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The Commissioners

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Dear Commissioners

Submission regarding draft Leniency Policy and Process Guidelines

1. Thank you for the opportunity to make submissions regarding the Commission's Draft Revised Leniency Policy and Process Guidelines on Cartels (the **Draft Policy**).
2. We welcome and support the proposed changes, which:
 - (a) incorporate the Cooperation Policy as it relates to cartels into the Leniency Policy so that both are set out in one place;
 - (b) introduce a marker system to establish priority for leniency applications; and
 - (c) introduce an "Amnesty Plus" system to provide additional incentives to cartel members to disclose the existence of, and cease their involvement in, cartels.
3. In our view, the proposed changes are likely to assist in achieving several important goals:
 - (a) providing greater transparency regarding the Commission's processes and greater certainty regarding treatment of companies and individuals considering whether to make a leniency application;
 - (b) improving consistency with the leniency policies of competition regulatory agencies of New Zealand's trading partners, including Australia, the US and Europe, at a time when business – and cartels – increasingly operate across jurisdictions;¹
 - (c) reducing compliance costs; and
 - (d) increasing the incentives for cartel members to disclose the existence of the cartel and assist the Commission, thereby improving the detection, investigation, prosecution and prevention of cartels.
4. We set out below our comments regarding:

¹ We note that one key aim of the Commission's review was to align the Leniency Policy as much as practicable with that of the Australian Competition and Consumer Commission (**ACCC**).

- (a) the proposed marker system;
- (b) the proposed Amnesty Plus system; and
- (c) some additional matters which we consider will also enhance the transparency, fairness, and efficacy of the Draft Policy.

Marker system

5. In our experience, it is often difficult at an early stage of an internal investigation (and sometimes even subsequently) to know whether there has been a breach of the Commerce Act 1986 (the **Act**). This can particularly be the case in an economy such as New Zealand's where, in some markets, there are a small number of competitors producing identical or near identical commodity products for which identical or near identical pricing is economically rational even in the absence of cartel conduct. This difficulty is increased where, as is sometimes the case, the competing firms also have a customer-supplier relationship for particular products and therefore valid reason for communication between them.
6. In this regard, we note the United States Department of Justice's (the **DOJ's**) comment that "The Division, however, understands that when corporate counsel first obtains indications of the client's possible participation in a cartel, authoritative personnel for a company may not know definitively whether the company has participated in a criminal violation of the antitrust laws."²
7. We consider that the proposed marker system is a useful mechanism for overcoming this uncertainty and note that it is a feature of leniency policies in a number of other jurisdictions, including Australia, the United States, and Europe.
8. We note the information to be supplied to obtain a marker at paragraph 4.26 of the Draft Policy. We assume that, as for the DOJ's Corporate Leniency Program, the evidentiary standard for obtaining a marker will be relatively low so that cartel members that wish to do so are able to seek leniency at the first indication of possible wrongdoing.³
9. In relation to the subsequent proffer of information required to perfect the marker, we note that considerable flexibility regarding timing may be required in some cases, e.g., for international cartels of large scale where significant volumes of information are involved and the leniency applicant in New Zealand is also seeking leniency in other jurisdictions and therefore needs to coordinate compliance with the Commission's requirements with those of other competition law regulators.

Amnesty Plus

10. We agree that the provision of dual credit for disclosing the existence of a second cartel will provide additional incentives for cartel members to do so.⁴ Both Australia and the United States already have "Amnesty Plus" systems (and the OECD has recommended its adoption

² Scott D Hammond, "Recent Developments relating to the Antitrust Division's Corporate Leniency Program", 5 March 2009, at page 1.

³ DOJ, "Frequently asked questions regarding the Antitrust Division's leniency program and model leniency letters (November 19, 2008)" (the **FAQs**), at page 3.

