

- the need for an appropriate mechanism to enable findings of fact made by the Federal Court in prosecutions for offences of Part V of the Act to be readily used in subsequent proceedings as *prima facie* evidence as contemplated by s. 83 of the Act; and
- the current degree of uncertainty in combining certain forms of civil remedies such as injunctions with criminal prosecutions.

The Commission is of the view that the beneficial developments that have occurred in civil cases could also be carried across to criminal matters. It is hoped that this conference will be able to develop some suggestions which will assist in the efficient running of criminal matters under the Act in the Federal Court.

Finally, it should be noted (although the debate is more appropriate for a different forum) that another policy dimension may require serious consideration. That is the appropriateness of converting the consequences of breaches of Part V of the Act — which are currently criminal offences — to become, like breaches of Part IV, contraventions liable to civil penalties.

Cooperation and leniency in enforcement

The following article discusses the Commission's policy on the adoption of leniency in circumstances flowing from cooperation in enforcement matters. The policy is expressed in terms of flexible guidelines because it continues to evolve in the light of Commission experience and marketplace changes.

Introduction

Commitment to active enforcement of the law is fundamental to the achievement of the Commission's objectives of promoting competition and fair trading.

It is not possible for the Commission to pursue all potential or alleged breaches of the Trade Practices Act or other legislation under which it has responsibilities. The effective use of resources in the public's best interests require that the Commission have clear priorities in its selection of matters for enforcement and that it chooses the enforcement vehicle most appropriate to the circumstances.

This statement deals with one aspect of the Commission's approach to enforcement — its policy on the adoption of leniency in circumstances flowing from cooperation. Because the policy continues to evolve in the light of Commission experience and changing markets it is presented in terms of flexible guidelines.

There are separate, but in many respects similar, guidelines in respect of individuals and corporations. It is emphasised that they are flexible and intended only as an indication of the factors the Commission will consider relevant when considering leniency.

The Commission's purpose in publishing this policy is twofold:

- to promote awareness of it; and
- to encourage participants possibly in breach to come forward to assist Commission investigations.

Recognition of such cooperation and assistance takes a variety of forms, e.g. complete or partial immunity from action by the Commission, submissions to the Court for a reduction in penalty or even administrative settlement in lieu of litigation.

The policy on litigation necessarily relates only to civil matters. The Commission does not have power to grant immunity for actions for criminal conduct under Part V of the Trade Practices Act. In such cases the discretion lies with the Director of Public Prosecutions.

Individual conduct

The following guidelines apply to directors, managers, officers or employees of a corporation who come to the Commission **as individuals** and not on behalf of the corporate entity with evidence of conduct contravening the

Trade Practices Act (or other legislation administered by the Commission).

Leniency, including immunity, is most likely to be considered appropriate for individuals who:

- come forward with valuable and important evidence of a contravention of which the Commission is either otherwise unaware or has insufficient evidence to initiate proceedings;
- provide the Commission with full and frank disclosure of the activity and relevant documentary and other evidence available to them;
- undertake to cooperate throughout the Commission's investigation and comply with that undertaking;
- agree not to use the same legal representation as the firm by which they are employed; and
- have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity.

Immunity would not be granted where the person seeking leniency has compelled or induced any other person/corporation to take part in the conduct or was a ringleader or originator of the activity.

Corporate conduct

The guidelines governing policy on leniency toward corporations necessarily differ in some respects, but are similar in spirit.

Leniency is most likely to be considered for a corporation which:

- comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings;
- upon its discovery of the breach, takes prompt and effective action to terminate its part in the activity;
- provides the Commission with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the Commission's investigation and any ensuing prosecution;

- has not compelled or induced any other corporation to take part in the anti-competitive agreement and was not a ringleader or originator of the activity;
- is prepared to make restitution where appropriate;
- is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking; and
- does not have a prior record of Trade Practices Act, or related, offences.

Immunity would not be granted where the corporation seeking leniency has compelled or induced any other person/corporation to take part in the conduct or was a ringleader or originator of the activity.

It is not necessary that all the above criteria be met in order for leniency to be granted. The Commission assesses each case on its merits.

Submissions to the court

It is the responsibility of the Court to determine penalties for contraventions of legislation administered by the Commission.

However, the Commission is free to reach an agreement with parties as to joint submissions to be placed before the Court for adjudication. It exercises this right if it is satisfied that a corporation or individual, which has not been granted an immunity, has cooperated with it in a substantive way.

In determining whether to reach an agreement on penalties, and what the agreement should be, the Commission takes into consideration factors including:

- whether the company or individual has cooperated with the authorities;
- whether the contravention arose out of the conduct of senior management, or at a lower level;
- whether the company has a corporate culture conducive to compliance with the law;
- the nature and extent of the contravening conduct;
- whether the conduct has ceased;

- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- the size and power of the company; and
- whether the contravention was deliberate and the period over which it extended.

Procedure

Individuals or corporations wishing to take advantage of the Commission's policy on leniency should approach the Chairman or General Manager of the Commission. The Commission determines each request on a case by case basis.

The Commission is open to the discussion of hypothetical scenarios in relation to involvement in conduct that contravenes legislation for which it is responsible.

Informants or their legal representatives may freely approach the Commission in an attempt to gain some indication of the likelihood of immunity or leniency in penalties. The Commission will not be able to give definitive answers in such cases, but will provide guidance as to the probable course of action it would take.