

OECD ROUNDTABLE

PLEA BARGAINING/ SETTLEMENT OF CARTEL CASES

Executive Summary

- New Zealand's Commerce Commission (*the Commission*) has in recent years adopted Leniency and Co-operation Policies with the aim of encouraging cartel participants to self-report, and to obtain their assistance in the prosecution of cartel cases.
- The policies are providing considerable assistance with the investigation and prosecution of cartels. The Commission is currently making significant headway in its pursuit of a major chemicals cartel, as a result of co-operation with key cartel participants.
- The Commission adopts the role of 'model litigant' and does not compromise claims before the Court in exchange for admissions or penalty and costs offers. The Commission's process for negotiating admissions and formulating penalty recommendations does not resemble a commercial negotiation. Rather, the Commission uses information obtained through discovery and co-operation to persuade defendants that the Commission's causes of action are sustainable, and seeks to negotiate penalty recommendations that can be submitted to the Court.
- The only sense in which the Commission 'compromises', therefore, is in agreeing to recommend to the Court that defendants' penalties should be meaningfully discounted for early admissions of liability and for their co-operation (if any) with the Commission.
- The New Zealand courts are mindful of avoiding capture of the penalty-setting process by the parties and their counsel. The Courts expressly reserve the power to depart from penalty recommendations in cartel cases; while that has occurred in Australia, it has not yet occurred in New Zealand.

Notes:

- Price-fixing, bid-rigging and other anti-competitive practices are not criminal offences in New Zealand. Accordingly, the term 'plea bargaining' is only used in this paper to refer to a negotiated outcome of a criminal proceeding relating to obstruction of the Commission.
- Attempts to mislead the Commission, and failure to provide all material in response to notices issued by the Commission, are criminal offences. The Commission has prosecuted cartel participants for these offences, and has 'plea-bargained' in respect of the sentences to be imposed.

Commission's cartel enforcement

- 1 The Commission is an independent public regulatory agency responsible for the enforcement of the Commerce Act 1986 (*the Act*) including, relevantly, Part II of the Act and its prohibitions against restrictive trade practices.
- 2 The Commission has in recent years increased its investigation of cartel activity, and has successfully brought civil penalty proceedings in around 16 cartel cases.
- 3 The Commission seeks to reduce the economic detriment caused by anti-competitive practices. To that end, the Commission has published a Leniency Policy and a Co-operation Policy, with the aim of maximising the Commission's prospects of uncovering cartel activity and taking effective action against cartels¹.
- 4 It is the Commission's experience that these twin policies have been effective in encouraging admissions and the provision of evidence which have had a 'domino-effect' on other persons and companies engaged in the same cartel.

Leniency & Co-operation Policies

- 5 The Commission released a Leniency Policy and companion Co-operation Policy during 2000. Like other such policies elsewhere, the purposes of the policies are to:
 - Assist in the detection of anti-competitive cartel behaviour; and
 - Assist in the bringing of enforcement action against cartel participants.

Leniency Policy

- 6 Under its Leniency Policy, the Commission extends immunity from suit to the first cartel participant (company or individual) to provide information to the Commission about a hitherto unknown cartel, and to co-operate fully with the Commission's investigation and prosecution of the cartel.
- 7 Immunity from Commission-initiated proceedings is not granted where the Commission is currently investigating conduct relating to the leniency application.
- 8 To date, the Commission has received 8 leniency applications, and has granted leniency in 7 instances.

Co-operation Policy

- 9 Under its Co-operation Policy, the Commission has a discretion to take a lower level of enforcement action (or none at all) against an individual or business, in exchange for information about the cartel and co-operation in pursuing the other participants. The principal respect in which this policy differs from the Leniency Policy is that it does not require the Commission to be unaware of the cartel when the applicant

approaches the Commission.

- 10 The Commission requires that co-operating parties supply to it all information in their possession, including documentary and electronic evidence, in relation to the cartel. This includes information held overseas, in circumstances where the Commission may be unable to access that information but for the co-operation.
- 11 The Commission applied its Co-operation Policy effectively in its recent prosecution of the Koppers Arch wood preservative chemicals cartel. The Commission was alerted to the existence of the cartel as a result of a new-entrant's complaint. Despite initial obstructive behaviour,² one of the cartel protagonists subsequently co-operated with the Commission by providing evidence and was given immunity from prosecution under the Co-operation Policy. His affidavit evidence as to meetings, events and transactions was invaluable in satisfying other defendants that they had breached the Act, and for use in the Court proceedings to establish whether, when and where specific conduct occurred.