⁴ See McElwee, "Should the European Commission Adopt "Amnesty Plus" in its fight against hard-core cartels" [2004] ECLR 558.

by the EC). The DOJ has observed that, “A large percentage of the Division’s investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy”.⁵

11. In the interests of providing greater transparency and certainty for potential applicants (and therefore increased incentives to seek leniency), we recommend that the Draft Policy indicate:
 - (a) the type of factors that the Commission will usually consider in determining the amount of additional discount for cooperation regarding the first cartel. For example, the DOJ has stated that its relevant factors include the strength of the evidence provided by the cooperating company regarding the second cartel, the potential significance of the breach measured in terms such as the volume of commerce involved, geographic scope, and number of cartel members, and the likelihood the DOJ would have identified the second cartel in any case;⁶ and
 - (b) the potential level of additional discount that can be obtained for disclosing a second cartel, in the same way that the Commission does for reduced penalty recommendations under the Cooperation Policy (i.e., at paragraph 5.08 of the Draft Policy).

Other matters

12. We consider that the Commission’s current review of its Leniency Policy provides the opportunity to make some further changes that enhance the transparency, fairness, and efficacy of the Policy, in particular in relation to:
 - (a) the Commission’s general approach to application of the Policy;
 - (b) the requirement that the Commission is unaware of the existence of the cartel at the time of the leniency application;
 - (c) exclusion of cartel members that have coerced other members of the cartel;
 - (d) evidence regarding the role of the applicant and others; and
 - (e) confidentiality.

General approach

13. The very recent “ACCC immunity policy interpretation guidelines” (the **Guidelines**) state that:⁷

The purpose of these guidelines is to provide a clear understanding of the availability of immunity, and the conditions under which it will be granted. In its interpretation of the immunity policy the ACCC will seek to:

⁵ FAQs, at page 8.

⁶ FAQs, at pages 9-10.

⁷ ACCC, Guidelines, July 2009, at paragraph 23.

- apply the policy consistently and fairly
 - be approachable and accessible
 - interpret the policy in favour of an applicant in cases of ambiguities in the policy.
14. The DOJ's FAQs also state "Wherever possible, the Division has construed or interpreted its program in favor of accepting an applicant into the leniency program in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity."⁸
15. These statements of principle are both fair and manifestly sensible in encouraging cartel members to "come forward and report their illegal activity". We recommend the inclusion of a similar statement to the ACCC's in the Preface to the Draft Policy.

Commission awareness of the existence of the cartel

16. The Draft Policy requires that, in order to be eligible for conditional immunity, the Commission must be unaware of the existence of the cartel at the time when the leniency application is made.⁹
17. This requirement is stricter than that of the ACCC, DOJ, or EC.
- (a) The "ACCC immunity policy for cartel conduct" (the **ACCC Immunity Policy**) requires that, "at the time the ACCC receives the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the TPA arising from the conduct in respect of the cartel."¹⁰
- (b) The DOJ states "Leniency is available for corporations either before or after a Division investigation has begun." Leniency will still be available where the DOJ already has information regarding the cartel provided "the Division does not have evidence against the company that is likely to result in a sustainable conviction".¹¹
- (c) The "European Commission Notice on Immunity from fines and reduction of fines in cartel cases" (the **EC Notice**) requires that the applicant:¹²
- ... is the first to submit information which in the Commission's view will enable it to:
- (a) carry out a targeted inspection in connection with the alleged cartel; or
 - (b) find an infringement of Article 81 EC in connection with the alleged cartel.

⁸ FAQs, at page 16.

⁹ Draft policy, at paragraph 4.04.

¹⁰ ACCC Immunity Policy, at paragraph 8(b). See also the Guidelines, at paragraph 43.

¹¹ FAQs, at pages 4 and 5.

¹² EC Notice, at paragraph 8.

18. We consider that these more flexible approaches are preferable to a requirement that the Commission be entirely unaware of the existence of the cartel. They provide greater opportunity for cartel members to come forward while still ensuring that the application (and associated disclosure and assistance) is made at an early stage of the Commission's investigation.
19. We consider that the ACCC's formulation of the test for eligibility provides the clearest means of determining when immunity will no longer be available and recommend the amendment of the Draft Policy to incorporate this test.

