

## **INTERNATIONAL CARTEL ENFORCEMENT: NEW ZEALAND'S ROLE<sup>1</sup>**

Globalisation is today commonplace and unavoidable. But the tools of government, including the laws passed by parliament and created within the common law, have struggled to evolve as quickly as has commerce.

What is needed is for competition enforcement and regulation to 'go global' in the same way as the commerce that it superintends.

This paper therefore addresses the ways in which the Commerce Commission seeks out and utilises opportunities to interact with its overseas counterparts, to assist their cartel enforcement and to make our own more effective.

The Commission is forced to take a "global approach to the law" - the theme of this Conference - by the global activities of its cartel suspects. But the legal issues thrown up are of great interest, and the Commission is generating some interesting jurisprudence in this field.

### **A The international antitrust community: shared concerns**

Before I directly address cartel enforcement issues, first some brief comments about the New Zealand Commerce Commissions international cooperation generally.

Not all members of the Bar Association practice in the antitrust field, and it may be surprising to learn quite how small and familiar the international competition community is. Like tax law, environmental law and some other difficult and specialised areas, competition law has a relatively small number of specialist legal practitioners. This is true throughout the world.

Perhaps because misery loves company, the members of that community not infrequently gather together at the OECD and at ICN (International Competition network) conferences, and also in Washington at the excellent American Bar Association fora. The Commerce Commission actively encourages members and staff to attend the most useful of these conferences and courses, and to seize the opportunities that they present to become familiar with the issues affecting our overseas counterparts, as well as to make the acquaintance of other agencies' personnel. We also seek out formal, and ad hoc, opportunities for staff exchanges with other regulatory agencies.

The Commerce Commission closely monitors the publications and press releases, and sometimes even the pleadings, of our counterpart agencies overseas. The papers of ICN working groups (for example) are also publicly available online, and can include the submissions of member countries.

---

<sup>1</sup> Conference paper to the New Zealand Bar Association Annual Conference, Sydney, 15-16 August 2008. I gratefully acknowledge the contributions of Ben Hamlin and Mary-Anne Borrowdale, Commerce Commission staff, in preparing this paper.

While there has been much written about international differences in antitrust, in particular between the United States and the European Union, it must be borne in mind how far we have come in a short time.<sup>2</sup> It is now expected that there will be interagency coordination on merger review, cartel enforcement, and the development of policy and best practice.

If one regulator takes objection to a particular practice or industry, it is not unlikely that similar practices will, one way or another, come to be examined in New Zealand. By way of recent example, in an environment of global rising food prices, the grocery sector has been under intense scrutiny around the world. There have been sectoral reviews in the UK and Australia, and the Wholefoods merger challenge in the United States. In New Zealand we have had our own much-publicised Warehouse merger challenge. There was nothing orchestrated in the timing of these grocery activities. But the regulator watches with interest the concerns, investigations and remedies explored in other jurisdictions.

A second example can be found in the fast-moving world of telecommunications. The Commission last year completed an investigation into potential bundling and margin squeeze concerns. In doing so it was necessary to consider the approaches taken by the ACCC in its papers on the subject, the approach of the EU in the Deutsche Telekom case, and the inchoate US jurisprudence (the US Supreme Court has decided to hear a telecommunications price-squeeze case next year).

Another important ingredient in this international antitrust mix is the expert economist. While economists are almost as numerous as lawyers, the truly expert in antitrust, and the even narrower group of those who are accustomed to advising or providing expert testimony for an enforcement agency, are relatively few. So we find ourselves working with and against the same lawyers and the same experts time and time again.

All this is by way of saying that there are many opportunities to become aware of globally shared concerns, and to discuss challenges with overseas agencies.

Speaking to the Bar Association, such trends may seem divorced from your daily practice. But they explain developments today, and perhaps herald developments in the future. Just as the Commission draws strength from overseas developments, it can be beneficial for competition law practitioners to look outside New Zealand to see what can be learned from other countries. Insights can be gained into the mind of the regulator, and you may find support for arguments that will assist your advocacy before or against the Commission. In our experience, the Courts are – like us – often keenly interested in whether and how competition law questions have been answered overseas.

