the Commission will protect applicants' confidential information against exposure in jurisdictions where criminal sanctions apply; and
- the Commission's information sharing protocols differ as between regulators in jurisdictions that have criminal sanctions and those that do not.

As noted above, New Zealand is a small country and price fixing fines are comparatively small compared to overseas jurisdictions. A clear statement from the Commission about how it will treat confidential information may encourage international leniency applicants. It would be a pity if the Commission missed the opportunity to address these concerns during the review of the Draft Revised Policy.

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Submissions

If you would like to make a submission on the Draft Revised Policy, we recommend you contribute to the Commission's consultation process. If you are uncertain as to whether or how these proposals may affect your business, please contact one of the contributors below.

The Commission intends to publish its revised Leniency Policy once it has considered submissions. **Submissions on the proposed Revised Policy are due on 30 October 2009.**

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1. See for example: (2009, August 19). New Zealand steps closer to cartel criminalisation. *Global Competition Review*. Retrieved October 5, 2009 from www.globalcompetitionreview.com
2. For further information on the Cooperation Bill please see our December 2008 Alert available at: http://www.russellmcveagh.com/_docs/CompetitionAlertDec08_190.pdf

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