

# COMPETITION ALERT

## AUGUST 2007

### CAN THE NZCC PROVIDE YOUR CONFIDENTIAL INFORMATION TO THE ACCC?

#### Summary

The New Zealand Commerce Commission and the Australian Competition and Consumer Commission have agreed to co-operate and co-ordinate their competition, consumer and regulatory functions pursuant to a co-operation agreement signed by the parties on 31 July 2007 ("**Agreement**").<sup>1</sup> The 2007 Agreement replaces a Co-operation and Co-ordination Agreement signed by the parties in 1994 ("**1994 Agreement**").

The Agreement covers the competition, consumer and regulatory functions conferred by the Commerce Act 1986, Fair Trading Act 1986, Telecommunications Act 2001, Electricity Industry Reform Act 1998, Dairy Industry Restructuring Act 2001 and the Credit Contracts and Consumer Finance Act 2003 (for New Zealand) and the Trade Practices Act 1974 (for Australia).

The NZCC and ACCC have committed to "provide careful consideration to each other's important interests in the application of their competition, consumer and regulatory functions" and agree that it is in their common interest to share information, evidence and documentation (including information on investigations).

An important question raised by the Agreement is to what extent can the NZCC disclose information to the ACCC which has been obtained during an investigation but which is subject to a formal (or informal) confidentiality order?

#### Confidentiality

Under the Agreement, the NZCC and ACCC agree to:

- (a) use their best efforts to maintain the confidentiality of any confidential information communicated to each other under the Agreement;
- (b) protect any confidential information provided to each other to the fullest extent possible (including in respect of requests made under the Official Information Act 1982 (NZ) and the Freedom of Information Act 1982 (Aust));
- (c) use their best efforts to oppose any application by a third party for disclosure of confidential information to the fullest extent possible; and
- (d) use their best efforts to notify each other as promptly as possible and ensure that conditions are imposed on any such disclosure to a third party.

Nothing prevents either party disclosing information to third parties where that disclosure is consistent with, or required by law.

However, the Agreement does not expressly address the issue of how information provided to the NZCC on the basis that it is "confidential" is to be regarded in dealings between the NZCC and the ACCC. This contrasts with the 1994 Agreement, which provided that the NZCC was not required to provide information to the ACCC where information was provided to the NZCC on the basis that it must not be disclosed.<sup>2</sup>

#### What are the legal limits on the extent to which information can be exchanged?

Historically, the NZCC has been constrained in its ability to share confidential information with other competition enforcement agencies, including the ACCC. As a general rule, the

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1. The parties will agree separate protocols for any area where more detail is required. As at 31 July 2007, the only Protocol in place is the *Cooperation Protocol for Merger Review - July 2006*.

2. See paragraph 4.1 of the 1994 Agreement.

law provides that sensitive information should only be used for the purposes for which it was obtained (subject to a public interest test in some circumstances). Under the Commerce Act, the NZCC is restrained by the limits on its information gathering powers under that Act, and the Privacy Act provides restrictions on the use of personal information held about natural persons.

In 2004, the Ministry of Economic Development issued a discussion paper asking whether commercially sensitive information should be shared by the NZCC with other enforcement agencies (including the ACCC). The MED paper considered that the general restrictions limited the NZCC's ability to enter into meaningful co-operation agreements with other international and domestic enforcement agencies, and consequently constrained the NZCC from sourcing valuable overseas information.

One of the options proposed in the MED paper was that the Commerce Act be amended to allow information to be exchanged under information sharing agreements between competition agencies by exempting them from the Official Information and Privacy Acts.

Australia has recently enacted legislation<sup>3</sup> which (among other things) amends the Trade Practices Act 1974 by inserting a new section 155AAA. Subsection 12 of section 155AAA permits protected information to be provided to a foreign government body if it will assist it to perform or exercise any of the functions or powers of the agency or body. Those provisions came into effect on 19 July 2007.

In a speech by the Hon Lianne Dalziel at the Competition Law and Regulation Review Conference on 26 February 2007, the Minister indicated that both Australia and New Zealand were in the process of developing legislation to permit the sharing of confidential information to assist each body in enforcing their competition laws. Although the Australian legislation has now taken effect, we are not aware of any legislative amendment to the Commerce Act on this point to date.

#### Practical tips to maintain confidentiality

As it stands at the moment, the Agreement between the NZCC and ACCC to share information does not override any obligation of confidence agreed between the NZCC and a company or individual. Some practical tips for ensuring the maintenance of confidential and commercially sensitive information include:

- (a) where information being provided is confidential, clearly identify that information and seek an assurance from the NZCC that it will be kept confidential. Explain the reason for the concern;
- (b) where possible, seek a formal confidentiality order from the NZCC under section 100 of the Commerce Act;
- (c) ask to be notified of any requests for information under the Official Information Act so that you can have an opportunity to comment on whether the information is still confidential;
- (d) ask the NZCC to confirm in writing that the confidential information will not be provided to any other enforcement body (including the ACCC). You may also offer to consider permitting disclosure if requested by the ACCC.

#### What about "without prejudice" privilege?

Keep in mind when providing information to the NZCC that "without prejudice" privilege generally applies to communications between parties who are negotiating a compromise or settlement of a dispute. On public policy grounds the privilege applies to protect genuine negotiations from being admissible in evidence. Importantly, the privilege also applies to protect negotiations being disclosed to third parties, including other regulators, without the consent of both parties to the negotiations.<sup>4</sup> You should mark "without prejudice" communications as such, although that will not always be determinative. Also keep in mind that statements that are not relevant to the negotiations will not be protected.

3. Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007 (Cth).

4. See Peter Taylor's comments that "[t]he privilege exists against all the world..." at p5 of his paper *Issues Arising from the Application of the Leniency Policy*, presented at Competition Law and Policy Institute Conference, 3-5 August 2007. See also *Rush & Tompkins Ltd v Greater London County Council* [1989] 1 AC 1280 at 1305.

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*[T]he Agreement between the NZCC and ACCC to share information does not override any obligation of confidence agreed between the NZCC and a company or individual.*