---

<sup>2</sup> See T Calvani “Conflict, Cooperation & Convergence In International Competition” (2006) ABA *Antitrust Law Journal*.

## **B Cartel investigation and information-sharing**

There is a steady flow of information and commerce across the Tasman, and the ACCC/ Commerce Commission relationship is likewise becoming better established.

Mr Goddard's paper discusses, so I will not, the newly-signed Trans-Tasman Treaty on Court Proceedings and Regulatory Enforcement. The Treaty will hopefully ease significantly the Commission's ability to serve proceedings in Australia, obtain relief (including injunctive relief) and enforce penalties and fines, including cartel fines.

But the practical scope of the Treaty is necessarily limited. It assists at the enforcement stage, but not during the investigation of a cartel. And it extends only to Australia. International cartels typically operate across a number of jurisdictions, so there is a 'bigger picture' for the Commission than simply its co-operation with Australia. Issues not solved by the Treaty are live issues in respect of the rest of the world.

So, let us examine the Commission's methods for investigating trans-Tasman cartels, and then those applying to the rest of the world.

### *B1 Australian assistance*

The trans-Tasman cartel is nothing new. The Koppers Arch wood chemical proceedings, which have in New Zealand been successful against 10 defendants including 7 companies, have also been brought in Australia. The origins of that cartel have never been quite pinned down, but are believed to date back to at least the start of the 1990's and to arrangements that also included the United Kingdom and the United States.

Some ad hoc assistance was given by the ACCC and the Commerce Commission to each other's investigation. But once issues of co-operation and confidentiality came into view, these opportunities were limited and did not, in our view, significantly advance our investigation in New Zealand.

But recent and foreshadowed amendments to the Australian and New Zealand information-sharing arrangements are expected to make a significant difference to our ability to effectively investigate trans-Tasman cartels.

Both New Zealand and Australia have passed a Mutual Assistance in Criminal Matters Act (MACMA), which enables steps to be taken in support of overseas criminal investigations. In Australia, the Mutual Assistance in Business Regulation Act 1992 (Cth) enables bodies such as the ACCC to take action in support of an overseas regulatory investigation, but did not allow for the release of information.

In July 2007 the Commerce Commission and the ACCC reaffirmed their commitment to inter-agency liaison by entering into a Cooperation Agreement.<sup>3</sup> In brief, the Agreement expresses the agencies' reciprocal undertakings to:

---

<sup>3</sup> <http://www.comcom.govt.nz/TheCommission/InternationalAgreements/australia.aspx>.

- Exchange information, documents, research, guidelines etc.
- Treat as confidential (as far as possible) information provided by the other agency.
- Exchange staff.
- Meet annually to review their cooperation and to, most relevantly:
  - “exchange information on their enforcement efforts and priorities”; and
  - “exchange information on economic sectors of common interest”.

Also in July 2007 the Trade Practices Act 1974 was amended to include the new s155AAA, which provides the ACCC with discretionary powers to disclose information to foreign government bodies, such as the Commerce Commission, where the disclosure will enable or assist that body to perform its powers or functions.

The Commerce Commission wasted no time in availing itself of the opportunity to request information under that regime.

But the information-sharing arrangement is currently asymmetrical; New Zealand has no corresponding statutory power to assist agencies overseas. We understand, however, that the Ministry of Economic Development is working on this issue, and envisages having a draft bill ready shortly.

In any event it is worth noting that, in the Commission’s experience, legislation is not always a complete solution. Differences in substantive law, such as the law on privilege, can be problematic.

- In one recent matter, the Commission was aware of information held by the ACCC, which could not be disclosed as (on the ACCC’s view of the Australian law of privilege) voluntary disclosure might have resulted in any privilege in the documents being waived.
- It was agreed that the Commerce Commission would apply for a New Zealand subpoena to obtain documents from the ACCC. As such a subpoena can only be issued in support of existing proceedings, the Commerce Commission was unable to obtain the information prior to considering whether to take enforcement action.
- Having filed proceedings, the Commerce Commission received and reviewed the documents and elected to discontinue the proceedings. But had the information been able to be shared from the outset, it is unlikely the proceedings would have been brought, saving cost and difficulty to all parties.