Incentives for Leniency/ Co-operation

- 12 The Commission has stated its intention to prioritise its anti-cartel enforcement³. That prioritisation, plus the Commission's active pursuit of cartel enforcement in practice and prosecution of attempts to obstruct the Commission⁴, are enhancing the Commission's reputation for effective enforcement in this area.
- 13 The primary incentives for co-operation with the Commission by cartel participants are, in summary:
 - 13.1 Potential procurement of immunity from suit (or at least a reduced penalty);
 - 13.2 Informational advantage as to the status of the investigation and litigation;
 - 13.3 Increased certainty of outcome, through negotiation of admissions and recommended penalties;
 - 13.4 Reduced risk of adverse publicity and reputational damage; and
 - 13.5 Avoidance of the legal costs and personal/ institutional pressure of litigation.
- 14 The characterisation of Part II breaches as civil rather than criminal is a factor that may in practice diminish the comparative effectiveness of the Commission's leniency programme. Cartel participants face less serious consequences than their counterparts in some jurisdictions, because cartel conduct is not a criminal offence in New Zealand and there is no prospect of imprisonment⁵.

Indemnity issues

- 15 Section 80A of the Act prohibits a body corporate from indemnifying directors, servants and the like in respect of liability for payment of a pecuniary penalty for breaches of s30, and costs incurred in defending or settling a s30 case. Section 30 is the *per se* price-fixing provision.
- 16 Indemnity is not prohibited in respect of other breaches, i.e. rule of reason breaches.
- 17 The s80A prohibition can affect an individual defendant's incentives to co-operate. Such a person must bear their own legal costs and pay their own penalty in respect of *per se* breaches. Because of their potentially considerable personal exposure, the benefits to be gained by co-operating with the Commission are enhanced accordingly. The Commission sees this indemnity prohibition as a useful weapon in its armoury. The prohibition is not however well-understood by the public and it is therefore important that defendants receive the advice of competent counsel.

Assessing a co-operation proposal

- 18 The Commission pleads those cartel breaches for which it believes that there is sufficient evidence and, of its own volition, discontinues any pleading that it considers to be flawed, for whatever reason. It follows that the Commission does not approach defendants with a view to compromising all or part of a claim. It is, of course, receptive to an indication that a defendant is willing to admit liability.
- 19 When a defendant indicates a willingness to negotiate an admission of liability and agreed penalty, the Commission's process usually incorporates the following phases. All of the communications between the Commission and the defendant take place on an expressly without prejudice basis:

Proposal phase

- 19.1 The Commission requests from the defendant:
- (a) Details of proposed admissions as to pleaded causes of action;
 - (b) If the defendant is an individual, the provision of a draft witness statement as to all relevant matters within that defendant's knowledge;
 - (c) The provision on a without prejudice basis of undiscovered documents relevant to the investigation and proceeding;
 - (d) Details of any circumstances relevant to the proposed penalty (e.g. financial circumstances, personal difficulties etc); and

- (e) A proposed recommended penalty and penalty range, and methods of payment (e.g. time-payment terms, if proposed; security for payment by mortgage or payment into solicitor's trust account etc).

