



Leniency Policy for Cartels

This fact sheet explains the Commerce Commission's approach to leniency in cartel cases. It outlines how a cartel member may be eligible for immunity from prosecution (or cooperation where immunity is no longer available) and the processes involved.

Cartels are illegal agreements between competitors not to compete with each other. This can include price fixing, agreeing to rig bids, divide markets by customer or area, or restrict output of a good or service. Cartels are illegal under the Commerce Act because they harm the economy by removing the benefits of competition. Cartels can lead to higher prices and less choice for consumers.

Under the Commerce Act, the Commission has the power to investigate and prosecute cartels. Because cartels can be difficult to detect, we have a Cartel Leniency Policy to encourage reporting of cartels by those involved. The policy has two parts: immunity and cooperation.

Immunity under the Cartel Leniency Policy

The Cartel Leniency Policy offers individuals or businesses involved in a cartel the opportunity to be granted immunity from Commission prosecution. Immunity is **conditional** because it depends on the cartel member continuing to provide information and cooperating with us throughout our investigation and any court proceedings.

The benefits of immunity for a cartel member are significant. The cartel member will not only avoid the cost and reputational damage of being taken to court, but also avoid fines that could run into millions of dollars if their behaviour is ruled illegal by the courts.

Immunity protects a cartel member from legal action by the Commission, however, it does not prevent third parties from making claims for damages.

When will the Commission grant immunity?

The Commission will grant immunity to the first member of a cartel to approach us, provided they meet the immunity requirements.

This document should be read in view of amendments to the Commerce Act made in August 2017. The Commission will update the document in the near future to reflect changes made under the Act.

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Immunity requirements

We will grant a cartel member immunity from prosecution in exchange for information about the cartel and ongoing cooperation. The cartel member must continue to provide information and cooperate with us throughout our investigation and any court proceedings to qualify for immunity.

A cartel member must provide enough information to show that the law has been broken, identify who is involved, and explain how the cartel operated and affected New Zealand consumers. For more detail on these requirements, you can read the *Cartel Leniency Policy and Process Guidelines* at www.comcom.govt.nz/cartel-leniency-policy.

If we are already aware of, or are investigating, the cartel, we may still grant immunity to the first cartel member to apply who can meet the immunity requirements. This won't apply if we already have sufficient evidence against the cartel member to take enforcement action.

How does a cartel member apply for immunity?

If a cartel member already has all the necessary information about a cartel's operation and who is involved, and meets all the requirements of our leniency policy (including being the first to apply), they can contact us and receive immunity immediately.

If a cartel member doesn't have enough information about the cartel, but wants to ensure they are the first applicant for immunity, they can approach us and request what is known as a 'marker'. This holds their position as first applicant for an agreed time, so that they can gather the necessary information.

At the end of the agreed time, the applicant must provide the additional information in order to be granted immunity. This is known as 'perfecting the marker'.

If they are unable to provide adequate information, any other cartel members who have applied for immunity in the meantime will be given the opportunity to provide the required information (or 'perfect the marker').

How can a cartel member find out if immunity is available?

A cartel member can contact us to find out whether immunity is available in relation to a particular cartel. These enquiries can be anonymous.

We deal with enquiries like this on a hypothetical basis. In other words, the information we receive will only be used to clarify and respond to the enquiry – it will not be used for any other purpose.

We will keep the identity of any marker holder or applicants for immunity confidential.

What if immunity is no longer available?

If immunity is no longer available, cartel members may still get significant benefit from cooperating with the Commission throughout the investigation and in any court proceedings.

The correct process

The Commission's Cartel Leniency Policy and Process Guidelines provide full details on our approach to leniency. The guidelines set out the steps a business or individual must take to apply for conditional immunity or cooperation. For an application to be valid, you must follow the correct process.

You can read the full Cartel Leniency Policy and Process Guidelines at www.comcom.govt.nz/cartel-leniency-policy

Cooperation under the Cartel Leniency Policy

Under our Cartel Leniency Policy, we offer cartel members more lenient treatment if they cooperate fully with us. The cartel member must provide information and give evidence during the investigation and in any subsequent court proceedings. In exchange, we may take a lower level of enforcement action against the cartel member or recommend a lower level of penalty to the court. In exceptional circumstances, we may decide not to prosecute an individual who provides information that adds significant value to our investigation.

Cartel members that cooperate as early as possible in an investigation are likely to get the greatest benefit.

Amnesty Plus

If a cartel member is not eligible for immunity in relation to a cartel, but tells us about their involvement in a separate, second cartel that we were unaware of, they may be eligible for 'Amnesty Plus'.

Under Amnesty Plus, a cartel member will get immunity for their participation in the second cartel (as long as they meet the requirements of conditional immunity). We will also recommend a lower level penalty in relation to the first cartel, if they admit being involved.

The Commission's Confidential Informant Policy

We recognise that informants can put themselves at significant risk by providing information to the Commission. Anyone who has become aware of a cartel, but has not been involved, can report it to us and we will take all available steps to protect their identity.

However, any individual who is in a position of authority (such as a company director) and was in a position to have stopped the cartel behaviour but did not, should instead apply under the Cartel Leniency Policy.

Anyone wishing to seek confidentiality – in relation to complaints under any of the laws we enforce – should mention this when they contact us. We value information from confidential informants and have a strong policy of protecting people's identity when requested.

The Commission's Cooperation Policy

The Commission has a separate Cooperation Policy which applies to other parts of the Commerce Act, along with the Credit Contracts and Consumer Finance Act, the Dairy Industry Restructuring Act and the Fair Trading Act. The policy encourages individuals and businesses to assist us in our investigations.

You can read the Cooperation Policy at www.comcom.govt.nz/cooperation-policy

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This fact sheet is a guide only and reflects the Commission's view. The publication is not intended to be definitive and should not be used instead of legal advice. It is businesses' responsibility to remain up to date with legislation. Only the courts can make a ruling on breaches of the Commerce Act.

Penalties

If the courts find an individual or body corporate has breached the Commerce Act, penalties can be heavy:

- for an individual, a maximum of \$500,000; or
- for a body corporate, the greater of:
 - \$10 million, or
 - three times the commercial gain, or, if this cannot be easily established, 10 percent of turnover.

Every separate breach of the Act (even if done by the same person) may incur a penalty.

To check for updates to this fact sheet visit: www.comcom.govt.nz/cartel-leniency-policy
 This fact sheet is part of a series looking at the Commerce Act and anti-competitive practices. Other fact sheets can be downloaded from www.comcom.govt.nz/business-competition

Contact Us

Contact the Commerce Commission with information about possible breaches of the Commerce Act.

Phone: 0800 943 600

Write : Contact Centre, PO Box 2351, Wellington 6140

Email : contact@comcom.govt.nz