Receipt of the ACCC’s information was very useful, in that the Commerce Commission was able to responsibly reassess its claim and discontinue the proceeding. But the timing delays were problematic.

Since the ability to quickly get to the facts, and form a view on them, is typically behind the Commission’s wish to obtain assistance from overseas agencies, it is to be hoped that the pace of information-sharing will quicken over time.

## B2 *Rest-of-the-world assistance*

As far back as 1995 the OECD recommended co-operation amongst competition regulators.<sup>4</sup> More recently, the ICN has brought particular focus to inter-agency co-operation (particularly in respect of cartels).<sup>5</sup> The need for co-operation is apparent. One can see this from very widespread arrangements such as the air cargo cartel that is the subject of litigation here and overseas overseas.

As in that case, the existence of well-understood leniency programmes means that sometimes cartel participants will seek leniency in many jurisdictions. This also means that an international response is required.

In cases involving conduct offshore – a problem to which I will return later – it can be very difficult for the Commission to gather evidence. The powers given to the Commission under s98 of the Commerce Act, for example, cannot be exercised outside New Zealand. So again, gaining access to evidence already gathered overseas can be mission-critical to an investigation.

While agency officials are often willing to assist one another, they are commonly pressed both in resources and time. And there can be a reluctance to provide confidential information about cases that have not yet been completed.

Language barriers, and the practical difficulties of working with those on the other side of the world, also complicate matters.

Beyond the trans-Tasman relationship, international information sharing is therefore less regular and slower. The Commission has existing co-operation arrangements with Australia, the UK, Canada and Taiwan.<sup>6</sup>

The ACCC, in comparison, has additional agreements the US, Korea, Fiji and PNG.<sup>7</sup> Such agreements generally provide for mutual assistance through the:

- notification of issues which affect another jurisdiction's markets;
- exchange of investigative information and research; and the
- use of information-gathering powers where possible.

Over time, the wrinkles in effective international cooperation will be ironed out. But it is salutary to note that that the International Competition Network has over 100 member agencies, so perhaps a series of bilateral agreements is not a practical path forward. What we might see instead is a series of multiparty arrangements.

For now, practitioners should simply note that regulators do exchange information, and it is not safe to assume that they have not done so in your matter. If your client is

---

<sup>4</sup> Recommendation C(95)130, Concerning Co-Operation Between Member Countries On Anticompetitive Practices Affecting International Trade (adopted 27/28 July 1995)

<sup>5</sup> Co-operation Between Competition Agencies in Cartel Investigations, ICN Cartel Working Group Report to the ICN Annual Conference (May 2006)

<sup>6</sup> <http://www.comcom.govt.nz/TheCommission/InternationalAgreements/Overview.aspx>

<sup>7</sup> <http://www.accc.gov.au/content/index.phtml/itemId/255435>

interested in cooperating with the Commission, this is one way in which they can give real assistance and receive the benefits that flow from cooperation.

It is at present generally quicker for the Commerce Commission to obtain the information directly from its source, than through interaction with another agency. Lawyers and their clients can exploit this opportunity by providing information directly, or by providing the necessary waivers to allow information sharing. This may diffuse unnecessary investigation or litigation, and will usually be taken into account by the regulator when considering the appropriate enforcement action or penalty.

### **C Territorial scope of the Commerce Act**

Questions of the substantive jurisdiction of the Commission – jurisdiction over the ‘subject-matter’ of the offence - arise in cartel situations, concerning:

- Conduct within New Zealand, or which is deemed to occur within New Zealand (ordinary jurisdiction); and
- Conduct outside New Zealand by residents or businesses doing, or deemed to be doing, business in New Zealand (s4 jurisdiction).