Assessment phase

- 19.2 Commission staff and external counsel (if instructed) closely assess the proposal, including specifically:
- (a) The completeness and adequacy of admissions, including the reasons for any unadmitted causes of action⁶;
 - (b) The completeness and utility of new evidence provided (documentary and affidavit); and
 - (c) The adequacy of the proposed penalty and costs, taking into account any proposed mitigating factors.
- 19.3 Commission staff negotiate as to the above with counsel for the relevant defendant. Investigators and Commission counsel consider whether there is good evidence as to pleaded breaches that are not admitted by the defendant, including evidence of which the defendant may not be aware.
- 19.4 Commission staff and counsel offer to meet with counsel for the defendant, to flesh out differences in view as to the above matters, and to ascertain if agreement is possible.
- 19.5 Commission staff and counsel prepare two draft documents that will be required if a proposal is to proceed further:
- (a) A draft co-operation agreement (see below at 20-22); and
 - (b) A draft agreed statement of facts based on discussions with the defendant. This document is annexed to the co-operation agreement, and later to the memorandum to the Court seeking the imposition of penalties. The statement of facts contains the following:
 - Relevant agreed background facts;
 - Definitions, as per the pleadings or as agreed, of the understandings entered into by the defendant in breach of the Act;
 - Particularisation of that defendant's participation in the breaches, whether personally or by means of employees/ directors;
 - Other matters relevant to penalty, such as level and timing of co-operation and admissions, relevant personal circumstances etc.

These documents are provided to the defendant for consideration and comment and to obtain the defendant's agreement to them.

- 19.6 The defendant may be asked to revise aspects of its proposal, with the aim of refining the proposal so that staff can recommend to the Commissioners that it should be accepted. Staff make it clear to the defendant that only the Commissioners can agree to a proposal, and that staff can only agree (at best) to recommend a proposal to Commissioners.

Recommendation phase

- 19.7 When a proposal is as fully developed as possible, staff will present it to Commissioners in a formal meeting, together with relevant material including the draft agreement and statement of facts. Staff make a recommendation as to the acceptability or otherwise of the proposal.
- 19.8 The Commission is free to agree a position on admissions without reaching agreement on the issue of a recommended penalty. Since the setting of a penalty is for the Court to determine, if the parties are unable to agree a recommendation then each is able to make separate submissions at a penalty hearing. A defendant is able to admit liability at any time, without consulting with the Commission. Alternately, the Commission and a defendant might agree admissions but not be able to reach agreement on penalties. Whichever occurs, the defendant must give the Court its views on penalty.

Terms of co-operation

- 20 The Commission's co-operation agreement with a defendant typically requires that party to promptly, reliably and without compulsion by legal process:
- Co-operate with the Commission in a full, frank and unstinting manner in relation to its investigation and the proceedings;
 - Provide to the Commission all information in that party's knowledge, possession or control relevant to the formation, existence, activities, operation and membership of the cartel, and the investigation;
 - Retain and make available to the Commission relevant personal documents and records;
 - Make himself or herself available for interviews by and discussions with the Commission, at places of mutual convenience or by telephone, email or otherwise, for the purposes of providing all information requested by the Commission or otherwise relevant to the investigation and proceedings;

- Provide full, frank and truthful responses to all inquiries by the Commission and agree to the questions and answers being recorded; and
 - Appear as a witness in any proceedings initiated by the Commission in relation to the cartel or the investigation, and provide full, frank and truthful evidence as to all matters within his or her knowledge⁷.
- 21 The defendant is also bound to support the joint penalty recommendation (if one has been agreed) before the Court.
- 22 Other obligations require the defendant to permit information-sharing between the Commission and relevant overseas regulators (most often the Australian Competition & Consumer Commission) and to give the Commission advance warning if any third-party requests like information from the defendant.
- 23 The Commission reserves the right to re-issue the proceedings if the co-operation agreement is breached or if the defendant has materially misled the Commission.

Commission's decision-making on co-operation proposal

- 24 In each instance, the co-operation proposal and the recommendations of staff and counsel are considered at a formal Commission meeting.
- 25 If the Commission decides to proceed with the proposed settlement, the Commission members are asked to delegate to a single Commission member the ability to sign the co-operation agreement. This allows there to be further negotiation of routine matters between staff and the defendant before the agreement is signed; a formal Commission meeting need not be reconvened.
- 26 This delegation can be particularly useful if last-minute issues arise or if co-operation is important to imminent steps in the proceedings. In one recent instance, a co-operation proposal was assessed and an agreement entered into by the Commission a little more than a week before the substantive hearing. The advance delegation to a single member allowed all matters to be resolved in short order.