Coercion and ringleaders

20. The Draft Policy provides that immunity is not available to any person who has coerced other participants to take part in the cartel. This exclusion (with which we agree) is narrower than that of the ACCC and DOJ.
 - (a) The ACCC's policy extends the exclusion to "the clear leader in the cartel".¹³
 - (b) The DOJ's program extends the exclusion to "the leader in, or the originator of, the activity".¹⁴
21. We agree with the Commission's view that it is inappropriate that parties who have coerced others to take part in the cartel should be eligible for immunity.¹⁵ However, we consider that the same concerns (and the need for fairness in the State's treatment of cartel members) will usually apply equally to the leader or instigator of the cartel.
22. We do not consider that extending the exclusion to the leader of a cartel (absent exceptional circumstances) will materially alter the leader's incentives to cooperate with the Commission. The leader will still be eligible to seek a reduced penalty under the Cooperation provisions of the Draft Policy (in the same way that a "coercer" is).
23. We agree that it may be difficult to establish whether there is a leader of a particular cartel and, if so, who it is. For that reason, we agree that the leader should only be excluded where its role can be clearly and objectively demonstrated.¹⁶

Evidence

24. In our experience, there are real incentives for leniency and cooperation applicants to downplay their own role in any cartel and to overstate the role of others. In the absence of contemporaneous evidence, it is then difficult for other parties to rebut the allegations made about them. The rebuttal is likely to be met with the (rhetorical) question as to why a leniency or cooperation applicant would admit things that are not true.
25. For this reason, we note the ACCC's statement that immunity is conditional upon "not understating the applicant's role or over-stating the role(s) of any other cartel participant(s)".¹⁷

¹³ ACCC Immunity Policy, at paragraphs 8(a) and 17(a).

¹⁴ FAQs, at pages 4 and 5.

¹⁵ Draft Policy, at paragraph 4.13.

¹⁶ See the Guidelines, at paragraphs 84 and 86-87.

26. The EC Notice also emphasises the importance of provision of “any evidence contemporaneous to the infringement”.¹⁸ Our experience is that the contemporaneous evidence is almost invariably the most reliable and accurate in circumstances where the events may have occurred up to 10 years previously and given the incentives referred to above.
27. We therefore recommend the inclusion of specific reference to these matters in both the Leniency and Cooperation sections of the Draft Policy.

Confidentiality

28. The confidentiality of leniency and cooperation applications and of the information subsequently provided to the Commission is a very serious concern for potential applicants, who will inevitably be influenced in their decision-making by the risk that such information may be disclosed to third parties with interests adverse to the applicants. For this reason, we welcome the Commission’s position regarding confidentiality at paragraphs 4.51 and 4.52 of the Draft Policy and regarding oral or “paperless” applications at paragraph 4.43.
29. We consider that the seriousness of these concerns (and the prospect that they act as barriers to leniency and cooperation applications) is such that the Commission should indicate in the Policy:
- (a) whether it can be expected to assert privilege for its own written records of oral applications (e.g., in the face of a non-party discovery application in separate damages proceedings); and
 - (b) the sorts of “practicable steps to protect confidential information” that the Commission could be expected to take.
30. While the Commission will retain the discretion to deal with each case on its merits, express statements in the Commission’s Draft Policy of the approach it would usually take can only increase certainty for potential applicants and, therefore, the incentive to seek leniency or cooperation.

As we have indicated, we welcome the Commission’s Draft Policy. We would be very happy to expand further on our submission and to meet with the Commission and its staff to discuss our views, if that would assist.

Yours faithfully

Bell Gully



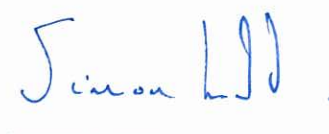
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¹⁷ Guidelines, at paragraph 77.

¹⁸ EC Notice, at paragraph 9(b).