In many cases it is clear that conduct took place in New Zealand, such that jurisdiction is not in issue. In other cases, the residency qualification in s4 is easily answered, so jurisdiction is clear. But not infrequently the Commission faces jurisdictional challenges.

Where the s4 jurisdiction cannot be relied upon (there is no residency/ doing business element, and conduct occurred outside New Zealand), there are three avenues for finding that the conduct occurred ‘within’ New Zealand for the purposes of the Act:

- Communications to New Zealand.
- Acts through an agent in New Zealand.
- Overt acts in New Zealand amounting to a breach of the Act.

There has been much comment in New Zealand about jurisdiction and the decision of Justice Williams in relation to the Koppers Arch wood chemicals cartel.<sup>8</sup> An appeal against that decision was heard in our Court of Appeal in June, and judgment is pending.

While it will be useful to have guidance from the appellate court, it is unlikely to be the final word on the subject, given the frequency with which the Commerce Commission considers cross-border cartel activity, and the endless variety of the arguments that our agency lacks jurisdiction.

---

<sup>8</sup> *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805. See, for example, “The Long Arm of Accessory Liability in New Zealand – How Far is Too Far?” S. Keene and D. Johnston (2007) conference paper for the University of South Australia Trade Practices Workshop.

I will refer to some recent examples of international cartels that we have pursued:

- In the **vitamins cases** there was a globally co-ordinated cartel that was implemented locally without the knowledge of the local subsidiaries. The question for the Australian and New Zealand Courts (in *Bray*<sup>9</sup> and *Bomac*<sup>10</sup> respectively) was the extent to which the overseas parent companies could be liable for the implementation of the cartels. The Australian court found that in the directions to the subsidiaries to implement the cartel, and in particular the communications to them, the companies “gave effect” to the cartel within Australia. The New Zealand court found similarly.
- In the **Koppers Arch wood chemicals case** a cartel existed in New Zealand and Australia and was knowingly implemented by local companies and individuals. Proceedings were filed in 2005, and a large number of defendants admitted liability. In respect of three remaining individuals, their protests to jurisdiction were set aside by the High Court in 2007. The question for that Court was the extent to which overseas individuals and companies could be held to account in New Zealand for their role as co-conspirators. The Court analogised from the criminal law accessory liability principles, and held that an overseas person who acted (or, importantly, failed to act where he or she had a legal duty to do so) pursuant to a conspiracy *any part of which* was performed in New Zealand, had engaged in conduct “in” New Zealand in breach of our Act.
- The **gas insulated switchgear cartel** was, like the vitamins cartel, co-ordinated in Europe during 1988-2004, when it fractured following a leniency application. Local subsidiaries were required to give effect to pricing decisions of their offshore parent companies. The Commission commenced proceedings last year against only the overseas parents. Two of the three defendants indicated that they would challenge the Commission’s jurisdiction. But those protests did not materialise after the Commission provided, on a without prejudice basis, the evidence that it relied upon.
- The **air cargo cartel** is currently under investigation in many jurisdictions. The common rejoinder to the investigating agencies is to argue that the investigative jurisdiction of each agency is limited because the alleged cartel was truly international. Investigation-related proceedings have issued in both New Zealand and Australia.<sup>11</sup> It is likely that these proceedings may add further to the jurisprudence in this area.

As practitioners there are perhaps two points to note, in this difficult area:

---

<sup>9</sup> *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR 1.

<sup>10</sup> *Bomac Laboratories Limited v F Hoffman La Roche Limited* (2002) 7 BLC 103,627.

<sup>11</sup> The Commission has recently filed criminal proceedings against three airlines who refused to comply with information gathering powers: *CC v Aerolineas Argentinas SA*, CRI- 2008-004-11167; *CC v Cathay Pacific Airways Ltd*, CRI-2008-004-11456; *CC v Singapore Airlines Cargo PTE Ltd*, CRI-2008-004-11459. Airlines have challenged the ACCC’s information gathering powers in *Korean Air Lines v Australian Competition and Consumer Commission* (No 3) [2008] FCA 701 and *Singapore Airlines Ltd & Ors v ACCC & Anor* (VID 234/2008, heard July 2008).