Differences between companies & individuals

- 27 In the Commission's experience, companies and individuals can experience different incentives to co-operate. Individual defendants who are not separately represented from their companies may be less motivated to formally co-operate or may be actively thwarted by their company. Corporate defendants face considerably greater penalties than individuals (as below at 28) and may be reluctant to make early admissions, or may seek to attribute responsibility for breaches to one or two executives (so that breaches appear to be isolated events rather than institutionally encouraged behaviour). In such circumstances, defendant executives are likely to have interests that conflict with those of their employer. The Commission

encourages, but cannot require, separate representation in such cases.

- 28 The penalties for cartel conduct differ as between corporates and individuals. From 2001 (when the corporate penalty doubled), the applicable maximum penalties are, for each act or omission:
- *Companies*: \$10,000,000 or either:
 - (a) 3 times the value of the commercial gain resulting from the contravention, if the gain can be readily ascertained and the Court is satisfied that the contravention occurred in the course of producing a commercial gain; and
 - (b) 10% of the turnover of the company and all of its interconnected bodies corporate, if the commercial gain cannot be readily ascertained.⁸
 - *Individuals*: \$500,000.⁹
- 29 The Commission has co-operated with companies whose executives and former executives were defendants to the same proceeding. In such cases it has been the Commission's practice to agree terms of co-operation, admissions etc separately with the individuals, rather than to give them the benefits of the company's co-operation deal with the Commission¹⁰. The reasons for this vary. In one instance, it was because the company was prepared to admit the individual's wrongdoing during his directorship, but the director was not. In other instances, it is because complex issues relating to admissions and penalty need to be resolved with each defendant.

New Zealand courts' approach to penalty recommendations and agreed statements of fact

Court is not a 'rubber stamp'

- 30 The New Zealand High Court, which has exclusive first-instance jurisdiction over competition proceedings, is receptive to the Commission's recommendations as to penalty:

"Properly negotiated settlements are in the interests of parties and the interests of the community so as to avoid Court action, potentially complex and lengthy litigation and its very substantial expense"¹¹

- 31 The Commission has presented agreed penalty recommendations to the High Court in a large number of Part II cases. In none of these cases has the Court imposed a penalty different from the recommended penalty.
- 32 Nor has the District Court differed from any agreed recommended criminal sentencing recommendation for s103 offences committed during a Commission investigation. There has, however, been little judicial discussion in that forum of the

process of accepting a sentencing recommendation.

- 33 The High Court has, however, made it clear that it alone has jurisdiction over penalty-setting, and that it will not tolerate ‘capture’ of the process by counsel.
- 34 In the Commission’s most recent cartel penalty decision, Williams J noted that the difficulty for the Court in setting penalties is that it is “*much less optimally informed than counsel and the parties of the detail of relevant matters*”¹².
- 35 The Court referred to and was influenced by the Australian decision in *ACCC v FFE Building Services Ltd*¹³, in which the Court stated that “*there is a danger in judges of this Court being overly influenced by the view as to penalty taken by the ACCC.*” The Court in that case resisted the notion that the Court would simply ‘rubber stamp’ a recommendation produced by the parties. The Court also cited *ACCC v Colgate Palmolive Pty Ltd*¹⁴:

“The Court may be seen, perhaps not altogether incorrectly, to act as a ‘rubber stamp’ in simply approving a decision taken at an executive level by a body charged with investigating and prosecuting contraventions of the Act, but having no role in actually imposing particular sanctions for those contraventions. Negotiated settlements are an important vehicle for resolving complex matters such as those involved in the present case. It must be borne in mind, however, that there is a public interest in ensuring that corporations that engage in behaviour of the kind that occurred in this case are dealt with appropriately, and that proper recognition is given to the need for specific and general deterrence.”

- 36 However, in the recent *Koppers Arch* cartel case, Williams J noted that despite these concerns, the recommendations of parties “*gain additional weight*” where the defendants are represented by skilled and experienced specialist counsel, “*who are unlikely to advise acceptance of the Commission’s proposals if they go well beyond what is justifiable*”¹⁵.
- 37 To guard against the Court’s acceptance of an aberrant recommendation, Williams J asked that counsel in future advise the Court in detail of:
- The process that the parties followed in order to reach their recommendations, with reference to applicable precedent and applicable facts; and of
 - The recommended range of penalties together with their reasons for their recommendation as to the appropriate penalty within that range¹⁶.

- 38 The Commission has followed that process in all subsequent recommendations.

Relevance of admissions and co-operation to penalty

- 39 Two of the principal factors relevant to the penalty imposed by the High Court following a negotiated admission and penalty are:

39.1 The timing of the defendant’s admission (i.e. nearness to trial); and

39.2 The extent of co-operation provided by the defendant.

- 40 Many other factors are also relevant (e.g. financial resources, personal circumstances, implementation of a compliance regime etc).
- 41 As to the discount applicable to an early admission, the High Court has recognised the following discounts in recent cartel cases (by analogy to criminal sentencing principles):
- 25-33% penalty discount applicable where a trial was about 2 months away¹⁷; and
 - Around 50% penalty discount applicable where there were early admissions and extensive co-operation¹⁸ (i.e. where admissions of liability were made close in time to the date of issuing).
- 42 The Court’s decision, and the parties’ recommendation, as to the discount applicable to a particular admission is fact-specific and will vary according to all of the circumstances.

Status of agreed statements of fact

- 43 The Court in *Koppers Arch* expressed some concern about setting a penalty, based on the parties’ recommendations, at a stage when there had not been a trial and many facts were unknown. However, the Court accepted that it could do so because – and only because - the Commission had filed an agreed statement of facts admitted by the defendant (see at 19.5(b) above). The Court carefully caveated that admissions relating to the conduct of other defendants cannot be taken as findings of fact against those defendants. The facts ultimately determined at trial “*can be confidently expected to differ to a greater or lesser degree from those appearing in the agreed statement*”¹⁹.

Jurisdiction issues

- 44 Where a co-operating defendant lives overseas and may otherwise seek to protest the jurisdiction of the New Zealand High Court to hear the matter against him or her, the Commission requires a submission to jurisdiction as a term of co-operation.
- 45 The co-operation agreement will contain agreement to the effect that the New Zealand courts have jurisdiction to determine any proceedings arising out of or in connection with the agreement, but also in relation to the matters to which the agreement relates (including the cartel investigation). This submission to jurisdiction provides the Commission with the certainty that it will not need to defend itself against a jurisdictional challenge, perhaps some significant time after such issues have been resolved against other defendants.

‘Plea-bargaining’ in obstruction cases

- 46 The wood chemicals cartel investigation gave rise to three criminal prosecutions under s103 of the Act for acts and omissions that obstructed the Commission’s investigation:
- Koppers Arch NZ and a director were convicted, respectively, of furnishing false or misleading information²⁰ and failing to comply with a statutory notice²¹, and were fined \$25,000 and \$8,000 respectively. Documents relevant to the Commission’s investigation were concealed under a house, and others were deleted from a computer hard-drive;
 - A director of Osmose NZ was convicted of attempting to deceive or knowingly mislead the Commission by way of lying in a voluntary interview²², and was fined \$7,000; and
 - Osmose NZ was convicted of failing to comply with a notice issued by the Commission²³, in that the company failed to produce relevant documents – including shared price-lists – that were held in the General Manager’s office. The company was fined \$13,000.
- 47 Each of these defendants, save for one individual, was also a defendant in the primary civil cartel proceedings. Each of those defendants sought to compromise with the Commission the civil proceedings and simultaneously to plea-bargain the criminal prosecution against them.
- 48 The Commission exercised care to conduct wholly separate discussions in respect of the civil and criminal pleas; it would be improper for the Commission to consider discontinuing civil claims in exchange for a guilty plea in a criminal case, and vice versa. Where both kinds of enforcement action are on foot at the same time, negotiations as to settlement of them proceed in tandem.
- 49 The penalties imposed in the above cases are modest in comparison to overseas penalties for analogous behaviour. They are respectable penalties given the applicable maxima²⁴, but the Commission will be considering whether the statutory maxima should be increased so as to serve as a meaningful deterrent. The experience internationally is that cartelists frequently resort to active obstruction of investigations, and will do a cost-benefit analysis of the potential ‘costs’ of obstruction versus the ‘benefits’ gained by impeding the investigation or limiting the scope of any resulting legal action²⁵.

¹ See the Commerce Commission’s Statement of Intent 2006–2009, available online at <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/SOI%202006-07.pdf>.