- Overseas persons who participate in cartel activity concerning or affecting a New Zealand market risk primary and accessory liability, and the Courts seem to be taking practical note of the international nature of modern commerce. Justice Williams noted, in the *Koppers Arch* decision, that “*constant interactions between New Zealand and Australian members of the same [corporate] group are... inevitable, even commonplace*” and that “*retrospective dissection of the parties’ actions along a rigid Tasman division can be unrealistic.*”<sup>12</sup> Jurisdiction is always a fact-intensive exercise, and not simply a matter of where a company trades or has its head office.
- The Commission for its part is unlikely to assume, at an early stage of an investigation, that jurisdiction is excluded. As per the Commission’s current *Astra-Zeneca* proceedings, this applies as much to territorial issues of jurisdiction as to the application of exemptions from Part II of the Act. However, the Commission will in appropriate cases engage in without-prejudice discussions with a view to demonstrating that jurisdiction can be established, so as to prevent implausible challenges.

## D Cartel enforcement issues

As above, the new trans-Tasman Treaty allows for easier service of cartel proceedings in Australia.

Likewise, the recently introduced Judicature (High Court Rules) Amendment Bill contemplates expanding the categories for service outside of jurisdiction. The Commission expects that one result of this will be that a greater number of proceedings are brought without seeking leave from the Court.

These developments are very welcome.

It is the Commission’s experience that service of proceedings abroad is invariably time-consuming and costly. In the current gas insulated switchgear proceedings two defendants accepted service through local lawyers, without prejudice to their arguments that the New Zealand Courts lacked jurisdiction.<sup>13</sup> One of the defendants did not agree to receive service on this basis, leading to a delay of 16 months while service in France was effected through diplomatic channels.

Defendants should give serious thought before adopting this strategy. For policy reasons alone it is difficult to imagine a regulator giving up on service. But moreover, playing cat-and-mouse can also disadvantage the defendant: after such delays, the defendant now comes to the proceeding some considerable distance behind the other parties. They will have grown familiar with the proceeding, and may have progressed discovery. They may have even begun discussions on cooperation and settlement, with the last in time and least cooperative necessarily receiving a lesser discount.

---

<sup>12</sup> *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 at [241].

<sup>13</sup> As noted above, those arguments were later abandoned.

Finally, I comment on the enforcement of pecuniary penalties. As Justice Williams noted in *Koppers Arch*, deterrence is “perhaps the most significant factor to be considered in the imposition of penalties for anti-competitive behaviour.”<sup>14</sup> But a problem facing the Commission is that the deterrent effect of its penalties is limited by their unenforceability in other jurisdictions (save, now, for Australia).

Accordingly, where parties submit to the jurisdiction of the High Court and agree to pay a penalty, the Commission places value on this co-operation by way of a discount to the recommended penalty.

## **E Closing remarks**

The theme of this conference is “A Global Approach to Law – Life as a Barrister in the 20<sup>th</sup> Century”, with topics concerning the globalisation of markets and the international dimensions of legal practice.

I am grateful to have had the opportunity to address you on these themes. The Commission undoubtedly contributes to the jurisprudence in these areas, and to increasingly involving the New Zealand bar in cases that contain difficult issues of international law enforcement. The legal work conducted and generated by the Commission has international elements that would have been most unfamiliar to a New Zealand government agency only a few decades ago.

And this is because the markets with which the Commission is concerned – markets within New Zealand<sup>15</sup> – seldom these days exist in splendid isolation.

This internationalisation, while providing intriguing challenges to the Commission and the counsel with whom we interact, also provides opportunities for further developing our information-exchanges with our counterparts overseas. The Commission’s goal is to become increasingly vigilant and effective in the detection and prosecution of cartels.

Denese Bates QC, Member of the New Zealand Commerce Commission

---

<sup>14</sup> *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 at [30].

<sup>15</sup> Commerce Act 1986 s1A.