² *Koppers Arch Wood Protection (NZ) Ltd v Commerce Commission* (Unreported, High Court Auckland, Williams J, 16/11/2004, CIV 2004-404-3868).

³ See Annual Report 2004-2005 at 5, available online at <http://www.comcom.govt.nz>.

⁴ *Commerce Commission v KANZ & Parish* (Unreported, District Court Manukau, Judge B A Morris, 3/6/2005, CRI 2004-092-13040 & CRN 04092506119-121); *Commerce Commission v Osmose New Zealand* (Unreported, District Court Auckland, Judge Bouchier, 23/8/2006, CRI 2006-004-8264); *Commerce Commission v Greenacre* (Unreported, District Court Auckland, Judge Bouchier, 23/8/2006, CRI 2004-004-013423).

⁵ There is considerable literature to suggest that the threat of imprisonment is effective in deterring 'rational' offences like price-fixing, and likewise in encouraging co-operation with regulators. See, for example, T O Barnett "Seven Steps to Better Cartel Enforcement" 2 June 2006 Presentation to the 11th Annual Competition law & Policy Workshop (available online at <http://www.usdoj.gov/atr/public/speeches/216453.htm>):

"... nothing in our enforcement arsenal has as great an effect as the threat of substantial incarceration in a United States prison - nothing is a greater deterrent and nothing is a greater incentive for a cartel, once exposed, to cooperate in the investigation of his co-conspirators."

⁶ The Commission has entered into co-operation agreements where no admissions were obtained. The negotiation process, in which the quality of the Commission's evidence is tested, may disclose that there is not sufficient evidence to proceed but that terms of assistance by that defendant can be agreed.

⁷ This obligation is expressed broadly in order that the party's evidence can be used in all cartel-related proceedings, including any criminal prosecution arising out of the investigation (as where a person of interest provides misleading information to the Commission, or fails to supply documents within their possession or control).

⁸ S80(2B)(b) Commerce Act 1986, as amended effective 26 May 2001.

⁹ S80(2B)(a) Commerce Act 1986.

¹⁰ Nevertheless, the corporate co-operation agreement requires it to use its best endeavours to obtain the co-operation of directors, employees and contractors, and to make such persons available for interviews and discussions. The company is also obliged to encourage such persons to appear as witnesses, if required, and to provide full, frank and truthful evidence as to all matters within their knowledge. The effect is that where such persons are also defendants, separate co-operation agreements with them will be required; the company cannot compel their co-operation with the Commission, which is not assured unless the individuals separately agree to co-operate.

¹¹ *Commerce Commission v Ellingham & Ors* (Unreported, HC Wellington, 27/10/2005, Gendall J, CIV 2002-485-720) at [5], see also *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 at 737:

"The cooperation of the defendants in acknowledging fault and bringing the matter to an early conclusion deserves full recognition and encouragement... But for that factor significantly higher penalties would have been appropriate."

¹² *Koppers Arch* at [35].

¹³ (2003) ATPR 47,798 at 47,805.

¹⁴ (2002) ATPR 41-880 at [34], per Weinberg J.

¹⁵ *Koppers Arch* at [36].

¹⁶ *Koppers Arch* at [37].

¹⁷ *Ellingham* at [14].

¹⁸ *Giltrap v Commerce Commission* [2004] 1 NZLR 608 (CA), also *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd & Ors* (Unreported, HC Auckland, 6/4/2006, Williams J, CIV 2005-404-2080) at [42]-[49]

¹⁹ *Koppers Arch* at [50]-[55].

²⁰ S103(1)(b) Commerce Act 1986:

“**103(1) [Duty of person supplying information]** No person shall –

(b) In purported compliance with [a s98] notice, furnish information, or produce a document, or give evidence, knowing it to be false or misleading...”

²¹ S103(1)(a) Commerce Act 1986:

“**103(1) [Duty of person supplying information]** No person shall –

(a) Without reasonable excuse, refuse or fail to comply with a notice under... section 98 of this Act...”

²² S103(2) Commerce Act 1986:

“**103(2) [No attempts at deceit, etc]** No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.”

²³ See 21 above.

²⁴ Maximum individual penalty \$10,000, maximum corporate penalty \$30,000 (s103(4)).

²⁵ See Barnett at 7.